DISTRICT COURT OF QUEENSLAND

CITATION:	*BS Investments Pty Ltd & Anor v Contempree & Ors* [2020] QDC 29
PARTIES:	**BS INVESTMENTS PTY LTD (ACN 135 819 939) AS TRUSTEE FOR B ENTITIES SMITH INVESTMENT TRUST** (First plaintiff) and **TIRLEY HOLDINGS PTY LTD (ACN 135 942 862) AS TRUSTEE FOR GODDARD FAMILY TRUST** (Second plaintiff) **v** **MARK CONTEMPREE** (First defendant) and **PAUL DAVID POWER** (Second defendant) and **FIONA POWER** (Third defendant)
FILE NO/S:	586/18
DIVISION:	Civil
PROCEEDING:	Trial
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	12 March 2020
DELIVERED AT:	Brisbane
HEARING DATE:	3-4 December 2019; 10 February 2020
JUDGE:	Kent QC DCJ
ORDER:	**1. Judgment for the plaintiffs against the defendants in the sum of $528,555.40** **2. I will hear the parties as to costs**
CATCHWORDS:	GUARANTEE AND INDEMNITY – ASSIGNMENT – Whether the lease was a valid lease capable of assignment – Where the 10 year lease was not registered at the time of assignment – Whether the assignment document was ineffective because of lack of proper definition of the interest

to be assigned, such as to be in breach of s10 of the *Property Law Act 1974* (Qld)

GUARANTEE AND INDEMNITY – ENFORCEMENT OF GUARANTEE AND RELATED MATTERS – Whether a right to payment can be assigned or guaranteed on a tenancy at will or equitable lease – Whether the first defendant was free of his guarantee because the guarantee operated only in respect of a legal lease – Where the lease was imperfectly executed.

GUARANTEE AND INDEMNITY – LANDLORD AND TENANT – LEASES AND TENANCY AGREEMENTS – SUBJECT MATTER OF LEASE – OTHER MATTERS – Whether the lease was not properly defined in the guarantee so as to render it ineffective – Whether the guarantee was so indecipherable as to contravene s 56 of the *Property Law Act 1974* (Qld).

LANDLORD AND TENANT – TERMINATION OF THE TENANCY – FORFEITURE – RE-ENTRY AND PROCEEDINGS – WHAT CONSTITUTES RE-ENTRY – Whether the presence of a caretaker on the premises constituted a re-entry by the lessor – Where the keys were not returned to the lessor – Where the lessee's chattels remained on the premises.

LANDLORD AND TENANT - TERMINATION OF THE TENANCY – GENERALLY – Whether the plaintiff elected to terminate the lease for breach – Where the lessee fell into arrears – Whether the delay in registering the lease constituted a repudiation/termination – Whether the defendants affirmed the lease – Whether the parties' conduct was consistent with maintaining the lease.

LANDLORD AND TENANT – TERMINATION OF THE TENANCY – SURRENDER – SURRENDER BY OPERATION OF LAW – PARTICULAR CASES – Whether the plaintiff surrendered the lease by operation of law – Whether the plaintiffs re-entered the premises or otherwise terminated the lease – Whether the presence of a caretaker was reasonable in protecting the first plaintiff's position and maintaining the property while maintaining their rights against the defendants.

ESTOPPEL – ESTOPPEL BY JUDGMENT – ANSHUN ESTOPPEL – GENERALLY – Whether the plaintiff was estopped from bringing the proceedings because of an earlier action commenced in the Magistrates Court, alternatively whether there was a *res judicata.*

LEGISLATION: *Land Title Act 1994* (Qld), ss 71 and 181.

Property Law Act 1974 (Qld), ss 10, 11, 56 and 129.

Real property Act 1861 (Qld), ss 43 and 129.

CASES: *American Dairy Queen (Qld) Pty Ltd v Blue Rio Pty Ltd* (1981) 147 CLR 677.

Anderson v Tooheys Ltd (1937) SR (NSW) 74.

Ankar Pty Ltd v National Westminster Finance (Aust) Ltd (1987) 162 CLR 549.

Artworld Financial Corporation v Saharyan (2009) EWCA CIV 303.

Ashton v Hunt [1998] QCA 308.

Blashki v Utara (2002) NSWSC 1201.

Brambles Holdings Ltd v Bathurst City Council (2001) 53 NSWLR 153.

Buckworth v Simpson (1835) 1 CRM & R 834; 148 ER 1317.

Callahan v O'Neill (2001) NSWCA 366.

Chan v Cresdon Pty Ltd [1989] 168 CLR 242.

Commercial Bank of Australia Ltd v Colonial Finance, Mortgage, Investment and Guarantee Corp Ltd (1906) 4 CLR 57.

Commonwealth Bank of Australia v Figgins Holdings Pty Ltd (1994) 2 VR 505.

Commonwealth Life Assurance Ltd v Anderson (1945) 62 WN (NSW) 240.

Cooke v Gill (AN 73 LR 8 CP 107).

Country Security Pty Ltd v Challenger Group Holdings Pty Ltd (2008) NSWCA 193.

Emata Group v Woodville Diagnostics and Imaging Pty Ltd [2016] SADC 96.

Heid v Connell Investments Pty Ltd [1987] 9 NSWLR 628.

Hookham Constructions Pty Ltd v Lindemann [2013] QCA 274.

Immer (No. 145) Pty Ltd v The Uniting Church in Australia Property Trust (1993) 182 CLR 26.

J & S Chan Pty Ltd v McKenzie (1994) Aust Conv Rep 610.

Konica Business Machines Pty Ltd v Tizine Pty Ltd (1992) 26 NSWLR 687.

Lanai Unit Holdings v Mallesons Stephen Jaques [2017] QSC 251.

Landale v Menzies (1909) 9 CLR 89.

Laurinda Pty Ltd v Capalaba Park Pty Ltd (1989) 166 CLR 623.

Leroux v Brown (1852) 12 CB 801.

Maridakis v Kouvaris (1975) 5 ALR 197.

Melbourne Port Authority v Anshun Pty Ltd [1981] HCA 28.

Meriton Apartments Pty Ltd v Owners of the Strata Plan No 72381 [2015] NSWSC 202.

Minister for Land and Water Conservation v NTL Australia Pty Limited (2002) NSWCA 149.

Perrylease Ltd v Imecar AG [1988] 1 WLR 463.

Rosser v Austral Wine and Spirit Co Pty Ltd [1980] VR 313.

Scobie v Collins [1895] 1 Q.B. 375.

Shevill v Builders Licencing Board (1982) 149 CLR 620.

Tall-Bennett & Co Pty Ltd v Sadot Holidays Pty Ltd (1988) NSW Conv Rep 57,881.

Tasita Pty Ltd v Sovereign State of Papua New Guinea (1994) 34 NSWLR 691.

Technomin Australia Pty Ltd v *XStrata Nickel Australasian Operations Pty Ltd* (2014) WASCA 164.

White & Carter (Councils) Ltd v McGregor (1962) AC 413.
Wong v Mura (2002) NSWSC 877.

COUNSEL: LD Bowden for the plaintiff

JM Manner for the first defendant

No appearance for the second or third defendants

SOLICITORS: Provest Law for the Plaintiff

O'Sullivan's Law Firm for the first defendant

No appearance for the second or third defendants

Background

[1] This is a claim for money said to be owing under a guarantee and indemnity. The proceedings were contested by the first defendant; the other two defendants did not attend the trial and it proceeded in their absence.

[2] The background is that the plaintiffs own a commercial building at 65-67 Rankin Street, Innisfail which was operated as a backpacker's hostel. They purchased the building in July 2013, apparently from Bemon Pty Ltd (Bemon) and on 29 November 2013 they leased the premises to Bemon for a term of 10 years expiring on 28 November 2023. The obligations of Bemon under the lease were guaranteed by its director, Mr Contempree.

The Transaction

[3] In late 2016 the plaintiffs were requested by Bemon to consent to an assignment of the lease to Foxworth Pty Ltd (Foxworth); generally, the scenario was that Mr Contempree's company had owned the freehold; sold it in 2013 to the plaintiffs and leased it back to continue the backpacker's business; then sold the business to Foxworth in 2016. The plaintiffs consented to the assignment and in return all defendants agreed to guarantee the obligations of Foxworth under the lease. Due to an oversight, however, the lease was not registered until December 2016.

[4] Title searches show that the plaintiffs became registered as proprietors of the land on 28 January 2014. The lease to Bemon was registered on 22 December 2016 (about three years after execution) and was for 10 years, terminating on 28 November 2023. That lease was assigned to Foxworth, the transfer being registered on 27 February 2017. Foxworth remains the registered lessee of the premises.

The Dispute

[5] Unfortunately Foxworth fairly quickly fell into arrears with the rent and in June 2017 the plaintiffs commenced proceedings against all the guarantors for payment under the guarantees in respect of the rent being due and owing by Foxworth. The claim was for $47,226.76 and was brought in the Brisbane Magistrates Court. Judgment was given on this sum, which included legal fees, in February 2018. As the pleadings set out, in April 2018 the plaintiffs were able to call on a bank guarantee in the sum of $50,000 in partial satisfaction of amounts owing under the lease. Thus the amount claimed in the present proceedings (issued in May 2018 in the Magistrates court at Southport; later transferred to this court in February 2019) was originally $146,931.38, for rent, outgoings and costs of default together with interest and costs. These amounts have, on the plaintiffs' case, continued to accrue, and the amount presently claimed is $528,555.40 including monies continuing to accrue pursuant to the said deeds of guarantee and indemnity until trial.

[6] Although the second and third defendants contested the matter by filing a defence, they have been unrepresented for some time, their previous legal representative

having been given leave to withdraw, and despite notice they did not attend the trial. Thus in respect of those defendants the plaintiff proceeds pursuant to UCPR 476, that is, they have called evidence to establish an entitlement to judgment against the defendants in the way directed. The court may still consider the absent defendant's pleadings.[1] In the event, the plaintiffs were required to conduct their case against the first defendant, so that the various matters in issue were supported by evidence.

[7] The matter was contested by the first defendant as set out below. In the event, the arguments were as to liability rather than quantum.

The pleadings

Amended Statement of Claim

[8] The plaintiff's amended statement of claim sets out an entitlement to payment of money pursuant to the guarantees broadly as summarised above.

Amended Defence

[9] The amended defence of the first defendant was filed on 25 November 2019. It pleads that there was no valid lease (and thus no performance thereunder to guarantee), in the sense that the purported lease was not valid at law until it was registered on 22 December 2016 and the plaintiffs' failure to effect registration until then constituted a repudiation of the agreement to lease which in turn gave the first defendant the right to rescind the agreement to lease, which "**it"** (sic – the first defendant is Mr Contempree, and it was Bemon which was in possession, not him) did by vacating possession. It is also pleaded that the purported guarantee does not comply with s 56 of the *Property Law Act*, alternatively the only lease in existence as at 16 December 2016 was a tenancy from month-to-month. The first defendant further pleads that because of the earlier Magistrates Court proceedings there is an *Anshun* estoppel; alternatively that the plaintiff is precluded from bringing these proceedings pursuant to the *res judicata* principle.

[10] Another alternative plea is that to the extent that any lease existed between the plaintiffs and Foxworth, it was surrendered or terminated in about April 2017, and thus the guarantee is limited to that period. It is also said that the plaintiffs failed in their duty to mitigate losses in respect of the alleged lease.

Reply

[11] In reply, the plaintiffs plead that there was at all material times a valid equitable lease; and/or a valid month to month tenancy. They deny any repudiation and also say the first defendant affirmed the lease and assignment by assigning and guaranteeing it. As to any estoppel or res judicata, the present claim is only for rent which became payable after the commencement of the earlier proceedings (and thus not claimable therein); thus the present cause of action is distinct from the earlier one. They deny any termination or surrender of the lease. Further, as the claim is for rent, i.e. debt rather than damages, there is no duty to mitigate.

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1 *Banque Commerciale SA, En Liquidation v Akhil Holdings Ltd* (1990) 169 CLR 279.

The evidence

Ms Podleska

[12] An affidavit was filed, sworn by Ms Podleska, the solicitor who at one time acted on behalf of the plaintiffs in relation to the proposed assignment of the lease of the premises from Bemon to Foxworth. She was not cross examined. She deposed that her instructions were that the obligations of Foxworth as assignee were to be guaranteed by the first defendant, the director of Bemon and the second and third defendants as directors of Foxworth. She drew up a deed of covenant and assignment and guarantee. She produced a deed of covenant and assignment signed by the landlord plaintiffs; a deed of covenant and assignment signed by the assignor, Bemon, and its director Mr Contempree; and a deed of covenant and assignment signed by the assignee, Foxworth, and its directors, Mr and Mrs Power. The first defendant's guarantee was signed separately by Mr Contempree and the two plaintiff landlords, and copies of those documents are exhibited by Ms Podleska. She deposed that during the transaction, despite the documents being signed as counterparties, there were no complaints from the various representatives of the parties.[2]

Mr Goddard and Mr Smith

[13] Mr Goddard, sole director of Tirley Holdings Pty Ltd and Mr Smith, sole director of BS Investments Pty Ltd, gave evidence for the plaintiffs; these companies own the subject property.[3] Mr Goddard issued monthly invoices for rent and outgoings, such as insurance and rates for the property, and provided activity statements recording these invoices and payments thereof to the court.[4] Mr Smith controlled the bank account, issued BAS statements and liaised with the accountant.[5]

[14] It was unknown to all parties that the initial lease between the plaintiffs, the first defendant and Bemon remained unregistered for some time.[6] When the lease was assigned to Foxcroft and Mr and Mrs Power in December 2016, Mr Contempree vacated the premises and the Powers took possession of the property including business chattels and commenced paying rent to the plaintiffs.[7]

[15] An agent, Mr Richard George, negotiated the sale of the backpacking business to Foxworth[8] and the assignment of the lease to Foxworth and the Powers.[9] Mr Goddard said Mr George effectively 'became the manager of the backpackers business.'[10] Both Mr Goddard and Mr Smith communicated with Mr George regarding Foxcroft's outstanding payments.[11] Although Mr Goddard attempted to contact Mr Power directly 'on numerous occasions' he never received a reply.[12] On 25 July 2017 Mr George emailed Mr Smith and Mr Goddard stating:

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2 Paragraph 10.
3 T 1-37, ll 10-15.
4 T 1-39, l 10; Exhibit 1.
5 T 1-43, ll 45-46 and T 1-89, ll 40-50.
6 T 1-44, ll 15-26 and T 1-90, ll 1-19 and T 2-43, l 5.
7 T 1-90 ll 25-30.
8 T 1-44, ll 1-13.
9 T 1-44, ll 1-13.
10 T 1-44, ll 30-35.
11 T 1-44, ll 30-35 and T 1-91, ll 5-15.
12 T 1-44, ll 40-45.

> …I tried to negotiate with Paul Power in regard to his company purchasing the freehold of the lodge. However I was not successful and he will know [sic] longer entertain the idea…as of today, I will have no involvement with the Lodge for Paul Power. I am also informing you that Paul intends to relinquish the lease as from the 31st of this month… he intends to not carry on trading.[13]

This is evidence of the fact of these assertions by Mr George, possibly Mr Power's agent, or more correctly his former agent. There is no direct evidence of those matters, or their truth, from Mr Power, nor was there any evidence from Mr George other than emails and text messages. The message has little weight, as evidence of the actions of Mr Power or Foxcroft at that time.

[16] When asked whether Mr George was negotiating the sale of the property on his behalf, Mr Goddard said 'I'm not quite sure' but conceded the sale of the property 'may have been one of the various things that we discussed.'[14] Mr Goddard explained he interpreted this email as an 'embittered statement' or a 'sour grapes email' from Mr George.[15] He believed a legal lease was in place and would continue as he had not heard from Mr Power or Foxcroft and understood Mr George no longer represented Mr Power.[16] Mr Power never contacted Mr Goddard nor returned the keys and Mr Goddard never attempted to take possession of the premises.[17] Although the plaintiffs were informed that Mr Power intended to vacate the premises through Mr George, Mr Goddard said that, to his knowledge, Foxworth remained in control of the premises[18] and Mr Smith said 'as far as I'm aware, they're [Foxworth Pty Ltd] still there.'[19] However, the plaintiffs clearly acted on the understanding that Foxworth had abandoned the premises and Mr Smith stated this in an email on 31 August 2017 to Colliers real estate agents.[20]

[17] Mr George's email quoted above also provided financial figures for the business and contact details for the property manager, Mr Wollschlager. Mr Wollschlager was hired by Mr George on behalf of Mr Power in around January 2017; he was solely responsible for managing the premises and never met Mr Power.[21] When Mr George advised Mr Wollschlager that Mr Power was ceasing business, Mr Wollschlager shut down the backpackers business but two or three permanent tenants remained on the premises.[22] All of the furniture, equipment and other chattels owned by Foxworth remained in the building after Mr Power ceased business.[23]

[18] Following Mr George's email, the plaintiffs were in contact with Mr Wollschlager. Mr Smith called him and Mr Wollschlager ultimately provided Mr Smith and Mr

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13 Exhibit 8.
14 T 1-55, ll 26-7 and ll 37-50.
15 T 1-55, ll 10.
16 T 1-55, ll 10-15.
17 T 1-49, ll 5-10.
18 T 1-50, l 43.
19 T 1-111, ll 15-20.
20 Exhibit 16, tab 10.
21 T 2-11, ll 10-25.
22 T 2-11, ll 40-45.
23 T 2-26, ll 10-36.

Goddard with a business proposal via email.[24] It is unclear whether this proposal was volunteered by Mr Wollschlager or requested by Mr Smith; Mr Wollschlager said Mr Smith specifically requested the information[25] but Mr Smith said they discussed that 'we'd have to do something…. Whatever we could do subject to the lease' and Mr Wollschlager suggested he could put a proposition forward.[26]

[19] Mr Goddard also spoke with Mr Wollschlager but did not ask for the business figures nor otherwise discuss the business[27] except to say the proposal had to wait until the legal case resolved as the lease was still afoot.[28] Mr Smith also responded to the proposal via email on 18 October 2017 stating 'we are currently waiting on the go ahead from our attorney. I suggest you carry on as you have been until we hear from him.'[29] Mr Wollschlager recalled telling Mr Smith that the backpackers business had ceased but that a few permanent tenants remained[30] and said he agreed to maintain the property on the understanding that the plaintiffs would 'look after him down the track.'[31]

[20] Mr Smith and Mr Goddard also approached agents about selling the property whilst still subject to the lease.[32] As noted above, on 31 August 2017 Mr Smith emailed an agent, Colliers, stating 'the lessees have effectively abandoned the property' and Mr Wollschlager was 'the last manager running the backpackers'.[33] In evidence, Mr Goddard said Mr Wollschlager was still 'managing the property'[34] and communicating with himself and Mr Smith at that time. However, Mr Goddard later said Mr Wollschlager was 'an occupier/caretaker, not a manager' and that Mr Wollschlager asked him if he could stay at the property and volunteered to maintain it.[35] He said Mr Wollschlager was not acting under his nor Mr Smith's direction but they enabled him staying on and maintaining the property to clean the pool and prevent squatters.[36] Mr Goddard thought Mr Wollschlager was living at the property and benefiting from free accommodation but said he did not know there were other tenants living on the property.[37] Although Mr Goddard conceded his company received intermittent payments from Mr Wollschlager, he stated this was for payment of the electricity bill, not rent;[38] Mr Smith confirmed this.[39] In response to the defendant's suggestion that Mr Wollschlager was collecting payments from tenants on their behalf, Mr Smith said 'If I've got somebody collecting money for me, I want a weekly list of income and expenditure sent to me… not an odd payment here and there for electricity.'[40]

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24 Exhibit 9.
25 T 2-19, ll 10-11.
26 T 1-94, l 45 – T 1-95, l 30.
27 T 1-58, ll 1-10 and T 1-59, ll 30-35.
28 T 1-48, ll 10-45.
29 Exhibit 9.
30 T 2-12, ll 1-20.
31 T 2-12, ll20-30.
32 T 1-93, ll 30-45.
33 Exhibit 16, tab 10.
34 T 1-60, ll 20-21.
35 T 1-61, ll 15-50.
36 T 1-62 – T 1-63.
37 T 1-63, ll 15-30 and T 1-64, l 1-10.
38 T 1-69.
39 T 1-96, ll 10-30; T 1-97, l 40 – 1-99, l 30; Exhibit 11
40 T 1-118, ll 45-50.

[21] The plaintiffs' records were that they had spent $14,700 on electricity and been reimbursed $13,779.99.[41] Mr Goddard recalled that the electricity account was created in his name as Mr Wollschlager was unable to open an energy account, although Mr Wollschlager said he never tried to open an energy account in his name.[42] Mr Smith explained that they accepted intermittent reimbursements from Mr Wollschlager rather than simply providing him with the electricity bill as he didn't have the capacity to pay the bills outright.[43] Mr Goddard's evidence was that he, and Mr Smith, enabled Mr Wollschlager to remain on the property so as to protect the asset.[44] Mr Smith summarised the relationship as 'he was there, he paid the electricity and kept the swimming pool clean.'[45] Mr Wollschlager agreed in the initial discussion regarding electricity, Mr Smith wanted it on so Mr Wollschlager could clean the pool and present the place as open.[46] The plaintiffs did not pay nor reimburse Mr Wollschlager for any works done on the property but Mr Smith conceded 'he might have been letting rooms on his own… for his own benefit… I don't know.'[47]

[22] As at the time of trial, Mr Goddard believed Mr Wollschlager was still maintaining the property[48] but Mr Smith said he didn't know as they hadn't received any payments since September.[49] Mr Smith did not believe the property was insured and said they would likely not pay future electricity bills as they were no longer receiving any money from Mr Wollschlager.[50]

Mr Wollschlager

[23] Mr Wollschlager was called by the first defendant. He said that after his initial conversation with Mr Smith he continued collecting rent from the permanent tenants.[51] He agreed he did not discuss the rental monies and how they would be used with the plaintiffs but said he used this money to pay Mr Smith for electricity bills and assumed Mr Smith knew this.[52] Mr Wollschlager agreed he was not provided with electricity bills but instead paid Mr Smith $300 per week to manage the electricity accounts.[53] However, he also said there was an express conversation with Mr Smith where they agreed that Mr Smith would get '$300 to pay the rent from the tenants' and Mr Wollschlager would keep any excess.[54] For example, Mr Wollschlager spent about $80 per week on maintenance expenses from rental money.[55] He said there was 'very little conversation' with the plaintiffs and they didn't discuss the tenancies or the business; they only spoke when Mr Wollschlager was late to pay the $300.[56] Mr Wollschlager agreed he never gave the plaintiffs any

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41 Exhibit 11.
42 T 1-70, l 30.
43 T 1-126, ll 20-40.
44 T 1-73, l 50.
45 T 1-101, ll 45-50.
46 T 2-21, ll 25-35.
47 T 1-108, ll 35-50.
48 T 1/75, l 40.
49 T 1-123, ll 30-40.
50 T 1-124, ll 6 – 50.
51 T 2-14, ll 34-35.
52 T 2-12, l 36 – 2-13, l 15.
53 T 2-14, ll 44-45 and T 2-13, ll 5-10.
54 T 2-15, ll 10-25.
55 T 2-15, 1-10.
56 T 2-15, ll 25-42.

details of who the tenants were nor the turnover or expenses of the property.[57] He denied ever being employed by the plaintiffs[58] but agreed he kept any rental money remaining after paying the plaintiffs and for maintenance.[59]

[24] At time of trial, due to illness, Mr Wollschlager had not attended upon the property, except to walk the fire department through, for about three and a half months.[60] The fire department had asked him for access to assess safety standards then contacted Mr Smith to advise of safety breaches.[61] Mr Wollschlager advised Mr Smith he was acquiring quotes to resolve the breaches and understood he was expected to take care of it.[62] Mr Wollschlager had no capacity to pay the quotes and the fire department advised him they would approach Mr Smith and Mr Goddard about it.[63] That was Mr Wollschlager's last involvement with the property.

David Tate

[25] Mr Tate is a maintenance diesel fitter by occupation but he conducted an evidence-gathering exercise and gave evidence for the first defendant. He posed as someone seeking accommodation at the property and was greeted by Jamie Carcher/Munroe who stated he was in charge of looking after the building.[64] Mr Tate paid Mr Munroe $100 cash for two night's accommodation and was given a handwritten document by way of receipt.[65] The interaction was recorded on Tate's phone.[66] Mr Tate agreed the room was of satisfactory condition and the accommodation business was generally operational.[67] Mr Wollschlager said Jamie Carcher's actual name was Jamie Munroe. He said Jamie was a resident and 'an opportunist.'[68] This seems an apt description; my conclusion on the evidence is that he took the opportunity to obtain some money from Tate and did not account to anyone for it. Neither Mr Smith nor Mr Goddard knew a Jamie Carcher or Jamie Munroe.[69]

Mr Contempree

[26] Mr Contempree also gave evidence to confirm that Bemon departed the property on 19 December 2016 and agreed that when the initial lease was assigned to Foxworth he believed the lease was fully registered and that he was endowing Foxworth with the residual term of the lease.[70] He confirmed that when Bemon left the property he wasn't intending to terminate a tenancy at will as he 'believed the plaintiffs has done their due diligence and had formed a bond with the new lessees and I was free to go and do what I… wanted to do.'[71]

[27] The chronology is therefore:

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57 T 2-28, ll 1-9.
58 T 2-32, l 35.
59 T 2-33, ll 1-10.
60 T 2-16, ll 40-45.
61 T 2-17, ll 5-29.
62 T 2-17, ll 30-45.
63 T 2-18, ll 1-10.
64 T 2-34, ll 15-35.
65 T 2-34, l 45 – 2-35, l 30; Document marked for identification B.
66 Part of Exhibit 16
67 T 2-35, l 10 – 2-36, l 15.
68 T 2-28, l 40 – 2-29, l 20.
69 T 1-75, ll 40-43 and T 1-124, ll 1-5.
70 T 2-43, ll 14-16.
71 T 2-42, ll 34 and 2-44, ll 20-25.

- Pre-2013 – the property was owned by, and the business operated by, Bemon, Mr Contempree's company

- 2013 – the property, i.e. the freehold, was sold by Bemon to the plaintiffs and leased back for 10 years (from 29 November 2013), Contempree guaranteeing Bemon's obligations; no one realised the lease was not registered due to oversight (transfer of the freehold was registered 28/1/2014). Rent was paid and the leasing arrangements continued uneventfully

- 2016 – Bemon sold the business to Foxworth, obtaining the plaintiffs' consent thereto, on the basis of guarantees from Contempree and the Powers; the parties belatedly realised the non-registration of the lease

- 28/11/2016 – Contempree signed the guarantee, bearing an apparently operative date of 16/12/2016

- 16/12/2016 – remaining guarantee and assignment documents signed

- 22/12/2016 – lease registered

- 27/2/2017 – assignment to Foxworth registered

- 4/4/2017 – Foxworth was in arrears, and a Notice to Remedy Breach of Covenant was delivered

- 16/6/2017 - the plaintiffs commenced Magistrates Court proceedings against all the guarantors for payment under the guarantees in respect of the rent being due and owing by Foxworth (at that time $44,628.86)

- 25/7/2017 – Mr George, the Powers' former agent, communicated their apparent intention to "relinquish" and not continue trading (nothing along these lines was sent by the Powers)

- 27/7/2017 – Defence filed in Magistrates Court action

- August 2017 onwards – the plaintiffs acknowledged Foxworth had abandoned the property, and arranged with Wollschlager on an informal basis, to collect some rent to be forwarded to them to offset the electricity bill, which they felt had to be kept connected

- 31/8/2017 – the plaintiffs emailed another agent, Colliers, attempting to sell the property **subject to the lease**

- 2/2/2018 – judgment for the plaintiffs in the Magistrates Court action

- April 2018 – bank guarantee paid, in partial satisfaction of the above

- May 2018 - these proceedings commenced, in respect of the guarantees for rental obligations including the period subsequent to that captured by the Magistrates Court action

Factual Matrix

[28] Many of the factual matters relevant to the action, as outlined above, are not in dispute. Bemon is controlled by Mr Contempree. In 2013 Bemon was the owner of

the Innisfail property and Mr Contempree put it up for sale whereupon it was purchased by the plaintiffs. It was leased back to Bemon on the basis that Contempree guaranteed Bemon's performance. Bemon paid the rent for three years. During this time, the 10 year lease between the parties was not registered, apparently by an oversight. Everyone concerned thought that all proper arrangements were in place.

[29] What then followed was that Mr Contempree sold the business associated with the property to Foxworth (including the balance of the term of the lease, and chattels) with the plaintiffs' consent, on the basis of his guaranteeing Foxworth's obligations. The transaction was intended to have, and did have, an operative date of 16 December 2016. Around this time it was discovered that the lease had not been registered, and this happened on 22 December 2016. The assignment to Foxworth was registered on 27 February 2017. Thus at the time of Contempree entering into the guarantee, the lease was not registered, a fact which assumes significance in this case.

[30] A few months after going into possession Foxworth fell into arrears with the rent. After that time it has not paid rent. The only payments thereafter were made by Mr Wollschlager.

[31] In the email sent by Mr George on 25 July 2017 it was indicated that Mr and Mrs Power intended to "relinquish" the property. The plaintiffs submit that the text of this falls far short of what would have been necessary for proper abandonment of the property. As noted above, the evidentiary value of that email is slight. The email also mentions that Wollschlager is the Powers' manager. There was no suggestion at that time, or since, of the Powers making any arrangements to remove their chattels from the property.

[32] In August Mr George indicated that Mr Wollschlager was still running the place, that is, (the plaintiffs submit) Foxworth was still in possession. Mr Smith went along with the idea of leaving Mr Wollschlager in place. There was no written confirmation that Foxworth had abandoned the property.

[33] Thereafter the plaintiffs were attempting to sell the property subject to the lease, that is, in the plaintiffs' submission, affirming the lease; and they were suing the guarantors. Legal proceedings were mentioned in correspondence. The plaintiffs also submit the fact that the electricity had to be connected in Mr Smith's name was not significant, and refer in this regard to Exhibits 11 to 14 (the figures relating to the account, and texts and emails relating thereto).

[34] What the plaintiffs submit is that they basically needed to maintain the premises. They never took possession, for example, they never had possession of keys. Wollschlager was not their employee. It is submitted that they have always maintained the lease was affirmed and they are suing in relation to unpaid rent. The plaintiffs then make submissions as to the various defences advanced.

[35] A number of issues thus arise as follows.

First Issue: Lease not registered

Defendant's Submissions

[36] The first defendant submits firstly that no legal lease existed as between Bemon and the plaintiffs nor did one exist by assignment between Foxworth and the plaintiffs, because of the unregistered and thus ineffective instrument relied on by the plaintiffs. Thus failure to register the lease until 22 December 2016 had the result that at the time of the purported assignment namely, 16 December 2016, no legal lease existed in respect of the property; s 181 of the *Land Title Act* 1994 (Qld) relevantly states that "an instrument does not transfer or create an in a lot at law until it is registered."

[37] The first defendant refers to *Chan v Cresdon Pty Ltd*[72] and *Ashton v Hunt*.[73] He submits that the Queensland Court of Appeal in *Ashton* followed the reasoning from *Chan*, notably "… the combined effect of s 71 and 181 of the *Land Title Act* seems to be that an unregistered instrument fails to transfer an interest at law… (possibly) it has validity between the immediate parties but that it fails to obtain any of the benefits of indefeasibility."[74]

[38] Thus the first defendant submits that for the entire duration of Bemon's tenancy of the property the nature of the tenancy was that of a lease at will terminable on a month's notice, by virtue of the plaintiff's failure to register the lease document (of course, this somewhat begs the question of exactly what kind of interest he was selling when selling the backpacker's business to the Powers, particularly in view of his sworn evidence that he believed the lease to be fully registered and he was endowing the purchasers with **the balance of the term of the lease**. The subjective intentions of the parties are not determinative, but provide the background against which the nature and effect of the dealings is to be determined).

[39] The first defendant submits that the High Court in *Chan*, applying the identical provisions of s 181 of the *Land Title Act* and s 129(1) of the *Property Law Act* 1974 (Qld) and of the then *Real Property Act* 1861, s 43 and 129 respectively, held that in the circumstances of a tenant who had taken occupation of a premises under an unregistered lease, "a common law tenancy at will terminable on one month's notice came into existence".[75] The first defendant also refers to Duncan *"Commercial Leases in Australia"* 7th Edition [10,4510] stating that a "lessee in possession under an unregistered lease for a term in excess of three years is considered to be a tenant at will."

[40] The first defendant further quotes from *Ashton* as follows:

> "The rental obligations of the lessee arose only because, at least until such time as the lease was actually registered, (the lessee) by entering into possession and paying rent became subject to a common law tenancy at will which imported a covenant to pay rent in the terms of the covenant in the unregistered lease"[76]
> although his Honour was actually there quoting the finding of the trial Judge.

[41] The first defendant thus submits that this aspect of the case is fatal to the plaintiff's claim for rental payments in that the lessee had departed the property prior to the

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72 [1989] 168 CLR 242.
73 1998 QCA 308.
74 Supra at [13] per Thomas JA.
75 *Chan v Cresdon* at p 249
76 At [6] per Thomas JA.

lease becoming a legal lease. Presumably in this context the first defendant is referring to "the lessee" as Bemon.

[42] The first defendant then submits that the lease at will which did exist was personal to Bemon, incapable of assignment and "evaporated" upon Bemon's departure on 19 December 2016. Further, that in the event that the lease was held to be an equitable lease, the right to payment of rent does not flow to an equitable assignee as obligations cannot be equitably assigned and "equitable assignee does not … render him or herself liable to be sued directly by the lessor on the covenants of the lease".[77] Therefore, so the first defendant submits, any claimed rights to payment could not have been assigned or guaranteed by the first defendant on a monthly tenancy at will, or even an equitable lease. The first defendant submits that the above analysis is a complete answer to the plaintiff's claim.

[43] It is noteworthy, however, that in both *Chan* and *Ashton*, the guarantee referred to the obligations of the lessee "under the terms of this lease", which was intended to be a registered lease, but in each case was never registered. In this case, by contrast, the terms of the guarantee were, as the plaintiffs submit, wider, and further the lease **did** become registered, before the time at which this action was commenced, and prior to the period in respect of which the relevant rental obligation, the subject of this action, is said to have accrued. Moreover, in *Ashton* Thomas J.A. said at [13]:

> "The combined effect of ss 71 and 181 of the *Land Title Act* seems to be that an unregistered instrument fails to transfer an interest at law, but the instrument is not rendered invalid merely because of lack of registration. One immediately notes the use of the double negative in "not invalid merely because…". What validity might this section confer upon an unregistered lease that it did not already possess? One possible answer is that suggested by the appellants, namely that it has validity between the immediate parties but that it fails to obtain any of the benefits of indefeasibility. The other answer is that it retains the same limited effect as that recognised for such a document in *Chan*. **It will be remembered that *Chan* did not hold the document to be void or totally ineffective. It remains the document which will become valid for all purposes if and when registered.** It is also the source of equitable rights and is a reference source for the ascertainment of the conditions of the common law tenancy that usually exists up until the time of registration." (emphasis added)

Thus the plaintiffs rely on the later, but pre – proceedings, registration of the lease, differing from *Chan* and *Ashton*, for the validity of it and the enforceability of the rental obligations thereunder, and thus the guarantee thereof by the defendants.

Plaintiff's Response On The First Issue

[44] As to the reliance by the defendants on the feature that the lease was not registered at relevant times, the plaintiffs make a number of submissions:

(a) the agreement between the parties, as *evidenced by* the executed lease, was always enforceable in equity[78] or, as the plaintiffs style it, a valid equitable lease[79]; indeed, for the term specified therein;[80]

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77 Virgona, L. "Commercial and Tenancy Law", 4th Ed., at [15.19], p 498

78 See e.g. *Telado Pty Ltd v Vincent and Anor* [1996] NSWSC 286

79 *Chan* at pp248, 251-2; further at 257-8

80 *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 57 ALR 609 per Mason J at 616

(b) delay in registering the lease, by oversight, is not enough to relieve the defendants of their obligations. The plaintiffs submit that *Laurinda Pty Ltd v Capalaba Park Pty Ltd*[81] (where a lessee was able to rescind, the lessor having disregarded its obligations) is a different kind of case, where there was vigorous correspondence between the parties including referring to the issue of registration of the lease, i.e. the parties were aware it was unregistered and the debate raged in that context. The lessor in that case was described as being dilatory, cavalier and recalcitrant. There is simply no such correspondence here, so the plaintiffs argue; rather the parties proceeded on the basis that everyone had the impression the lease was in fact registered. Nothing the plaintiffs did could be construed as a repudiation;

(c) the plaintiffs also submit that the first defendant never elected to terminate the lease on the ground it was not registered, rather he affirmed it by seeking to have it assigned to Foxworth (assuming it was registered), which in fact not only occurred, but was perfected by the later registration of the assignment. After signing the guarantee, he did nothing to try to avoid its effect between the date of execution and when the transfer of the then-registered lease was finally registered in February 2017. The plaintiffs submit that if there is an election to terminate it must be unequivocal; *Immer (No. 145) Pty Ltd v The Uniting Church in Australia Property Trust.*[82] There is simply no evidence here of any election to terminate; quite the contrary;

(d) therefore the plaintiffs submit that the agreement to lease remained on foot for the benefit of both parties. If there was any repudiation thereof it had not been acted on and further was retracted by the registration of the lease in December 2016. Thereafter Bemon was not in a position to terminate;[83]

(e) therefore there was at all times a valid equitable lease; which was capable of assignment; which was validly assigned; and in respect of which the first defendant guaranteed the obligations of Foxworth;

(f) the lease can be said to be a lease at will until its expiry date in 2023 since it was **not** terminated by a months' notice. Although the defendant contends that it was terminated in this way because Bemon vacated the premises, the plaintiffs submit that it cannot be ignored that this was not on the basis that the tenancy was coming to an end; rather, as outlined above, all of the parties were involved in a consensual transfer of the ongoing lease to Foxworth (and presumably, in those dealings, a value was ascribed by Bemon and the first defendant to the unexpired portion of the presumed 10 year lease, i.e. he claimed a benefit from its presumed existence). Further the plaintiffs submit that such a lease is assignable:

- All periodic tenancies may be described as tenancies at will; see per Griffiths CJ in *Landale v Menzies*.[84]

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81 (1989) 166 CLR 623.

82 (1993) 182 CLR 26 at 30 per Brennan J.

83 See *Frost v Knight* (1872) LR 7 Ex 111 and *Peter Turnbull & Co v Mundus Trading (Australasia) Pty Ltd* (1954) 90 CLR 235.

84 (1909) 9 CLR 89 at 101.

- Any periodic tenancy is capable of assignment; see *Commonwealth Life Assurance Ltd v Anderson*[85] and *American Dairy Queen (Qld) Pty Ltd v Blue Rio Pty Ltd*.[86]
- Further the plaintiffs submit that there is a vast difference between a bare assignment and an assignment with the consent of the landlord as occurred here. The consent of the landlord operates to create a new tenancy at will; see *Buckworth v Simpson*[87] and *Anderson v Tooheys Ltd*;[88]

(g) In any case, the plaintiffs submit that it is unhelpful to focus too closely on the events leading up to 16 December 2016. The guarantee operates to guarantee the leasing arrangements between the plaintiffs and Foxworth and that only commenced on that date. The lease was registered on 22 December and the transfer was registered on 27 February 2017. From that point onwards Foxworth had an indefeasible title as lessee in respect of the subject property pursuant to the terms of the now registered lease (as referenced in [43] above). The first defendant covenanted in the guarantee:

> "The guarantor unconditionally and irrevocably guarantees to the landlord the strict performance and observance by the assignee at all times with the lease provisions including, without limitation, the obligations to pay the guarantee money, and any obligation to indemnify the landlord from the assignment date."

(h) Further the lease was **defined** therein as:

> "(a) The lease described in schedule 1:
> (b) Any agreement to enter into the lease described in schedule 1;
> (c) Any lease, tenancy or relationship between the Landlord and the Tenant and assigned to the Assignee on the Assignment Date established by the lease described in schedule 1 whether legal or equitable, express or implied, registered or unregistered;
> (d) Any lease, tenancy or relationship between the Landlord and the Tenant assigned to the Assignee on the Assignment Date arising out of the tenants and/or Assignees occupation and use of the premises where the legal or equitable, express or implied, registered or unregistered;
> (e) Any lease, tenancy or relationship between the Landlord and the Tenant and assigned to the Assignee on the Assignment Date arising by the exercise by the tenant or the assignee of any option for renewal."

(i) Thus, the plaintiffs submit that is clear that at all material times the relationship between the plaintiffs and Foxworth was governed by the registered lease. These proceedings relate to an indebtedness

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85 (1945) 62 WN (NSW) 240.
86 (1981) 147 CLR 677 at 683 per Mason J.
87 (1835) 1 CRM & R 834; 148 ER 1317.
88 (1937) SR (NSW) 74.

deriving from about August 2017[89], that is, well after the point where the lease was duly registered, as was the assignment. Thus the plaintiffs submit that sub paragraph (a) of the definition of lease as set out above applied. The guarantee is of the "lease described in schedule 1". This contemplated a registered lease, which was in place at the time of these proceedings. The schedule identifies the correct real property description and address and there is no doubt which lease governed the relationship between the parties;

(j) Further, all the other sub headings of the definition of "lease" may likewise apply apart from (e);

(k) Thus the guarantee is of the obligations as to the lease so described.

[45] The plaintiffs submit that the principal problem for the plaintiff in *Chan v Cresdon Pty Ltd*[90] (where the guarantor was **not** liable as the lessee's obligation to pay rent did not arise "under the lease") does not exist in this case. There the phrase was "under this lease". This meant an obligation created *pursuant to* the lease (at p249) so a common law tenancy arising by *operation of law* (i.e. not pursuant to the lease but perhaps arising, for example, from the underlying agreement to lease – giving rise to a lease in equity - evidenced by the unregistered instrument) would not be the subject of the guarantee. One touchstone for this is the lessor's entitlement to specific performance of the agreement to lease[91]; in *Chan* the failure to register would have been an obstacle;[92] but there is of course no such problem here, because unlike in *Chan*, the lease **was** later registered, before the proceedings commenced. Further, the term was construed to mean a registered lease which did not exist in that case.

[46] Further, importantly, the above definition of lease in this guarantee is wider than, and different from, that in *Chan* and seems to have been drawn with the judgment in *Chan* in mind. Thus the plaintiffs submit that the subject guarantee is of the obligations in a registered lease as it existed at all times material to these proceedings; but in any case if the relevant lease was an equitable lease at the relevant time then the guarantee still applies as it does to other tenancies as defined. Thus the plaintiffs' argument is that the non-registration at the time of execution of the guarantee is not an obstacle to its enforcement.

Conclusion as to the First Issue

[47] In my conclusion, the plaintiffs' position on the first issue must be accepted. The equitable lease which existed at the time of execution of the assignment documents was intended to be assigned with the consent of all of the parties and the instruments were effective. Any imperfections in these arrangements were remedied by the later registration of the lease and the assignment, at a time prior to the arising of any of the obligations which are now sued upon. For these reasons, Bemon departing the premises, with the consent of all of the parties in the context of the legal arrangements agreed upon and executed, while all parties were legally represented, did not put an end to the lease; it did not "evaporate".

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89 See, e.g. Exhibits 1 and 2

90 *Supra*

91 Creating an equitable estate or interest in the land; see *Telado (Supra)*

92 At p 256

[48] The central question is whether the circumstance that the lease was unregistered at the time of execution of the relevant documents, thus rendering the lease not a legal lease at the time, is fatal to the validity of the transaction. The circumstances would be otherwise if the lease and assignment had never been registered. However, as is sometimes said, the Torrens system is one of title by registration, not registration of title. Thus, from the time of registration, the lease was a legal lease under which Foxworth had its continuing obligations pursuant to a lease for a definite term; those are the obligations the defendants guaranteed, as part of the bargain to *obtain* the plaintiffs' consent to the assignment, which is what they all desired. Moreover, although the obligations undertaken by the defendants pursuant to the guarantees were antecedent to the lease becoming a legal lease, it must be remembered that the definition of "lease" in the relevant documents was broad, and in my view, broad enough to encompass the circumstances both as they existed at the time and later became formalised by the acts of registration.

[49] Thus, in this somewhat unusual case, such difficulties as arose in cases such as *Laurinda Pty Ltd v Capalaba Park Pty Ltd*, *Chan v Cresdon Pty Ltd* and *Ashton v Hunt* – where this particular definition of "lease" was not under consideration - are not fatal to the plaintiffs' position. The unregistered lease as at 16 December 2016 was not void or totally ineffective. It remained the document which would become valid for all purposes if and when registered (as Thomas J.A. commented in *Ashton v Hunt*), which it later was. The defendants' obligations under the broadly drafted guarantees were in place, continued and became crystallised upon registration of the lease and assignment. In all the circumstances, in my conclusion, the plaintiffs are able to enforce the guarantees, subject to the resolution of the remaining issues.

Second Issue: Defective assignment of the lease

Defendant's Submissions

(a) "Lease" not defined

[50] The first defendant further submits that the Deed of Covenant on Assignment document is defective and therefore ineffective. He refers to cl 2.2 of the deed:

> "2.2 Assignees Covenants.
> The assignees shall strictly observe and perform the lease provisions on and from the assignment date in the same manner and to the same extent as if the lease had originally been entered into between a landlord and the assignees…"

[51] The first defendant submits that the "lease provisions" are defined at cl 1.1 as being the provisions of the defined lease. The lease is defined as being "the lease described in the schedule". The first defendant submits that the assignment document articulates no definition of the lease of any kind to be assigned in the schedule or at any part, and thereby does not describe the assigned lease, whatever it is claimed to be. For example, the first defendant asks rhetorically whether the assignment is of a legal lease, an equitable lease, or a monthly tenancy.

The evidence as to the assignment document

[52] The document under discussion in that submission is, as I understand it, exhibit "MP-04" referred to in the affidavit of Ms Podleska sworn 12 October 2017. The affidavit exhibits a large bundle of documents, and the deed of covenant on assignment of the lease runs from page 52 to 64 of the bundle. In that document,

both on the cover, page 1 and the definitions, the landlord is described as the plaintiffs, the assignor is Bemon Pty Ltd, the assignee is Foxworth Pty Ltd as trustee for the Goddard Family Trust, and the guarantors for the assignee are the first, second and third defendants. Clause 2.1 is the landlord's consent to the proposed assignment of the assigned property – Bemon's right, title and interest in the lease – and clause 2.3 is the guarantors' agreement to sign the guarantee.

[53] The definition of "lease" is as the first defendant submits. The schedule, wherein the lease is described, is at page 62 of the bundle. Under "transaction details" it includes the assignment date and the date of the document as both being 16 December 2016 (the deed does not seem to be otherwise dated, including the first defendant's execution thereof, both on behalf of himself and Bemon, p63 of the Exhibit). In respect of this document:

(a) The land is described pursuant to its real property description, and it is common ground that the leased property is correctly described.

(b) The premises are described by address as being 65-67 Rankin Street, Innisfail Queensland 4860; again the correct address.

(c) There is also a heading "lease". Under this heading, the lease is described by a number which, it is common ground, is incorrect and thus the number is crossed out. The crossing out is initialled by the first defendant. The lease is not further described.

(d) Apart from the schedule, these same identifying details of the property are noted on the cover of the document.

Thus the schedule describes a lease between the parties mentioned in the deed, relating to land which is correctly defined and described, and in relation to which the parties are said to be entering into an assignment of 16 December 2016. The deed also includes a "background" (page 54 of the bundle) where:

(e) The landlord is the registered owner of the land (the land being correctly defined in the document).

(f) The landlord leased the premises to the assignor (Bemon) on the terms contained in the lease.

(g) Under the lease, the assignor covenanted with the landlord not to assign its interest without the landlord's consent.

(h) The assignor has agreed to assign the property to the assignee (Foxworth) subject to obtaining the landlords consent.

(i) The guarantors agreed to guarantee the assignee's performance of and compliance with the lease provisions.

(j) The landlord agreed to consent to the assignment upon the terms in the document.

[54] Despite the apparent clarity of these provisions, and that there is no doubt that the first defendant executed the document both on behalf of Bemon and himself as guarantor (see p 63), with the intention, whilst legally represented, of effecting an assignment he desired and wished to complete, the first defendant submits that the document cannot possibly be seen to effect an assignment of the lease and is indecipherable. The first defendant points to the plaintiff apparently relying upon multiple allegations as to the nature of the lease, namely whether it was a legal lease (which according to the first defendant did not exist at the time of the assignment, because of lack of registration) or an equitable lease or a monthly tenancy. Thus the

first defendant submits that the assignment, which does not distinguish between these concepts, cannot be valid.

[55] In this context the observations of Thomas J.A. in *Ashton*, *supra*, are noteworthy; the lease, whilst unregistered, is the source of equitable rights and the ascertainment of the conditions of the common law tenancy which exists until registration. This analysis runs counter to the defendant's submission; the deed identifies the property, the parties, the transaction and the mutual desire for, and conditions of, assignment, and the lease document, which was subsequently registered, is the source of equitable rights and the conditions of the intended tenancy, which was intended to be for a term. It is difficult to see how the deed was completely ineffective and indecipherable; and of course both the lease and the assignment were later registered without difficulty.

Plaintiff's response on Issue 2 (a): Lease not defined

[56] In response to this issue the plaintiffs in reply submit that:

(a) The assignment on its proper interpretation is clear enough as to the subject of the assignment;

(b) In any event extrinsic evidence is admissible, was admitted and may be relied upon to resolve any perceived ambiguity; and

(c) In any event the parties went ahead and settled the transaction, registered the lease and caused the transfer of the lease to Foxworth to be registered, by at least the following February. Thus, at all times material to this action, these arrangements between the parties were formalised pursuant to the Torrens System.

[57] As to (a), the plaintiffs submit that the assignment document clearly enough specifies the transaction the subject matter of the assignment as being a lease of the premises at the leased address and the schedule correctly gives the real property description.

[58] As to (b), the relevant lease was admitted into evidence. Extrinsic evidence is admissible to properly identify the subject matter of a contract and does not offend the parol evidence rule; see *Country Security Pty Ltd v Challenger Group Holdings Pty Ltd,*[93] also *Technomin Australia Pty Ltd* v *XStrata Nickel Australasian Operations Pty Ltd.*[94] It was not suggested in evidence to either of the witnesses for the plaintiffs that the lease was not the subject of the assignment. The plaintiffs submit that there was only one such lease and there really is no room for doubt.

[59] As to (c), the plaintiffs submit that if even there was uncertainty as to the 'lease' the subject of the assignment, that was resolved by the subsequent actions of the parties including the ultimate transfer of the subject lease and its registration. The plaintiffs referred to *Blashki v Utara*[95] at [20] to [30]. The plaintiffs submit that this transaction having being completed, such transactions cannot be void for uncertainty.

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93 (2008) NSWCA 193 at [15].
94 (2014) WASCA 164 at [171].
95 (2002) NSWSC 1201.

[60] The passage referred to by the plaintiffs in relation to this proposition from *Blashki v Utara* includes reference to *Brambles Holdings Ltd v Bathurst City Council*[96], *Wong v Mura*[97]and *Callahan v O'Neill*[98]. In the latter case, Young CJ in Eq said at [46]:

> "In such cases, there is no reason why the parties cannot make a vague or fuzzy contract on the basis that they will in mutual trust and goodwill fill in the uncertainties in their arrangement as the contract is played out. Indeed, even in cases where the courts might have held the arrangement void for uncertainty in its initial stages, the conduct of the parties may fill in the gaps and make the contract good and certain. However, where there is an established contractual regime, particularly if the contract has been partly executed, a court is less inclined to say that there is voidness for uncertainty."

Further at [47]:

> "Indeed, this principal applies even if there is in law no contract initially because of uncertainty. Examples are *Macaulay v Greater Paramount Theatres Ltd* (1921) 22 SR (NSW) 66, 73 (where until plans and specifications were supplied, the contract might have been unenforceable, but once they were supplied, the deficiency was overcome), *Bradford v Zahra* (1977) Qd R 24 (where a "subject to finance" provision was saved by satisfactory finance actually being obtained)."

[61] Thus, the plaintiffs submit that the lease assigned on 16 December 2016 was the lease in existence between the plaintiffs and Bemon as it then existed. It was the written but unregistered lease which operated as an equitable lease until registration.

Conclusion as to Issue 2 (a) – Lease not Defined

[62] Contrary to the first defendant's submissions, I accept the plaintiffs' submissions on this issue, thus in my conclusion for the reasons outlined above, the assignment was effectual. There were some omissions in the documents which were imperfectly executed, however as discussed above, none of these are, in the result, material.

Issue 2 (b) - Assurance of land not in writing

[63] Further, the first defendant submits that it is fatal to the effectiveness of the assignment that the assurance of land was not in writing, in breach of s 10(1) of the *Property Law Act* (1974), apparently on the basis that the failure to properly define the lease means that the assignment does not satisfy s 10.

[64] Here the first defendant submits that the lease which was in existence at the time of the purported assignment, namely 16 December 2016, would have been a tenancy at will which became a legal lease upon registration on 22 December 2016. Thus, so the submission proceeds, when the plaintiffs purported to assign the legal lease contained in the lease document, no such legal lease existed by operation of s 181 of the *Property Law Act*, thus no lease was actually assigned to Foxworth.

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96 (2001) 53 NSWLR 153 per Heydon JA at [74].
97 (2001) NSWCA 366 at [25], [26].
98 (2002) NSWSC 877.

[65] He submits that the tenancy at will which existed at the time of the purported assignment could not have been assigned. He submits that it is clear that the purported assignment of the tenancy at will is in effect the termination of the old Bemon tenancy and novation of the new tenancy at will to Foxworth. He refers to *Minister for Land and Water Conservation v NTL Australia Pty Limited*[99];

> "The apparent similarity of a permissive occupancy to a tenancy at will makes apposite what Jordan CJ said in *Anderson v Tooheys Limited* (1937) 37 SR (NSW) 70 at 74 in marking the difference between a letting at will and a letting for a term."

> "A tenancy at will is terminable at the will of either party: it constitutes a personal relation between the landlord and tenant, and therefore terminates upon the death of either. A purported assignment by a tenant at will, if followed by the giving up a premises, operates as a termination of the tenancy because it is inconsistent with an intention on his part that his personal tenancy shall continue. If the landlord agrees to the purported assignment, either expressly or by recognising the purported assignment as tenant, this operates by implication as a termination of the old tenancy at will and the creation of a new tenancy at will with the incoming tenant. The owner's acceptance of all agreement to occupation by the purported transferee operates not as the recognition or acceptance of a transfer but as a novation. The estate created by the tenancy at will is unassignable."

[66] Thus, the first defendant admits that the occupancy by Foxworth became a new tenancy at will terminable by one month's notice. He argues, therefore, that the notice was provided in writing to the plaintiffs on 25 July 2017[100] which has the effect of extending the entitlement of the plaintiffs to rental no further than 31 August 2017.

Plaintiff's Response as to Issue 2 (b)

[67] As to s 10 of the *Property Law Act* 1974, the plaintiffs object that it was not pleaded (although possibly the relevant facts were). However, further, such provisions have no operation in respect of completed transactions which this one is. This is because such contracts, not within the statute, are not void but merely unenforceable; see *Leroux v Brown*[101]. The plaintiffs further submitted that in any case it is a classic example of the operation of the doctrine of part performance, the parties not only having concluded the transaction but registered the relative instruments (without requisition by the Titles office).

Discussion and Conclusion as to Issue 2 (b)

[68] The first defendant's reliance on *Minister for Land and Water Conservation* is problematic. The court was there dealing with an express permissive occupancy under NSW legislation. The parties were in no doubt as to the nature of the tenancy. It dealt with the situation of an assignment without consent, which was fatal to its validity. Similarly in *Anderson*, the arrangement was never intended to be other than an express weekly letting at will, never a letting for a term. It is this nature of a letting at will of this kind (as opposed to a letting for a term) which according to the

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99 (2002) NSWCA 149 at [18].

100 Exhibit 8.

101 (1852) 12 CB 801 and Cheshire and Fifoot Law of Contract 11th Australian Edition at pages 911 to 913.

judgement of Jordan C.J. and *Scobie v Collins* [1895] 1 Q.B. 375, endow the arrangement with its personal nature which therefore terminates upon the death of either party, or, indeed, purported assignment followed by giving up of the premises. As his Honour said, it is different in kind from the assignment of a term, which leaves the original lessee liable upon the obligations of the lease.

[69] This kind of express letting at will is not the situation in this case. It was never intended by either party to be a personal tenancy; it was intended to be for a term; was intended to be, and was, registered; and was intended to be, and was, assigned. Again, as Thomas J.A. said in *Ashton*, the lease, whilst unregistered, is the source of equitable rights and the ascertainment of the conditions of the common law tenancy which exists until registration. The imperfections and deficiencies were perfected by later registration.

[70] The plaintiffs' submissions should be accepted on this issue. The assignment was not invalidated by s 10.

Issue 3: Defective Guarantee

(a) Lease Not Properly Defined

[71] The defendant further submits that the guarantee is defective. Its execution is said to precede the formation of the legal lease. It was executed 16 December 2016 (actually 28 November) and the lease was not registered until 22 December. Again, it is submitted that the lease to which it refers is not properly defined. These submissions are similar to the criticisms of the deed of assignment outlined and discussed at [50]-[62] above.

Evidence as to the Guarantee

[72] The guarantee (signed pursuant to clause 2.3 of the deed of covenant on assignment of lease, Exhibit MP-04, discussed above) is Exhibit "MP-06" produced by Ms Podleska, at pages 80-92 of her bundle. The parties are described on page 1 as the plaintiffs as landlord and the first defendant as guarantor. The assignee is Foxworth. The "lease" is defined in Clause 1.1 as the lease described in Schedule 1 together with further subparagraphs which include:

> "(b) any agreement to enter into the lease described in Schedule 1;
>
> (c) any lease, tenancy or relationship between the landlord and the tenant and assigned to the assignee on the assignment date established by the lease described in Schedule 1 whether legal or equitable, express or implied, registered or unregistered;
>
> (d) any lease, tenancy or relationship between the landlord and the tenant and assigned to the assignee on the assignment date arising out of the tenants' and/or assignee's occupation and use of the premises whether legal or equitable, express or implied, registered or unregistered …"

[73] Schedule 1, in the guarantee signed by Mr Contempree, does not include a date of the agreement, other than to say it was in 2016. It was signed by him on 28 November 2016 (earlier than the assignment date in MP-04). It correctly describes

the land and the address. An incorrect number for the lease is crossed out and initialled by Mr Contempree.

First Defendant's submissions

[74] In this context the first defendant submits again that Schedule 1 contains no description of any lease whatsoever, nor does the entire document or any attachment. As outlined above, however, in the context of the document and the dealings between the parties, the guarantee on its proper interpretation is clear enough as to the subject of the guarantee; as the plaintiff submits extrinsic evidence is admissible and was admitted including the relevant lease as to which there is simply no dispute. As the plaintiff also submits, the parties went ahead and settled the transaction, registered the lease and then registered the assignment of the lease to Foxworth.

Approach to Construction on this issue

[75] As to the exercise of construction, in construing a guarantee, the general judicial approach is to consider the contract as a whole in the light of the general law[102]. In construing the contract, the court is entitled to look at the general setting in which the contract has come into existence.[103] It is well established that the task of construction of a written instrument requires the whole of the instrument to be considered. In construing the contract the court will bear in mind its object[104]. Where a contract is one of guarantee, two elements are important from a creditor's perspective:

(1) The assurance that payment will be made; and

(2) The prima facie intention that the guarantee will continue for as long as the debt is outstanding.[105]

It must be borne in mind, however, that such a contract is generally strictly construed in favour of the surety, so that ambiguity is resolved in the surety's favour.

Plaintiffs response on this issue

[76] The plaintiffs submit on this topic that it has been held that extrinsic evidence is admissible to establish the identity of the parties to a guarantee; see *Rosser v Austral Wine and Spirit Co Pty Ltd*[106] (where extrinsic evidence was admitted to establish that the defendant was a member of the class of people referred to in the guarantee). Thus the same analysis is available as to the subject matter of, rather than the identity of the parties to, a guarantee, and again, as they previously submitted, the lease itself was admitted into evidence, it is the only such lease, and the contents thereof are simply not controversial and resolve this issue in their favour.

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102 See Halsbury's Laws of Australia, [220-160], [220-165]

103 *Ankar Pty Ltd v National Westminster Finance (Aust) Ltd* (1987) 162 CLR 549 at 561

104 *Commercial Bank of Australia Ltd v Colonial Finance, Mortgage, Investment and Guarantee Corp Ltd* (1906) 4 CLR 57 at 65 per Griffith CJ. See also *Parkinson v Booth* (1934) 34 SR (NSW) 185 at 188.

105 *Commercial Bank of Australia Ltd v Colonial Finance, Mortgage, Investment and Guarantee Corp Ltd* (1906) 4 CLR 57

106 [1980] VR 313.

[77] *Perrylease Ltd v Imecar AG*[107] supports this approach. There it was held that extrinsic evidence was admissible to identify the liability being guaranteed regardless of whether it was a present or future liability, in that case future leasing agreements for cars. Extrinsic evidence was also admissible to identify the true name of a company described in the guarantee. Scott J. said at 469-70:

"So the question is whether extrinsic evidence is available to identify the proposed leasing to which the guarantee is referring. The general approach to construction of guarantees is set out in *Halsbury's Laws of England*, 4th ed., vol. 20 (1978), para. 143:

"The principles of construction governing contracts in general apply equally to contracts of guarantee. Dealing with a guarantee as a mercantile contract, the court does not apply to it merely technical rules, but construes it so as to reflect what may fairly be inferred to have been the parties' real intention and understanding as expressed by them in writing, and so as to give effect to it rather than not.""

[78] The plaintiffs also submit that the guarantee in its terms relates to a registered lease, an equitable lease and an unregistered lease. As of the date of the guarantee there was no *registered* lease in favour of Foxworth, nor could there be because the assignment had not yet taken effect. The plaintiffs submit that the intention clearly was that the guarantee attach to the registered lease in favour of Foxworth when the registration occurred, which it did soon after. In terms it allows for the lease arrangements to vary from time to time; see clause 2.7, which explains the **continuing** nature of the guarantor's security. In all these circumstances the plaintiffs submit that the guarantee is valid and effective.

Conclusion as to Issue 3 (a)

[79] The plaintiffs' submissions on this issue are accepted. There is nothing in the description of the lease in the guarantee which, in the above context, avoids its effectiveness.

Issue 3(b): Date Missing From First Defendant's Copy

[80] Returning to the defendants' submissions, it is also argued that the assignment date as defined in the document is absent (from the document signed by the first defendant), therefore the effect of the guarantee is not ascertainable. This is based on the proposition that the relevant area for insertion of the assignment date on the copy of the guarantee signed by the first defendant has been left blank, although at the top of that page the date of 16 December 2016 has been inserted.[108]

[81] As noted above, the first defendant signed that document on 28 November 2016. The exhibit referred to is the copy of the guarantee signed solely by him. Exhibit MP-07 to Ms Podleska's affidavit is the copy of the first defendant's guarantee and indemnity signed, separately, by the plaintiffs. In this copy, the relevant assignment date **has** been inserted, that is, 16 December 2016. Curiously, the guarantee and indemnity deed does not include an express provision for counterparts, in distinction from the deed of assignment, which contained such a provision in clause 3.6. However, the guarantee and indemnity deed does contain clause 1.7, providing that

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107 [1988] 1 WLR 463

108 See p 82 of the Podleska exhibits.

the document shall bind each of the signatories, notwithstanding that one or more of the persons named as guarantor have not executed or may never execute the document or that execution by any one or more of such persons (***other than the person sought to be made liable,*** which is of course relevant), is or may become void or voidable. In this case, the issue is not that there is any problem with the first defendant's execution of the guarantee (other than it being by way of counterparties) rather the missing detail of the operative date being inserted in the correct location. This, on the plaintiffs' case, is to be implied, with reference to the documentary and factual context, including the signed counterpart of the document.

Discussion and Conclusion as to Issue 3 (b)

[82] Having regard to the principles of construction outlined above, in my view, the guarantee and indemnity deed can be regarded, in the context of this transaction between these parties (including the deed of assignment) as coming into existence by way of execution of counterparts. This being the case, the date referred to in the copy signed by the plaintiffs can be resorted to for interpretation of the deed, in the same way as the construction exercise outlined above. Thus, in my view, the failure to insert that date on the first defendant's copy is not fatal to the integrity of the guarantee, particularly where the relevant date is present on another part of the same page from which it is missing. There is no competing possible date which would be more favourable to the first defendant, and thus no ambiguity arises to be resolved in his favour.

Issue 3(c): First Defendant's Reliance on s 56 of the Property Law Act 1974

[83] The first defendant then goes on to develop the same general point, i.e. as to the guarantee being "indecipherable", into his submission that the guarantee document in the same way falls foul of the provision in s 56(1) of the *Property Law Act* 1974 (Qld):

> "**56 Guarantees to be in writing**
>
> (1) No action may be brought upon any promise to guarantee any liability of another unless the promise upon which such action is brought, or some memorandum or note of the promise, is in writing, and signed by the party to be charged, or by some other person by the party lawfully authorised."

[84] The point is advanced that the guarantee being defective, as the first defendant submits, it is an insufficient memorandum in writing of the promise. The plaintiffs submit that it is clear in this case that Mr Contempree has signed the relevant guarantee and there is no evidence to the contrary, therefore such arguments as are advanced along these lines have no merit. The first defendant relies upon, as I have noted above, the passage from *Ankar Pty Ltd v National Westminster Finance (Australia)*, to the effect that ambiguity in respect of guarantees must be construed in favour of the surety. Giving this principle its full effect, in my view, in the context of the whole of the evidence, there is no such ambiguity, as discussed above.

[85] Thus in my conclusion, for the reasons outlined above, the guarantee is not defective and thus the provisions of s 56(1) do not further assist the first defendant in this regard.

Issue 4: Was the lease surrendered or terminated

The first defendants' submissions

[86] The first defendant then submits that, if there was a legal lease on foot, the rental is not claimable because the lease was effectively surrendered. He points to the abandonment of the premises by Foxworth, followed by what he submits was the plaintiffs' re-entry, occupation of the premises and collection of a fixed portion of rental moneys from the tenants. This, so the submission goes, is an unequivocal act by which the landlord accepted that the lease was determined.[109]

[87] In support of this submission, the first defendant argues, in effect, that the acts of the lessor were so inconsistent with the continuance of the lease that it is estopped from asserting that the lease has continued. The first defendant argues that Foxworth had "legally and as a matter of fact" abandoned the property as at 31 July 2017, although the submission acknowledges that Foxworth left its goods and chattels on the premises.

[88] True it is that Foxworth had apparently abandoned the property, but whether it had legally, and effectively, done so is contentious. The plaintiffs submit on this point that the email sent by the Mr George on 25 July 2017 to the effect that Mr and Mrs Power intended to "relinquish" falls far short of what would have been necessary for proper abandonment of the property. There was simply no written confirmation that Foxworth had abandoned the property, in the plaintiffs' submission.

[89] The first defendant then refers to evidence from Mr Wollschlager including:

(a) Him informing Mr Smith in a phone call in late August/early September that there were two to three permanent tenants at the property;
(b) Smith requesting Wollschlager to "continue what he was doing" maintaining the property including the existing name tenancies;
(c) Separately, Smith telling Wollschlager in an email things to the same effect. The email of 18 October 2017 directed him to "carry on as you have been". The first defendant submits that Mr Smith admitted that this meant continuing to manage the premises as he was doing for Foxworth;
(d) Smith told Wollschlager that in return for those services he would be "looked after down the track"; and
(e) Smith asked Wollschlager to pay an electricity bill for the property to the account which was in the plaintiffs' name.

[90] Further, the first defendant points to events of December 2017 and January 2018:

(a) Smith asked Wollschlager to pay $300 per week to the joint account of the plaintiffs; and
(b) They discussed dividing the rent money so that $300 per week would be sent to the plaintiffs and Wollschlager could keep the balance; as he put it "I automatically took those other costs to maintain the property out of my stipend".[110]
(c) Further, Wollschlager was compensated for his work in this way. This apparently relies on the following exchange:

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109 See *Tasita Pty Ltd v Sovereign State of Papua New Guinea* (1994) 34 NSWLR 691
110 T2-15, l 17.

> "So you were being compensated for the work that you were doing? – Yes. So I'd use whatever moneys were left over to do maintenance and then, if there was extra, that would go to me".[111]

[91] The first defendant also makes the submission that the plaintiffs did not give Mr Wollschlager the electricity bills. It is also pointed out that Mr Wollschlager said that he told Mr Smith he did not live on the premises.[112]

[92] The first defendant submits that the conclusion from all of this is that Wollschlager was the agent for the plaintiffs, which amounts to occupation of the premises by the plaintiffs via their agent. However, I do not accept this is the correct characterisation of the circumstances. Rather, as the plaintiffs submit, they were attempting to sell the property subject to the lease, that is, affirming the lease and suing the guarantors. The electricity had to be connected in Mr Smith's name, and the payments went to the electricity bill. They needed to maintain the premises. They never took possession, for example they did not have keys nor were any keys surrendered to them. Wollschlager was not their employee, as he agrees. They maintained the stance that the lease was affirmed and they were suing for unpaid rent. I do not accept, as the first defendant submits, that the plaintiffs' actions constituted unequivocal acts utterly inconsistent with the continuation of the lease. The plaintiffs' very limited actions, to attempt to pay the electricity bill, did not amount to setting up their own trading operation in the premises, as the first defendant submits.

[93] The first defendant also submits that Mr Goddard said that he had asked Wollschlager to remain at the property as an occupier and caretaker. Specifically, Goddard said that Wollschlager was not to manage the property, rather look after it, and the swimming pool and squatters were his biggest fear. He said that Wollschlager volunteered to maintain it and look after the property.[113] He said that Wollschlager volunteered in the context that he needed somewhere to live,[114] and that Wollschlager had done that for Foxworth for some months previously so he just continued.

[94] The first defendant submits that these matters are inconsistent with the continuation of the lease. This is said to be because of the plaintiffs' knowledge of the departure of Foxworth; communications about Wollschlager's idea to "grow the business"; and the plaintiffs' direction to Wollschlager to remain in the business, conduct maintenance and collect money to be contributed to the electricity account. The first defendant submits that all of this could not be consistent with the ongoing lease. Thus, so it is argued, claim for payment of Foxworth's obligations under the lease after August 2017 is precluded. A re-entry of the premises, so it is argued, brought the lease to an end following the abandonment.

[95] Further, the first defendant submits that any rental obligations to the end of August 2017 have been met and exceeded by Foxworth (presumably a reference to money recovered pursuant to the judgment of the Magistrates Court) and thus there is nothing for the first defendant to guarantee.

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111 T2-33, ll 1-3.
112 T2-14, l 30.
113 T1-61, ll 35-42.
114 T1-62, ll 105.

The Plaintiffs' Response as to Issue 4

(a) Surrender

[96] As the plaintiffs point out, this apparently refers to surrender by operation of law. An express surrender would be required to be evidenced in writing pursuant to s 11(1)(a) *Property Law Act* 1974 (PLA). Conversely a surrender by operation of law is not required to be in writing; see s 10(2)(b) PLA.

[97] The plaintiffs submit that a surrender by operation of law requires two elements:

(a) an act by the tenant evidencing an intention to give up possession of the leased property, usually in the form of an abandonment of the property; and

(b) an assent to such abandonment usually in the form of a retaking of possession.

[98] The plaintiffs refer to *Artworld Financial Corporation v Saharyan*[115] where Dyson LJ set out eight relevant principles as to a conclusion of a surrender by operation of the law. Broadly, the landlord's conduct must be evaluated as a whole as to whether it is so inconsistent with a continuation of the lease that it could only be justified on the basis that the landlord has accepted the tenant's implied offer and taken possession of the premises beneficially for himself. Acceptance of keys without more will always be equivocal. An act of the landlord consistent with its rights under the lease, such as entering to inspect or repair will not in itself give rise to a surrender because it is not inconsistent with the lease continuing. Any further act of the landlord amounting to protecting or preserving the property, such as security measures or necessary repairs will not in itself give rise to a surrender because such necessary self-help is a reasonable response to the circumstances.

[99] The plaintiff submits that the Australian authorities are to a similar effect, see *Tasita Pty Ltd v Sovereign State of Papua New Guinea*.[116] Further there is no rule that even if the tenant abandons the property and the landlord re-lets, that a surrender by operation of the law necessarily results.[117] That is, a landlord may re-let the premises on the tenant's account (the first defendants' submissions engage this idea – see above). Whether the tenant has abandoned the property is a question of fact to be determined objectively. The leaving of a considerable amount of shop-fittings and similar items in the premises may prevent a finding of abandonment; see e.g. *Commonwealth Bank of Australia v Figgins Holdings Pty Ltd*.[118] In this case there were 105 beds, two to three television sets, furniture and all the other kitchen equipment expected in such a hostel.[119] As noted, Foxworth never tried to hand over the keys or perform any other express acts of abandonment.

[100] Thus the plaintiffs submit that a finding of abandonment should not be made given the property left behind and the lack of clear unequivocal written notice from the tenant Foxworth. Further, the landlord's conduct went no further than normal protection and preservation of the property, consistent with their rights under the lease, and is not such as to amount to a resumption of possession, because the

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115 (2009) EWCA CIV 303.

116 (1994) 34 NSWLR 691 particularly at 696 to 697.

117 *Konica Business Machines Pty Ltd v Tizine Pty Ltd* (1992) 26 NSWLR 687 at 693.

118 (1994) 2 VR 505 at 516.

119 T2-27, l 6.

actions were not inconsistent with holding the defaulting tenant to performing the lease. Indeed, many of the plaintiffs' actions and commentary were consistent with this stance.

(b) Termination for breach

[101] Did the plaintiffs accept the breach or repudiation by Foxworth, such as to bring the lease to an end, together with the obligation to pay rent? The plaintiffs submit that the first defendant seems to accept the fundamental proposition that it is open to the plaintiffs to affirm the lease and sue for the rent due and owing rather than to terminate it and sue for damages. Thus the position of the first defendant is that on the facts the plaintiffs *in fact* terminated and therefore are restricted to such damages, and of course that is relief for which no proceedings have been taken pursuant to the guarantee. A mere failure to pay the rent does not entitle the landlord to terminate the lease immediately. The plaintiffs submit that in the ordinary course a notice to remedy breach pursuant to the *Property Law Act* 1974 has to be served on the defaulting tenant. The plaintiffs submit that the relevant law as to repudiation and right to terminate immediately is canvased in cases such as *Shevill v Builders Licencing Board.*[120]

[102] The plaintiffs submit that when a party to a contract repudiates it, the other innocent party has the option to elect to terminate the contract or to affirm it. If it is affirmed, the innocent party must continue to offer performance of their obligations and in return is entitled to demand the contract price; in this case, the rent. This is what the plaintiffs argue they have done in this case. The principles are referred to in *White & Carter (Councils) Ltd v McGregor.*[121] The plaintiffs submit that in determining whether to terminate or affirm, the innocent party is not obliged to act "reasonably" and further in such circumstances there is no obligation on the innocent party to mitigate damages because no claim for damages is being made. Rather, the claim is for monies due and owing under a contract. The plaintiffs submit that this decision remains good law in Australia: see for example *Meriton Apartments Pty Ltd v Owners of the Strata Plan No 72381.*[122]

[103] The plaintiff submit that *White & Carter* has been applied to lease cases in Australia in similar circumstances to the present. They refer to *J & S Chan Pty Ltd v McKenzie,*[123]which clearly sets out this position. The plaintiffs submit that the authorities also establish a number of propositions similar to those set out in the *Art World* case (*supra*) such as that the advertisement of the premises seeking a new tenant (which did not occur here) does not amount to an election to terminate and the changing of the locks to secure the premises does not amount to an election by the lessor to terminate or accept the proffered surrender (changing of the locks did not occur in this case).

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120 (1982) 149 CLR 620.

121 (1962) AC 413.

122 [2015] NSWSC 202.

123 (1994) Aust Conv Rep 610; (1994) ACTSC 1; also *Maridakis v Kouvaris* (1975) 5 ALR 197; *Tall-Bennett & Co Pty Ltd v Sadot Holidays Pty Ltd* (1988) NSW Conv Rep 57,881; *Emata Group v Woodville Diagnostics and Imaging Pty Ltd* [2016] SADC 96.

Plaintiffs' submissions in conclusion on surrender and termination

[104] The plaintiffs thus submit that no surrender or termination has been established in this case; neither Mr Goddard nor Mr Smith did anything that might suggest an election to terminate the lease by the plaintiffs or to a surrender of the lease. What they did was entirely consistent with maintaining the lease as against Foxworth. They had a solicitor at all times and indeed were maintaining an action in the Magistrates Court for the recovery of rental. Their decision was not to disturb Mr Wollschlager's informal *ad hoc* arrangement and that is both understandable and consistent with the desire to preserve the premises. This also applies to maintenance of the electricity supply, and money paid to the plaintiffs by Mr Wollschlager was to reimburse the plaintiffs for the electricity. It is submitted that this is consistent with the emails and text messages. The keys were never returned to the plaintiffs. It is submitted that, broadly, Foxworth was still in possession. Mr Wollschlager, Foxworth's subagent, was still there and the chattels including furniture are also still there.

Discussion and Conclusion as to Surrender/ Termination

[105] My conclusion on this point is that the plaintiffs did not re-enter or otherwise terminate the lease. Their actions were reasonable in protecting their position and maintaining the property in a minimal way, while maintaining their rights as against the tenant (and the defendants). On this point I accept the submissions of the plaintiffs, as set out at [96]-[104] above. There was no surrender or termination. Of course it must also be remembered that (despite the first defendant's pleading at paragraph 17 (c) of the Amended Defence) the plaintiffs were not, in a claim for debt, under a positive duty to mitigate their damages.

Overall Summary of The First Defendant's Submissions

[106] The first defendant's position is summarised as follows:

(a) a legal lease did not exist at the time of the alleged assignment or guarantee, so there was nothing to guarantee;

(b) Bemon departed the premises whilst the only lease in existence was a tenancy at will, terminable on a months' notice and incapable of assignment (although the months' notice was not given; rather there was an assignment with consent, with all parties intending and believing the lease was to continue);

(c) the purported assignment and guarantees were of no effect because they were defective;

(d) Foxworth's subsequent occupation of the property was merely a tenancy at will; and

(e) any lease which did exist was surrendered as at the end of August 2017, thus terminating the obligations of Foxworth which could be the subject of any guarantee.

Overall Summary of the Plaintiffs' Submissions including matters not otherwise addressed

Calling up the guarantee

[107] The bank guarantee was called upon after the lease was breached (after the Magistrates Court judgment), which is, so it is submitted, normal in the

circumstances. This calling up of the bond simply meant that the money went to the land lord which would have been the case if a cash bond had been paid in the first instance. When the lease is finally terminated there must be an accounting and any refund made to the tenant to which it may be entitled. The plaintiffs submitted that arguments along these lines by the first defendant (only in the pleadings) are without merit.

The *Anshun* point

[108] Paragraph 14 of the amended defence of the first defendant relies on the principles from *Melbourne Port Authority v Anshun Pty Ltd*[124] to conclude that the plaintiffs are estopped from bringing the proceedings. As the plaintiffs acknowledge, there is an obligation on a party to bring forth its whole case in the relevant action, and if this is not done then the party may be prevented from raising the relevant matter in subsequent proceedings. The question is whether the relevant party behaved unreasonably in not raising the relevant point or defence in earlier proceedings. What the plaintiffs submit is that it was not possible for the plaintiffs to raise the matters the subject of this action in the earlier Magistrates Court action for the simple reason that the facts upon which this action is based had not then occurred; it claims rent which accrued later. Reference is made to *Heid v Connell Investments Pty Ltd*[125]:

> "The principle enunciated in *Henderson's* case only applies to plaintiffs when they are litigating again on the same cause of action. As the cause of action in these proceedings was not a cause of action in the previous proceedings, the principle does not debar the plaintiff's action."

[109] The plaintiffs here submit that the facts pleaded in this case are different from those pleaded in the earlier Magistrates Court action because the breaches are simply different and therefore the causes of action are different.[126] Thus the plaintiff's submit there is no substance in this point.

[110] Thus the plaintiffs overall argue in summary that:

(a) the lease was at least an equitable lease as at the date of execution of the deed of assignment and the guarantees; further, nothing was done to bring it to an end;
(b) it was capable of being assigned and was, and the assignment was later perfected by registration, which was the situation at all times material to this action;
(c) thus the guarantees are enforceable;
(d) there was no surrender or repudiation of the lease which remains on foot;
(e) there is no estoppel or *res judicata*, and overall they should succeed.

Conclusion

[111] Contrary to the first defendant's submissions, in my conclusion, the assignment and guarantees were effectual. There were some omissions in the documents which

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124 [1981] HCA 28.
125 [1987] 9 NSWLR 628 at 632.
126 *Cooke v Gill* (AN 73 LR 8 CP 107) and *Lanai Unit Holdings v Mallesons Stephen Jaques* [2017] QSC 251 at [14] per Jackson J.

were imperfectly executed, however as discussed above, none of these are, in the result, material. They do not give rise to a relevant ambiguity such as to result in an alternative interpretation which would favour the defendants. Neither Bemon nor the first defendant took any step to terminate the lease, on any of the bases now advanced, prior to registration of the lease and assignment, pursuant to the transaction between the parties.

[112] Foxworth's occupation of the property was pursuant to the registered lease, not a tenancy at will, at the very least from February 2017 onwards. The assignment and guarantees were broadly drafted, the effect of which was to take effect immediately, or at least from registration onwards. The obligations of the defendants to guarantee Foxworth's obligations continued as outlined above and are enforceable. Further, as outlined above, in my view, the circumstances did not amount to any surrender or other determination of the lease following Foxworth's later abandonment. The obligations under the lease continued and the plaintiffs are within their rights to enforce the guarantees.

Second and Third Defendants

[113] In relation to the second and third defendants, although I have taken into account their pleadings, they have not otherwise been engaged in the trial. In my view, nothing more could have been said for their position than was said on behalf of the first defendant, indeed if anything their position was somewhat more tenuous. The amended defence, which was filed when the matter was still before the Magistrates court, pleaded that there was no such provision in the lease as pleaded in paragraph 6 of the Statement of Claim. This related to payment by the Tenant of the Landlord's legal costs and disbursements in relation to the Tenant's breach. This may be literally correct, but in any case the lease does contain such a provision, clause 4.3 (b) (v) (G). Nothing turns on the misdescription.

[114] The second and third defendants next deny the assignment. The basis is not clear. They admit executing documents purporting to be the assignment and guarantee – as Ms Podleska's exhibits clearly demonstrate – but then deny execution by the assignees, assignors, or Mr Contempree. The documents were signed, as counterparts, as outlined above.[127]

[115] It is next pleaded that there was no registered lease at the relevant time, thus no assignment; this issue is dealt with above as argued by the first defendant. A point is also made about the security bond, pleading that the calling up of the bond was only after the delivery of possession after termination of the lease. As discussed above, I do not accept this is correct – see discussion at [107].

[116] The second and third defendants next plead a termination of the lease by them in April 2017, apparently through a communication by Mr Wollschlager. There is no evidence of this. Mr Wollschlager's evidence is summarised above. The second and third defendants also plead that the plaintiffs went into possession and accepted the lease was at an end. This issue has also been determined against the defendants in the above reasoning.

[117] An *Anshun* estoppel is also pleaded, and this issue has also been dealt with.

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127 See e.g. pages 50 and 77-8 of Ms Podleska's exhibits for the assignment, and 106 and 120 for the guarantee.

Orders

[118] In my conclusion, the plaintiffs succeed against all three defendants, and there will be judgment in the plaintiffs' favour against all three for the calculated claimed amount. Costs would normally follow the event, but I will hear submissions as to this if requested, or any other suggested refinement or perfection of the relevant orders.