SUPREME COURT OF QUEENSLAND

CITATION:	*Filmana Pty Ltd & Ors v Tynan & Anor* [2013] QCA 256
PARTIES:	**FILMANA PTY LTD** ACN 080 055 429 (first appellant) **ANNA-MARIA SCIACCA** (second appellant) **PHILIPPO SCIACCA** (third appellant) **v** **DAVID PATRICK TYNAN & JUDITH GARCIA TYNAN** (respondents)
FILE NO/S:	Appeal No 2857 of 2013 SC No 5923 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	10 September 2013
DELIVERED AT:	Brisbane
HEARING DATE:	24 July 2013
JUDGES:	Margaret McMurdo P and Holmes and Muir JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal be dismissed with costs.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – SUMMARY JUDGMENT – where the respondents, as vendors, entered into a contract with the first appellant for the purchase of a dwelling house – where the respondents' solicitors, alleging that the first appellant had repudiated the contract, purported to terminate the contract and forfeit the deposit – where the respondents were granted summary judgment "in respect of liability" pursuant to r 292 of the *Uniform Civil Procedure Rules* 1999 (Qld) with damages to be assessed – where the appellants submit that there was a triable issue as to whether the contract had been abandoned or replaced – where the appellants allege that the negotiations between the parties fell within the fourth category of *Masters v Cameron* – where the appellants submit that the primary judge was overly robust in applying the "no real prospect of

success" test and that the complexity of the questions to be determined rendered summary judgment inappropriate – whether the primary judge erred in concluding that the appellants had no real prospect of successfully defending the issues of liability raised for determination – whether summary judgment was appropriate

GUARANTEE AND INDEMNITY – THE CONTRACT OF GUARANTEE – CONSTRUCTION AND EFFECT – GENERALLY – where the second and third appellants guaranteed the obligations of the first appellant under a contract for the purchase of a dwelling house – where the guarantee provided that the guarantor would be liable if the first appellant "breaches the Contract" – where the first appellant repudiated the contract by indicating that it would not perform an essential term – where the respondents accepted the repudiation and rescinded the contract for anticipatory breach – where the appellants submit that the guarantee was confined to "actual breaches of contractual terms" and did not extend to an anticipatory breach – whether the primary judge erred in construing the guarantee as extending to an anticipatory breach of contract amounting to a repudiation

GUARANTEE AND INDEMNITY – ACTIONS AGAINST SURETY – GENERALLY – NOTICE OF DEFAULT, DEMANDS, ETC – where the appellants submit that liability under the guarantee did not arise until the respondents made a demand on the guarantors identifying the quantum of the respondents' loss – where the appellants submit that, where the extent of liability has not been quantified, the right to a demand should be implied as a matter of business efficacy – whether the primary judge erred in entering judgment against the second and third appellants when no demand for payment had been made under the guarantee

APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – AMENDMENT – where the appellants sought leave to amend the notice of appeal to include a ground that the primary judge erred in entering judgments against the second and third appellants where there was neither a finding nor an admission that the respondents had suffered a loss due to the first appellant's breach – where the argument was not raised at first instance – where the appellants submit that they should be permitted to rely upon the ground as the existence of loss is a necessary element of the respondents' cause of action – where the appellants submit that this matter does not come within the principle of finality of litigation espoused in *Coulton v Holcombe* as it did not concern a trial – whether there would be significant prejudice to the respondents by allowing the amendment – whether leave should be given to amend the notice of appeal

Uniform Civil Procedure Rules 1999 (Qld), r 292, r 483

Ankar Pty Ltd v National Westminster Finance (Australia) Ltd (1987) 162 CLR 549; [1987] HCA 15, distinguished
Brinkibon Ltd v Stahag Stahl und Stahlwarenhandelsgesellschaft mbH [1980] 2 Lloyd's Rep 556, cited
Coulton v Holcombe (1986) 162 CLR 1; [1986] HCA 33, cited
DTR Nominees Pty Ltd v Mona Homes Pty Ltd (1978) 138 CLR 423; [1978] HCA 12, cited
Esso Petroleum Co Ltd v Alstonbridge Properties Ltd [1975] 1 WLR 1474; [1975] 3 All ER 358, cited
Foran v Wight (1989) 168 CLR 385; [1989] HCA 51, cited
Hochster v De La Tour (1853) 2 E & B 678; [1853] EngR 760, cited
Jessup v Lawyers Private Mortgages Pty Ltd & Ors [2006] QSC 3, cited
Maredelanto Compania Naviera SA v Bergbau-Handel GmbH (The Mihalis Angelos) [1971] 1 QB 164; [1970] 3 All ER 125; [1970] EWCA Civ 4, cited
Martin v Stout [1925] AC 359; [1924] UKPC 106, cited
Masters v Cameron (1954) 91 CLR 353; [1954] HCA 72, considered
McCann v Switzerland Insurance Australia Ltd (2000) 203 CLR 579; [2000] HCA 65, cited
Minister Administering the Crown Lands Act v NSW Aboriginal Land Council (2008) 237 CLR 285; [2008] HCA 48, cited
Moschi v Lep Air Services Ltd [1973] AC 331; [1972] 2 All ER 393, cited
MS Fashions Ltd v Bank of Credit and Commerce International SA (in liq) [1993] Ch 425; [1993] 3 All ER 769, cited
National House-Building Council v Fraser [1983] 1 All ER 1090, cited
Progressive Mailing House Pty Ltd v Tabali Pty Ltd (1985) 157 CLR 17; [1985] HCA 14, cited
Re Taylor, Ex parte Century 21 Real Estate Corporation (1995) 130 ALR 723; [1995] FCA 1335, cited
Sinclair, Scott & Co Ltd v Naughton (1929) 43 CLR 310, [1929] HCA 34, cited
Sunbird Plaza Pty Ltd v Maloney (1988) 166 CLR 245; [1988] HCA 11, cited
Suttor v Gundowda Pty Ltd (1950) 81 CLR 418; [1950] HCA 35, cited
Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165; [2004] HCA 52, cited
Tynan & Anor v Filmana Pty Ltd & Ors [2013] QSC 32, related
Wardman v Hatfield [2003] NSWCA 283, cited
Webster v Lampard (1993) 177 CLR 598; [1993] HCA 57, cited
Westpac Banking Corporation v Hughes [2012] 1 Qd R 581; [2011] QCA 42, cited

COUNSEL: B D O'Donnell QC, with M O Jones, for the appellants
P Dunning QC, with B Kidston, for the respondents

SOLICITORS: Tucker & Cowen for the appellants
Mahoney Lawyers for the respondents

[1] **MARGARET McMURDO P:** I agree with Muir JA's reasons for dismissing this appeal with costs.

[2] **HOLMES JA:** I agree with the reasons of Muir JA and the order he proposes.

[3] **MUIR JA: Introduction** The respondents entered into a contract with the first appellant for the purchase of a dwelling house in Brisbane. The second and third appellants guaranteed the obligations of the first appellant under the contract. On 16 November 2011, the respondents' solicitors, alleging that the first appellant had repudiated the contract, sent a facsimile to the solicitors for the appellants purporting to terminate the contract and forfeit the deposit paid under it. The respondents commenced proceedings claiming, amongst other relief:

- payment of $2,769,559.43;
- damages for breach of contract; and
- interest on any payment or award of damages.

[4] The respondents applied for summary judgment "in respect of liability" pursuant to r 292 of the *Uniform Civil Procedure Rules* 1999 (Qld) (the UCPR). They sought, in the alternative, an order that the issue of liability be decided separately in accordance with r 483 of the UCPR. The application was heard by the primary judge on 15 February 2013. On 26 February 2013, the primary judge ordered in these terms:

> "1. The judgment of the court is that the [respondents] do recover damages to be assessed against the [appellants].
>
> 2. The [appellants] pay the [respondents'] costs of the application to be assessed."

[5] The appellants appealed against these orders.

[6] The contract provided for a purchase price of $7,000,000; the payment of an initial deposit of $50,000 on the signing of the contract; the payment of a balance deposit of $450,000 within 90 days of the date of the contract; and settlement 12 months after the contract date, 9 October 2010. Settlement was thus initially due on 10 October 2011.

[7] The second and third appellants each signed a deed of guarantee, in relevantly identical terms, which provided, *inter alia*:

> "The Guarantor will be liable if the Buyer breaches the Contract as though the Guarantor was named in the Contract as, and had signed the Contract as, the Buyer and the Guarantor must pay any money for the Seller's loss due to the Buyer's breach …

> The Seller may recover all damages for losses in enforcing this Guarantee from the Guarantor.
>
> The Guarantor indemnifies the Seller against any liability, loss and cost incurred as a result of the Buyer's breach of the Contract."

[8] In the interests of brevity, these deeds will be referred to as "the guarantee".

[9] From an unspecified date in August 2011, the parties negotiated with a view to rescinding the contract and replacing it with a new contract. The primary judge found:[1]

> "[6] There is no dispute the negotiations proceeded from 15 August 2011 on the basis of the vendors' [lawyers'] statement that the 'correspondence should not be seen in any way as an indication by us or our clients that they will grant any extension of time for settlement. All of their rights under the [2010] contract are reserved.'
>
> [7] On 7 September 2011, the vendors' lawyers wrote '[p]ending the execution of the Deed of Rescission, new contract and accompanying documents our clients reserve all of their rights'.
>
> [8] By 16 September 2011, the terms of any rescission or new contract had not been agreed. Further points of difference were discussed by correspondence.
>
> [9] On 29 September 2011, the vendors' lawyers wrote to the purchaser's (and guarantors') solicitors attaching drafts of a deed of rescission, new contract, special conditions, guarantee and indemnity, acknowledgement and consent to guarantee, mortgage, and authority to agent to release deposit which were 'for review purposes only and not for signing. We reserve the right[s] to make changes to the documents before signing.'
>
> [10] On 4 October 2011, the vendors' lawyers sought a response no later than the following day to the documents they had sent on 29 September 2011.
>
> [11] On 6 October 2011, responding to the vendors' [lawyers'] correspondence of 29 September 2011, the purchaser's lawyers sought further changes.
>
> [12] Also on that day, the vendors' lawyers wrote to the purchaser's lawyers confirming the vendors' agreement to what had been sought and confirming a discussion that there was agreement on the terms of the 'extension' with the documents then to be signed.
>
> [13] On 6 October 2011, the vendors' lawyers forwarded, by courier, to the purchaser's lawyers, a letter attaching a deed of rescission in triplicate, new contract in triplicate, mortgage in

[1] *Tynan & Anor v Filmana Pty Ltd & Ors* [2013] QSC 32 at 2–3.

triplicate, acknowledgement and consent to guarantee in triplicate and authority to the agent to release the deposit.

[14] The attached draft deed of rescission referred to the 2010 contract, which was defined as 'the Contract' and provided in cl 2.1 and 3.6 as follows:

> '2.1 The Contract will remain binding on the parties until such time as the Replacement Contract becomes binding on the parties.
>
> …
>
> 3.6 The parties acknowledge that no party will be bound by, liable for or subject to any obligation arising in accordance with this Deed or any negotiations, actions, or omissions including the payment or [nonpayment] of any [moneys] by a party to any other [party] until such time as:
>
> (a) this Deed has been executed by all parties; and
>
> (b) the Replacement Contract has been entered into by the parties to it; and
>
> (c) the Buyer and [the] Seller become bound by the Replacement Contract.'"

[10] Neither party attended for settlement on 10 October 2011. On 17 October 2011, the respondents' solicitors, in a facsimile to the appellants' solicitors, required settlement of the contract on 16 November 2011. The facsimile stated that time was of the essence of the contract and that if the first appellant did not effect settlement on that date, the respondents would treat the contract as at an end. In another facsimile earlier the same day, the respondents' solicitors asserted that, at a conference on 14 October 2011 between Mr Mahoney of the respondents' solicitors, Mr Hui of the appellants' solicitors, Mr Tynan (one of the respondents) and the second and third appellants, all parties agreed that: the contract remained on foot; the first appellant had not been able to complete on the due date and was in default; and the respondents reserved their rights in relation to the first appellant's default.

[11] On 3 November 2011, the respondents' solicitors asserted their clients' readiness and willingness to complete on 16 November 2011 and enquired as to the first appellant's "intentions and ability to settle on that date". They notified their clients' intention to advertise the property with a view to its prompt sale to a third party should the first appellant not complete. The appellants' solicitors replied that day, "As discussed, we are instructed that at present, our client will not be in a position to settle on 16 November 2011".

[12] On 9 November 2011, the respondents' solicitors enquired, in a facsimile sent to the appellants' solicitors, whether the first appellant would like them to arrange

production of the transfer documents for stamping before settlement. The appellants' solicitors responded by facsimile that day stating that production of the transfer documents prior to settlement was not required and that "[a]t present" their clients' position remained that stated in their facsimile of 3 November 2011.

[13] The respondents' solicitors sent a facsimile to the appellants' solicitors on 11 November 2011 seeking written confirmation that the first appellant would not "be tendering for settlement on November 16, 2011" and that the respondents were not required "to vacate the property by that date". The respondents' solicitors further advised that, in the event that settlement did not take place on 16 November 2011, the respondents proposed that the property would be sold at auction on 17 March 2012.

[14] In a facsimile dated 14 November 2011 to the respondents' solicitors, the appellants' solicitors advised that the first appellant would not be in a position to settle on 16 November 2011 and did not require the respondents to tender at settlement or to vacate the property "in anticipation of settlement".

[15] The appellants maintained their interest in purchasing the property and, on 15 November 2011, their solicitors, in a lengthy facsimile to the respondents' solicitors, advised of a strategy their clients were pursuing with a view to acquiring the property.

[16] At 9.57 am on 16 November 2011, the respondents' solicitors sent a facsimile to the appellants' solicitors terminating the contract, forfeiting the deposit and reserving the respondents' rights. The respondents' solicitors also wrote to the stakeholders, who were holding the deposit, confirming that the contract had been terminated and requesting payment of the balance deposit less commission. The solicitors for the appellants wrote to the stakeholders on 16 November 2011 confirming that the contract had been terminated and requesting that the "deposit and all interest thereon" be released to the respondents.

[17] In an affidavit before the primary judge, the third appellant swore that he would have been able to settle under the contract on 10 October 2011 had he been called on to do so by the respondents. In his affidavit he stated that he "wholly reject[ed] the contents of the [respondents' solicitors'] letter [of 17 October 2011, regarding the conference of 14 October 2011] and the allegations therein". He further stated that he did not "specifically recall seeing that letter" and that if he had seen it he would have instructed his solicitors to refute its contents. He swore to having consented to the release of the deposit to the respondents on or about 16 November 2011 but made no comment regarding the content of his solicitors' letter to the stakeholders of 16 November 2011.

[18] It is now convenient to address the grounds of appeal.

Ground 1 – the primary judge erred in construing the guarantee as obliging the guarantors to pay to the respondents their losses resulting from termination of the contract

The appellants' argument

[19] The appellants assert that, even if the contract was repudiated by the first appellant, that repudiation and its acceptance by the respondents did not trigger the operation

of the guarantee. It is argued that the second and third appellants' liability under the guarantee arose only where the first appellant breached the contract and after demand for payment of a specific sum had been made to the guarantors by the respondents. The demand point will be considered separately.

[20] "Breach" in this context, it was asserted, meant the actual breach of a term of the contract and there was no such breach because, at best for the respondents, the contract came to an end as a result of a repudiation by the first appellant accepted by the respondents. That repudiation was not a non-performance of any contractual obligation but a communicated inability to perform at a future time when performance fell due.

[21] The primary judge erred in construing the reference to breach of contract in the guarantee as extending to an anticipatory breach. "Calling a repudiation an anticipatory breach does not make it an actual breach (i.e. non-performance) of a contractual obligation."

[22] The primary judge disposed of this issue as follows:[2]

> "[39] The question which is raised is one of construction of the guarantees. In my opinion, the suggested construction is untenable and the guarantors have no real prospect of success in their defence on that ground, because of the words 'as though the guarantor was named in the contract as, and had signed the contract as, the buyer'. If there were any reason otherwise to think that the breaches referred to in that clause would not extend to an anticipatory breach of contract amounting to repudiation, in my view those words make it perfectly clear that the intention of the parties was that the guarantors be placed in the same position in terms of their liability for the purchaser's breach of contract as if they had been the buyer under the contract. The guarantors do not contend that on termination of the contract, by the vendors for anticipatory breach amounting to a repudiation by the purchaser, the vendors would not be entitled to damages for breach of contract against the purchaser."

[23] The words quoted by the primary judge in the above passage did not operate to expand the scope of the guarantors' liability. Those words may qualify "breaches of contract" but they do not expand its meaning. The first appellant's communication of its inability to perform the contract was not a breach of contract; it was a repudiation which was accepted but not an "actual breach" in the sense of non-performance of a contractual obligation.

Consideration

[24] The first appellant repudiated the contract by making it plain that it would not perform an essential term of the contract.[3] The respondents, as innocent parties to the contract, were thus entitled to accept the repudiation and to rescind for anticipatory breach if they themselves were able and willing to perform their

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2 *Tynan & Anor v Filmana Pty Ltd & Ors* [2013] QSC 32 at 7.

3 *Foran v Wight* (1989) 168 CLR 385 at 441.

contractual obligations.[4] There was no issue about the respondents' ability and willingness to perform. Acceptance of the first appellant's repudiation entitled the respondents to claim damages immediately, i.e. before the time fixed for performance under the contract.[5] An anticipatory breach such as that under consideration does not amount to an actual breach of any specific term of the contract but, if the innocent party elects to accept it, it is nevertheless a breach of contract which gives rise to the consequences just identified. Moreover, the breach was of a serious kind. The repudiation by the first appellant of its contractual obligations deprived the respondents of the benefits for which the contract provided.

[25] In *The Mihalis Angelos*, Lord Denning MR said:[6]

> "The words 'anticipatory breach' are misleading. The cause of action is not the future breach. It is the renunciation itself. I venture to quote the notes to *Cutter* v. *Powell* (1795) 6 Term Rep. 320 in 2 *Smith's Leading Cases,* 13th ed. (1929), p. 30:
>
> > '… it is of the essence of every contract that each party thereto should have the right to consider it as of binding force from the moment that it is made and should have the right to base his conduct upon the expectation of its being fulfilled by the other party. If, therefore, the other party, by an unqualified refusal to perform his side of the contract, destroys that expectation, he destroys that which is the basis of the contract; and his conduct may be treated by the opposite party as a breach going to the whole of the consideration.'"

[26] Standard texts on contract treat anticipatory breach as a form of breach of contract.[7] For example, *Halsbury's* states:[8]

> "**546. Repudiation and anticipatory breach.** Instead of merely failing to provide due performance at the stipulated time, a party may put himself in breach by evincing an intention, by words or conduct, of repudiating his obligations under the contract. Such repudiation may occur at the time fixed for performance or before that time; in the latter case it is known as 'anticipatory breach' or 'anticipatory repudiation'." (citations omitted)

[27] Professor Carter explains in *Breach of Contract*,[9] when discussing the requirement that a repudiation must be accepted in order to confer rights on the innocent party, "The first reason for the acceptance requirement is to create a breach of contract".

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4 *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* (1978) 138 CLR 423 at 433; *Sunbird Plaza Pty Ltd v Maloney* (1988) 166 CLR 245 at 278–280; *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17 at 40.

5 *Hochster v De La Tour* (1853) 2 E & B 678.

6 [1971] 1 QB 164 at 196.

7 N C Seddon & M P Ellinghaus, *Cheshire and Fifoot's Law of Contract*, 8th Australian ed, LexisNexis Butterworths, Chatswood, 2002 at para 21.14; J Beatson QC, *Anson's Law of Contract*, 27th ed, Oxford University Press, Oxford, 1998 at 541–543; E Peel, *Treitel's The Law of Contract*, 13th ed, Sweet & Maxwell, Thomson Reuters, London, 2011 at para 17-073–17-091; *Halsbury's Laws of England*, 4th ed, Butterworths, London, 1974, Volume 9 at para 546 and 550.

8 *Halsbury's Laws of England*, 4th ed, Butterworths, London, 1974, Volume 9 at para 546.

9 J W Carter, *Breach of Contract*, 2nd ed, The Law Book Company Limited, Sydney, 1991 at para 751.

[28] In *Martin v Stout*,[10] Lord Atkinson, delivering the judgment of the Privy Council, described the repudiation by one party to a contract of his contractual obligations as "a breach of his contract".[11] His Lordship said, "It was, however, a breach conditional on [the innocent party] accepting and acting upon the repudiation".[12]

[29] *Martin v Stout* and other cases which treat repudiatory conduct as a breach of contract are referred to in the reasons of Stephenson LJ in *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandelsgesellschaft mbH*.[13] The other member of the Court of Appeal, Templeman LJ also referred to *Martin v Stout* and treated repudiation as a breach of contract.[14]

[30] In my view, there is no justification for confining the meaning of "breaches the Contract" in the guarantee to "actual breaches of contractual terms". There is no good reason why a reasonable person, having the knowledge of the parties to the guarantee, the surrounding circumstances and the purpose and object of the subject transaction,[15] would conclude that the reference in the contract to "breaches the Contract" was confined to breaches of a particular kind and thus not apt to apply to a breach which arose from the renunciation by a party of its contractual obligations.

[31] The appellants relied on the principle that "ambiguous contractual provisions should be construed in favour of the surety".[16] There is no scope, however, for the application of this principle once the subject words of the guarantee are construed in accordance with conventional canons of construction, including the need to construe the guarantee with "attention to … the commercial circumstances which the document addresses, and the objects which it is intended to secure".[17]

[32] This ground of appeal has not been made out.

Ground 2 – the primary judge erred in entering judgment against the second and third appellants when no demand for payment had been made under the guarantee

The appellants' argument

[33] The appellants argued that, on the proper construction of the words of the guarantee quoted in paragraph [7] above, no obligation to pay could arise until the amount payable by the guarantors was identified. It was further submitted:

> "Where the amount of payment required is unable to be established, in circumstances where there may in fact be no liability to the Respondents at all, and no demand identifying the amount of such liability has been made, there was no proper basis for the learned Primary Judge to enter judgment on the guarantees. Such judgment was of no effect and ought not have been entered."

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10 [1925] AC 359.
11 *Martin v Stout* [1925] AC 359 at 368.
12 *Martin v Stout* [1925] AC 359 at 368.
13 [1980] 2 Lloyd's Rep 556 at 562–563.
14 *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandelsgesellschaft mbH* [1980] 2 Lloyd's Rep 556 at 565.
15 *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 176.
16 *Ankar Pty Ltd v National Westminster Finance (Australia) Ltd* (1987) 162 CLR 549 at 561.
17 *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579 at 589.

[34] It was submitted that, as it would be impossible for the second and third appellants to satisfy their obligations as guarantors without knowing the amount of the respondents' loss, an obligation to make a demand notifying the quantum of that loss should be implied as a matter of business efficacy.

Consideration

[35] Hoffmann LJ observed in *MS Fashions Ltd v Bank of Credit and Commerce International SA (in liq)*:[18]

> "The right to a demand before liability can accrue is not inherent in the nature of suretyship and will not be implied unless expressly provided."

[36] That observation is consistent with prior authority. For example, in *Moschi v Lep Air Services Ltd*,[19] Simon LJ, referring to "the high authority of Rowlatt, *The Law of Principal and Surety*, 3rd ed. (1936), p. 144", said:

> "The learned author was discussing the rule that on default of the principal promisor causing damage to the promisee the surety is, apart from special stipulation, immediately liable to the full extent of his obligation, without being entitled to require either notice of the default, or previous recourse against the principal, or simultaneous recourse against co-sureties. 'The reason for the rule,' wrote Rowlatt, 'is that it is the surety's duty to see that the principal pays or performs his duty as the case may be. . . .' No other reason for the rule was proposed in argument before your Lordships, nor was the rule itself questioned; which suggests that Rowlatt's proposed reason is the correct one, which his own high standing would in any case vouch."[20]

[37] In *Re Taylor, Ex parte Century 21 Real Estate Corporation*,[21] it was accepted that, as a general rule, demand on a surety is not necessary to give rise to liability under a guarantee unless the guarantee so provides. A similar view was expressed in *Wardman v Hatfield*.[22] The guarantor's liability arises although the extent of liability may not have been quantified.[23]

[38] There is nothing in the guarantee which expressly or impliedly makes the giving of a demand a condition precedent to the respondents' cause of action. The fact that the guarantors are liable upon breach of contract as though they were named in the contract and had signed the contract as buyer is, in itself, strongly suggestive of the guarantors being primary obligors on whom no demand is required.[24] The existence of a parallel indemnity clause which makes no provision for the making of a demand further militates against the implication of an obligation on the part of the

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18 [1993] Ch 425 at 436.

19 [1973] AC 331 at 356–357.

20 To like effect, the reasons of Diplock LJ at 348 and Kilbrandon LJ at 359.

21 (1995) 130 ALR 723 at 725.

22 [2003] NSWCA 283 at [21]–[23].

23 *Wardman v Hatfield* [2003] NSWCA 283 at [21]; *National House-Building Council v Fraser* [1983] 1 All ER 1090 at 1092.

24 *MS Fashions Ltd v Bank of Credit and Commerce International SA (in liq)* [1993] Ch 425 at 436; *Esso Petroleum Co Ltd v Alstonbridge Properties Ltd* [1975] 1 WLR 1474 at 1483.

respondents to make demand. Finally, in this regard, it does not appear to me that the statement that "the Guarantor must pay any money for the Seller's loss due to the Buyer's breach" offers material support for the appellants' arguments. In my view, those words add nothing of substance to the obligations created by the words:

> "… the Guarantor guarantees the obligations of the Buyer specified in the Contract and the payment by the Buyer to the Seller of all monies payable under the Contract.
>
> The Guarantor will be liable if the Buyer breaches the Contract as though the Guarantor was named in the Contract as, and had signed the Contract as, the Buyer …"

Proposed Ground 2(b) – the primary judge erred in entering judgment against the second and third appellants as there was neither a finding nor an admission that there had been loss suffered by the respondents due to the first appellant's breach

[39] On the hearing of the appeal, the appellants' sought leave to amend the Notice of Appeal in order to include the above ground. The Court reserved its decision.

The appellants' argument

[40] The application for summary judgment sought judgment on liability only. The evidence led by the respondents did not establish any loss on the part of the respondents let alone quantify any such loss. The primary judge did not find that any loss had been suffered.

[41] The second and third appellants become liable under the guarantee only if the first appellant breaches the contract. Their liability is expressed to be an obligation to pay money to the respondents for their loss due to the first appellant's breach. Consequently, in order to succeed against the second and third appellants, the respondents were required to prove loss caused by the breach.

[42] As a deposit of $500,000 was forfeited by the respondents, that amount had to be taken into account when determining whether the first appellant's default under the contract and subsequent relevant events, including the resale of the property, resulted in a loss.

[43] The appellants accepted that this argument was not raised at first instance but submitted that they should be allowed to rely on it now because:

- existence of loss on the part of the respondents is a necessary element of the respondents' cause of action against the second and third appellants. The respondents failed to prove a necessary part of their case; and

- this situation does not come within the principle discussed in cases such as *Suttor v Gundowda Pty Ltd;*[25] *Coulton v Holcombe;*[26] and *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council*.[27] In those

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25 (1950) 81 CLR 418 at 438.

26 (1986) 162 CLR 1 at 7–8.

27 (2008) 237 CLR 285 at [66].

cases, an unsuccessful party raised a new point which, if raised during the trial, could possibly have been met by the calling of evidence. This matter did not concern a trial.

Consideration

[44] The respondents pleaded that the purchase price on resale was $4,800,000 and that, taking into account the difference between that figure and the sale price under the contract of $7,000,000 and after allowing for the deposit and other costs and expenses, the respondents had lost just under $2,000,000. Nevertheless, the respondents may have experienced difficulty in adducing evidence which satisfied the primary judge that the second and third appellants had no arguable case that loss and damage had not been sustained by the respondents. The appellants pleaded, in the alternative, that the measure of the respondents' loss was the difference between the market value of the property at the time of termination and the contract price. They also alleged that the respondents, in breach of duty, failed to act reasonably in selling the property and to take reasonable steps to mitigate or minimise any loss or damage consequent upon the alleged breach of contract.

[45] Despite the foregoing considerations, leave to amend should be refused. The primary judge, as he was obliged to do, decided the case on the issues raised and argued before him. If leave to amend is granted, the respondents will be deprived of the opportunity of attempting to adduce further evidence to address the new issue. As cases such as *Coulton v Holcombe*[28] demonstrate, finality in litigation is an important principle and parties to applications such as summary judgment applications are obliged to bring forward their whole case on the hearing. There is another pertinent consideration; if the point had been raised, the respondents would have had the opportunity to attempt to persuade the primary judge of the desirability of a separate trial of the issues raised by the appellants as a bar to their respective liabilities. For example, they could have sought declarations that:

- the contract had been repudiated by the first appellant and the repudiation had been accepted by the respondents, terminating the contract; and

- on the true construction of the guarantee, any losses flowing from the repudiation and termination were losses due to the first appellant's breach of contract.

[46] The resolution of those matters against the appellants could have avoided a lengthy trial. Resolution of those matters against the appellants would have tended to facilitate the settlement of the respondents' claims.

[47] Having regard to the provision that the "Guarantor will be liable … as though … named in the Contract as, and … signed the Contract as, the Buyer", it is relevant that a cause of action for breach of contract arises on breach and nominal damages may be awarded even though the innocent party has suffered no loss.[29]

[48] Leave to amend the notice of appeal should be refused. This ground of appeal has not succeeded.

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28 (1986) 162 CLR 1 at 7–8.

29 E Peel, *Treitel's The Law of Contract*, 13th ed, Sweet & Maxwell, Thomson Reuters, London, 2011 at para 20-002 and *Chitty on Contracts: Volume 1: General Principles*, 28th ed, volume 1, Sweet & Maxwell, London, 1999 at para 27-007.

Grounds 3, 4 and 7 – the primary judge erred in concluding that the second and third appellants were liable pursuant to the guarantee and should have found there was a triable issue as to whether the contract had been abandoned or terminated by the entering into of a fresh contract

The appellants' argument

[49] The appellants contend that there was a triable issue as to whether the contract had been abandoned or replaced by a new agreement for sale. The following matters were pointed to as supporting one or other of these conclusions.

[50] The respondents' solicitors, in their email to the appellants' solicitors of 7 September 2011, stated that their clients were prepared to proceed with negotiations for substitution of the 2010 contract with a new contract on specified bases, including the basis that, "The Deed of Rescission, new contract, guarantees and mortgage documents must be executed by no later than September 23, 2011". They further stated, "Pending the execution of the Deed of Rescission, new contract and accompanying documents [the respondents] reserve all of their rights". Nevertheless, negotiations continued after 23 September. By 23 September 2011, there had been no agreement but there was very little difference between the parties. On 4 October 2011, the respondents' solicitors, in an email to the appellants' solicitors, stated:

> "… could you please let us have your response no later than tomorrow to the documents we sent through with the email below. We note that the original settlement date was Monday October 10 and we must have any extension resolved before then."

[51] On 6 October 2011, the respondents' solicitors, in an email to the appellants' solicitors, stated:

> "… as discussed I confirm that my client agrees to what your client sought in your email.[30] Also as discussed **we now have agreement on the terms of the extension** with the documents now to be signed. I am attaching the revised special conditions for the Contract." (emphasis added)

[52] The author of the 6 October email noted that he had changed special conditions 2 and 3 of the contract and added 5.3 and had made a similar change to the contemplated mortgage, the text of which was set out. The email requested confirmation that the changes were acceptable to the appellants' solicitors. In a further letter dated 6 October 2011 to the appellants' solicitors, the respondents' solicitors sent the proposed contractual documents for execution observing, "Further to our recent exchange of correspondence we note that the parties have agreed to the terms under which this transaction will be extended".

[53] On 11 October 2011, the appellants' solicitors informed the respondents' solicitors, in an email, that their clients had instructed them that the signed documents would be returned to their office the following day. They stated that the documents would be sent to the respondents' solicitors immediately upon receipt. The forwarding of the engrossed contractual documents on 6 October 2011 demonstrated that

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30 This is a reference to requests made in an email of 6 October 2011.

negotiations had been concluded and all that remained to be done was the execution of the formal transaction documents.

[54] The negotiations between the parties therefore fell within the fourth category of *Masters v Cameron*.[31] That is, the parties had reached an agreement that they intended to be immediately binding, although they intended that the agreement be re-stated in a formal written agreement. So much is clear by the words "the parties have agreed to the terms under which this transaction will be extended" in the 6 October 2011 letter.

[55] Another matter of significance relied on in this regard was that there was no evidence of an attempt on the part of either side to settle under the contract on 10 October 2011. It was submitted that that was consistent with the contract no longer being on foot. The primary judge's reliance on the fact that the negotiations "were conducted in writing and explicitly on the footing that until a new contract was signed the 2010 contract was binding"[32] was criticised. It was submitted that insufficient regard was had to the possibility of a change in the parties' positions when negotiating over an extended period.

[56] The remaining substantial matter relied on to support this ground was the conflict in the evidence as to what took place at a meeting of 14 October 2011. The third appellant swore that at the meeting, which was held on a without prejudice basis, the contract was not mentioned and that:

> "The discussion was about, first, the financial position of the [first appellant] and related companies and then the focus shifted to the terms and dates for payment in the New Contract."

[57] He denied assertions by Mr Mahoney, a partner in the firm of solicitors representing the respondents, that at the meeting, he, the second appellant or his solicitor acknowledged that: "the Abandoned Contract remained on foot"; the appellants "were in default under the Abandoned Contract"; and the respondents "reserved their rights under the Abandoned Contract, or at all".

[58] Mr Tynan swore that at the 14 October meeting there was mention of the contract being on foot and of the first appellant "not [being] able to settle at this stage" and "therefore in default".

[59] The primary judge regarded this conflict as being of "no consequence"[33] as the effect of the appellants' evidence was that there had been no mention of the contract at "a without prejudice discussion about proposed terms of the proposed new contract".[34] The appellants submitted that this showed that, in determining whether the contract had been abandoned, the primary judge erred in not having regard to a relevant consideration. As the primary judge was not in a position to resolve the conflict in the evidence, he was obliged to proceed on the basis that the appellants' version of events was correct. The failure on the part of those at the meeting to mention the contract gave rise to the inference that the parties were treating it as abandoned.

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31 (1954) 91 CLR 353. See also *Sinclair, Scott & Co Ltd v Naughton* (1929) 43 CLR 310 at 317.

32 *Tynan & Anor v Filmana Pty Ltd & Ors* [2013] QSC 32 at [30].

33 *Tynan & Anor v Filmana Pty Ltd & Ors* [2013] QSC 32 at [17].

34 *Tynan & Anor v Filmana Pty Ltd & Ors* [2013] QSC 32 at [17].

Consideration

[60] There is no reason to suppose that the primary judge disregarded the argument just mentioned. It was advanced by the appellants at first instance both orally and in writing. The primary judge was right in rejecting the argument. There was overwhelming evidence against the proposition that the contract had been abandoned.

[61] The respondents' solicitors were at pains throughout the negotiations to ensure that the negotiations did not affect or prejudice their clients' rights under the contract. That may be seen from the narrative in paragraph [9] hereof.

[62] Clauses 2.1 and 3.6 of the draft deed of rescission sent by the respondents' solicitors to the appellants' solicitors on 6 October 2011 are evidence of continuing attempts to ensure that no rights under the existing contract were lost or abandoned unless or until new written contractual arrangements were formally entered into.

[63] The original settlement date of 10 October 2011 came and went without either party tendering, but that can be explained by the advanced state of the negotiations. The parties' ensuing conduct provides compelling evidence that the contract was not abandoned.

[64] The correspondence from 17 October onwards is entirely inconsistent with abandonment and contains implied admissions that the contract remained on foot. The implied admissions in facsimiles from the appellants' solicitors on 9 and 14 November are expressly stated to have been made on instructions. Although the third appellant swore that he did not "specifically recall seeing" the letter of 17 October 2011 from the respondents' solicitors to the appellants' solicitors, he did not assert that the later letters or facsimiles were sent without instructions. Nor was it contended that the communications exceeded the authority of the appellants' solicitors.

[65] The appellants' argument attached considerable significance to the references to an "agreement" in the email and letter of 6 October from the respondents' solicitors and to the absence, from those communications, of any further express statement that any agreement was subject to the execution of the fresh documentation. It is, however, impossible to conclude that any intention to be contractually bound was manifested by this exchange of correspondence having regard to the background to the exchange. In any event, the language used was not, in the circumstances, apt to suggest acceptance of the existence of a final agreement. The email refers to an "agreement on the terms of the extension with the documents now to be signed". The remainder of the email is also inconsistent with the existence of any overall agreement. It states, implicitly, that the provisions of some clauses have been changed and requests confirmation that the changes are acceptable. Emphasis continued to be placed on the execution of relevant documents.

[66] The letter of 6 October enclosing the engrossments of the proposed deed of rescission, new contract and other documents also refers to agreement "to the terms under which this transaction will be extended". It seeks the execution and return of the documents.

[67] In addition to the above considerations, the very nature of the transaction, which involved the sale and purchase of a valuable property between parties represented

by solicitors and the provision of deeds of guarantee and a deed of rescission, pointed strongly against the conclusion that the parties intended to be bound before the documents, which had been the subject of lengthy negotiations, had been executed by the parties.

[68] It was submitted that the primary judge was overly robust in applying the "no real prospect of success" test in r 292 of the UCPR and that the complexity of the questions requiring determination made summary judgment inappropriate. Reliance was placed on the observations of Mason CJ, Deane and Dawson JJ in *Webster v Lampard*:[35]

> "The power to order summary judgment must be exercised with 'exceptional caution' and 'should never be exercised unless it is clear that there is no real question to be tried' …
>
> Nowhere is that need for exceptional caution more important than in a case where the ultimate outcome turns upon the resolution of some disputed issue or issues of fact. In such a case, it is essential that 'great care ... be exercised to ensure that under the guise of achieving expeditious finality a plaintiff is not improperly deprived of his opportunity for the trial of his case by the appointed tribunal'." (citations omitted)

[69] As the above discussion shows, the outcome of the summary judgment application did not turn on the resolution of disputed issues of fact.

[70] Rule 292 of the UCPR provides:

> "**292 Summary judgment for plaintiff**
>
> (1) A plaintiff may, at any time after a defendant files a notice of intention to defend, apply to the court under this part for judgment against the defendant.
>
> (2) If the court is satisfied that—
>
> (a) the defendant has no real prospect of successfully defending all or a part of the plaintiff's claim; and
>
> (b) there is no need for a trial of the claim or the part of the claim;
>
> the court may give judgment for the plaintiff against the defendant for all or the part of the plaintiff's claim and may make any other order the court considers appropriate."

[71] For the reasons discussed above, the primary judge was entitled to conclude that the appellants had "no real prospect of successfully defending" the issues of liability raised for his determination and that there was no need for a trial of those issues. The primary judge's approach gave rise to no injustice.

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35 (1993) 177 CLR 598 at 602–603.

[72] Even if it were to be accepted that the summary judgment application raised one or more matters of legal complexity, that would not have prohibited the primary judge from entertaining the application and giving summary judgment.[36] Where a summary judgment application raises complex issues of law, the judge hearing the application may be ill-advised to determine the application forthwith and give ex tempore reasons; but, it will normally be open to the judge to reserve his or her decision so that due consideration can be given to the issues. That was the course taken by the primary judge.

Conclusion

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

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[36] *Jessup v Lawyers Private Mortgages Pty Ltd & Ors* [2006] QSC 3 at [22]; *Westpac Banking Corporation v Hughes* [2012] 1 Qd R 581 at 602.