SUPREME COURT OF QUEENSLAND

CITATION:	*Bank of Queensland Limited v Y & L Promising Pty Ltd* [2022] QCA 217
PARTIES:	**BANK OF QUEENSLAND LIMITED** ACN 009 656 740 (applicant/appellant) **v** **Y & L PROMISING PTY LTD (IN ITS OWN RIGHT AND AS TRUSTEE FOR THE Y & L TRUST)** ACN 639 419 775 (respondent)
FILE NO/S:	Appeal No 4532 of 2022 DC No 2611 of 2021
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension of Time s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane – [2022] QDC 52 (Porter KC DCJ)
DELIVERED ON:	8 November 2022
DELIVERED AT:	Brisbane
HEARING DATE:	9 September 2022; further submissions dated 20 September 2022 and 5 October 2022
JUDGES:	Morrison JA and Williams and Cooper JJ
ORDERS:	**1. Application for extension of time to apply for leave to appeal granted.** **2. Application for leave to appeal granted.** **3. Appeal allowed.** **4. The order dated 24 March 2022 dismissing the appellant's claim be set aside.** **5. The Amended Statement of Claim filed 15 February 2022 be struck out, with leave to replead.** **6. The respondent pay the appellant's costs of the appeal.**
CATCHWORDS:	REAL PROPERTY – TORRENS TITLE – GENERAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF LEGISLATION – where the appellant is the lessee of commercial premises – where asbestos was detected at the premises and a consultant provided a scope of the works required for removal – where the appellant undertook the remediation works at its own cost – where the respondent

became the registered owner of the land after the remediation works were undertaken – where the appellant demanded payment for the remediation works from the respondent and subsequently commenced proceedings – where the respondent obtained summary judgment dismissing the appellant's claim – whether the breach occurring prior to the transfer of ownership of the land is a liability "in relation to the lot" for the purpose of s 62(1) of the *Land Title Act 1994* (Qld) – whether the learned primary judge erred in summarily dismissing the appellant's claim

DEEDS – DEED POLL – where the respondent became the registered owner of the land and executed a deed poll as buyer – where the deed poll provided that the respondent agreed to abide by the terms of the lease on the part of the lessor to be performed, fulfilled or observed on or after the settlement date – where the deed poll provided that the respondent would observe the provisions of the lease which otherwise do not touch and concern or run with the land – whether the respondent intended to assume liability for the debt which had accrued prior to the transfer of the land – whether the learned primary judge erred in finding that the respondent promised to be bound by the terms of the lease only in respect of obligations arising after the settlement date – whether the learned primary judge erred in summarily dismissing the appellant's claim

APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – WHEN APPEAL LIES – FROM DISTRICT COURT – BY LEAVE OF COURT – where a clause of the lease entitled the appellant to recover its costs of removing asbestos – where the issue of set-off was not pleaded or argued before the learned primary judge – whether the lease conferred a current and ongoing right of set-off against future rent – whether the appellant's right of set-off was transferred to the respondent by execution of a deed poll or under s 62(1) of the *Land Title Act 1994* (Qld) – whether the learned primary judge erred in summarily dismissing the appellant's claim

Acts Interpretation Act 1954 (Qld), Schedule 1
District Court of Queensland Act 1967 (Qld), s 118
Land Title Act 1994 (Qld), s 3, s 61(1)
Property Law Act 1974 (Qld), s 117, s 118
Uniform Civil Procedure Rules 1999 (Qld), r 171, r 293

Brisbane City Council v Amos (2019) 266 CLR 593; [2019] HCA 27, applied
Chamberlain Early Learning Centre Pty Ltd v Precious 1 Pty Ltd (2017) 18 BPR 36,895; [2017] NSWSC 189, considered
Edlington Properties Ltd v JH Fenner & Co Ltd [2006] 3 All ER 1200; [2006] 1 WLR 1583; [2006] EWCA Civ 403, considered

Geroff v CAPD Enterprises Pty Ltd [2003] QCA 187, considered
Jodaway Pty Ltd v Langton [2004] 2 Qd R 272; [2003] QSC 79, considered
Measures v McFadyen (1910) 11 CLR 723; [1910] HCA 74, considered
Queensland Premier Mines Pty Ltd v French (2007) 235 CLR 81; [2007] HCA 53, considered

COUNSEL: M D Martin KC for the applicant/appellant
J P Hastie for the respondent

SOLICITORS: Mills Oakley Lawyers for the applicant/appellant
SLF Lawyers respondent

[1] **MORRISON JA:** I agree with the reasons prepared by Cooper J and the orders his Honour proposes.

[2] **WILLIAMS J:** I agree with the reasons and orders of Cooper J.

[3] **COOPER J:** This is an appeal from a judgment of the District Court dated 24 March 2022 by which, pursuant to r 293 of the *Uniform Civil Procedure Rules 1999* (Qld) (**UCPR**), the appellant's claim against the respondent for damages for breach of a lease was summarily dismissed.[1]

[4] The appellant seeks to have the order dismissing its claim set aside and, in its place, an order that the respondent's application for summary judgment be dismissed.

Background

[5] The appellant (**BOQ**) is the lessee of commercial premises in Coolangatta on land owned by the respondent (**Y&L**).

[6] The lease was entered into in April 2016, at which time the land was owned by Well Property Holdings Pty Ltd (**WPH**).

[7] The lease relevantly provided:

(a) by special condition 1 set out in item 18 of the Schedule:

> "1. The Lessee will not accept any liability for residual asbestos if contained in the Premises. Prior to handover, the Lessor must provide a full destructive report and remove any asbestos at the Lessor's cost. An asbestos certificate warranting that no asbestos is contained in the Premises must be provided prior to handover."

(b) by clause 23.10(c) (subparagraphs (a) and (b) having been omitted by agreement):

> "**23.10 Asbestos**
>
> …
>
> (c) If any asbestos is found in the Premises during the Term or any Further Term, the Landlord will remove it at the Landlord's cost in consultation with the Tenant, and any

[1] *Bank of Queensland v Y&L Promising* [2022] QDC 52 (**Reasons**).

other associated costs incurred by the Tenant, directly or indirectly, with the removal of the asbestos will be the responsibility of the Landlord."

(c) by clauses 35.3 and 35.4:

"**35.3 Landlord Default Events**

(a) A Landlord Default Event occurs if the Landlord does not comply with any obligation under this Lease within 14 days after the Landlord has received notice from the Tenant of the breach

(b) …

35.4 Landlord default

If a Landlord Default Event occurs or the Landlord repudiates its obligations under this Lease and the Landlord fails to remedy it to the Tenant's reasonable satisfaction within a reasonable time after the Tenant has given the Landlord notice to remedy it, then the Tenant may, without limiting any other rights that the Tenant may have, either:

(a) remedy the breach and the Landlord must pay to the Tenant all reasonable Costs incurred by the Tenant in relation to remedying the breach, as a liquidated debt, within 7 days after demand or the Tenant may set-off the Costs against the Rent and other moneys payable by the Tenant under this Lease; or

(b) terminate this Lease by notice to the Landlord.

The exercise by the Tenant of any of its rights under this clause 35.4 is without liability to the Tenant and does not prejudice any of the Tenant's rights under this Lease."

(d) by clause 39.4:

"**39.4 Antecedent breaches and obligations**

The assignment, expiry or termination of this Lease does not affect the rights of either party for a breach of this Lease by the other party before the assignment, expiry or termination."

[8] For the purposes of its summary judgment application, Y&L accepted that certain facts, despite being in issue on the pleadings, should be assumed in BOQ's favour. In August 2017, a consultant engaged by BOQ detected asbestos at the premises and provided a scope of the works required for its safe removal. In September 2017, having received a fee proposal for the remediation works, BOQ notified WPH that it was required to remove the asbestos from the premises. On 11 April 2018, the asbestos not having been removed, BOQ issued a notice to remedy breach to WPH. Upon WPH failing to remedy the breach, BOQ caused the remediation works to be undertaken pursuant to clause 35.4(a) of the lease at a cost of $193,102.50. On or about 21 October 2019, BOQ demanded that WPH pay the costs of the remediation works. WPH did not pay those costs.

[9] On 27 March 2020, the land and premises were transferred to Don & Sons Investments Pty Ltd (**DSI**). BOQ subsequently demanded payment of the costs of the remediation works from DSI. DSI did not pay those costs.

[10] Y&L became the registered owner of the land and premises on 13 July 2021. On or about that date, Y&L executed a deed poll as buyer which relevantly provided:

> "The Buyer covenants for the benefit of the Lessee as follows:
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> 1. the Buyer agrees that it will on and from Tuesday, 13 July 2021 (Settlement Date) abide by the terms of the Lease on the part of the lessor to be performed, fulfilled or observed on or after the Settlement Date; and
>
> 2. without limitation, the Buyer agrees that it will on and from the Settlement Date observe the provisions of the Lease giving to the Lessee any option to renew or which otherwise do not touch and concern or run with the Land."

[11] On 22 July 2021, BOQ demanded payment of the costs of the remediation works from Y&L. Y&L has refused to pay those costs.

The parties' arguments at first instance

[12] BOQ's statement of claim alleged that, by reason of the transfer of ownership from WPH to DSI and the subsequent transfer from DSI to Y&L, all liabilities in respect of damage suffered by BOQ by reason of breach of the lease vested in Y&L.[2] BOQ relied upon either s 62(1) of the *Land Title Act 1994* (Qld) (**LTA**) or the terms of the Deed Poll as the basis for the transfer of those liabilities to Y&L, although the claim based on the Deed Poll had not been fully pleaded when the summary judgment application was heard.

[13] Section 62 of the LTA provides:

> "**62 Effect of registration of transfer**
>
> (1) On registration of an instrument of transfer for a lot or an interest in a lot, all the rights, powers, privileges and liabilities of the transferor in relation to the lot vest in the transferee.
>
> (2) Without limiting subsection (1), the registered transferee of a registered mortgage is bound by and liable under the mortgage to the same extent as the original mortgagee.
>
> (3) Without limiting subsection (1), the registered transferee of a registered lease is bound by and liable under the lease to the same extent as the original lessee.
>
> (4) In this section—
>
> ***rights***, in relation to a mortgage or lease, includes the right to sue on the terms of the mortgage or lease and to recover a debt or enforce a liability under the mortgage or lease."

[14] Y&L contended before the primary judge that there was no real, as opposed to fanciful, prospect of BOQ succeeding on its claim because, in circumstances where

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2 Amended Statement of Claim [31].

the liability to pay the costs of the remediation works accrued before the transfer of the land to Y&L, that liability remained with WPH.

[15] Y&L submitted that:

(a) the High Court authority of *Measures v McFadyen*,[3] which considered the effect of provisions similar to s 62 in earlier legislation in New South Wales,[4] established that s 62(1) of the LTA did not operate to effect a transfer of the liability for completed breaches of lease which occurred before it became the owner of the land; and

(b) the terms of the Deed Poll, properly construed, operated prospectively and not retrospectively so that from the date Y&L became the owner of the land, and the landlord under the lease, it was obliged to comply with the terms of the lease which, thereafter, fell to be performed by the landlord. An accrued obligation to pay damages, or money, in respect of a past breach of the lease fell outside the scope of the obligations Y&L agreed to assume under the Deed Poll.

[16] BOQ submitted that there was a need for a trial because:

(a) as a matter of statutory construction of s 62(1) of the LTA, it did not matter that the liability under the lease had accrued because the liabilities which were transferred to the new owner included any liability, whether accrued or accruing. This argument relied upon the definition of "liability" in Schedule 1 of the *Acts Interpretation Act 1954* (Qld) (**AIA**) which defines that term as meaning "any liability or obligation (whether liquidated or unliquidated, certain or contingent, or accrued or accruing)." BOQ submitted that differences in the wording of s 62(1), with the AIA definition of "liability" and the definition of rights in s 62(4) not appearing in the provisions considered in *Measures*, meant that the earlier decision could be distinguished;

(b) it was at least arguable that, under the Deed Poll, Y&L had contractually agreed it would be liable for damages arising from the prior breach of covenant even if the liability to pay such damages did not run with the land.

The decision at first instance

[17] In considering the argument on s 62 of the LTA, the primary judge commenced by reviewing *Measures* and two other authorities in which s 62 itself had been considered: *Jodaway Pty Ltd v Langton*[5] and *Queensland Premier Mines Pty Ltd v French*.[6] From that review, the primary judge concluded that *Measures* stands as authority for the proposition that a right of recovery for a completed breach of a lease does not pass to a transferee of land under a cognate provision to s 62 of the LTA.[7]

[18] The primary judge characterised BOQ's claim as one for damages for a completed breach of covenant under the lease or, to the extent BOQ relies on cl 35.4(a) of the lease, an accrued chose in action in debt for a liquidated sum calculated under the

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3 (1910) 11 CLR 723 (***Measures***).

4 *Real Property Act 1900* (NSW) ss 51 and 52.

5 [2004] 2 Qd R 272 (***Jodaway***).

6 (2007) 235 CLR 81 (***Queensland Premier Mines***).

7 Reasons at [46].

lease as a contractual remedy for a completed breach of covenant.[8] On this appeal, BOQ does not challenge that characterisation of its claim as it was articulated on the hearing of the summary judgment application.

[19] The primary judge observed that the provisions considered in *Measures* have the same purpose as s 62 of the LTA: to ensure the effective transfer of interests in the Torrens system which carry with them, not only the interest in land transferred, but the rights and liabilities incidental to that interest in land.[9] His Honour also considered the language of s 62 of the LTA to be substantively similar to the provisions considered in *Measures*, particularly the use of words which link the rights and liabilities coming within the scope of the provisions to the lot which is transferred.[10]

[20] The primary judge did not accept BOQ's argument that the definition of "liability" in the AIA provided a reason to give a different construction to a liability of a transferor in s 62 from that adopted in *Measures* for a right of a transferor under cognate provisions.[11] His Honour considered that, having regard to the entrenched nature of the approach to the construction of s 62 and cognate provisions which he discerned from his review of the authorities, the context and subject matter of the provision indicated that the definition of liability in the AIA should not apply to s 62 of the LTA. Although his Honour referred to s 4 of the AIA when finding that the AIA definition of liability was excluded, the primary judge adopted the wording used in s 32A of the AIA.[12]

[21] Having rejected that argument, the primary judge concluded that the principle set out in *Measures* applies to liabilities under s 62 of the LTA such that, in that respect, BOQ's claim must fail.[13]

[22] In considering the claim under the Deed Poll, the primary judge found that BOQ had standing to enforce the Deed Poll directly. Y&L does not challenge that finding on this appeal.

[23] In addressing the construction of the Deed Poll, the primary judge found that Y&L had promised to be bound only in respect of obligations arising under the lease after the settlement date of the transfer of the land to it.[14] His Honour rejected BOQ's argument that the obligation to pay the debt arising under cl 35.4 was, as at the settlement date, an obligation to be performed by the landlord under a term of the lease. The primary judge concluded that the obligation under cl 35.4 was to pay the debt within seven days of the date of demand and once that period expired there was nothing remaining to be performed under the clause.[15] On that basis, the primary judge considered that BOQ had no real prospect of succeeding on its claim against Y&L relying on the Deed Poll.

Leave to appeal

[24] A threshold issue arises as to whether BOQ requires leave to appeal the judgment.

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8 Reasons at [53].
9 Reasons at [55].
10 Reasons at [57].
11 Reasons at [58]-[59].
12 Reasons at [59].
13 Reasons at [54], noting that the reference to BOQ's defence in that paragraph appears to be mistaken.
14 Reasons at [66].
15 Reasons at [68].

[25] Appeals from the District Court in its civil jurisdiction are provided for in s 118 of the *District Court of Queensland Act 1967* (Qld). Subsections (2) and (3) of that provision provide:

> "(2) A party who is dissatisfied with a final or interlocutory judgment of the District Court in its original jurisdiction may appeal to the Court of Appeal if the judgment—
>
> (a) is given for an amount equal to or more than the Magistrates Courts jurisdictional limit; or
>
> (b) relates to a claim for, or relating to, property that has a value equal to or more than the Magistrates Courts jurisdictional limit.
>
> (3) Subject to sections 118A and 118B, a party who is dissatisfied with any other judgment of the District Court, whether in the court's original or appellate jurisdiction, may appeal to the Court of Appeal with the leave of that court."

[26] Both parties to the appeal noted the somewhat anomalous discrimination between an unsuccessful defendant and an unsuccessful plaintiff apparent from the wording of s 118(2)(a). An unsuccessful defendant has a right of appeal, without leave, where judgment is given for an amount equal to or more than $150,000, that being the Magistrates Court jurisdictional limit. A plaintiff who, having made a claim in excess of $150,000, fails to obtain judgment has no similar right.

[27] BOQ's written submissions drew attention to the form of s 118(2) prior to amendments made on 8 December 2003 which provided an unqualified right of appeal to an unsuccessful plaintiff who had a bona fide claim in excess of the Magistrates Court jurisdictional limit. The explanation for the amendments which saw s 118(2) changed to its current form was to overcome difficulties associated with differing interpretations of that earlier form of s 118(2) and to clarify when an appeal would be available. I agree with the submission by both parties that, given this legislative purpose, it is difficult to understand the legislative intention in drawing the distinction between an unsuccessful defendant and an unsuccessful plaintiff.

[28] Nevertheless, previous authority suggests that, in a case such as this, s 118(2) means that an unsuccessful plaintiff requires leave to appeal.[16]

[29] BOQ filed an application for leave to appeal, albeit after the 28 day appeal period had expired.[17] The written outline of argument for Y&L indicated it did not oppose an extension of time in which leave should be sought. Further, during the course of argument, counsel for Y&L did not oppose the grant of leave to appeal itself. It is therefore unnecessary to consider the issue further. In circumstances where the substantive appeal was fully argued, leave to appeal should be granted.

Grounds of appeal

[30] BOQ's notice of appeal sets out the following grounds:

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[16] *Wash Investments Pty Ltd v SCK Properties Pty Ltd* [2016] QCA 258; *Tutos v Roman Catholic Trust Corporation* [2020] QCA 171; *Goldsmith v AMP Life Ltd* (2021) 7 QR 113.

[17] The notice of appeal was filed within the prescribed period.

(a) the primary judge erred in law and in fact in finding that on a proper construction of s 62 of the LTA and the definition of liability in Schedule 1 to the AIA, BOQ's accrued claim pursuant to the lease did not vest in Y&L;

(b) the primary judge erred in law and in fact in finding that BOQ's claim to recover a liquidated debt pursuant to cl 35.4 of the lease lapsed upon the expiration of seven days from the date of demand for the payment of such debt and therefore was not otherwise recoverable by the appellant from the respondent pursuant to the Deed Poll;

(c) the primary judge erred in fact and in law by dismissing BOQ's claim without a trial.

The parties' arguments on appeal

[31] BOQ repeated the arguments it advanced before the primary judge concerning the proper construction of s 62 of the LTA, incorporating the definition of liability in Schedule 1 of the AIA. It pointed to the fact that the legislature, when enacting the LTA in 1994, did not see fit to give the term liability in s 62 a meaning different from that prescribed in the AIA. It submitted that the proper approach to statutory construction is to assume that an expression is used as defined and then ask whether, in the particular context in which it appears, a contrary intention can be shown.[18]

[32] BOQ argued that the primary judge had impermissibly relied upon the way in which s 62 had been construed by the courts, not the words of the section itself, as evincing a contrary intention for the purposes of s 4 of the AIA. It submitted that none of the authorities relied on by the primary judge considered the AIA definition of liability. On BOQ's argument, nothing in the language of s 62 or the general character of the LTA evinced a contrary intention that would exclude the incorporation of the AIA definition of liability in s 62.

[33] As to liability under the Deed Poll, BOQ submitted that a failure by the landlord to pay a debt demanded in accordance with cl 35.4(a) of the lease did not mean that BOQ lost its right to recover the liquidated debt. The seven day period merely provided the landlord with a timeframe within which to pay. BOQ maintained that, on the proper construction of the Deed Poll, Y&L had agreed to assume the obligation to pay the debt which had arisen under cl 35.4(a) and which remained in existence as at the settlement date for the transfer of the land to Y&L.

[34] Y&L supported the reasoning of the primary judge as being consistent with the approach taken to accrued rights under the provisions considered in *Measures*. It argued that the words "in relation to a lot" in s 62 of the LTA mean that the section only operates on rights and liabilities which bear sufficient connection to the interest in land which is being transferred and an accrued liability for a completed breach of covenant lacks sufficient connection. The object of s 62 is to effect a transfer of the former owner's interests in the land, including under the lease, to Y&L. The fulfilment of that objective did not require that Y&L be made liable in respect of breaches of the lease which occurred prior to it becoming the owner of the land. In other words, the efficacy of that which was transferred by s 62 of the LTA did not depend upon a transfer of the accrued liabilities for prior completed breaches.

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[18] *RACQ Insurance Ltd v Wilkins* [2010] 2 Qd R 552 at 557 [18].

[35] Y&L also argued that BOQ's rights in respect of accrued breaches of covenant in a lease were personal rights which did not run with the land,[19] and, on the reasoning in *Jodaway*, the liability for such breaches are not transferred under s 62.

[36] Y&L submitted that the definition of liability in the AIA did not change the outcome. The purpose and context of s 62 of the LTA, as explained by *Measures* and *Queensland Premier Mines*, was inconsistent with the section being construed as operating to transfer liabilities for completed breaches of covenant which accrued prior to the transfer of the interest in land so the AIA definition is excluded under ss 4 or 32A of the AIA. Even if the AIA definition was incorporated in s 62, liabilities for completed breaches of covenant which accrued prior to the transfer of the interest in land would not be properly characterised as liabilities "in relation to a lot" so as to come within the scope of the section.

[37] On the issue of the proper construction of the Deed Poll, Y&L accepted that BOQ did not lose the right to recover the debt arising from cl 35.4(a) if that debt was not paid within seven days but repeated its argument below that Y&L's covenants operated prospectively to make it liable for obligations which fell to be performed under the lease from the date of settlement of the transfer. Those covenants did not operate retrospectively to make Y&L liable for an obligation which had fallen due for performance under cl 35.4(a) prior to the settlement date. The debt which had arisen under cl 35.4(a) prior to settlement had an existence separate from the lease.[20]

Section 62 of the LTA

[38] The proper approach to statutory construction requires that the court's consideration focus on the text of the provision, in context.[21] The task must begin with a consideration of the text itself, although the meaning of the text may require consideration of the context, which includes the general purpose and policy of the provision.[22]

[39] A consideration of the text of s 62(1) of the LTA reveals the provision is concerned with the effect of transfers of land, or interests in land, within the context of the Torrens system of land registration. This is supported by and consistent with the heading of s 62, as well as its positioning in Division 1 of Part 6 of the LTA. Part 6 is entitled "Dealings directly affecting lots". Division 1 is entitled "Transfers". Those headings form part of the LTA,[23] and part of the context within which s 62 falls to be construed.

[40] That context also includes the object of the LTA which, in so far as is relevant to this appeal, is set out in s 3 as follows:

> "**3 Object of Act**
>
> The object of this Act is to consolidate and reform the law about the registration of freehold land and interests in freehold land and, in particular—

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19 *Edlington Properties Ltd v JH Fenner & Co Ltd* [2006] 3 All ER 1200; [2006] 1 WLR 1583 at [17]-[18].

20 *Geroff v CAPD Enterprises Pty Ltd* [2003] QCA 187 at [3]-[4].

21 *R v Wassmuth; Ex parte Attorney-General (Qld)* [2022] QCA 113 at [26].

22 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46-47.

23 See s 14(1) of the AIA.

(a) to define the rights of persons with an interest in registered freehold land; and

(b) to continue and improve the system for registering title to and transferring interests in freehold land; …"

[41] That legislative object further confirms that s 62(1) is concerned with the effect of transfers within the context of the Torrens system.

[42] By its terms s 62(1) operates when an instrument of transfer is registered to vest certain rights, powers, privileges and liabilities held by the transferor in the transferee. The description of the rights, powers, privileges and liabilities so vested as being "in relation to the lot" makes it clear that, for vesting to occur under the provision, there must be some connection between the rights, powers, privileges and liabilities and the transferor's interest in the lot.

[43] The requirement for such a connection can also be seen from the text of ss 62(2) and 62(3). Those provisions are directed to the transfer of particular registered interests in land, namely mortgages and leases. Upon registration of an instrument of transfer of a registered mortgage or a registered lease the transferee becomes bound to observe the terms of the mortgage or lease in the same manner as the original mortgagee or the original lessee had been bound. By their terms those subsections, which are expressed not to limit the operation of s 62(1), apply only to a transferee of the interest as mortgagee or lessee, and not to a transferee of ownership of the lot itself. Further, they only address the vesting of liabilities. Nevertheless, they are consistent with there being a requirement for a connection between the interest in land transferred and the liabilities which are vested in the transferee by reason of s 62(1).

[44] The definition of "rights" in s 62(4), although also limited to the context of a mortgage or lease, has a broader operation than ss 62(2) and 62(3). The right to sue on the terms of the mortgage or lease and to recover a debt or enforce a liability under the mortgage or lease is a right which might be held, and therefore transferred, by the owner of the land as mortgagor or lessor as well as the mortgagee or lessee. However, it must be remembered that for such a right to vest in a transferee under s 62(1) it must be characterised as a right in relation to the lot and therefore be sufficiently connected to the transferor's interest in the lot.

[45] On this appeal, the relevant inquiry for the purpose of construing s 62(1) involves identifying the degree or character of connection required to characterise a liability as one "in relation to the lot" for the purposes of the provision.

[46] BOQ's argument relying upon the definition of liability in the AIA does not advance that inquiry. To read that definition into s 62(1) so that it refers to "liabilities (including accrued liabilities) of the transferor" says nothing about whether a particular accrued liability is one which bears a sufficient connection to the transferor's interest in the lot to come within the operation of the provision.

[47] In this regard, the proper construction of s 62(1) of the LTA should be informed by the long history and understanding of its legislative predecessors. That is because,

as Gageler J stated in *Brisbane City Council v Amos*,[24] re-enacted statutory provisions should ordinarily be taken to retain judicially settled meanings absent some judicially cognisable indication that some different meaning was legislatively intended. This accords with the observation of Mullins J (as her Honour was then) in *Jodaway*,[25] that s 62 cannot be construed in isolation from its long history tracing back to ss 43, 65 and 66 of the *Real Property Act 1861* (Qld).

[48] This raises two issues to be resolved in the process of construction. First, whether a consideration of the history and understanding of the legislative predecessors to s 62 of the LTA reveals a judicially settled meaning as to the degree or character of the connection required to characterise a liability as one "in relation to the lot" for the purposes of the provision. Secondly, if such a settled meaning is discerned, whether there was some judicially cognisable indication that some different meaning was legislatively intended when s 62 was enacted.

[49] Y&L's submissions relying on the earlier authorities of *Measures*, *Jodaway* and *Queensland Premier Mines* were directed to the first of these issues.

[50] *Measures* concerned a lease for five years in which the tenant covenanted that he would erect alterations and additions on the leased premises "forthwith." The registered owner transferred the land almost three years into the lease term. By that time, the tenant had not commenced construction of the works and was in breach of his covenant. That breach was complete at the date of transfer. The question was whether, on the proper construction of ss 51 and 52 of the *Real Property Act 1900* (NSW), the registered owner's right to sue for damages for a breach of covenant completed before the date of transfer, passed to the transferee.

[51] Section 51 of the NSW legislation provided:

> "Upon the registration of any transfer, the estate or interest of the transferor as set forth in such instrument, with all rights, powers and privileges thereto belonging or appertaining, shall pass to the transferee, and such transferee shall thereupon become subject to and liable for all and every the same requirements and liabilities to which he would have been subject and liable if named in such instrument originally as mortgagee, encumbrancee or lessee of such land, estate, or interest."

[52] Section 52(1) of the NSW legislation provided:

> "By virtue of every such transfer, the right to sue upon any memorandum of mortgage or other instrument and to recover any debt, sum of money, annuity, or damages thereunder (notwithstanding the same may be deemed or held to constitute a chose in action), and all interest in any such debt, sum of money, annuity, or damages shall be transferred so as to vest the same at law as well as in equity in the transferee thereof."

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24 (2019) 266 CLR 593 at 615 [45], citing *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees* (1994) 181 CLR 96 at 106 and *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* (2015) 254 CLR 489 at 496 [3], 502-503 [15]-[16].

25 [2004] 2 Qd R 272 at 275 [19].

[53] These provisions were in terms similar to ss 65 and 66 of the *Real Property Act 1861* (Qld), the predecessors to s 62 of the LTA.

[54] In *Measures*, each of Griffith CJ, O'Connor and Isaacs JJ held that, properly construed, those provisions did not operate to transfer the right to sue for damages on a completed breach of covenant to the new owner of the land.

[55] Griffiths CJ stated:[26]

> "The question is whether the right to sue for damages for a breach of covenant, not being a continuing breach, which is complete before transfer passes by virtue of these provisions to the transferee. The term 'transfer' in sec. 51 means the transference of estate resulting from registration, and the word 'thereto' refers to the estate or interest transferred. The estate or interest transferred is one thing, and the personal right of action in respect of an antecedent completed breach of contract is another. In my opinion the words of this section are not sufficient to transfer the right to bring an action in respect of such a past breach.
>
> The plaintiff, however, contends that the words 'the right to sue upon any … instrument and to recover any … damages thereunder' in sec. 52(1) are sufficient to transfer the right. The state of the law before the Act is shown by the case of *Coward v. Gregory*, and in my judgment these words are not sufficient to alter it. The purpose of the Act was to transfer the estate or interest of the transferor in the land with all the rights incidental to present and future possession, but I do not think that it was intended to transfer also mere choses in action in respect of past and completed breaches of covenant."

[56] O'Connor J stated:[27]

> "It is also clear that, in the case of a covenant to build, the breach is not a continuing breach. As Mr. Justice Willes says in *Coward v. Gregory* that kind of covenant can only be broken once for all. It is well settled law that, apart from any statutory provision, the assignment of a reversion does not vest in the assignee a right of action for breach of covenant in the lease committed before the assignment.… The plaintiff, however, relied on secs. 51 and 52 of the *Real Property Act* as operating to vest in the assignee any cause of action which had accrued under the lease before the assignment of the reversion. If that contention is well founded, it is immaterial in an action by the assignee whether the breach occurred while the estate was vested in the assignor, or after it had become vested in the assignee. The interpretation of those sections is therefore the first matter to be disposed of. In my opinion the mere transfer of the freehold estate does not empower the transferee to sue for breaches of covenants in the lease committed by the lessee before the transfer. The words of sec. 52, referring to damages, relied on by the respondent's counsel, cannot, consistently with the other portions of the Act, material in this connection, be so interpreted. It therefore

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26 (1910) 11 CLR 723 at 731 (citation omitted).

27 (1910) 11 CLR 723 at 732-733 (citations omitted).

became incumbent on the plaintiff at the trial to show that the breach of the covenant took place after transfer."

[57] Isaacs J stated:[28]

> "Consequently, the breach, not being a continuing one, must be taken to have been complete before the assignment.
>
> Then it was urged by Mr. Knox, that even so, sec. 52 of the *Real Property Act* passed the right to the damages for the breach to the plaintiff. But the object of the section is only to perfect the transaction effected by the statutory transfer. With respect to personal obligations the Act primarily concerns itself with their security upon land for their fulfilment, and having provided a statutory transfer of the benefits of the obligation as between the transferor and the transferee, proceeds in this section to completely effectuate the transfer by affecting the third person, the obligor also. To this end it transfers the right to sue and recover whatever debt, sum of money, annuity or damages (that is, right to damages) has been thereunder transferred.
>
> But whether a right to damages has been transferred depends not on that section, but on the terms of the transfer and other sections of the Act. The real key to the section is contained in the words 'notwithstanding the same may be deemed or held to constitute a chose in action.' The general non-assignability of choses in action at common law was well known. So too was the vagueness of the meaning of the term, making it very uncertain in many cases whether a given claim fell within that designation. And to transfer a debt at common law required, as a rule, the assent of the debtor – really a novation.
>
> Sec. 52 was intended to put an end to all this, and to perfect, even in regard to legal procedure, the simplicity and directness which otherwise characterise the Statute.
>
> It was not intended to extend, and its language is not sufficient to extend to so radical and unexpected a change, and probably so unfair a change, as bodily transferring all accrued rights to damages, limited only by the *Statute of Limitation* and existing independently of the continuance of the obligation under which they arose, and of the land upon which they were originally secured."

[58] The judgments in *Measures* were considered by the High Court, along with other authorities, in *Queensland Premier Mines*. That case concerned the application of s 62 of the LTA to the transfer of registered mortgages which secured moneys owing by the mortgagor and others to the mortgagor under loan agreements that were separate from the mortgages. While that situation is different to the issue raised in *Measures*, and on the present appeal, Kiefel J (as her Honour then was), with whom five other members of the court agreed, observed that the judgments in *Measures* contain useful discussion of the historical need for, and intended

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[28] (1910) 11 CLR 723 at 737-738 (emphasis omitted).

operation of, statutory provisions such as s 62, in the context of land registration statutes.[29]

[59] Kiefel J made particular reference to the decision of Isaacs J in *Measures*, noting his Honour's explanation (extracted above) that the object of the section is "only to perfect the transaction effected by the statutory transfer".[30] Kiefel J then continued:[31]

> "[44] These aspects of his Honour's reasons, to which the trial judge had regard, serve to explain the historical background to provisions such as s 62. The legal problem to which they were directed identifies what was necessary to be effected by them. That effect remains the same despite the removal of the words 'notwithstanding the same may be deemed or held to constitute a chose in action' in later statutes such as the *Land Title Act*. Section 62 effects an assignment of both the mortgagee's interest in the land and the mortgagee's right of action with respect to moneys which become due under the mortgage. To that end it was necessary to extend the operation of the statute to the person whose obligation it was to pay the moneys, as the law would otherwise require their express agreement to pay the transferee. Isaacs J did not say that the statute extended to any person whose obligation to pay is secured by the mortgage the subject of the transfer. His Honour's reasons assume that the debt transferred is that owed to the transferor. That is to say, the 'obligor' is the mortgagor. His Honour's emphasis of the word 'thereunder', which appears in s 52, identifies the mortgage as the source of the debt. It may be inferred that his Honour drew attention to the mortgage in that case, because it had been argued that the transfer was effective to pass rights to damages which were complete and independent of it. This does not detract from what his Honour said about the intended operation of the section.
>
> [45] The discussion in *Consolidated Trust v Naylor* confirms such an approach. Speaking of s 52, and by analogy of s 91 of the *Conveyancing Act*, Dixon and Evatt JJ identified as the concern of the statute dealings in land. Their Honours explained that it is only because the mortgage involves such a dealing that the statute concerns itself with the transaction in its entirety. It extends to the personal liability of the mortgagor for the mortgage debt 'because that liability is intimately connected with the rights of property arising out of the mortgage transaction'.
>
> [46] In *ES&A Bank v Phillips* Dixon, Evatt and McTiernan JJ pointed out that a statutory charge described in a mortgage, under the equivalent South Australian legislation, is a distinct interest, which may itself be dealt with, but which usually includes personal obligations. Latham CJ observed that a

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29 (2007) 235 CLR 81 at 100 [54].

30 (2007) 235 CLR 81 at 97 [43].

31 (2007) 235 CLR 81 at 97-98 [44]-[46] (citations omitted).

> mortgage as a security could exist without a covenant to pay. The majority said that, whilst it was not possible to treat the personal obligations in the same way as the interest in land is treated by the registration system, 'nevertheless, the plan of the legislation is to enable the proprietor to transfer by registration not only the interest in the land, but all the accompanying personal obligations normally incident thereto', referring to *Consolidated Trust v Naylor*."

[60] This analysis confirms that personal obligations or liabilities of the transferor of an interest in land can be vested in the transferee by operation of s 62 or similar provisions, but that will only occur when the personal obligation or liability is intimately connected with the rights of property arising out of the transfer or normally incident to the interest in land which is transferred. That position is entirely consistent with the reference by Griffiths CJ in *Measures* to the purpose of the land titles legislation being "to transfer the estate or interest of the transferor in the land with all the rights incidental to present and future possession" but not choses in action in respect of past and completed breaches of covenant. Likewise, it is consistent with the observation of Isaacs J in *Measures* that the provision did not transfer accrued rights to damage which exist independently of the lease obligation under which they arose.

[61] It suggests that, on the proper construction of s 62, personal obligations or liabilities of the owner of land will vest in a transferee upon registration of the transfer of the land only if they are incidental to the present and future ownership of the land. Those are the only personal obligations or liabilities which are intimately connected with, or normally incident to, the right of ownership being transferred. It is only those personal obligations or liabilities which have a sufficient connection to the ownership interest and can properly be described as a liability "in relation to the lot" for the purposes of the provision.

[62] Consistently with the decision of Isaacs J in *Measures*, an accrued liability to pay damages for a completed breach of a lease covenant on the part of the transferring owner exists independently of the lease obligations. I can see no reason in principle why a distinction should be drawn in that regard between an accrued right to sue for damages for a completed breach of a lease covenant and an accrued obligation to pay damages for such a breach. Further, as submitted by Y&L, a debt which arose under cl 35.4(a) of the lease had an independent existence separate from the lease.[32] Those liabilities were not, in my view, liabilities "in relation to the lot" for the purposes of s 62. That construction is consistent with the history and understanding of the legislative predecessors to s 62.

[63] The construction proposed by BOQ would, if accepted, effect a significant change to the previous understanding of the legislative predecessors to s 62. For the reasons already discussed, BOQ's construction should only be preferred if there was some judicially cognisable indication that, in enacting s 62, the legislature intended to depart from the previously understood meaning of its legislative predecessors.

[64] The genesis of the re-enactment of s 62 in the LTA is to be found in Report No. 40 of the Queensland Law Reform Commission (**QLRC**) which is titled "Consolidation of Real Property Acts" (**QLRC Report**). The introduction to that report notes that it was prepared in response to a request from the Attorney-General that

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32 *Geroff v CAPD Enterprises Pty Ltd* [2003] QCA 187 at [3]-[4].

the QLRC examine and amend the *Real Property Act 1861* (Qld) and the *Real Property Act 1877* (Qld) "with a view to the consolidation of the law in this area." The introduction then set out four principles which the QLRC adopted. The first two of those principles were:

> "(i) The primary thrust of the Commission's examination of existing real property law should be the manner in which real property laws can be consolidated.
>
> (ii) The Torrens System is currently operating well in Queensland. Amendments made by the Commission to existing legislation should focus upon modernisation, rather than alteration, of the system."

[65] The QLRC Report contained a draft form of legislation to consolidate Queensland real property legislation. The commentary on Division 1, Part VI of the draft legislation containing s 40 (which would ultimately become s 62 of the LTA) stated:

> "Clause 39 sets out those features which must be present in a transfer for the transfer to be registrable.
>
> The remaining clauses set out the rights of and – in the case of transfers of registered mortgages and leases – the liabilities that are imposed on a transferee once a transfer is registered."

[66] Clause 40 of the draft legislation stated:[33]

> "40. Effect of transfer.
>
> (1) A registered transfer under section 39 vests in the transferee all rights, powers and privileges of the transferor affecting the land.
>
> (2) The registered transferee of a registered mortgage is bound by and liable under the mortgage to the same extent as the original mortgagee.
>
> (3) From the time the transferee of a registered lease is registered, the transferee becomes bound by and liable under the lease to the same extent as the original lessee.
>
> (4) In this section 'rights' includes the right to sue on the covenants and terms in a mortgage or lease and to recover a debt or enforce any liability under the mortgage or lease."

[67] There are a number of differences between this draft clause and the form in which s 62 of the LTA was enacted.

[68] First, cl 40(1), unlike s 62(1) of the LTA, makes no reference to the vesting of any liability. The only references to a transfer of liability appear in cll 40(2) and 40(3) which address the liability of a mortgagee or a lessee, not an owner of the land. This is consistent with the commentary extracted above which refers to the draft legislation imposing liabilities only on a transferee of a registered mortgage or registered lease, not a transferee of ownership of the land.

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33 Emphasis and citations omitted.

[69] Secondly, cl 40(1) uses the phrase "affecting the land" to describe the relevant connection between the right, power or privilege and the land. That is entirely consistent with the history and understanding of the legislative predecessors of s 62 of the LTA already discussed.

[70] Thirdly, the operation of cl 40(3) on a new lessee, unlike cl 40(2) which addresses a new mortgagee, is expressed to be engaged from the time of registration of the transfer. That is, a new lessee would only be liable for a breach of a lease covenant which occurred after the date of transfer, not for any breach by the original lessee prior to the date of transfer. The corollary of this would be that the owner of the land would only be liable to the new lessee for a breach of a lease covenant which occurred after the date of transfer, not a breach which occurred when the leasehold interest was held by the original lessee. This would be consistent with transfer of ownership of land subject to a lease only vesting a liability on the new owner for a breach of lease which occurred after the date of transfer, not a breach by the previous owner.

[71] Nothing in the QLRC Report suggests that, in enacting s 62 of the LTA, the legislature intended to depart from the previously understood construction of the legislative predecessors of s 62.

[72] BOQ's argument that the legislature must have been aware of the AIA definition of liability when it enacted s 62(1) of the LTA and chose not to define liability differently is answered by the fact that, at the time of enactment, the legislature would also have been aware of the previously understood construction of the legislative predecessors of s 62 as well as ss 4 and 32A of the AIA. Those provisions of the AIA meant that it was not necessary for the legislature to include in the LTA a definition of liability that differed from the AIA definition. I note in particular that s 32A of the AIA has been described as evincing an intention by the legislature that a more flexible approach be taken to the application of a statutory definition when interpreting Queensland legislation than would be required under some other interpretation provisions.[34]

[73] For the reasons already addressed, the context and subject matter of s 62 of the LTA indicate that the AIA definition of liability does not apply in that provision in such a way as to vest liability for a completed breach of a lease covenant which occurred prior to the transfer of ownership of the leased land in the new owner of the land.

[74] On the proper construction of s 62(1) of the LTA, such a breach is not a liability "in relation to the lot". Accordingly, this ground of appeal fails.

The Deed Poll

[75] There is no doubt that the expiration of the seven day period referred to in cl 35.4(a) of the lease did not terminate the obligation of WPH to pay the debt it owed to BOQ on the facts assumed for the purposes of the summary judgment application. At the date of the transfer of the land to Y&L, BOQ continued to have a cause of action in debt derived from cl 35.4(a) of the lease. However, to so conclude does not mean that the accrued debt obligation was one which Y&L agreed to assume under the terms of the Deed Poll.

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[34] *Conde v Gilfoyle* [2010] QCA 109 at [20].

[76] As McPherson JA observed in *Geroff v CAPD Enterprises Pty Ltd*:[35]

> "… there is no presumption or expectation at law that the assignment of the benefit of an agreement has the effect of transferring debts that have already arisen or accrued before the assignment takes place. Whether the assignment has such an effect depends on its terms and the intentions of the parties to it, to be gathered from its language."

[77] The same observation applies in this case to the Deed Poll. Whether it has the effect of transferring a debt that has already arisen or accrued before the transfer of the land depends upon Y&L's intentions to be ascertained from the language of the Deed Poll itself.

[78] By clause 1 of the Deed Poll, Y&L promised to abide by the terms of the lease on the part of the lessor "to be performed, fulfilled or observed on or after the Settlement Date."

[79] By clause 2, Y&L promised that it would "on and from the Settlement Date observe the provisions of the Lease … which otherwise do not touch and concern or run with the Land."

[80] There is nothing in that language which, construed objectively, suggests that Y&L intended to assume liability for WPH's debt which had accrued prior to the transfer of the land to Y&L. Notwithstanding the continued existence of BOQ's cause of action in debt derived from cl 35.4(a) of the lease at the time the land was transferred to Y&L, I am not persuaded that the obligation to pay the debt was one which was "to be performed, fulfilled or observed on or after the Settlement Date" as required by cl 1. The language of cl 2 leads to the same conclusion.

[81] I accept Y&L's submission that, properly construed, the Deed Poll was directed to ensuring that Y&L would comply with the provisions of the lease which fell to be performed going forward from the date of transfer of the lease. That is, the Deed Poll operates prospectively and not retrospectively.

[82] This ground of appeal also fails.

The right of set-off under cl 35.4(a) of the lease

[83] In the course of argument on the appeal, the court invited the parties to provide further written submissions as to the effect, if any, that the right of set-off under cl 35.4(a) of the lease might have had upon the disposition of Y&L's application for summary judgment.

[84] The potential relevance of this right of set-off was adverted to by the primary judge.[36] His Honour observed that if BOQ had set-off the debt against future rent, rather than having demanded payment of that debt within seven days, it might be arguable that cl 35.4(a) conferred a current and ongoing right of set-off against future rent. The primary judge did not further consider that issue because the point was not pleaded or argued on the application before him. His Honour also expressed the view that it was strongly arguable that, on its proper construction, clause 35.4(a) provides alternative rights between which BOQ had to elect and that

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35 [2003] QCA 187 at [5].

36 Reasons at [61].

by making the demand for payment of the debt it had elected to crystallise its right to sue in debt.

[85] In its further written submissions BOQ contended that by reason of s 62(1) of the LTA and the definition of "rights" under s 62(4), the right to recover rent under the registered lease was a right which vested in Y&L as transferee of ownership of the lot.

[86] In *Chamberlain Early Learning Centre Pty Ltd v Precious 1 Pty Ltd*,[37] Emmett AJA said that the NSW provisions equivalent to s 62 of the LTA do not appear to have the consequence that a right to sue for recovery of the rent passes with the transfer of the reversion. Whether or not that statement is correct with reference to s 62 of the LTA need not be considered further because it is clear that the benefit and burden of a covenant which touches or concerns the land is enforceable by and against an assignee of the reversion or the leasehold, as a result of ss 117 and 118 of the *Property Law Act 1974* (Qld).[38] A covenant to pay rent touches and concerns the land.[39]

[87] From this proposition BOQ submitted that, in circumstances where the landlord and the tenant had agreed by cl 35.4(a) of the lease that remediation costs could be set-off against rent, Y&L's right to recover rent which vested in Y&L was qualified by BOQ's entitlement to claim such a set-off.

[88] BOQ argued that it could have pleaded a case at first instance that it was entitled to set-off the remediation costs against its obligation to pay rent and sought a declaration to that effect. Although the argument was not pleaded at the time Y&L's application for summary judgment was heard, BOQ submitted it could have been raised in the course of argument so as to defeat the application.

[89] Y&L submitted that the right of set-off in cl 35.4(a) of the lease might be construed in two ways.

[90] First, as conferring a right to set-off any debt presently owing by Y&L under cl 35.4(a). Y&L submitted that this is the preferable construction and argued that, if it is accepted, BOQ has no right of set-off because, for the reasons addressed in deciding grounds 1 and 2 of the appeal, Y&L does not owe a debt to BOQ.

[91] Secondly, as creating separate and independent rights: a right to set-off costs of remedying a breach and a right to recover those costs as a debt. On this construction, Y&L submitted that a separate right to set-off remedial costs against rent payable to Y&L does not change the character of the debt as a personal obligation of WPH which was not transferred to Y&L.

[92] Commencing with the first construction Y&L submitted that, because the right of set-off must be understood as a right to set-off a debt presently owing under cl 35.4(a), the availability of set-off turns upon whether the debt itself was payable by Y&L to BOQ as the current owner of the land.

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[37] (2017) 18 BPR 36,895; [2017] NSWSC 189 at [38]-[40].

[38] *Rural View Developments Pty Ltd v Fastfort Pty Ltd* [2011] 1 Qd R 35 at 39 [15].

[39] *Gumland Property Holdings Pty Ltd v Duffy Bros Fruit Market (Campbelltown) Pty Ltd* (2008) 234 CLR 237 at 264 [74].

[93] I do not accept that submission. The correct question is not whether Y&L owed a debt under cl 35.4(a), but whether, as against WPH, BOQ had a right to set-off which co-existed with its right to recover the remediation costs as a debt.

[94] Clause 35.4(a) provides two means by which BOQ could have sought to recover the costs it incurred in remedying WPH's breach of the lease. The first was to claim the costs of the remediation works as a liquidated debt. This was the course BOQ followed. The second was to set-off the remediation costs against the rent which BOQ was liable to pay under the lease.

[95] In my respectful opinion, contrary to the view expressed by the primary judge, BOQ continued to have a right of set-off against WPH, even after it demanded payment of the remediation costs as a debt. The express words of the opening paragraph of cl 35.4 provide that BOQ could exercise the right to claim the remediation costs as a debt "without limiting" any other rights it had. To similar effect, the express words of the concluding paragraph of the clause provide that BOQ's exercise of its right to claim the remediation costs as a debt "does not prejudice" any of its rights under the lease.

[96] Construed objectively, cl 35.4(a) did not require BOQ to elect between the right to recover the remediation costs as a debt and the right of set-off. A party is required to make an election between two rights where its exercise of one right would be inconsistent with the exercise of the other.[40] As long as BOQ's claim to recover the remediation costs as a debt remained unsatisfied, the exercise of that right was not inconsistent with BOQ continuing to have the right to recover the remediation costs by setting those costs off against its obligation to pay rent under the lease. If those costs were set-off against rent the amount of the debt would progressively reduce until, upon the full amount of the remediation costs being recovered, both the right to recover the debt and the right of set-off would be fully satisfied.

[97] The question then becomes whether the obligation created by BOQ's right of set-off was ultimately transferred to Y&L, whether under s 62(1) of the LTA upon its registration as the owner of the land or by reason of its execution of the Deed Poll.

[98] Y&L relied upon the approach taken by the England and Wales Court of Appeal in *Edlington Properties Ltd v JH Fenner & Co Ltd*[41] to refute such a proposition. In that case, after the reversion of a lease was transferred a tenant sought to set-off a claim for damages arising out of a breach of the lease by the original landlord against rent falling due after the transfer. The Court of Appeal held that the tenant had no right of set-off in those circumstances.

[99] Importantly, the set-off claimed by the tenant in *Edlington* was an equitable set-off. As Neuberger LJ observed:[42]

> "The very nature of an equitable set-off is that it is personal in nature, in that it is a claim raised against the claimant which impeaches his right to sue and does not run against third parties."

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40 *Surfers Paradise Investments Pty Ltd (in liq) v Davoren Nominees Pty Ltd* [2004] 1 Qd R 567 at 576-577 [31]-[33].

41 [2006] 3 All ER 1200; [2006] 1 WLR 1583 (***Edlington***).

42 [2006] 3 All ER 1200; [2006] 1 WLR 1583 at [20] (citation omitted).

[100] I am unable to accept Y&L's submission that there is no reason to draw any distinction between a contractual right of set-off conferred by the lease (as in this case) and an equitable set-off.

[101] In my view, it is at least reasonably arguable that:

(a) The right of set-off conferred by s 35.4(a) gave rise to a personal liability on the part of WPH which, because the liability affected the amount of future rent which WPH would be entitled to recover from BOQ, was incidental to the present and future ownership of the land and, on that basis, intimately connected with, or normally incident to, the right of ownership being transferred.

(b) Unlike the accrued liability of WPH to pay damages for its completed breach, the liability to have future rent payments reduced by reason of the contractual set-off did not exist independently of the lease obligations.

(c) The liability created by the right of set-off had a sufficient connection to the ownership interest that it could properly be described as a liability "in relation to the lot" for the purposes of s 62(1) of the LTA.

[102] This explains the acceptance in *Edlington*[43] that the outcome of that case, namely that after the transfer of the reversion to a lease the tenant was not able to set-off a claim for damages arising out of a breach by the original landlord against rent falling due after the transfer, would be different if the lease specifically provides that the tenant should have that right.

[103] It seems to me that the reference in *Edlington* to the lease providing that the tenant should have "that right" was intended to refer to a situation where the lease expressly conferred on the tenant a right to set-off costs incurred or damage suffered by reason of the landlord's breach of the lease against the tenant's liability to pay rent. The different outcome of the case in those circumstances would reflect the distinction between the continuing effect of a contractual right of set-off after the transfer of the reversion and an equitable right of set-off.

[104] I do not accept Y&L's submission that the reference in *Edlington* to the lease providing that the tenant should have "that right" was intended to refer to a clause which dealt expressly with the exercise of a right of set-off by a tenant after a transfer of the reversion. It seems to me unlikely that parties to a lease would specifically advert to that issue and address it in the manner which, on Y&L's submission, would be required.

[105] Although Y&L submitted, correctly, that the existence of the right of set-off does not transform the nature of the separate right to recover the remedial costs as a debt from a personal obligation into one which was "in relation to the lot" for the purposes of s 62 of the LTA, that submission does not provide any response to the question identified in [97] above. Y&L's only response to that question was to argue that BOQ should not be permitted to reformulate its case from being one by which it sues to recover money to one by which it seeks declaratory relief to establish the existence of the right of set-off under cl 35.4(a).

[106] At first instance there was no real difference between the parties as to the principles which apply to the determination of an application for summary judgment. The

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43 [2006] 3 All ER 1200; [2006] 1 WLR 1583 at [64].

primary judge set out those principles.[44] The relevant inquiry is whether there exists a real, as opposed to fanciful, prospects of success.[45]

[107] Proceedings will be determined only in the clearest of cases, where there is a high degree of certainty about the outcome.[46] Further, the jurisdiction to dismiss a plaintiff's action should only be exercised where the plaintiff cannot improve its position by a proper amendment of its pleading.[47]

[108] In my view, this is a case where BOQ can improve its position by amendment to plead the argument identified in [101] above. There is no reason why BOQ should not be afforded the opportunity to reformulate its claim in the manner which, had it been raised in argument before the primary judge, would have defeated Y&L's application for summary judgment.

[109] On that basis, I consider that the appeal should succeed.

[110] Y&L submitted that, if the appeal should be allowed:

(a) the order dismissing BOQ's claim should be set aside;

(b) in its place, an order should be made striking out BOQ's Amended Statement of Claim;

(c) the costs order made by the primary judge should not be disturbed; and

(d) the costs of the appeal should follow the event.

[111] That is the appropriate course to follow in circumstances where Y&L's application for summary dismissal of the claim sought, as an alternative, to strike out the Amended Statement of Claim pursuant to r 171 of the UCPR and the only basis upon which the appeal has succeeded is not presently pleaded by BOQ.

[112] The orders I would make are:

1. Application for extension of time to apply for leave to appeal granted.
2. Application for leave to appeal granted.
3. Appeal allowed.
4. The order dated 24 March 2022 dismissing the appellant's claim be set aside.
5. The Amended Statement of Claim filed 15 February 2022 be struck out, with leave to replead.
6. The respondent pay the appellant's costs of the appeal.

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44 Reasons at [4].

45 *Deputy Commissioner of Taxation v Salcedo* [2005] 2 Qd R 232 at 234-235 [11].

46 *Neumann Contractors Pty Ltd v Traspunt No 5 Pty Ltd* [2011] 2 Qd R 114 at 136 [80]-[81]; *Westpac Banking Corporation v Hughes* [2012] 1 Qd R 581 at 602 [74].

47 *Chen v Australian and New Zealand Banking Group Ltd* [2001] QSC 43 at [1].