DISTRICT COURT OF QUEENSLAND

CITATION:	*Pryde v Khoury* [2018] QDC 95
PARTIES:	**JULIENNE PRYDE** (appellant) **v** **PAUL KHOURY** (respondent)
FILE NO/S:	4730/17
DIVISION:	Civil
PROCEEDING:	Appeal
ORIGINATING COURT:	Magistrates Court at Brisbane
DELIVERED ON:	1 June 2018
DELIVERED AT:	Brisbane
HEARING DATE:	17 April 2018
JUDGE:	Farr SC DCJ
ORDER:	**1. The appeal is dismissed.** 2. **The appellant is to pay the respondent's costs of and incidental to this appeal to be assessed on the standard basis.**
CATCHWORDS:	APPEAL AND NEW TRIAL – REHEARING – APPEAL – FINDINGS OF FACT – ERROR OF LAW – where the appellant leased commercial premises and the lessor failed to comply with obligations under the lease – whether the respondent entered into a binding guarantee relating to the lease – whether the purported guarantee bound the respondent to undertake the obligations of the lessor – where the magistrate found that the purported guarantee did not bind the respondent to undertake the obligations of the lessor – whether the magistrate erred in factual findings – whether the magistrate erred in using post contractual conduct in construing terms in and scope of the guarantee *Magistrates Courts Act* 1921 (Qld) s 41(1)(a) *Property Law Act 1974* (Qld) s 45, s 47 *Uniform Civil Procedure Rules* 1999 (Qld) r 149, r 151, 166, r 211, r 762(1) *400 George Street (Qld) Pty Limited v BG International Limited* [2010] QCA 245 *Allesch v Maunz* (2000) 203 CLR 172

JJ Richards & Sons Pty Ltd v Precast Concrete Pty Ltd [2010] QDC 272
Wash Investments Pty Ltd & Ors v SCK Properties Pty Ltd & Ors [2016] QCA 258

COUNSEL: S V Whitten for the appellant
A M Nelson for the respondent

SOLICITORS: McCarthy Durie Lawyers for the appellant
Slade Waterhouse Lawyers for the respondent

[1] The appellant has appealed against a decision made in the Magistrates Court at Brisbane on 10 November 2017 dismissing her claim against the respondent.

Background

[2] The learned magistrate summarised the issue between the parties succinctly as follows:[1]

> "*In 2013, the plaintiff and first defendant (the company) entered into a lease of commercial premises in East Brisbane (the premises). The company failed to comply with its obligations in terms of payment of rent. The company was deregistered on 23 October 2016. The current proceeding continues against only the second defendant, Mr Khoury. The primary issue for the court to determine is whether there is a guarantee and indemnity which makes Mr Khoury liable for the company's debt for rent and other related amounts. The guarantee document purported to impose that liability on Mr Khoury (the Instrument) preceded the execution of the lease document by some four and a half months and the defence position is that there is no binding guarantee. If there is no binding guarantee, the plaintiff must fail.*"

[3] As the learned magistrate correctly identified, the crucial question to be determined relevant to this issue is whether a document dated 31 July 2013 ("the Instrument")[2] constituted a binding guarantee which applied to the lease of the premises executed on 21 December 2013.

Notice of appeal

[4] The notice of appeal lists 22 separate, lengthy and at times confusing grounds of appeal.

[5] Counsel for the appellant however has concisely condensed those grounds into the following:

(a) the learned magistrate erred in finding that the guarantee was not witnessed;

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1 *Pryde v Khoury* [2017] QMC.
2 Exhibit 2.

(b) the learned magistrate misdirected herself as to the application of the legal principles for construing the term "lease" in the guarantee by directing her attention to conduct occurring after the guarantee had been signed;

(c) the learned magistrate erred in using the post contractual conduct to construe the scope of the guarantee, and in doing so failed to adequately consider the actual words of the guarantee in the context of the facts known to each party at the time; and

(d) the learned magistrate erred in finding that there existed an alleged REIQ lease and guarantee documents which she then erroneously used to determine that the guarantee did not apply to the lease as signed, and that the parties objectively intended a different guarantee should have been executed.

Facts

[6] The facts relevant to this matter have been accurately recited by the learned magistrate in the course of her decision at paragraphs 4 to 18 inclusive and are repeated below:

> *"[4] The plaintiff gave evidence and called her husband Warren Pryde as a witness. The second defendant, Paul Khoury (Mr Khoury) was a director of the company and the putative guarantor; he gave evidence. The company had earlier leased premises in Enterprise Street, Cleveland from a trust in which the plaintiff and Warren Pryde both had an interest. Mr Khoury's evidence was that his business was not doing well there and he was looking for smaller premises and to pay less rent.*
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> *[5] Mr Pryde informed Mr Khoury about the availability of the premises at Overend Street East Brisbane. After inspecting those premises, Mr Khoury decided he wanted to acquire those premises for the business operated by the company. He hoped that, given the closer proximity to the city, the premises may generate extra business for him and that would be of benefit in expanding his business. According to Mr Pryde, following discussions, a meeting between Mr Khoury and Mr Pryde, took place on or about 20 June 2013 and a document dated that day was created, purporting to set out the agreed terms of the lease which the first defendant would enter (T1-42-43). That handwritten document (exhibit 11) is not signed by any person. It was referred to in Mr Pryde's evidence of as 'heads of agreement'. There is no mention in that document of any guarantee being required. That document contains two very different styles of handwriting suggesting two people have contributed to the document.*

[6] *There was a contest about the rental cost payable in respect of the premises, specifically the monthly amount that was originally agreed. Ultimately (but seemingly reluctantly) Mr Khoury for the first defendant, by signing the Lease document (exhibit 3), agreed that the rental would initially be $6400 per month plus GST. A rent free period from 1 July 2013 to 30 November 2013 was agreed. The lease states a commencement date from 1 December 2013. The company entered into possession of the premises at the beginning of August 2013, although Mr Khoury said he had tried to get in earlier but "Mr Pryde was emphatic that was the date that was agreed upon" (T1-67 L45).*

The Instrument

[7] *The plaintiff relies on the Instrument (exhibit 2) as a binding guarantee creating liability in the second defendant. That document is dated 31 July 2013 and is two pages in length. It includes on the second page the words "executed as a deed". It recites as follows:*

> *A. The Lessor has agreed to lease certain property described as 15 Overend Street East Brisbane QLD 4169 to Auctioneering Link Pty Ltd (the lessee")*
> *B. In consideration of the Lessor granting the lease to the Lessee, the guarantor has agreed to execute this deed".*

[8] *Clause 6 states "any reference herein to "lease" shall include any agreement to lease." The Instrument includes under the heading "Operative Provisions" that the guarantor unconditionally and irrevocably guarantees to the plaintiff the "due punctual performance and observance by the Lessee of its obligations under the lease …". The guarantee is expressed to be a "continuing security and is not discharged by any one payment".*

[9] *Mr Khoury's evidence about the arrangement for the East Brisbane premises was that Mr Pryde had said that he would keep the rent the same as it was for his (then) current premises which was in the region of $5500 per month (T1-83 L41). Mr Khoury gave evidence that by the time the lease document was ultimately presented to him, he had no choice but to continue with the Lease even though the rent was higher (T1-85 L3). The reason, given during cross-examination, was that he had moved and disposed of most of his assets that could not fit into the new building (the premises).*

[10] Mr Pryde's evidence was that the Instrument was required by him to be signed before handing over of the keys to the premises (T1-45 L3). Mr Khoury recalled signing a document at some stage to enable him to obtain the keys to the East Brisbane premises. He does not recall what that was and concedes that it could have been the Instrument being a purported deed of guarantee and indemnity.

[11] Mr Khoury's evidence was that he did not know what the Instrument was at the time he signed it (T1-71 L1). The Instrument is expressed to have been witnessed by Scott Smith. Mr Pryde's evidence is that Mr Smith was there on the day and the document was signed in his presence. Mr Khoury disputes that Mr Smith was present. According to Mr Khoury only he and Mr Pryde were present at on 31 July 2013 when he received the keys to the premises. He denied at any stage ever having a meeting with Mr Pryde when anyone else was present, apart from his son. Mr Smith was not called as a witness.

[12] Mr Pryde also states that as was his usual routine when documents were signed at this office, he would have given a copy to Mr Khoury. Mr Khoury denies that he was given a copy. It is not disputed that Mr Pryde retained the original.

[13] Mr Khoury, or a company with which he was associated, had paid a bond as part of the leasing arrangement for the building at Enterprise Street, Cleveland from where he moved to the premises. The transfer of that bond and a further payment towards a bond for the lease of the premises were contemplated. The expected further payment to make up the balance of the bond for the premises was not paid. The transferred bond was offset against outstanding rent for the premises at some stage.

[14] After entering into possession of the premises, Mr Khoury's evidence is that he received from the plaintiff some documents which included a REIQ lease and a Guarantee document with labels indicating where he should sign. After receiving those he proposed to the plaintiff that his daughter prepare a lease document, as he did not consider the REIQ lease to be 'a nice lease'. His daughter had, he said, recently completed her law degree. By agreement between the parties, Mr Khoury's daughter was to draw up a lease document. The plaintiff is not aware who did in fact prepare the lease, but a lease document was prepared which was received by the plaintiff.

[15] In response to that proposed lease, the plaintiff sent an email dated 12 November 2013 to Mr Khoury which is part of

exhibit 6. That includes a sub-heading "guarantor". The words following that are as follows:

> *"Should be separate document and annexed at end of lease – must be executed as a deed. – please use deed of guarantee and indemnity as provided."*

[16] At clause 1(j) of the Summary in the lease document (exhibit 3) Paul Joseph Khoury is named as the only guarantor under the sub-heading 'Guarantors'. Clause 11 of exhibit 3 refers to guarantors and the obligation accepted by the guarantors. That lease document, although signed by Mr Khoury, was signed only in his capacity as director of the first defendant. The lease document was apparently executed by Mr Khoury on 12 December 2013 and by the plaintiff on 18 December 2013.

[17] The plaintiff's case was conducted on the basis that the Instrument was intended to continue to have effect and created liability in Mr Khoury for the first defendant's obligations.

[18] The plaintiff's evidence about this commences at T1-16 L30 of the Transcript. She stated that when she wrote to Mr Khoury the words "as provided", she was referring to the guarantee signed by Mr Khoury on 31 July 2013 (T1-17 L43). She denied during cross-examination that by her words she intended a new executed guarantee was required (T1-26 L24-35). She could not recall whether another Guarantee document was attached to the Lease document when it was returned to her (T1-27 L2). It is not in dispute that no other document that could be considered a Guarantee was ever signed by Mr Khoury or any other person. There was no communication between the plaintiff and Mr Khoury in which he asserted invalidity of the guarantee signed by him (T1-49 L23-37) or seeking to discharge any liability he might have had under a guarantee." (footnotes omitted)

Standard to be met on appeal

[7] The appeal is brought pursuant to s 41(1)(a) of the *Magistrates Courts Act* 1921 (Qld). Rule 762(1) *Uniform Civil Procedure Rules* 1999 (Qld) (UCPR) provides that such an appeal is by way of rehearing.

[8] McGill SC DCJ succinctly summarised the way such an appeal should be approached in *JJ Richards & Sons Pty Ltd v Precast Concrete Pty Ltd*:[3]

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3 [2010] QDC 272 at [8].

> "*The ordinary characteristics of an appeal by way of rehearing are well established. It is necessary for the appeal court to make up its own mind on the basis of the findings of primary fact made at the previous hearing, unless those findings are set aside in accordance with the established principles, but it is necessary for the appellant to show that the decision under appeal was wrong. Where the appeal is from the exercise of discretion, that involves showing that there was an error of principle in the exercise of the discretion, or that the discretion miscarried, in that the result was manifestly inappropriate."* (footnotes omitted)

[9] In *Allesch v Maunz*[4] Gaudron, McHugh, Gummow and Hayne JJ said:

> "*For present purposes, the critical difference between an appeal by way of rehearing and a hearing de novo is that, in the former case, the powers of the appellate court are exercisable only where the appellant can demonstrate that, having regard to all the evidence now before the appellate court, the order that is the subject of the appeal is the result of some legal, factual or discretionary error, whereas, in the latter case, those powers may be exercised regardless of error. At least that is so unless, in the case of an appeal by way of rehearing, there is some statutory provision which indicates that the powers may be exercised whether or not there was error at first instance. …*"[5]

[10] Therefore, the appellant must demonstrate that the order that is the subject of this appeal is the result of some legal, factual or discretionary error before this court's appellate powers become exercisable.

Submissions

Appellant's submissions

[11] The appellant submits:

(a) that the magistrate failed to place adequate weight on the 'heads of agreement' document dated June 2013[6] when determining what the parties knew at the time the Instrument was signed;

(b) the terms identified in the heads of agreement were pleaded by way of amendment in the Amended Statement of Claim filed 3 April 2017 but were not pleaded to by the respondent and therefore are the subject of deemed admissions on the pleadings pursuant to r 166(1) and (5) UCPR;

(c) that in cross-examination the respondent accepted that at the time the Instrument was agreed he understood that:

(i) Mr Pryde was going to let the respondent out of the Enterprise Street lease, which still had time left before it

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4 (2000) 203 CLR 172 at 180-181 [23].
5 See also s 113, *District Court of Queensland Act* 1967; ss 46 and 47 *Magistrates Courts Act* 1921.
6 Exhibit 11.

expired and the first defendant would take up the lease for Overend Street;

(ii) there was to be a rent free period until end of November 2013 before the lease commenced, and during part of that time the premises was to be fitted out by the appellant to allow the first defendant to move in;[7]

(iii) from 1 December 2013 there would be a lease for three years, with a three year option;

(iv) the respondent's daughter would prepare the lease, which would save money;

(v) rent was to be paid from 1 December 2013; and

(vi) the major terms had been agreed upon in respect of the parties to the lease, the premises, the term, the option and the rental.[8]

(d) that the matters raised in paragraph 11 (i) – (vi) above were known to each party prior to the signing of the Instrument;

(e) that there was no evidence of any significant negotiations regarding the major terms of the lease leading up to the signing of the lease;

(f) that the respondent did not plead nor give evidence that there was any change to the conditions or terms of the lease which would have resulted in he not being bound by the Instrument;

(g) that the only evidence of negotiations is that which is contained in Exhibit 6 where the appellant asks for changes to the draft lease, noting however that the evidence does not show whether the changes were of any consequence to either party;

(h) that the magistrate's findings regarding the "heads of agreement" were in error and that she should have concluded, relevantly, that all of the parties knew at the time the Instrument was entered into, what was to be the respondents obligations under the lease;
and that to the extent that the magistrate held otherwise, she misdirected herself as to the application of the law;

(i) that if the word 'lease' in the Instrument had been so constructed, it would have guaranteed the obligations of the lease that commenced on 1 December 2013;

(j) that the magistrate impermissibly used post-contractual conduct to construe the terms of the instrument;

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7 Transcript p 1-44, ll 26-37.
8 Transcript p 1-92, l 23 to transcript p 1-94, l 10.

(k) that the magistrate erred by inferring that the words "as provided" in the email sent by the appellant on 12 November 2013 was referable to guarantee documents attached to an REIQ lease;

(l) that the magistrate erred by relying on the respondent's evidence as to the factual foundation for determining what was meant by the words 'as provided' because the respondent had not pleaded the existence of the alleged REIQ lease and guarantee nor did he disclose them in the proceedings, despite giving evidence that he might still have them in his possession;[9]

(m) that the magistrate erred by finding that the Instrument was not properly executed as a deed and that there had been non-compliance with ss 45 and 47 of the *Property Law Act* 1974 (Qld) (PLA).

Respondent's submissions

[12] The respondent has submitted that:

(a) the learned magistrate was entitled to conclude that the respondent's signing of the lease was not witnessed and was therefore not compliant with the provisions of ss 45 and 47 of the PLA;

(b) the learned magistrate did not purport to construe the terms of the guarantee by the subsequent conduct of the parties, rather she correctly used that conduct to ascertain whether the deed had been "delivered" and whether a contract had been formed; and

(c) the learned magistrate was correct to identify that even if the parties had intended the guarantee to apply to the later lease, the terms of the lease had not been finalised until mid-November and the appellant herself had contemplated a further deed of guarantee being executed.

Execution of the Instrument

[13] In respect to the execution of the Instrument, two questions arise:

(a) was the signing of the document actually witnessed?; and

(b) was there "delivery" of the Instrument?

[14] The learned magistrate held that it was not properly executed as it was not witnessed.

[15] The appellant has submitted that this issue was raised for the first time by the respondent's counsel during closing submissions and was not pleaded in the defence and is therefore non-compliant with the provisions of r 211 UCPR. I note however that r 211 relates solely to the duty of disclosure of documents and has no relevance to this issue. Rule 149(c) however, requires that a pleading must state specifically any matter that, if not stated specifically may take another party by surprise.

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9 Transcript p 1-97, l 10.

Similarly, r 151(1) UCPR requires a party to include in a pleading particulars necessary to define the issues for, and prevent surprise at, the trial.

[16] The learned magistrate acknowledged the appellant's counsel's submission that the issue took the appellant by surprise, but nevertheless, concluded that there was "*no real prejudice*" to the appellant.[10]

[17] Yet, the magistrate was of the view that there was uncertainty in the evidence over whether there was a witness to the signing of the Instrument and then concluded that the Instrument was not witnessed (notwithstanding that the signature of "Mr Smith" appears on the document as a witness).

[18] In my view, the magistrate was in error for so concluding for these reasons:

(a) the Further Amended Defence dated 12 August 2016 did not assert that the document had not been witnessed. Given that the appellant had pleaded that, in accordance with the agreement, the written guarantee had been given by the respondent,[11] the respondent, ought, pursuant to r 151(1) and r 157(a) UCPR have taken issue with the validity of the document to prevent the appellant from being taken by surprise. In fact, nothing in the defence alleged that the guarantee was unenforceable, not binding or otherwise affected by virtue of ss 45 and 47 of the PLA;

(b) an obvious consequence of this is that the appellant was denied the chance of calling Mr Smith at trial; and

(c) in such circumstances the magistrate erred by placing any reliance on the absence of Mr Smith being called as a witness.

[19] The respondent has submitted that the appellant bore the onus of pleading and proving that the deed was validly executed and enforceable, and that its efficacy was challenged in paragraph 3 of the Further Amended Defence. Yet that paragraph does not in any way suggest, imply or even insinuate that the deed was not validly executed. It merely asserted that the Instrument was not given in respect of the subject lease and provided a number of reasons – none of which related to an allegation of there having been a failure of proper execution.

[20] In the alternative the respondent submits that the appellant was aware of the respondent's argument that the Instrument was not effective as a deed "*right from the outset of the trial*" and refers to two passages from the transcript, both of which occurred when counsel for the respondent made interjections during the opening address of the appellant's counsel. In the first, the respondent's counsel when discussing whether an oral agreement to terminate the lease by a certain date had occurred said:

> *"Mr Nelson: I can probably clear that up. It's not pressed in so much as it was a requirement under the Land Titles Act to be registered but whether the parties had agreed, but as I understand my instructions, that's*

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10 Decision paragraph 35.

11 Amended Statement of Claim paragraph 6.

no longer an issue in the proceeding. It's really whether the guarantee is enforceable against the second defendant."

[21] The second occasion arose from an objection made by counsel for the respondent to a submission made by his opponent regarding what was asserted to be a deemed admission. The following was said:

"Mr Nelson: *Yes, your Honour. Yes. It is possible, your Honour, that someone enters into a defence, they plead their defence and they are content to rely upon that despite the fact that the other party subsequently amends – if the existing defence, they consider it sufficient. Your Honour will see – I'm concerned that what I seem to be hearing is a closing submission as opposed to an opening. That's the reason that I stood to interrupt.*

Mr Whitten: *I was trying to identify the issues for your Honour.*

Bench: *Well, this issue about the deemed admissions is a relevant one because that will govern what matters need to go into evidence, in my view. So perhaps we need to talk about that. Is that something you need to discuss with each other or do you want to tell me now why you are saying the deemed admissions don't arise?*

Mr Nelson: *Well, I'm just concerned, your Honour. Usually in the opening you hear what the evidence is going to be, a summary of that sort of thing, but you are hearing arguments, legal arguments. Your Honour will see in the defence – and I am concerned that at this stage you haven't seen the defence but you are being told there are deemed admissions. There is a denial that the guarantee could have been effective at all and there is an allegation that the parties intended for a fresh guarantee to have been entered into.*

Those allegations were seen as sufficient to rebut the application of the guarantee to the lease, whether it was a common law lease from some date in July 2013 or whether it was the lease, meaning from 1 December 2013. So the defendant – the second defendant doesn't accept that there was a deemed admission that this guarantee applies to either of those periods of time."[12]

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12 Transcript p 1-9, ll 13-35.

[22] Neither of those passages, by any stretch of the imagination, identify as a potential issue in the trial, whether the Instrument was lawfully executed.

[23] The respondent also suggests that the appellant would have become aware of this issue during the appellant's husband's cross-examination:[13]

> *"That document that you've got in front of you, Exhibit 2: what I want to suggest to (sic) is that when that document was signed, it was you and Paul Khoury only in the room? - - - It would have been (indistinct) and Scott Smith, my – my Operations Manager, would have witnessed that signature.*
>
> *Yeah. What I'm suggesting to you is that Scott Smith wasn't there when it was signed? - - - I'm suggesting he was because he witnessed the signature.*
>
> *Yeah. He's – what I'm saying to you is when Paul Khoury signed the document, Scott Smith wasn't in the room with him? - - - I believe he was. And – and Scott – Scott's witnessed several signatures, and he's always been there to witness it.*
>
> *Well, I'm asking you about this – Mr Pryde, I'm asking you about this document, not about other - - - ? - - - Yeah.*
>
> *- - - documents that Mr - - - ? - - - OK.*
>
> *- - - Smith might have attested? - - - Well, Scott Smith was in the room."*

[24] I agree that that passage would have so alerted the appellant. Furthermore, the respondent attested in his evidence-in-chief, that he could not recall any occasion when someone else *"has come in to witness someone signing something"*.[14] But that testimony must be considered in light of his evidence in cross-examination where he conceded that he had no recollection of signing the Instrument (despite acknowledging that it was his signature) and that it was possible that Mr Smith was present as a witness.[15]

[25] The effect of this evidence is that on the face of the Instrument it had been appropriately witnessed, the appellant gave unambiguous evidence that it had been witnessed and the respondent conceded that that may have been the case and had no actual recollection of the event.

[26] Such evidence, in my view, would not have alerted the appellant to the prospect that a submission would be made that the court could conclude that the document had not been appropriately witnessed. Given the state of the evidence, the appellant could not have anticipated either such a submission being made or it prevailing.[16]

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13 Transcript pp 1-54, ll 4-21.
14 Transcript pp 1-71, ll 14-18.
15 Transcript pp 1-91, ll 1-10.
16 As opposed to the situation in *Wash Investments Pty Ltd & Ors v SCK Properties Pty Ltd & Ors* [2016] QCA 258.

[27] In my opinion not only was the appellant unfairly taken by surprise in relation to this matter, the magistrate's conclusion that she was not satisfied on the balance of probabilities that the Instrument was signed by Mr Khoury in the presence of Mr Smith[17] was not reasonably open. In reaching that conclusion the learned Magistrate misdirected herself as to the evidence when she said:

> *"Mr Khoury disputes that Mr Smith was present. According to Mr Khoury only he and Mr Pryde were present on 31 July 2013…"*[18]

[28] By failing to acknowledge that Mr Khoury had conceded the possibility that Mr Smith did witness the signature, the magistrate has incorrectly elevated Mr Khoury's evidence on the point. Alternatively, she has failed to give any reasons as to why she concluded that the concession made by Mr Khoury did not cause her to accept, on balance, the evidence of Mr Pryde.

[29] My conclusion however on this issue, is not determinative of this appeal.

Central issue

[30] The appellant acknowledges that the central issue was whether the Instrument bound the respondent to undertake the obligations of the first defendant. That is, what was being guaranteed by its terms?

[31] The question is whether the reference to "lease" in the Instrument[19] was intended by the parties to mean the lease which was subsequently executed on 18 December 2013 to commence on 1 December 2013. The appellant submits that if it was, then the appellant must succeed and if it was not, then the appellant's case would fail. The respondent agrees. The learned magistrate held that it was not.

Consideration of central issue

[32] The learned magistrate correctly identified that commercial documents must be construed objectively by what reasonable persons in the position of the parties would have understood the document to mean.[20]

[33] Contrary to the appellant's submission, in my view the magistrate did not err by using post-contractual conduct to construe the scope of the Instrument, nor did she fail to adequately consider the actual words of the Instrument in the context of the facts known to each party at the time. Rather, her Honour quite clearly stated that she was considering the conduct of the parties after the signing of the Instrument in order to decide whether a contract had been formed.

[34] That uncertainty arose because of the evidence relating to three matters:

(a) the first, is the evidence of the respondent where he stated that he recalled signing a document at some stage to enable him to obtain the keys to the East Brisbane premises and conceded that that document could have been the Instrument;[21]

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17 Decision paragraph 32.
18 Decision paragraph 11.
19 In paragraph B, 1, 2, 6 and 7.
20 *400 George Street (Qld) Pty Limited v BG International Limited* [2010] QCA 245 at [30].
21 Transcript pp 1-68, ll 15-40; Transcript pp 1-89, ll 15-35; Transcript pp 1-90, ll 40-41.

(b) the second issue flows from the first, that is, did "delivery" of the Instrument take place?

(c) the third issue is whether the "lease" referred to in the Instrument was the lease that was entered into some four months later.

[35] As to the first issue, the learned magistrate accepted the respondent's evidence that the document "was signed by him as a form of security for the plaintiff (through her husband) handing over the keys to the premises to allow unfettered access to it by the defendant company".[22] Her conclusion in that regard was based on the evidence of the respondent. In accepting that evidence she took into account the fact that as at 31 July 2013, whilst there had been "discussions and agreement about some terms about the lease", there were other important terms which were not negotiated until some considerable time later, including the default interest rate.

[36] Of course, the learned magistrate had the benefit of being able to listen to and observe the witnesses and was better positioned than this court to make assessment of issues such as credibility. With that in mind, I can discern no error on the part of the learned magistrate in reaching such a conclusion, given that it was based on evidence before the court that she was reasonably entitled to accept.

[37] Her Honour's conclusion was further bolstered by the evidence of the contents of the appellant's email to the respondent dated 12 November 2013[23] which I will repeat:

> *"Guarantor – should be separate document and annexed at end of lease – must be executed as a deed – please use deed of guarantee and indemnity as provided."*

[38] The appellant attested that this was a reference to the Instrument which was signed on 31 July 2013 and which was, as at 12 November 2013, in the appellant's possession.

[39] The respondent attested that an REIQ lease was attached to that email as was a new guarantee. He said that receipt of these documents prompted him to propose his daughters involvement in drawing up a lease in a different form. He said that he did not execute the new guarantee.

[40] The learned magistrate accepted the respondent's evidence, noting that the wording of the email "*points to a requirement by the plaintiff for the second defendant to execute a document other than the Instrument*".[24] Her Honour said:

> *"[37] ... The expression used by the plaintiff in the email when referring to the "deed of guarantee and indemnity as provided" is, in my view, not consistent with the intended reliance on the Instrument. If the plaintiff did not expect that a new deed of guarantee and indemnity would be executed, she could have used more precise words to the effect of "the*

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22 Decision paragraph 33.
23 Exhibit 2.
24 Decision paragraph 37.

> *deed of guarantee and indemnity dated 31 July 2013 previously signed by you is accepted and will be relied on". She, or possibly her husband (who was her agent) was in possession of the Instrument, so it was not the situation where she would have then needed to obtain possession of it from Mr Khoury.*
>
> *[38] The plaintiff's use of the words "must be executed as a deed" suggest one of two scenarios; either she did not consider the Instrument to have been executed as a deed (but she does not refer to a requirement for alteration and re-execution of it), or* ***some other document should be executed as a deed.*** *If, in fact, the instrument was intended to be relied on, there would have been no reason for the directive that it must be executed as a deed and she could simply have annexed it to the Lease, with the consent of Mr Khoury."*

[41] On the evidence before the court, such a conclusion was reasonably open and I can discern no error on the part of the magistrate in reaching it.

[42] Of course, such a conclusion meant that there had been no "delivery" of the instrument. Delivery means the intention to be legally bound either immediately or subject to fulfilment of a condition.[25]

[43] Ultimately, it was open on the evidence for the magistrate to find that the appellant had expected another document in the form of a deed to be executed and that the Instrument was intended by the appellant to be signed by the respondent as a means of showing a genuine intention on the part of the respondent to enter into a lease of the premise. There was no error of fact or law in her reaching the conclusion that the respondent was not legally bound by the terms of the Instrument.

[44] The appellant has also submitted that of relevance to the issue is the fact that the REIQ lease and guarantee were not pleaded or disclosed in the pleadings or at trial. It is further submitted that the facts informing the finding of the learned magistrate at [36][26] were not put by the respondent's counsel to any of the appellant's witnesses.[27] That is incorrect. During cross examination of the appellant regarding the contents of her email dated 12 November 2013, counsel for the respondent put to the appellant:[28]

> *"So what I'm suggesting to you is you were saying to Mr Khoury: You need to send me the lease, and attached to the lease you need to have a document, a new executed guarantee attached to it."*

[45] Furthermore, I note that paragraph 3(b) of the Further Amended Defence states:

> *"Further the parties intended, and the Plaintiff required, that a fresh guarantee and indemnity be executed as a deed…"*

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25 Section 47 *Property Law Act* (Qld) 1974.
26 That the respondent had received from the appellant a REIQ lease and guarantee documents.
27 Contrary to the UCPR r 149(1)(c); r 211 and the r in *Browne v Dunn* (1894) 6 R 67 (HL).
28 Transcript p 1-26 l 31.

[46] Whilst these pleadings do not specifically plead or disclose the REIQ lease and guarantee, in my view the contents of the pleadings and the aforementioned cross-examination of the appellant placed the appellant on notice, in a timely way, such that the appellant should have anticipated the argument that ultimately prevailed.[29]

[47] The appellant also submits that the magistrate's conclusion on this issue is in error because neither the REIQ lease nor the fresh guarantee were produced in evidence. This is an issue however that counsel for the appellant drew to the magistrate's attention in submissions. Ultimately, it was a matter of relevance for the magistrate to consider, which she did.[30] However, the fact that she concluded in a way that was unfavourable to the appellant is not indicative of error. It was a conclusion which was reasonably open on the evidence.

[48] Finally, I turn to what the appellant has named the "heads of agreement" issue. The appellant submits that the learned magistrate failed to place adequate weight on the "heads of agreement" reached in June 2013 when determining what the parties knew at the time the Instrument was signed. The terms of this agreement were the subject of an amendment to the appellant's Statement of Claim filed 3 April 2017, and, so the appellant submits, were not pleaded to by the defendant. The appellant submits that to the extent that the terms were agreed by the respondent, they are the subject of deemed admissions on the pleadings pursuant to UCPR r 166(1) and (5).

[49] The appellant submits therefore that at the time the Instrument was signed, the respondent understood that:

(a) he was going to be let out of the Enterprise Street lease, which still had time left before it expired and the first defendant would take up a lease for Overend Street;

(b) there was to be a rent free period until the end of November 2013 before the lease commenced, and during part of that time the premises was being fitted out by the appellant to allow the first defendant to move in;[31]

(c) from 1 December 2013 there would be a lease for 3 years, with a 3 year option;

(d) rent was to be paid from 1 December 2013.

[50] The appellant also submits that the major terms of the proposed lease had been agreed upon including the parties to the lease, the premises, the terms, the option and the rental.

[51] In my view though it is not correct to say that the rental had been agreed upon. Even the appellant's husband, Warren Pryde, gave evidence that he believed the terms were going to be the same as the previous lease over the property at Enterprise Street:

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29 *Wash Investments Pty Ltd & Ors v SCK Properties Pty Ltd & Ors* [2016] QCA 258 at [29] – [31].
30 Decision paragraph 36.
31 Transcript pp 1-44 ll 26-37.

> *"What makes you say the terms were the same as the lease that was to be entered into? --- I was referring to the base terms to be the same.*
>
> *The rent? --- Yes."*[32]

[52] There is no dispute that the rent payable on the previous lease had been $5,500.00 per month.[33] The respondent gave evidence that he understood the rent was to stay the same until some future, as yet undetermined time.[34]

[53] Yet, despite both Mr Pryde and Mr Khoury believing that the rent was to remain at $5,500.00 per month, the "heads of agreement" referred to a monthly rent of $6,400.00 plus outgoings plus GST. That uncertainty is supportive of the magistrate's conclusion that there had not been agreement on this most important term.

[54] Additionally, [42] and [43] the magistrate noted that the "heads of agreement" made no reference to other important terms including the default interest rate and the provision about the payment of a bond. She noted also, correctly recalling the evidence, that in November 2013 there were matters of such sufficient concern to the appellant that she required changes to the draft lease that had been submitted by the respondent and she emailed the respondent detailing those proposed amendments. With that in mind, the magistrate found that not all of the conditions of the proposed lease were sufficiently clear at the time the respondent signed the Instrument such that the respondent could have known what he might have been guaranteeing, including, the amount of the monthly rental payment.

[55] On the evidence before the court such a conclusion was reasonably open.

[56] Furthermore, insofar as the appellant's allegation that the respondent failed to plead to the appellant's claim that the respondent knew all relevant terms at the time the Instrument was executed due to the contents of the "heads of agreement", I disagree. At paragraph 3(a) of the Further Amended Defence the respondent pleaded:

> *"The guarantee and indemnity referred to therein could not have been a guarantee and indemnity given in respect of "the Lease" pleaded by the plaintiff as the lease was not then in existence and its terms had not yet been negotiated or agreed upon between the plaintiff and the first defendant, such that the second defendant could not be said to have guaranteed those terms."*

[57] The respondent was entitled to rely upon that pleading and this is not a situation where deemed admissions arise.

Order

1. The appeal is dismissed.
2. The appellant is to pay the respondent's costs of and incidental to this appeal to be assessed on the standard basis.

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32 Transcript pp 1-51 l 35.
33 Transcript pp 1-83 l 36.
34 Transcript pp 1-84 l 7; Transcript pp 1-84 l 34.