DISTRICT COURT OF QUEENSLAND

CITATION:	*Nyst v Cameron* [2017] QDC 264
PARTIES:	**NYST** (plaintiff) **v** **CAMERON** (defendant)
FILE NO/S:	DC No 1518 of 2017
DIVISION:	Civil
PROCEEDING:	Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	21 September 2017 (ex tempore)
DELIVERED AT:	Brisbane
HEARING DATE:	21 September 2017
JUDGE:	Porter QC DCJ
ORDER:	**1. Pursuant to rule 292 of the *Uniform Civil Procedure Rules 1999* judgment be given for the plaintiff against defendant.** **2. The defendant pay the plaintiff $126, 082.73.** **3. The defendant pay the plaintiff's costs of the proceeding to be assessed on the indemnity basis.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – ENDING PROCEEDINGS EARLY – SUMMARY DISPOSAL – SUMMARY JUDGMENT FOR PLAINTIFF OR APPLICANT – SUMMARY JUDGMENT FOR DEFENDANT OR RESPONDENT – where the plaintiff, the lessor under a lease, seeks summary judgment against the defendant, a guarantor, of the obligations of a company under that lease – where the defendant seeks summary judgment on his defence against the plaintiff - where the plaintiff alleges there was a binding agreement between the parties in terms of the lease – where the plaintiff alleges the lease is registered and that registration attracts indefeasibility– where the plaintiff alleges Mr Cameron is liable on the guarantee contained in that lease - whether the defendant has no real prospect of successfully defending all or a part of the plaintiff's claim – whether there is no need for a trial of the claim or the part of the claim.

Legislation

UCPR, rr 292, 293
Land Title Act 1994 (Qld) ss 71, 184, 185, Schedule 2

Cases

Ashton v Hunt [1998] QCA 308
Chan v Cresdon (1989) 168 CLR 242
Gattellaro v Westpac Banking Corporation [2004] HCA 6
Harvey v Dunbar Assets plc [2013] EWCA Civ 952
Streat v Fantastic Holdings Pty Ltd [2011] NSWSC 1097
Taubmans Pty Ltd v Loakes [1991] 2 Qd R 109

Other

Sharon Christensen, Bill Dixon, Anne Wallace, Thomson Reuters, *Land Titles Law and Practice Queensland*, (at 21 September 2017), section 10.3400

COUNSEL: C Jennings for the plaintiff
M Bryne (solicitor) for the defendant

SOLICITORS: Nyst Legal for the plaintiff
Coast to Coast Legal for the defendant

Introduction

[1] I have before me dueling summary judgment applications. The plaintiff, the lessor under a lease, seeks summary judgment against the defendant, a guarantor, the plaintiff says, of the obligations of a company under that lease. The defendant, for his part, contends that he is entitled to summary judgment on his defence against the plaintiff's claim under the guarantee.

[2] The plaintiff's primary argument is that there was a binding agreement between the parties in terms of a written lease signed by both parties (the **lease**), whether that required registration to attract indefeasibility or not; and that Mr Cameron is liable on the guarantee contained in that lease for unpaid rent and other amounts.

[3] Mr Cameron, for his part, defends on three grounds, primarily. **First**, he contends that no binding agreement in terms of the lease ever arose. **Second**, he says that, on the proper construction of the guarantee, no obligation has arisen because, in effect, the guarantee contemplated and required that the lease be a legal lease, and that the lease was not a legal lease because it was not a short lease, within the meaning of that term in the *Land Title Act 1994* (Qld); and also, not being a short lease, it was required to be registered to be a legal lease. It was not in dispute that the lease was not so registered.

[4] **Third**, he contends that the guarantee required, for it to be binding upon him, that it was signed by both guarantors identified in the lease, which contained the terms of

the guarantee. It was not in dispute that the guarantee had not been signed by the other guarantor.

Whether there was a binding agreement between the parties on the terms of the lease?

[5] I will deal first with the question of whether an agreement on the terms of the lease ever came into existence. The plaintiff is the owner of land at Constance Street, Fortitude Valley. By an email sent on the 26th of June 2015, the plaintiff's solicitor identified his instructions on terms to be included in a standard commercial lease, and requested the defendant to confirm, by return email:

> "...that the above terms are in accordance with your agreement with our client, and we will begin preparation of the draft lease."

[6] In response, by an email sent on 29 June 2015, the defendant requested the solicitor for the plaintiff to include in the draft lease that the plaintiff would have the air conditioner unit serviced, and said that the company Entice Engage Retain Pty Ltd, (the **company**) would be the entity for the lease, but otherwise:

> "I believe you've covered all the important points we agreed."

[7] The company took possession of the premises on 29 July 2015. On 3 August 2015, the plaintiff's solicitors sent to the defendant and a Brian Wolstenholme, the plaintiff's solicitors' draft lease in registrable form, and requested that they inform whether they were agreeable to the terms of the draft.

[8] That request was followed by further requests by the plaintiff's solicitors on 6 August, 7 September and 28 September 2015 in similar terms.

[9] Between 2 October and 19 October 2015, the parties engaged in correspondence regarding the terms of the draft lease, resulting in the defendant requesting the plaintiff's solicitor:

> "Please proceed to document so that we can sign."

[10] Accordingly, by a letter, dated 20 October 2015, to the company, marked to the attention of the defendant, the plaintiff's solicitor sent two copies of a draft of the lease to the company, and requested payment for their fees.

[11] Between 2 and November 2015, the plaintiff's solicitors and the defendant exchanged correspondence concerning amendments to the lease and concerning its execution. From that exchange of correspondence, it seems, the plaintiff's solicitors made an amendment to clause 13.1 of the draft sent on 20 October and fixed page numbering, and sent a further draft of the lease for execution in the form ultimately executed. The company and the defendant delayed executing the lease and guarantee as a consequence of, as it was explained by their solicitor in writing, some dispute amongst members of the board.

[12] In an email sent on 8 December 2015 to the plaintiff's solicitors, the defendant's solicitors requested the plaintiff accept, by way of an interim security, something less than a seven-month bank guarantee as required by the lease which had been tendered by plaintiff. By a letter dated 14 December 2015, the plaintiff sent to the

company a notice to remedy breach of covenant, dated 14 December 2015, relevantly identifying the company's failure to provide a bank guarantee as a breach under the lease. That email has some importance to the question of whether the binding agreement on the terms of the lease came into existence. It provided, relevantly:

> "we note, you are still yet to execute the agreed lease, and have failed to deliver a bank guarantee to the landlord pursuant to clause 20 of the lease. Given that the lease commencement date was 1 July 2015, and you have been in the premises rent-free since that time, this is unacceptable to the landlord."
>
> Whilst the parties have not yet formally executed the lease, in our view, given that all of the terms of the lease have been agreed, and having regard to the conduct of the parties to date, a lease exists between the parties. With that in mind, our client hereby encloses a notice to remedy breach, pursuant to clause 13 of the lease..." (emphasis added).

[13] I note that there are earlier emails where the landlord refers to the "agreed terms of the lease", particularly on 2 December 2015, because, as noted above, one argument advanced by the defendant guarantor is that no agreement on the terms of the lease arose, because, although the landlord ultimately signed the lease, the landlord never communicated to the guarantor, or, indeed, the company, as I understand it, that the lease had been signed. And Mr Jennings does not cavil with the proposition that the fact of signing was not communicated prior to the lease being purportedly terminated by the plaintiff.

[14] However, the fact that, in December 2015, the landlord was communicating to the tenant that it considered the agreement to be binding makes it difficult to conclude objectively that when the tenant subsequently signed the lease and returned it to the landlord, it was not, looked at objectively, intended to be binding on both parties on execution by the tenant.

[15] In any event, on 16 December 2015, the plaintiff, by his solicitor, informed the defendant he would accept a three-month bank guarantee until March 2016. This was confirmed in an email from the defendant's solicitor to the plaintiff's solicitor, sent on 16 December 2015, wherein the solicitor noted, the defendant anticipated having:

> "...the three-month bank guarantee, executed lease and payment for your firm's invoice by the end of the week."

[16] On 23 December 2015, the company paid the invoice issued by the plaintiff for the fees incurred in drafting the lease as provided in the lease terms. On 24 December 2015, the defendant executed the lease, as sole director of the company, and executed the guarantee. I will come back to the relevant terms of the lease later in these reasons.

[17] On 4 February 2016, the defendant posted the lease and guarantee, signed as I have just indicated, to the plaintiffs. I note that, on the day prior to the posting of the lease and guarantee, the solicitors for the plaintiff wrote to Mr Cameron and the

company, enclosing another notice to remedy breach of covenant, which referred to the lease, and finishes, relevantly, with the paragraph:

> "Pursuant to the terms of the agreed lease, we enclose an invoice for legal costs associated with this letter, and enclose a notice to remedy breach."

[18] On the 16th of April 2016, the landlord executed the lease, but, as I have said, did not communicate the fact of that execution to the defendant at a relevant time. The first question which arises is whether, in those circumstances, the parties were bound by the terms of the lease as a contract.

[19] Mr Jennings referred me to the case of *Streat v Fantastic Holdings Pty Ltd* [2011] NSWSC 1097. That case was not dissimilar to this in respect of this issue. On the 20th of January, the lessor gave the tenant a formal lease document, containing all essential terms which the tenant had requested. On 1 March 2011, the tenant returned the duly executed lease. In that case, the lessor did not execute the document at all. The lessor in that case tried to contend that in the circumstances, it should be inferred, the objective intention of parties was that neither would be bound unless and until the lease was executed by both of them:

> "It says it was free to withdraw until it did so."

[20] The lessor said it had just changed its mind. I note that questions of communication did not arise there, but that was because, of course, the lease it had not been signed at all by the lessor.

[21] In dealing with the approach to determining whether an agreement for lease is legally binding in those circumstances, or a lease is binding in those circumstances, Mr Jennings took me to paragraphs 11 to 16 of the judgment which provide:

> "This question is be resolved by ascertaining the objective intention of the parties as disclosed in their correspondence and communications viewed in the light of the subject matter and the surrounding circumstances: *Allen v Carbone* (1975) 132 CLR 528; *Pan American World Airways Inc v Commonwealth of Australia* (1977) 7 BPR 15,145 (CA); *Australian Broadcasting Corporation v XIVth Commonwealth Games* (1988) 18 NSWLR 540 (CA). When those communications and circumstances are reviewed there is, in my view, no support for the contention that the bargain which the parties reached could not have been intended to be a legally enforceable contract unless and until the lease document was executed by both of them. cf *Masters v Cameron* (1954) 91 CLR 353. On the facts of this case, I do not think that an inference is reasonably open that either party regarded itself as being free to withdraw after 1 March 2011. By that stage the tenant had returned to the lessor the duly executed lease document which the lessor had submitted to it for that very purpose.
>
> In fact the opposite inference is irresistible. The lessor wanted the commitment of the tenant in order to satisfy its lender. It was grateful for the offer of a formal letter from the tenant to be presented to its lender. The purpose of submitting the letter to the bank was to satisfy the bank about the tenant's long-term commitment (3 + 2 + 5 years) and the regular income

> stream that would be received. The purpose of submitting the lease to the tenant and requiring its execution and return was to secure that commitment. The return of the duly executed lease confirmed that commitment. From the lessor's perspective, let alone the tenant's perspective, it bound the tenant. Looked at objectively, when the lessor embodied in a lease document the agreed essential commercial terms together with the remaining standard terms taken from the then existing lease, and submitted that document to the tenant, it was making a final offer in a form capable of acceptance, leaving nothing for further negotiation. The tenant's subsequent execution of the lease document and the return of it to the lessor signified its unqualified acceptance of that offer. In those circumstances a reasonable bystander would regard the due execution of the document by the lessor as a formality; whose inevitable likelihood went without saying.
>
> The circumstances in this case are unlike *Pan American World Airways Inc v Commonwealth of Australia* (above). Each case of this type will turn on its own unique facts. The circumstances in the *Pan Am* case are distinguishable. The parties were a multinational corporation and a sovereign state. The negotiations dealt with a number of leases in different sites and required Pan Am to surrender sites that it held in exchange for various concessions. The negotiations were far more complicated than in this case.
>
> This case is much closer to, and indeed stronger than, *Blackburn Developments No 19 Pty Ltd V Downs (Surgical) Australia Pty Ltd* (1974) 2 BPR 9141 and *Concorde Personnel Services Pty Ltd v Fire and All Risks Insurance Company Ltd* (Supreme Court of New South Wales, Kearney J 16 July 1986, unreported). In the first case, the agreement in question was a lease renewal. There was no exchange of lease documentation — draft or otherwise — merely correspondence evidencing negotiation and acceptance of terms additional to the existing agreement. In the second case, a draft lease document was exchanged that was expressed to be subject to the defendant's instructions and comments. Kearney J held that the parties had created a binding contract based on the correspondence exchanged.
>
> The parties in this case had passed the stage of negotiation. All of the terms had been settled and included in a formal document. The tenant accepted and agreed to all of the detailed terms. The most important terms, the essential commercial terms, had been proposed by the tenant as early as 20 October 2010 and agreed to by the lessor at least by 20 December 2010, if not earlier."

[22] As that case demonstrates, the question of whether the parties are bound by terms of the lease is to be resolved by ascertaining the objective intention of the parties as disclosed in their correspondence and communications, viewed in the light of the subject matter and the surrounding circumstances. In my respectful view, the circumstances of this case are that it was plain, if not at the time the final form lease was tendered, then certainly by the time of execution of the lease by the tenant, that the lessor had communicated in absolutely unequivocal terms that it would consider itself to be bound once the lease was executed by the tenant, and accordingly, once it

was executed by the tenant and the fact of execution communicated, the parties were bound by contract to the terms of the lease.

[23] Even if that were not the case, the lease was subsequently executed by the landlord and there was conduct by the landlord which unequivocally communicated that it considered itself bound by the lease, such that it would have been quite untenable for it to contend as the landlord tried to do in *Streat,* that it was not bound by the lease because it had not communicate acceptance.

[24] The matters that occurred included continual reliance on the lease as a basis to demand payment of rent in correspondence and most remarkably, that the tenant approached the landlord with a view to seeking consent to assignment of the benefit of the lease, and those negotiations continued for some time on the premise that he lease was binding on both parties. Accordingly I find the parties were legally bound to the terms of the lease, probably by at the latest, the 4th of February 2016, and certainly well before the issues which arise in this case manifested themselves.

Whether Mr Cameron is bound by the guarantee contained in the lease

[25] Given that conclusion, there are two matters relied upon by Mr Cameron to sustain the conclusion that he is not liable as alleged under the guarantee contained in the lease. These matters give rise potentially to issues of some complexity. Nonetheless, I consider it appropriate that I proceed to deal with the matter because, as I have said, both parties want the matter to be dealt with, neither party pointed to extrinsic facts that require examination in a trial, and also, I should say, because in the end I think the terms of the guarantee provide answers to the points ably and inventively advance by Mr Byrne on behalf of his client, who could not possibly imagine that he had not done everything that he could for them on this application.

[26] The first question is whether the fact that the lease was not registered, (it is not in dispute that it was unregistered), has the effect that there is no liability under the guarantee. The best way to deal with this, I think, is to start with the case of *Chan v Cresdon* (1989) 168 CLR 242.

[27] In that case the appellants were parties to an agreement for lease for five years. The lease contained a guarantee by the appellants of the obligations of Sarcourt, the lessee. A lease in that form was executed simultaneously with an agreement for lease, but the lease was not registered with the Registrar of Titles, notwithstanding the land was Torrens land. The respondent sued the guarantors, relevantly, for rent, other charges and interest. The appellants, the guarantors, contended in the District Court that there had been a total failure of consideration on the part of the respondent as lessor because it had been required to grant Sarcourt a legal lease of five years and accordingly, the appellants were relieved of their obligations as guarantors described in the executed instruments. This submission was successful.

[28] In the Full Court of the Supreme Court of Queensland, the appeal was allowed on the grounds that there was no failure of consideration and that the lease was good in equity despite being "void at law" due to the failure of the respondent to see to its registration.

[29] In the Full Court it appears to have been accepted that there was an obligation of the respondent landlord to attend to the registration, but the guarantee was held to extend to obligations under the equitable lease. That decision was appealed by the guarantors.

[30] There was two issues raised before the High Court, one was the question of whether there had been a total failure of consideration and the second, whether the money said to be owing by the principal debtor were obligations to be performed under this "lease". As to the question of consideration, that point was answered by the High Court in paragraph 7 of the judgment. Their Honours say:

> "At the outset…it is convenient to dispose of the guarantors' argument that, in as much as the lease was not registered, there was a total failure of consideration for the guarantee. The short answer to the argument is that the consideration for the guarantee is expressed in cl.23.01 to be the "entering into (of) this lease". In their context these words obviously relate to the execution of the instrument of lease by the respondent as lessor."

[31] A similar form of words is used in this guarantee in clause 23.1, which provides in consideration of the landlord at the request of the guarantor entering into this lease with the tenant, the guarantor covenants and agrees and so on. These words are in the same form or substantially the same form, as the term considered by the High Court I can see no material difference nor any reason why that reasoning would not apply here. Accordingly, the argument that the lack of a legal lease means there was no consideration for the guarantee is rejected.

[32] The more substantial point raised in *Chan v Cresdon* was whether the moneys owing by Sarcourt under the unregistered lease were obligations on Sarcourt's part to be performed under "this lease". To put that in context, the guarantee clause in *Chan v Cresdon*, relevantly provided:

> "The guarantors in consideration of the landlord entering into this lease at the guarantor's request, jointly and separately guarantee to the landlord due and punctual performance by Sarcourt of the obligations on its part to be performed under this lease."[1]

[33] The argument advanced was that as the lease was not a legal lease, but a lease that took effect in equity, the obligations did not arise "under this lease". There are a number of interesting points that arise in this regard, but in summary, the position reached of the High Court was this. In paragraph 29, their Honours said:

> "If we assume that the agreement for lease would have been specifically enforced in equity and that, as a result, an equitable lease for a term of five years came into existence between the [landlord] as lessor and Sarcourt as lessee, that equitable lease is a different thing from the unregistered form of lease executed by the parties. Although such an equitable lease would incorporate the terms of the unregistered lease, by virtue of s.43 it necessarily arises not from the instrument but from the agreement which lies behind it. On this score alone, it would be impossible to conclude that a

[1] (1989) 168 CLR 242, 246 at para 5.

> liability to pay rent under the equitable lease was an obligation "under this lease" within the meaning of cl.23.01."

[34] This case was considered by the Queensland Court of Appeal in *Ashton v Hunt* [1998] QCA 308 in which her Honour, Justice Mullins appeared for the appellants. The leading judgment was given by Thomas JA with whom Justices Ambrose and Cullinane agreed. In that case the question came up as to whether *Chan* continued to apply because of the enactment of section 71 *Land Title Act 1994* (Qld). I will not go into the subtleties of that point, which are explained in paragraph 15 of his Honour's judgment. For present purposes I accept that section 71 does not mean that the reasoning in *Chan v Cresdon* can no longer apply in Queensland. However, an important point that emerges from the appeal decision in *Ashton v Hunt* is identified in paragraph 3 where Justice of Appeal Thomas, after setting out a relevant part of the guarantee, says:

> "It is common ground that the parties intended the lease to be registered. This can be inferred from the lessee's covenant to pay all costs of and incidental to the registration of this lease. It would seem the parties intended the document to operate as a lease at law and that the lessor was an implied obligation to register it or procure its registration."

[35] That is one important threshold condition for the application of the reasoning in *Chan v Cresdon.* There is another threshold consideration for the application of *Chan v Cresdon* and that is whether the lease was one which was not a short lease and therefore a legal lease notwithstanding it was not registered. The second point, as Mr Byrne rightly points out, raises some interesting issues, however, they are both necessary conditions for the reasoning in *Chan v Cresdon* to apply and like many other issues in this case, they fall to be resolved by reference to the terms of the guarantee.

[36] As to the former question, whether the lease contemplated that on its proper construction that the parties intended it to be registered, I refer to clause no 10.2.3, which says, relevantly:

> "The tenant will pay ... any duty and registration fees payable in respect of this lease."

[37] That is the only clause, (with the exception of a clause in the guarantee, to which I will come) which could be considered to deal with whether the parties intended the lease to be registered. It is different from the clause considered by his Honour in *Ashton*, in which the lessee's covenant was to pay all costs of and incidental to the registration of the lease. That clause plainly contemplated that the lease was to be registered, and to be registered by the lessor.

[38] It is not common ground, in this case, the parties intended the lease to be registered. Clause 10.2.3 cannot, in my view, be cast in a way which expressly or impliedly commands registration. It might be thought that it did contemplate registration might occur. However, in my respectful view, the following clause in the lease, under the heading Guarantee Indemnity, is also relevant. It provides, under clause 23.1.15, that:

> "This guarantee takes effect immediately upon its execution and continues to be of full effect whether or not the lease is subsequently registered in the Department of Lands. References to this lease include any equitable lease, agreement for lease, or periodic tenancy arising upon execution or acceptance by the tenant of the instrument to which this guarantee is annexed."

[39] The guarantee is part of the lease. In my respectful view, that clause, at the least, indicates that the obligation that is guaranteed by the guarantor is an obligation which arises under the lease as executed. Whether, in fact, the lease contemplated that it should be registered is, of itself, not significant when one is considering the obligation of guarantor. What is significant is whether the obligation which the guarantor guaranteed was confined to an obligation under a legal lease. In my respectful view, it was not, and, therefore, the reasoning in *Chan v Cresdon* is inapplicable, and, on the proper construction of the guarantee, whether it is a legal lease, or an agreement for lease, or an equitable lease, the obligations are guaranteed by the guarantor.

[40] That means I do not need to decide the interesting point that Mr Byrne raised as to whether the lease required registration to be a legal lease because it was not a short lease. I will say something about it out of deference to the work that was done. Obviously, *Chan v Cresdon*, would not apply unless the guarantor limited the guarantee to obligations under a legal lease, and the lease was not a legal lease. A lease which is a short lease has been recognised as being a legal lease for many years. The odd question that arises here is this. A short lease is defined in schedule 2 of the *Land Title Act 1994* (Qld) to mean:

> "A lease for a term of three years or less, or from year to year or a shorter period."

[41] We are interested, in this case, with sub (a):

> "A lease for a term of three years."

[42] Term of a lease is also defined. Term of a lease means:

> "The period beginning when the lessee is first entitled to possession of a lot or part of a lot under the lease and ending when the lessee is last entitled to possession, even if the lease consists of two or more discontinuous periods."

[43] The question that arises here, then, is this. In this case, the lease is for a period of two years, and it has an option to renew the lease for a further period of two years. If the "term of the lease" under the Land Title Act definition is four years (i.e includes the initial term and the option term), then it is not a short lease. It does not get the benefits of indefeasibility unless registered and, importantly, section 181 applies, which provides:

> "An instrument does not transfer or create an interest in a lot at law until it is registered."

[44] That is the equivalent provision to section 43, which was considered by the High Court in *Chan v Cresdon*. The question, then, is whether, if there is an option for two years, that is an entitlement under the lease and/or whether that period is taken into account in determining when the lessee is "last entitled to possession". The learned authors of Land Titles Law & Practice Queensland, Thomson Reuters, as at 21 September 2019, at section 10.3400 deal with the interest of a lessee under a short lease. Ultimately, the learned authors reached this view:

> "It is suggested that an option to review a short-term least, which does not extend the term of the short lease beyond three years from the beginning of the original term is within the meaning of interest of a lessee under a short lease, and, therefore, will not be defeated under section 184. This accords with the view stated by the Queensland Law Reform Commission Report in their final report QLRC Report Number 40, commentary to clause 1153B. It follows from the application of the definition of "term" contained in the dictionary in schedule 2, namely, "Term of a lease means the period when the lessee is first entitled to possession of a lot or part of a lot under the lease, and ending"

[45] And there is set out the definition. Then the learned authors go on to say:

> "Thus, in the case of a lease granted for a one year term with options to renew for two further one year terms, the initial term, plus the option rights, will be protected from the extinguishing effects of indefeasibility, because, when added together, they do not exceed three years."

[46] And they identify that this differs from what the position had been under section 11 of the old Real Property Acts. There is no authority cited for that proposition. With deference to the learned authors, it is not clear to me that tenant is entitled to possession under an option in any ordinary sense, because, until the option is exercised, they are not entitled to possession under the option at all. On the other hand, when one looks at section 185(1)(b) of the *Land Title Act 1994* (Qld), which contains exceptions to section 184, we see the following, relevantly

> "A registered proprietor of a lot does not obtain the benefit of section 184, for the registered proprietor for the following interests in relation to the lot:
>
> …
>
> (b) the interest of a lessee under a short lease."

[47] Now, that recognises and has, as I understand it, been taken in the authorities to recognise, that the interest of a lessee under a short lease binds a registered proprietor, notwithstanding indefeasibility, and, as I understand it, that is the basis for the approach that such leases are legal leases. Section 185(2) provides that:

> "The interest of the lessee under subsection (1)(b) does not include… a right to renew or extend the term of the short lease beyond three years from the beginning of the original term."

[48] On one view of it, that subsection might seem to support the view of the learned authors of Land Titles Law & Practice Queensland set out above.

[49] It may be that if this was the only issue in the case, more analysis of this issue would be required. However, I do not have to decide that point, because I have decided that the lease is not required to be a legal lease to attract the obligations of the guarantor. However, on balance, it seems to me the Land Titles Law & Practice position seems correct.

[50] That leaves one issue in respect to the guarantee. Mr Byrne contended that as the guarantee contemplated two persons to comprise the guarantor, and that one of those persons had not signed the guarantee, then the guarantee was not binding on his client. There are a great number of cases dealing with this issue. There seem to be a range of possible approaches. One is that there is a starting point or a prima facie rule or – Justice Kirby goes so far in *Gattellaro v Westpac Banking Corporation* [2004] HCA 6 at paragraph 95, to suggest that it is a rule of law, to the following effect:

> "If a contract of guarantee is to be signed by co-sureties, so that a principal debt will be secured in that way, then, unless the intended surety who has executed the guarantee consents to the other co-surety who has not executed the guarantee not thereafter executing it, the intended surety never becomes liable under the guarantee. This is so despite the execution of it by one party alone."

[51] As I said, his Honour characterises that as a rule of law. Mr Byrne informed me that was a dissenting judgment on the facts. I am not sure whether the majority had anything to say about this proposition. But in any event, his Honour also said at paragraph 96

> "If this is a rule of law, as I presently think it is, the failure of Westpac to obtain the signature to the personal guarantee of Mrs Gattellaro (as found by the primary judge) released Mr Gattellaro of any obligation assumed under the guarantee. <u>At least it did so in the absence of a clear term of the contract of guarantee (not proved by Westpac) rendering Mr Gattellaro separately and individually liable.</u> On this footing, Westpac failed to prove that there was a personal guarantee binding Mr and Mrs Gattellaro in respect of Falgat's debts to the bank on the basis of the propounded guarantee of November 1985. In the absence of a clear term of the contract of guarantee rendering them separately, individually liable, you were not liable unless all parties signed."
>
> [underlining added]

[52] I was also referred to *Harvey v Dunbar Assets plc* [2013] EWCA Civ 952, at paragraphs 26 to 32, where Lady Justice Gloster, with whom Lord Justice Longmore and Lady Justice Black agreed, seemed to reach the view that there was at least a prima facie position that if more than one guarantor were to sign, and all guarantors did not sign, then the guarantor was not bound. She also recognized, however, that that prima facie position could be displaced by express or implied provisions.

[53] But perhaps of most direct relevance to this Court is what was said by Justice McPherson, as his Honour then was, in *Taubmans Pty Ltd v Loakes* [1991] 2 Qd R 109, with whom Demack J agreed. His Honour's observations which are relevant here begin at page 111, line 41, through to 113, line 5.

[54] The most relevant part of this passage for present purposes is as follows:

> "A guarantee may be given conditionally. It may be executed subject to a condition it is to be binding only if another or others also execute it. A condition to that effect may be express, or it may be capable of being inferred ... in judging whether there is such an intention, a cogent factor may be that the instrument of guarantee is in a form or in terms that imply it is to be executed by more than one guarantor who are to be jointly and severally liable. The underlying reason for regarding that factor as having, in the case of an instrument of guarantee, something more than ordinary importance is that without execution by the other guarantor or guarantors, the signatory loses his right to contribution from the others as co-sureties in the event of having to pay."

[55] His Honour goes on, however, to take a different view about the presumption issue from those stated above. His Honour says – and, I interpolate, perhaps presciently, given the later authorities I have been referred to:

> "In some textbooks and judgments, it is possible to find the matter stated in a broad and unqualified way, almost as if to suggest that an instrument executed in the form referred to raises an irrebuttable presumption that all must sign before any is bound. This would make it tantamount to a rule of law to that effect. But that is plainly not so, as can be seen from the extract from Coyte v Elphick."

[56] His Honour sets out the relevant part of that judgment, and concludes :

> "What his Lordship said there shows that it is the intention of the parties that is critical. He also said that the defendant must show something in the deed which indicates such intention. That implies, as, indeed is accepted in O'Donovan and Phillips: The Modern Contract of Guarantee at 72, that the burden of proof is on the guarantor to establish the relevant condition."

[57] In the absence of a decision of our Court of Appeal or the High Court which authoritatively leads to a different conclusion, I intend to follow the approach of Justice McPherson, agreed in by Justice Demack, in the Court of Appeal of Queensland, to the effect that there is a burden of proof on the guarantor to establish the relevant condition, and that there is no rule of law, much less an irrebuttable presumption, that all must sign. However, I should make clear that even if the view that there is a presumption and that the onus is on the plaintiff promisee to make good the proposition that not all were required to sign, I would still reach the same conclusion on the terms of this guarantee, which ultimately must determine the legal obligations of these parties.

[58] Turning to the guarantee, Mr Byrne made a number of strong points favouring the proposition that, in effect, on its proper construction, the guarantee required both

guarantors to sign if either was to be bound. First of all, he pointed to the definition of "guarantor", which is in singular form, and identifies Mr Cameron and Mr I.O. Vennela as the guarantor. There is no doubt that the effect of that definition is that, prima facie, when there is a reference to "guarantor", it is a reference to both gentlemen. I was also referred to clause 2.1.8, where "guarantor" is defined to mean:

> "The guarantor or collectively the guarantors referred to in item 11 [sic item 10] of the reference data"
>
> and also any person who enters into conveyance with the landlord under clause 24"
>
> (which is the guarantee clause)
>
> "If the guarantor is one person, the expression includes that person, his executors, and his administrators; if it is more than one, the guarantor includes those persons and their respective executors and administrators, jointly and severally. If the guarantor is a corporation the guarantor includes the corporation and its successors; and if more than one corporation, the guarantor includes those and their respective successors."

[59] So far, so good for Mr Byrne's client. If we then turn to the guarantee clause, it uses the word "guarantor", singular, and says:

> "In consideration of the landlord, at the request of the guarantor, entering into this lease with the tenant, the guarantor covenants and agrees with the landlord…"

[60] There are various covenants. For some reason, the first covenant is a small-g "guarantor", that is the covenant to be jointly and severally liable for due and punctual performance of all rent and other obligations, but I do not take anything from that.

[61] As I said, so far, so good for Mr Byrne's client. I do note that there is another provision in this contract that uses the word "guarantor" in a circumstance that seems to contemplate that the use of the term "guarantor" refers to each of the individuals defined as such. I cannot find it now. Well, in the absence of being able to re-locate that clause, I will not rely on that consideration.

[62] In any event, Mr Jennings points to clause 23.1.7, which provides that:

> "The covenants and agreements made by the guarantor are not conditional or contingent in any way or dependent upon the validity or enforceability of the covenants and agreements of any other person, and remain binding even though any other person does not execute this lease or this guarantee and indemnity."

[63] The point he relies upon is that, on the face of this document, the persons who were required to execute this guarantee and indemnity were the two guarantors. And he says, on the proper construction of that clause, it must be intended to make each of the individuals who comprise the guarantor liable, even though the other person does

not execute this guarantee and indemnity. That conclusion is reinforced by the fact that no one can identify for me another person who is to execute the guarantee and indemnity.

[64] The point is a finely balanced one. As I said, I do not think questions of presumptions necessarily assist. I note clause 15.4, which deals with new guarantors, under the heading "General". It provides:

> "Within 14 days of the death of any guarantor during the term of this lease, or of any guarantor becoming bankrupt or having a receiving order made against them ... the tenant will give notice of this to the landlord. If required by the landlord, the tenant, at their own expense, within 28 days, must procure some other person acceptable to the landlord to execute a guarantee ... in the form of the guarantor's covenants which are contained in this lease or in any guarantee separate from this lease."

[65] I was considering whether that clause gave work to do for clause 23.1.7 when it identifies that the covenants made by the guarantor "remain binding even though another person does not execute this guarantee and indemnity." But I think the situation contemplated there is not one which could engage the interests of an existing guarantor in any event, because that is a right of the landlord to require a new person to be made a guarantor. I also note that the clause uses the term guarantor in a way that must mean, where guarantor was defined as more than one person, one of those persons. It would make no sense at all to read that as requiring both guarantors to die or to become insane before the landlord was entitled to call for a new guarantee.

[66] In my respectful view, the plain object of clause 23.1.7 is to overcome the principle that until all guarantors sign, none are bound, and although the matter is not without doubt given the nature of this application, on balance my conclusion is that the defendant's defence on this point also fails.

[67] That leaves the question of the amount of the judgment. Mr Jennings outlined in paragraph 31 to 36 of his submissions that he claimed the sum of $126,082.73. That is less than the amount claimed for reasons he elaborated on. I gave Mr Byrne an opportunity to critique this figure, and he did it so but not on the basis that that figure would be inappropriate if the plaintiff succeeded. Therefore, I propose to dismiss the defendant's application for summary judgment with costs. I propose to order summary judgment be entered in the amount of $126,082.73 on the plaintiff's application for summary judgment and that the plaintiff have the costs of the proceeding including reserve costs.

[68] As to the costs of the application, I will make an order that the defendant pay the plaintiff's costs of the plaintiff's application for summary judgment on an indemnity basis and to the extent there is any costs of the defendant's application for summary judgment which are on top of that or separate to that, those costs will be on a standard basis, I will make an order in terms of the draft amended so that the amount of the judgment is 126,082.73 which I will sign and place with the papers.