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Leasing seminar for LegalWise

26th March 2013

Recent Cases and Developments in Leasing

- Assignment –*Lockrey v Historic Houses Trust of New South Wales* [2012] NSWCA 249

- Guarantees - *Alonso v SRS Investments (WA) Pty Ltd* [2012] WASC 168. Is a clause in lease guaranteeing obligations "under this lease", engaged by an unregistered lease? Relevance of wording of the guarantee and the analyses undertaken in the High Court in the *Chan* and *Ankar* cases.

- Exercise of an option to renew:

  (a) What constitutes notice? *Kavia Holdings Pty Limited v Suntrack Holdings Pty Limited* [2011] NSWSC 716;

  (b) when exercisable, as opposed to option of tenant to purchase the freehold? *Tim Barr Pty Ltd v Narui Gold Coast* Pty Ltd [2010] NSWSC 29

- Termination: consider the difference between rescission and termination. When can loss of bargain damages be claimed? The rule in *Shevill v Builders Licensing Board* [1982] HCA 47; (1982) 149 CLR 620 at 624-5, updated: *CMA Recycling Victoria Pty Ltd v Doubt Free Investments Pty Ltd* [2011] TASSC 71.

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ASSIGNMENT

1. Relevant provisions of the *Retail Leases Act* are s39 and s41 as follows:

Section 39:

"(1) The lessor is entitled to withhold consent to the assignment of a retail shop lease in any of the following circumstances (and is not entitled to withhold that consent in any other circumstances):

(a) if the proposed assignee proposes to change the use to which the shop is put,

(b) if the proposed assignee has financial resources or retailing skills that are inferior to those of the proposed assignor,

(c) if the lessee has not complied with section 41 (Procedure for obtaining consent to assignment),

(d) the circumstances set out in section 80E.

(2) This section does not preclude any right of the lessor to require payment of a reasonable sum in respect of any legal or other expenses incurred in connection with the consent, so long as the lessor has substantiated those expenses to the lessee at the request of the lessee."

Section 41:

"A retail shop lease is taken to include the following provisions:

(a) A request for the lessor's consent to an assignment of the lease must be made in writing and the lessee must provide the lessor with such information as the lessor may reasonably require concerning the financial standing and business experience of the proposed assignee. The lessee may provide the lessor with a copy of a statement in writing that contains the information that is contained in or required to complete the prescribed form that has been provided to the proposed assignee. The statement may be provided if the assignment is in connection with the lease of a retail shop that will continue to be an ongoing business. The layout of the statement need not comply with that of the prescribed form.

(b) Before requesting the consent of the lessor to a proposed assignment of the lease, the lessee must furnish the proposed assignee with a copy of any disclosure statement given to the lessee in respect of the

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lease, together with details of any changes that have occurred in respect of the information contained in that disclosure statement since it was given to the lessee (being changes of which the lessee is aware or could reasonably be expected to be aware). The lessee may provide the proposed assignee with a copy of a statement in writing that contains the information that is contained in or required to complete the prescribed form. The statement may be provided if the assignment is in connection with the lease of a retail shop that will continue to be an ongoing business. The layout of the statement need not comply with that of the prescribed form.

(c) For the purpose of enabling the lessee to comply with paragraph (b), the lessee is entitled to request the lessor to provide the lessee with a copy of the disclosure statement concerned and, if the lessor is unable or unwilling to comply with such a request within 14 days after it is made, paragraph (b) does not apply to the lessee.

(d) The lessor must deal expeditiously with a request for consent and is taken to have consented to the assignment if:

(i) the lessee has complied with paragraphs (a) and (b), and

(ii) the lessor has not, within 28 days (or another period prescribed instead by the regulations) after the request was made or after the lessee complied with those paragraphs, whichever is the later, given notice in writing to the lessee either consenting or withholding consent.

Note. Clause 20 of Schedule 3 provides that the form set out in Schedule 2A is taken to be prescribed for the purposes of section 41 until regulations are made prescribing the form and repealing Schedule 2A."

Section 41A

"(1) A person who assigns a retail shop lease in connection with the lease of a retail shop that will continue to be an ongoing business, or a guarantor or covenantor of the person, is not liable to pay to the lessor any money in respect of amounts payable by the person to whom the lease is assigned if the former lessee gave (before the start of the period of 7 clear days before the assignment is effected):

(a) the lessor a copy of the assignor's disclosure statement as referred to in section 41 (a), and
(b) the proposed assignee a copy of the assignor's disclosure statement as referred to in section 41 (b).

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(2) This section does not apply to a former lessee, guarantor or covenantor or a lessor if the assignor's disclosure statement contains information that is materially false or misleading or incomplete."

CASES

2. In *Burton v Mayor etc of The London Borough of Camden* [2000] UKHL 8; [2000] 2 AC 399; [2000] 1 All ER 943; [2000] 2 WLR 427 (17th February, 2000), the good sense of the common law defeated an attempt by a Council tenant on rent assistance being bank rolled for life in a 3 bedroom flat, in circumstances where there was a dire shortage of subsidised properties for those in need.

3. Tenants B & H held the lease jointly. Each received rental assistance. The statutory scheme prohibited assignments. H left the premises, as she bought a new house. That left B in occupation and she wished to have it alone and not move to a one bedroom flat, thereby freeing up the flat for those in need.

4. H could of course serve a notice to quit, bringing her tenancy to an end and discharging her obligations to pay rental (and hence receive rental assistance)-but she did not.

5. The case concerned the statutory construction of the prohibition against assignment in certain UK legislation, and thus will not be delved into in detail. However, there are certain statements of principle which can be extracted

Per Lord Nicholls of Birkenhead, for the majority

> "The issue before your Lordships is whether the deed of release was effectual to vest the tenancy in Miss Burton alone. More precisely, before the execution of the deed of release the legal estate in the tenancy was held by Miss Burton and Miss Hannawin in trust for themselves as joint tenants: see section 36(1) of the Law of Property Act 1925, as amended. The issue is whether the deed of release was effectual to vest this legal estate in Miss Burton alone. This was the object she sought to achieve. Anything less would not assist her.
>
> Having in mind that this is the issue, I turn to the non-assignability provision in section 91. In the context of a lease, assign normally connotes the transfer of the lease from one person to another. The simplest example is a transfer of a lease from A to B. Another example is a transfer of a lease from A to A and B. The present case is different because the transaction under consideration did not involve the

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introduction of a new tenant. The present case concerned a transfer of the legal estate from A and B to A alone. What was involved was that one of the existing tenants should cease to be a tenant. This difference is not material. Here also, as a matter of ordinary usage, such a transfer of a lease, changing the identity of the tenants, would be regarded as an assignment. Consistently with this, in *Varley v. Coppard* (1872) L.R.7 C.P. 505 one of two joint lessees assigned his estate and interest in the leased property to the other lessee. The court (Willes and Keating JJ.) held this was a breach of a covenant not to assign the demised premises. The fact that the assignee was already a tenant was not regarded by anyone as negativing a breach of the covenant against assignment. In that case the joint lessees held the lease as tenants in common, not joint tenants. On the point now under consideration that difference is immaterial. In each case the identity of the lessees is changed."

Lord Millet added:

"the word "assignment" is not a term of art. It denotes any conveyance, transfer, assurance or other disposition of property from one party to another. The essence of an assignment is that it operates to transfer its subject-matter from the ownership of the assignor to that of the assignee. A lease is not an assignment, because it does not transfer any pre-existing property from the lessor to the lessee, but creates a new interest and vests it for the first time in the lessee. A purported assignment of the interest of one joint tenant to the other joint tenant does not constitute an assignment, because each of the joint tenants is already the owner of the whole. The so-called assignor has no separate interest of his own which is capable of being transferred to the other and which the other does not already own. None of this, of course, applies to a tenant in common, because he has a separate and distinct interest of his own which he can assign either to a third party or to his co-owner."

Paras [33] – [35] of *Lockrey* (below)

"[33] .....a lease is, of its nature, assignable by the lessee and that a right to alienate a leasehold interest is one of its normal incidents. The right may however, be regulated or restricted by provisions of the lease or by statute."

[35] Clause 3.8(a) of the lease regulates and restricts the lessee's right to assign. That clause provides that, subject to the other sub-clauses of clause 3.8, the lessee must not assign or transfer the lease without the written consent of the lessor. Subject to that, the common law right to assign prevails."

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6. L & S were joint tenants of the MOS Cafe for many years. The lease was a retail shop lease within the meaning of the *Retail Leases Act*. S agreed to sell his share of the cafe to L; and both S & L executed a transfer of the lease to L alone, as transferee. L applied to the landlord, the Historic Houses Trust of NSW (HHT") for its consent to the assignment.

7. None of the lease terms governing assignment differed significantly to the provisions of the *RLA* above.

8. The CA at para [20] endorsed *Burton v Camden London Borough Council* [2000] UKHL 8; [2000] 2 AC 399 in holding that merely because L & S were joint tenants, that did not mean an assignment was not necessary; and as such, consent was required to assignment.

9. The sole remaining question was thus, the question whether HHT was entitled to withhold consent because of a failure to provide information "reasonably required" by HHT concerning Mr Lockrey's "financial standing."

10. If HHT was not entitled to withhold consent for that reason, then consent would be deemed under s 41(d) or clause 3.8(d).

11. There at least 4 requests by L to the landlord, HHT, for consent.

12. Barret JA, for the plurality, shone the spotlight on the primary judge's analysis of the correspondence between the parties, as follows, from para [26] of the CA report:

> "[54] Mr Lockrey's first request for consent to the assignment of Mr Shelhot's interest in the Lease was by letter dated 22 July 2009.
>
> [55] In reply, HHT wrote on 12 August 2009:-
>
> > 'The HHT considers that Section 41(a) of the Act has not been complied with as HHT has not been provided with reasonable information concerning Mr Lockrey's financial standing and, at this stage, is unwilling to consent to the proposed assignment until it is provided.
> >
> > We therefore request the following information:
> >
> > Verifiable information regarding Mr Lockrey's financial standing
> >
> > A detailed proposal as to how Mr Lockrey proposes to clear his current indebtedness

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A statement regarding Mr Lockrey's proposed strategies to avoid future indebtedness.'

[56] At the date this letter was sent, rental arrears under the Lease were $129,237.23.

[57] In those circumstances, it was, in my opinion, reasonable for HHT to seek the information set out in its letter of 12 August 2009. Indeed the request for 'information concerning Mr Lockrey's financial standing' adopted the language used in s 41(1) of the Act and clause 3.8(c) of the Lease.

[58] Mr Lockrey did not, at any stage, provide HHT with such information.

…

[64] Mr Lockrey, through his solicitor, did not reply to HHT's letter of 12 August 2009 until 15 April 2010; some eight months later. "

13. There was considerable further correspondence, staggered over time, with L asserting (without providing any "verifying information" etc) his financial good standing and repeatedly calling for consent; and the HHT raising further issues but (significantly) not again calling for information about L's finances, treating it as an *ongoing conversation* rather than responding to each of L's calls for consent, *individually and on their merits*.

14. In Para [31], Barret JA noted that the sole request of HHT as to financial good standing of L:

> "was contained in HHT's letter of 12 August 2009. It is plain that the request was intended by HHT to have a basis in provisions of the lease and the *Retail Leases Act*. In its letter of 27 September 2010, HHT stated that it had not received 'any information concerning the financial standing of Mr Lockrey that the HHT can definitely rely on and be confident with, especially as the MOS Café is only one of Mr Lockrey's business ventures'. Beyond that, the correspondence did not contain anything that could be construed as a request or requirement of HHT with respect to information concerning Mr Lockrey's financial standing."
>
> [41] In approaching the central question whether there has been compliance with clause 3.8(c) and s 41, I concentrate, for the moment, on clause 3.8(c) in its entirety and the first sentence of s 41(1)(a).
>
> [42] Compliance with those provisions entails two actions by the lessee: first, communication to the lessor of a written request for consent to assign; and, second, provision by the lessee to the lessor

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of ‘such information as the lessor may reasonably require’ concerning certain matters, one of which is the "financial standing" of the proposed assignee.

[43] Whether the first action has been taken in a particular case is a simple question of fact: did the lessee communicate with the lessor in writing and, if so, did the writing contain a request for the lessor's consent to assignment? The second aspect requires more detailed consideration.

[44] The first point to be made about that second aspect is that it necessarily contemplates action by the lessee separate from and subsequent to the making of the lessee's written request for consent to assign. This is because the "information" that must be given by the lessee is information that the lessor requires; and the lessor will have no occasion to require anything unless a request for consent has been made. This is not to say that the lessee, when delivering the written request, might not seek to pre-empt and streamline matters by offering, in an unsolicited way, information about the financial standing of the proposed assignee. If the lessee does that, the volunteered information will necessarily be taken into account in assessing whether any subsequent information request from the lessor is reasonable.

[45] This leads to the second point. The lessee comes under no obligation to furnish information about the proposed assignee unless required by the lessor to do so.

[46] Third, it is for the lessor to specify the information sought. Thus, in *Indian Taj Pty Ltd v Gilany* [2004] NSWSC 1249 at [22], for example, the lessor required, in respect of a proposed assignee that was a company, ‘two years accounts, two years tax returns from the company and an asset and liability statement of the company and all directors verified by statutory declaration’. A reasonable degree of specificity of this kind is necessary and was, in that case, provided by describing the required information by reference to the content of particular documents.

[47] Fourth, the information that is required must be information "concerning" the particular person's "financial standing", that is, the state of his ability to meet financial commitments. A person's assets and liabilities will be relevant, as will matters of cash flow such as sources and amounts of regular income and requirements for and amounts of regular expenditure. Borrowing capacity may be a factor. In *Re RHD Power Services Pty Ltd* (1990) 3 ACSR 261, McPherson SPJ said (at 264) that ‘a person's ability to borrow without security may in some circumstances provide compelling evidence of his strong financial standing’.

[48] Fifth, the permitted ambit of a requirement imposed by the lessor is that the information sought concerning financial standing be

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"reasonably required" in the sense of having some rational bearing on an objective assessment of relevant matters concerning the financial standing of the proposed assignee as that standing is material to the lease and the financial obligations it entails. An assessment of what is "reasonably" required will proceed in the way indicated by the following observation of Latham CJ in *Opera House Investment Pty Ltd v Devon Buildings Pty Ltd* [1936] HCA 14; (1936) 55 CLR 110 at 116:

> 'The word "reasonable" has often been declared to mean "reasonable in all the circumstances of the case." The real question, in my opinion, is to determine what circumstances are relevant. In determining this question regard must be paid to the nature of the transaction.'

[49] Beyond that, two different views emerged in the course of submissions as to the ambit of the information that a lessor 'may reasonably require' within the meaning of clause 3.8(c) of the lease and s 41(a). When considering a lease that is not regulated by the *Retail Leases Act* but contains (either expressly or by operation of s 133B(1)(a) of the *Conveyancing Act*) a proviso that the lessor will not unreasonably withhold consent to an assignment, the commercial desirability of the assignee is taken into account in deciding whether consent has been unreasonably withheld. In deciding that question, it is legitimate to take into account matters that bear upon the likelihood that the proposed assignee will be able to pay the rent and perform the other covenants that the lease imposes on a lessee for the balance of the term.

[50] However, it may be that for a lease that is regulated by the Act the ambit of the information that the lessor can "reasonably require" within s 41(a) is more limited. It may be that the limited grounds upon which a lessor is entitled to withhold consent to an assignment have the effect that the only information that a lessor may 'reasonably require concerning the financial standing and business experience of the proposed assignee', is information that will enable the lessor to decide whether the proposed assignee has financial resources or business experience or retailing or restauranting skills inferior to those of the lessee.

[51] The difference between these two approaches to the ambit of the information that the lessor could reasonably require would show up in a situation where the existing lessee was a person of only marginal financial standing and indifferent retailing skills. If the second view of the ambit of the information that the lessor could reasonably require were correct, the lessor would not be able to use the opportunity of an assignment being requested to obtain a tenant that was superior to the tenant to whom the lessor was currently leasing the premises. Counsel for Mr Lockrey argued that the Act was beneficial legislation

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designed to protect tenants of retail premises, and that that purpose of the Act favoured the second of the two possible constructions.

[52] It is not necessary in this case to choose between these alternatives."

[55- [56]] "...These provisions are, in substance, the same. Each imposes on the lessor a requirement to "deal expeditiously" with a request for consent to assign. Each goes on to say that, if the lessee is in a state of relevant compliance (that is, compliance with clause 3.8(c) or s 41(a) and (b)), consent to assign is deemed to have been given at the expiration of a particular period of 28 days. ...*Consent to assign may thus arise in one of two ways: by being granted by the lessor or by the effluxion of time after the happening of certain events.*"

[59] The making of each of the five written requests for consent to assign identified by the primary judge enabled HHT to require information concerning the financial standing of Mr Lockrey, he being the proposed assignee. *On each of five occasions*, HHT could have imposed on Mr Lockrey and Mr Shelhot an obligation to provide information about that matter.

[60] HHT acted with a view to imposing such an obligation on one occasion only. By its solicitors' letter of 12 August 2009, it required:

> 'Verifiable information regarding Mr Lockrey's financial standing
>
> A detailed proposal as to how Mr Lockrey proposes to clear his current indebtedness
>
> A statement regarding Mr Lockrey's proposed strategies to avoid future indebtedness.'

[61] This requirement might be validly imposed only if and to the extent that the information it sought was information concerning Mr Lockrey's "financial standing".

[62] The second and third items in the letter of 12 August 2009 did not relate to information "concerning the financial standing of" Mr Lockrey. Each sought information about his proposed future conduct.

[63] The first of the three items raises a different question, that is, whether there was in truth a proper delineation of 'such information as the lessor may reasonably require concerning the financial standing of' Mr Lockrey.

[64] As I have said, it is for the lessor to specify the information it requires. Once it has done so, it is possible to make a judgment whether the specified information is "reasonably" required. HHT's letter of 12 August 2009 did not identify any particular information as being required by HHT. *On the face of the communication, HHT's requirement related to the totality of the information in existence concerning Mr Lockrey's "financial standing", except any part of that*

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totality that did not answer the "verifiable" description (whatever that description meant). It was thus for the recipient of HHT's communication to identify every conceivable fact concerning Mr Lockrey's "financial standing", to make a judgment whether that fact was "verifiable" and, if it was "verifiable", to add it to the collection of facts to be communicated in satisfaction of the requirement.

[65] I do not think that "verifiable information regarding Mr Lockrey's financial standing" qualifies as a description of information "concerning" his "financial standing" that is "reasonably" required by HHT. *It lacks the essential quality of specificity to which a lessee on whom a requirement is imposed is entitled.* That being so and having regard to what is said at [63] above, HHT's letter of 12 August 2009 did not cause Mr Lockrey and Mr Shelhot as lessor to become subject to any obligation under clause 3.8(c) or s 41(a) with respect to the provision of information regarding Mr Lockrey's financial standing."

GUARANTEES: IN WHAT CAPACITY HAS A DIRECTOR SIGNED?

15. The following analysis is extracted from the judgment of her Honour Judge Gibson in *D & D Property Holdings Pty Ltd v Davidovic Holdings Pty Ltd* [2012] NSWDC 162 (26 September 2012):

> "37. Mr Davidovic submits that he is not bound by the guarantee because he did not sign it in his personal capacity, but in his capacity as a director of the first defendant.
>
> 38. The actual wording appended to the signature on the lease was in the same terms as the signature appended to the contract in *Padstow Corporation Pty Ltd v Fleming (No. 2)* [2011] NSWSC 1572 ("*Padstow*"), where Gzell J explained the approach the court should take in such circumstances (at [12]):
>
> > '[12] The authorities make clear that the question whether a person has signed in a personal capacity is to be determined in accordance with the construction of the document as a whole and on the basis of admissible surrounding circumstances known to the parties.'
>
> 39. There was dispute between the parties as to the law relevant to this issue, so I shall set out the relevant authorities.
>
> 40. The first of these is *Delaney v Purves* [1930] QWN 6. The directors of a company signed a lease as directors of the lessee. They did not execute that part of the document which contained provisions

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for the directors to be sureties. It was argued that these agreements were severable, namely an agreement for lease and a separate guarantee agreement. Macrossan SPJ (at 7) held the directors to be sureties stating:

> 'I am of the opinion that the document is one single and indivisible whole, and that the signatures of the defendants, even as directors merely, would be sufficient to bind them as sureties ... The question is not one of intention, but simply one of evidence against them. The Court is in quest of evidence, under the hands of the defendants, that they in fact entered into the contract of suretyship. The document signed by them and containing the contract is sufficient for the purpose.'

41. Australian courts have differed in their interpretation of the principles discussed in *Ariadne Steamship Co v James McKelvie & Co* [1922] 1 KB 518. Analysis of these interpretations is helpfully set out in *Padstow*, *supra*, (at [14]-[16]) by Gzell J as follows:

> '[14] In *National Commercial Banking Corporation of Australia Ltd v Cheung* (1983) 1 ACLC 1,326 the document was in terms a guarantee by the defendant directors of their company. It was not a party to the document. It was signed by each of the directors and the common seal of the company was affixed to it. The second defendant's interest had been bought by the first defendant and he played no further part in the proceedings. The bank manager crossed out the seal of the company and had the first defendant initial the amendment. Clarke J held that each defendant signed in order to validate the affixation of the company seal and the only intention that could be imputed to the second defendant was that of participating in the execution of the document by the company.
>
> [15] In *Ariadne Steamship Co v James McKelvie & Co* [1922] 1 KB 518 at 535-536, Atkin LJ had said:
>
> > Signature unconditionally appended is proof of unconditional assent to the terms recorded in the body of the contract. If the body of the contract records that the signer is a party, or leaves the name of the party to be inferred from the signature, the signature will be proof that the signer has assented to a contract made with him. The contract may, however, record that the contract is made between A. and B. acting by his agent C. and may be signed by C., in which case C. has assented to a contract between A. and not C. but C.'s principal B. But the assent signified by the signature may be qualified so as to show that the signer is not

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> assenting unconditionally to the contract, but is assenting in a representative capacity on behalf of a principal. "B. by C. his attorney" written by C. is plainly an assent only by B. "C. on behalf of B." is, I think, equally plainly an assent of C. to the contract not so as to bind himself but bind B. If the assent to the contract clearly appears from the form of the signature to be qualified, it appears to me to be impossible to charge the signer on the footing that there is an unqualified assent by him.

[16] In *Cheung* at 1,330, Clarke J followed this dictum and concluded that the question with which he was confronted was not one of construction of a document but whether a person who placed his name on the document together with a common seal or an endorsement indicating a qualification of the capacity in which he signed the document, should be taken to have signed it personally so as to become bound thereby, or merely to have signed either in the qualified capacity or as witness to the affixing of the common seal.'

42. In *NEC Information Systems Australia Pty Ltd v Linton* (1985) NSW ConvR 55-240, Wood J explained:

> 'The decisions to which I have referred, and in particular the passages cited by Clarke J, emphasize the need to bear in mind the differences which may arise depending on whether the contract is signed by a person unconditionally and without qualification, or with an expressed qualification showing that his assent is not unconditional but made on behalf of another, or with words appended which leave it doubtful whether a qualified or unqualified assent is intended. I do not read the dicta of Atkin LJ, the passages in the speeches in the House of Lords in Universal Steam Navigation Company; or the passages in the judgment of Lord Goddard C.J, in *Lester v Balfour Williamson Merchant Shippers* (1953) 2 QB168, as excluding reference to the surrounding circumstances or to the terms of the document, when consideration is given to the manner of execution of a document. I do not think that Clarke J intended the contrary. Rather, it appears to me that his Honor was at pains to reject the proposition that the answer could be determined by simply disregarding any qualifications affixed to a signature out of Accord with the body of the contract. Although his Honor did use language suggesting that the question was not one of construction, and that regard should be had only to the actual signature placed on the document, I do not think that this was intended as a general statement of

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principle. The test propounded in the passages in his judgment which I have set out earlier, to my mind involves acceptance of a wider inquiry in appropriate cases in determining what was the objective intention of the parties.

I have accordingly reached the conclusion that the question in the present case is not to be determined by regard solely to the attestation clause and the actual signature placed on the document. In my assessment, the weight of authority favors the view that the question remains one of construction. As a result, despite the presumption attached to the actual signatures and the presence of the common seal, I consider that regard should be had to the remaining provisions of the deed, and to the circumstances surrounding its execution.

The inquiry to be made by reference to these matters concerns what the parties must objectively and fairly be understood to have intended by the document once executed. Evidence of subjective intention is to be disregarded.'

43. In *Scottish Amicable Life Assurance Society v Reg Austin Insurances Pty Ltd* (1985) 9 ACLR 909 ("*Scottish Amicable*") the appellant agreed to the appointment of a company as agent but said that it would require personal guarantees from the directors. The directors attested the affixation of a common seal of the company to the agency agreement. McHugh JA considered that one should go beyond the qualification of a signature and regard the contents of the document and surrounding circumstances which may indicate a signatory is bound even though a qualification attached to his signature, stating at 923-924:

'But if that dictum is correct I think it should be confined to the special case of the agent who signs for an undisclosed principal. It cannot be accepted as applicable in all cases. In some cases the contents of a document may indicate that the signatory is bound even though a qualification attaches to his signature. Expressly or by implication the body of the document may make it plain that the signatory is a party to the contract. In the examples given by Atkin LJ, it would usually follow that there was no liability on the part of the person signing. But this is because the express disavowal of responsibility in those examples is so strong that no other consideration, based on the terms of the document, can overcome it. In other cases, however, the qualification to the signature may be overcome by the terms of the document and the surrounding circumstances. In the end the decision must depend upon the terms of the document including the

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> qualification attaching to the signature together with the surrounding circumstances.'

44. The decision in *National Commercial Banking Corporation of Australia Ltd v Cheung* (1983) 1 ACLC 1326 ("*Cheung*") was doubted and not followed in *Clark Equipment Credit of Australia Ltd v Kiyose Holdings Pty Ltd* (1989) 21 NSWLR 160 ("*Clark Equipment*"), where it was held that signatures to a factoring agreement did not bind the signatories as guarantors. Giles J, rejecting the dictum of Atkin LJ in *Ariadne Steamship Co v James McKelvie & Co* [1922] 1 KB 518 ("*Ariadne Steamship*") at 535-536, said at 174:

> 'In the result, I conclude that the proper approach is to inquire whether there is to be found an intention that the signatory be personally bound to the contract evidenced in the document, meaning thereby not a subjective intention but an intention to be found objectively, notwithstanding a qualification attached to the signature. That intention, or lack thereof, is to be found upon the construction of the document as a whole, including but not being limited to the qualification attached to the signature, in light of the surrounding circumstances to the extent to which evidence thereof is permissible. The inquiry is not limited to consideration of the signature and its qualification in order to determine whether or not the signature indicates an assent to be personally bound.'

45. In *Clark Equipment*, a factoring agreement was entered into in respect of a company's debts. The surrounding circumstances indicated the directors were to provide personal guarantees for the company. However, the form of agreement in that case made no provision for execution by any guarantor. The signature of a key director appeared alongside an attestation clause which read 'signed by [name] for and on behalf of [company]'. The named directors were referred in the body of the agreement to guaranteeing the obligations of the company.

46. Giles J gave a number of reasons for declining to find that these named directors were personally bound. These included that the form of the signing clause made it clear that one of them was signing for and on behalf of the company, while the other director was only the witness.

47. In *Follacchio v Harvard Securities (Aust) Pty Ltd* [2002] FCA 1067 ("*Follacchio*"), an agreement provided that any signatory for a proprietary company vendor would be personally liable for the due performance of the vendor's obligations. Finkelstein J noted the uncertain history of Atkin LJ's statement of the law in *Ariadne Steamship* in *Cheung*, including its doubting in *Scottish Amicable* and

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its rejection in *Clark Equipment*. At [9], Finkelstein J held that a person might sign a document in more than one capacity:

> 'Mr Simon for the appellant sought to avoid this result by arguing that it is not permissible for a person to affix one signature to a contract and have that signature operate in, say, two capacities: one as agent for a principal and another to assume personal responsibility. But I see no reason in principle why this could not occur. All that is necessary is that the capacity or capacities in which the person is placing his signature on a contract be clear. If it is clear that he intends to sign the contract in two or more capacities, there is no reason why that intention should not be given effect.'

48. In *Howhua Steel Door Frames Pty Ltd v O'Leary* [2008] NSWSC 1185 ("*Howhua*"), Harrison AsJ helpfully summarises the authorities set out above and notes that these analyses involved a two-step process (at [20]), referring to the approach of Mahoney JA in *Scottish Amicable* and to a passage from the text *The Interpretation of Contracts* by Sir Kim Lewis, Sweet & Maxwell [2007] where it was said:

> 'The proper construction of a written contract is a question of law. However, the ascertainment of the meaning of a particular word is a question of fact. The division between what is a question of law and what is a question of fact is extremely difficult to draw. However, it has been said on many occasions that the a proper interpretation of a contract is a question of law.'

49. Harrison AsJ held (at [24]) that whether the document constituted both the company and personal guarantee was 'not determined solely by the attestation clause and the actual signature placed on the document', but was a question of construction of the document. Harrison AsJ found that the magistrate had erred in failing to construe the documents and the express words relating to personal guarantee in this fashion (at [35] and [42]).

50. *Palindrome Holdings Pty Ltd v Wass* [2009] NSWSC 797 ("*Palindrome*") is relied upon by Mr Davidovic as supporting his contentions that failure to sign a guarantor is decisive. *Palindrome* was an application for summary judgment which was refused. The facts in that case were far removed from the present, in that there was no reference to the guarantors (either by name or otherwise) other than a statement that 'the indorsers, sureties and guarantors hereof' jointly and severally waived certain requirements (at [51]). The question of who the guarantors were, what their obligations were and whether there was a document of guarantee were unknown (at [57]).

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Nevertheless, the court declined to dismiss the proceedings on the basis that no guarantee could be proved (at [66]). This case is of limited assistance.

51. Finally, in *Padstow*, *supra*, Gzell J, in his careful review of the authorities set out above, rejected a submission that the lack of a separate signature of a director as guarantor, when coupled with the qualification to his signature as a company director suggested a lack of objective intention that he should be bound by a personal guarantee. The wording of the contract clearly identified him as a guarantor. The terms of the document were clear and by operation of its provisions he became a guarantor upon signing the lease.

52. A similar process of reasoning, and result, may be seen in a recent Western Australian case, ***Alonso*** *v* ***SRS*** *Investments (WA) Pty Ltd* [2012] WASC 168 ("***Alonso***"), which refers to the decision in *Padstow* (at [56]), as well as tracing the principles back to the earlier decision of *Scottish Amicable*. The fact situation of ***Alonso*** was similar to *Padstow*, in that the second defendant signed above the word "director" but denied that she was the author of the neatly handwritten words "Sara Sandford" (at [13]-[14]). Edelman J considered that the lease, construed in its surrounding circumstances, manifested an objective intention for the second defendant to be legally bound as a guarantor, for the following reasons:

(a) The second defendant was specifically identified as the guarantor and, apart from the absence of any signature, the guarantee and indemnity provisions applied to her 'directly and in plain terms'. Other clauses had been amended and initialled by the second defendant, but this guarantee provision had not been altered or removed;
(b) Although the second defendant did not sign in the marked place, there was 'a peculiarity about the execution page which contradicts the suggestion that there is a clear absence of any signature by the second defendant in her personal capacity' (at [59]);
(c) The existence of the handwritten words, and the fact that there was no signature in the blank space, appeared to be witnessed.

53. Edelman J concluded that a reasonable person in the position of the person seeking the guarantee would have inferred that the second defendant had signed in her personal capacity, and in particular, in light of the other handwritten changes and initials in the document.

The application of these principles to the facts in this case

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54. The following are cumulative (***Alonso*** at [57]) as well as separate reasons as to why the agreement in this case, construed in its surrounding circumstances, manifested an objective intention for Mr Davidovic, the second defendant, to be legally bound as guarantor.

55. First, Mr Davidovic is specifically identified by the name "Michael Davidovic" (which I find he in fact changed to "Miroslav Davidovic" on the first page of the subsequently prepared two-page document, this being information previously unknown to Mr Diaz) in the heading to the sale agreement. Apart from the absence of signature in the footer section to the page on which the signatures appear, the guarantee, in recital C and clause 7, applies to him directly and in plain terms. While the change to the name of the company on the signature page was initialled by Mr Davidovic, these other references to him as a guarantor were not crossed out (***Alonso*** at [58]).

56. Secondly, although Mr Davidovic did not sign in the place on the execution section opposite the words ‘signed, sealed and delivered by the said Michael Davidovic and Silvana Davidovic’, which appears in both documents, the circumstances concerning the change of the name of the second defendant from "Michael" to "Miroslav" on the front page, and change of the word "guarantors" to "guarantor" in recital C and clause 7, contradict the suggestion that there is a clear absence of any signature by the second defendant in his personal capacity (***Alonso***at [59]). While I should not read too much into typographical errors, the fact that ‘they’ and plural verbs still appear, the only change being to the first word (‘guarantor’ replaces ‘guarantors’) suggests that these changes were not made by Mr Budd, but by one or both of the parties to the agreement.

57. Thirdly, the second defendant made a handwritten change to the name of the borrower and, on his own evidence, drew attention to the wrong first name typed for himself as guarantor. The fact that the second defendant made alterations to some provisions of the document but left the guarantee provision unaffected demonstrates what Edelman J in ***Alonso*** considered was ‘an objectively manifested intention to be bound by those provisions’ (at [62]). In addition, the additional reference to ‘concrete fencing panels (M7 surplus panels)’ to clause 5 is an indication that the second document represents refinements to the first, which included the removal of Mrs Davidovic's name as a guarantor, but which did not extend to the removal of Mr Davidovic as the guarantor, hence the use of a singular person (‘guarantor’) in the revised document despite the use of plurals in the rest of clause 7.

58. Fourthly, the factual matrix whereby the agreement came into being is of importance. The contract was for a substantial sum of money and Mr Diaz consulted his solicitor to obtain a contract setting

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out his requirements as to guarantees in clear and unambiguous terms. While that document underwent some changes, at all times it was the activities of the two men who represented their respective companies who dealt with each other about these changes. These changes were the subject of agreement, and I find that they preserved Mr Davidovic's role as guarantor.

59. Fifthly, subsequent to the agreement being entered into, the plaintiff sought to follow up on failure to make payments. In the course of this correspondence, and in particular in the letter from Rosier Partners set out above, no challenge was made to statements concerning the liability of Mr and Mrs Davidovic as guarantors. I also take into account, in favour of the second defendant, that Mrs Davidovic was not in fact a guarantor, and has since been agreed not to be a guarantor by Mr Diaz. However, this does not affect the position of Mr Davidovic, for the reasons set out above.

60. Sixthly, I reject the evidence of Mr Davidovic that he told Mr Diaz he would not give a guarantee. Mr Davidovic's affidavit of 16 February 2012, which he relied upon to set aside the judgment, and his proposed defence, stated that Obnova Concrete Pty Ltd was the correct defendant, not Davidovic Holdings Pty Ltd and that the goods were faulty. These statements were untruthful, and known to him to be untruthful. These were statements made under oath for the purpose of setting aside a default judgment, which makes it all the more serious. This must significantly damage his credit on all issues."

EXERCISE OF OPTIONS: Context and characterisation triumph over literalism

16. In *Prudential Assurance Co Ltd v Health Minders Pty Ltd* (1987) 9 NSWLR 673, 677], Kirby P summarised the applicable principles with respect to the exercise of an option. These were referred to by the New South Wales Court of Appeal in *Young v Lamb & Ors* [2001] NSWCA 225:

    (i) the purported exercise must clearly and unequivocally express the fact that it is intended to exercise the option, *Ballas v Theophilos (No 2)* [1957] HCA 90; (1957) 98 CLR 193 at 196

    (ii) it is unnecessary that the words used conform precisely to the terms of the option, *Ballas* at 205.

    (iii) the appropriate question to ask is what a reasonable person who received the letter would fairly have understood to be the meaning of it, in all the circumstances of its receipt, *Carter v Hyde* (1923) 33 CLR 116 at 126 adapting *Jones v Daniel* [1894] 2 Ch 332.

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(iv) a notice which mis-states the terms of the option may nevertheless amount to an unqualified and unconditional exercise, *Quadling v Robinson*[1976] HCA 31; (1976) 137 CLR 192 at 201;

(v) every case ultimately depends on its own facts and upon the proper construction of the document in dispute.

17. As added by Pembroke J in *Kavia* (below, para [13]):

> "...the context is essential for the purpose of characterising the written communication." HH warned against "...the dangers of adopting an approach too literal..."

Kavia Holdings Pty Limited v Suntrack Holdings Pty Limited [2011] NSWSC 716

18. The lessee owned the restaurant in Darling Harbour, Jordan's. It seems as though it also operated or owned Cohibar and Watershed. Kavia's Mr Crawley was exasperating the landlord by equivocating as to whether it wished to renew the Jordan's lease and thus secure another 20 year term.

19. The lease contains an option to renew as follows:

> "7.2 If the Lessee desires to have a further Lease of the Premises for the further term of years set out in Item 4B of the Reference Schedule and provided:
>
> 7.2.1 in respect of the further lease the Lessee shall give to the Lessor written notice to that effect not more than twelve (12) months nor less than six (6) months prior to the expiration of the immediately preceding term;
>
> the Lessor shall grant to the Lessee a Lease of the Premises for such further term of years commencing on the day following the date of expiry of the immediately preceding term."

20. The primary issue was whether Kavia exercised the option to renew. It relied on a sentence in an email sent by its Mr Crawley which contained the following lines:

> "I am just considering and it is probably worth the lessors while as well, that we tie all the leases up for the full term that we can expect. I would like to have at least another 20 years with Jordons lease and tie that in with Cohibar and Watershed so that they are a composite asset

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in the books of Kavia. There are benefits both ways by doing such an agreement…"

21. Pembroke J, after referring to the relevant principles, emphasised that:

> "[14] The question in this case is not one of contractual interpretation. Rather it is one of *factual characterisation*, which is a different juridical concept. Nonetheless the *context* is equally relevant in both cases. Because the characterisation of the lessee's written communication is *an objective question*, it does not matter what particular misconceptions, errors or oversights may have affected the understanding or intention of either the lessor or the lessee. All that matters is that the written communication satisfy the contractual requirements.
>
> [15] The contractual requirements are set out in clause 7.2 of the lease. They do not expressly, or by necessary implication, require the particular lessee to understand or intend that his written communication has the actual legal effect which the terms of the lease may or may not give to it. *He need only give notice in language that would be reasonably clear to a reasonable person in the lessor's position that he desires to take a further lease of the premises for the further term of years set out in the reference schedule.*
>
> ....
>
> [17] A reasonable person in the lessor's position would, of course, be familiar with the terms of the lease, including that the lessor is bound to grant a further lease for the stipulated term if the lessee gives the requisite notice. The lessor would also know in this case that the lessee had until 31 December 2010 to exercise the option if it wished to do so.
>
> [18] ....All that is necessary is that the written communication comply with the contractual description. It must be fairly and reasonably characterised in its context as a notice by the lessee of its desire to have a further lease for the further term.
>
> [22] Nonetheless, the lessee cannot *hedge its bets, impose its own qualifications, or point to the need for further negotiations*. This is the sense in which it is sometimes said that the notice must be 'absolute and unqualified': *Quadling v Robinson* (supra) at 200-201 (Gibbs J). This is the problem in this case. ...
>
> [23] The parties may have agreed in this lease to a formula for the exercise of an option by the lessee that is relatively undemanding. But *there are minimum requirements and sound policy reasons to support them*. Foremost among the minimum requirements is the need for reasonable clarity in the context and the absence of any qualification... As I have mentioned, no separate notice of the exercise of the option is required to be served. Nor is there any necessity for solemnity or

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formality in the statement of the lessee's desire to take a further lease. And common expressions such as "I want", "I would like to have", "I seek" or "I wish" are just a few of the many formulations that will suffice to reflect the contractual requirement".

And at para [30]:

"...a reasonable person in the lessor's position would have regarded the relevant sentence in the email as no more than a step in a negotiation in which all three leases (Jordons, Cohibar and Watershed) were in play. Such a person would also have been well aware that the lessee did not need to make a commitment to renew the Jordons lease on 18 August, but had until 31 December 2010 before finally deciding to do so. That additional consideration would have reinforced the otherwise obvious understanding that the 18 August email was not itself a notice pursuant to clause 7."

Notice by email

HH also held that notice by email would meet the requirement for writing, which was permissive and not mandatory: paras [31] ff

There were apparently no submissions on the effect of the *Electronics Transactions Act*.

OPTIONS OF LESSEE TO RENEW V OPTIONS OF LESSEE TO PURCHASE: CAN OPTION ONLY BE EXERCISED DURING THE TERM OF THE LEASE?

22. *Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd* [2010] NSWSC 29 involved a convoluted commercial relationship between Mr Barr and his company, TBPL and NGC, regarding the development of rural land. TBPL was initially retained to project manage obtaining a DA, but that was bedevilled by various factors including protected flora. In the end, TBPL entered into a 5 year lease in respect of the land, and the lease contained an option to purchase. NGC purported to terminate prior to the 5 year term, and TBPL purported to exercise the option to purchase after the expiry of the 5 year term.

23. One question then became whether the option was a self standing agreement, independent of the lease; or terminated along with the lease.

24. Barrett J analysed the terms of the option and the lease, and continued as follows:

> "[184] …the provisions of the lease contemplate determination of the lessee's estate and of the lease itself before the expiry of the five year term. Expiry and earlier determination of the term are in several places recognised as distinct events. There is also resort variously to the words 'during the continuance of the Lease' and the words 'during the term of the Lease'. For reasons already mentioned, the particular

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words used may take their precise significance from the fact that determination within the term will deprive the lessee of the right to possession that would otherwise have continued up to expiry of the term.

[185] The factor just mentioned has been recognised as relevant to the construction of provisions by which a lessee is given an option to renew. *Such a provision will generally be approached on the footing that, if no specific time is limited for exercise, exercise may only occur during the currency of the lease or, at least, while the relationship or lessor and lessee subsists*. The reason was stated by Menzies J in *Trustees Executors and Agency Co Ltd v Peters* [1960] HCA 16; (1960) 102 CLR 537 at 552-553:

> 'When parties are negotiating a lease, it is highly probable that they are dealing with their relationship as landlord and tenant and it is highly improbable that they would intend that after that relationship had ended, the tenant could exercise an option to renew a lease that had already come to an end. To bind the "landlord" to renew the "lease" when it had run out and he was no longer landlord would require very clear words indeed.'

[186] Renewal involves continuation of the relationship of landlord and tenant. Where that relationship has come to an end – and particularly if it has come to an end in consequence of some breach of the lease provisions sufficiently serious to produce that result – it is unlikely that the parties contemplated its later reestablishment through exercise of a right to renew.

[187] *The same considerations do not apply to a lease provision creating an option for the tenant to purchase*. Menzies J said (at 553):

> 'Where the option granted is not to renew a lease but to buy the freehold, it has been said that it is "outside of the terms which regulate the relations between the landlord as landlord and the tenant as tenant" (per Peterson J. in *In re Leeds & Batley Breweries and Bradbury's Lease; Bradbury v. Grimble & Co.* [(1920) 2 Ch 548 at 551, 552] and "is not itself one of the incidents of a tenancy strictly speaking" (per Sargant L.J. in *Sherwood v. Tucker* [(1924) 2 Ch 440 at 450]. In *Rider v. Ford* [(1923) 1 Ch 541] Russell J. decided that an option in a lease to purchase the freehold without any limitation as to time exists so long as a relationship of landlord and tenant continues and could be exercised notwithstanding that the original lease had run out; in *Shearer v. Wilding* [(1915) 15 SR (NSW) 283], Harvey J. took a different view and decided that an option to purchase the freehold contained in a lease could be exercisable only during the currency of the lease.'
>
> …

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[188] Menzies J did not need to determine this question but nevertheless expressed an inclination towards the view taken by Harvey J in *Shearer v Wilding* (1915) 15 SR (NSW) 283. The decision in that case was that an option unlimited as to time was only exercisable during the currency of the lease. As made clear by the extract from Harvey J's judgment quoted by Menzies J, *an influential factor was that the subject matter of the option was described as 'the said demised premises', from which it was inferred that the intention was that the lessee should have 'an option of purchase as incident to his lease'.*

[189] In the present case, of course, the option is not unlimited as to time. It is not a question of reading it down in order to deal with the possibility that it would otherwise be of indefinite duration. The option is expressed to subsist until 5pm on 'the date of the expiry of the term of the Lease'. The subject matter of the option, according to clause 15.3, is "the Premises", that is, 'the Property leased and described' at the start of the lease (also, the definition of "Call Option" in clause 1(b) refers to 'the option to purchase the Premises leased ...'). *The question is whether there is any basis for holding, as a matter of construction, that the time limit expressed by reference to 5pm on the date of expiry of the particular period of five years is to be read as if the words 'or sooner determination of the lease' were added; or, in other words, that the relationship of landlord and tenant must continue to exist when the option is exercised at or before the stated point of expiry.*

[190] A different but conceptually somewhat similar issue arose in *Sherwood v Tucker* [1924] 2 Ch 440. The lease in that case gave the lessee an option to purchase 'during the three years hereby provided for', being a term commencing on 25 December 1914. The lessor and lessee agreed on two occasions to extend the term. The question before the court was whether the deadline for exercise of the option to purchase had been correspondingly extended. It was held that it had not been.

[191] Pollock MR drew a distinction between the demise of the premises by the landlord to the tenant and the 'separate and independent' option contract, albeit one contained in a lease executed by the parties. Warrington LJ said (at 446-447):

> 'It has frequently been held and may be treated as perfectly well settled that an option of purchase is not to be regarded as a provision incident to the relation of landlord and tenant, but is a matter collateral to and independent of it.'

[192] …

[193] In the present case, I do not consider that the description of the subject matter of the option to purchase as the "Property leased" or the "Premises leased" should, of itself, be taken as indicating that the

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lessor's obligation under the option provision continues to be operative only while that subject matter remains leased under the lease. Rather "Property leased" and "Premises leased" identify the property comprised in the grant of the option as that which is made subject to the lease at the lease's inception – that is, the property referred to in the operative words:

> 'The lessor leases to the lessee the property referred to above.'

[194] The words "Property leased" and "Premises leased" *do no more than incorporate by reference into the option provisions of clause 15 the description of the property at the start of the lease*. Those provisions operated from inception upon and in relation to the property that was the subject of the demise that also took effect at inception. The option and the demise were each expressed to have the same five-year period of operation.

[195] The same conclusion flows from the description of the grantor and grantee of the option as "the landlord" and "the tenant". Those expressions are defined in such a way that NGC, its successors and assigns are "landlord" and TBPL, its successors and assigns are "tenant". Again, *mere labelling, as a matter of economical drafting, cannot be regarded as injecting particular meaning into provisions in which the labels are employed*.

[196] *Much more significant is clause 15.7 which contains a particular time specification.* Clause 15.7 states the effect of exercise of the option. It says that, upon exercise, 'the party bound by the Call Option *as landlord* at that date and the party exercising the Call Option shall become immediately bound as vendor and as purchaser respectively under the Contract'.

[197] NGC *attaches particular significance to the words 'as landlord' and 'at that date'. I agree that this formulation conveys a wealth of meaning.* Had it been intended, as TBPL submits, that NGG or its successor or assign for the time being owning the land should, upon exercise of a separate and free-standing option, become bound as vendor, clause 15.7 would simply have said, 'the landlord . . . shall become immediately bound as vendor'. *That would have been consistent with the labelling approach to which I have referred. Instead, the words actually employed focus upon the party bound by the option, at the date of its exercise, 'as landlord' and say that it is that party that becomes immediately bound as vendor. This must connote something beyond mere designation by label. I do not accept TBPL's submission that the particular form of words used is simply an example of the use of defined terms.*

[198] *The words 'as landlord' in clause 15.7, coupled with the words, 'at that date', must be accepted as indicating an intention of the parties that there could be no effective exercise of the option unless the party*

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bound by the option at the time of any purported exercise ('at that date') was then bound 'as landlord', with 'landlord' having its ordinary signification of a person from whom the person's land is held by another under lease. …

[205] *In the end, it is a matter of construing the parties' agreement.* "

25. There was then much consideration of whether the lease had properly been brought to end or not; and if so, whether TBPL had any defence or could rely on relief against forfeiture. HH found on all counts in favour of NGC, and as such, TBPL was held not entitled to specifically enforce the option to purchase.

DAMAGES: RESCISSION & TERMINATION

26. A unanimous High Court held as follows in *Gumland Property Holdings Pty Limited v Duffy Bros Fruit Market (Campbelltown) Pty Limited* [2008] HCA 10 paras [53] to [58] (a lease case where the remaining term was 15 years):

(a) It may be that if a lease clearly provides that whenever a landlord exercised the right of re-entry conferred by the lease he was able to recover such loss as he may have suffered by reason of the premature termination of the lease (ie loss of bargain damages), such a provision might be effective.

(b) But, citing from the *Sheville* case in the High Court:

> "[I]t would require very clear words to bring about the result, which in some circumstances would be quite unjust, that whenever a lessor could exercise the right given by the clause to re-enter, he could also recover damages for the loss resulting from the failure of the lessee to carry out all the covenants of the lease."

(c) The High Court in *Gumland* concluded as follows at para [58]:

> "Save for any applicable statutory requirements or rules of law, there is no reason in law why general contractual principles do not apply to leases in this respect. Under general contractual principles, an innocent promisee can terminate the contract, *and recover loss of bargain damages, where there is* repudiation, or *a fundamental breach, or a breach of condition - ie a breach of an essential term*. And under these principles it is possible by express provision in the contract to make a term a condition, even if it would not be so in the absence of such a provision - not only in order to support a power to terminate the

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contract [43], which the Lessee concedes, but *also to support a power to recover loss of bargain damages* [44]. …"

27. It ought be borne in mind that in *Gumland*, there was a "preoccupation" in the lease, viewed as a whole, with the payment of rental being viewed as "essential" and "fundamental": para [47].

28. The lease at hand does not display a pre-occupation of the same magnitude: it has one Sub Clause (23.5) declaring certain obligations to be "essential terms", though bolstered by the right to re enter and determine the lease in the event of "Default"; with default in rental being viewed so seriously that *no* prior notice is required prior to exercising the right.

29. There is a summary of further relevant legal principles in *CMA Recycling Victoria Pty Ltd v Doubt Free Investments Pty Ltd* [2011] TASSC 71, paras [97] to [142]:

    (a) A landlord may have a right to terminate a lease for the tenant's default under a term of the lease that provides for that right, commonly one of re-entry and forfeiture.

    (b) But a landlord may also have a right to terminate a lease under general contract law principles that if one party to the contract breaches an essential term of the contract or repudiates its obligations under the contract, the other party may terminate it. As a general rule, the ordinary principles of contract law, including those of termination for fundamental breach or repudiation, apply to leases.

    (c) When parties to a contract agree that a term is essential it usually amounts to an agreement that the term goes to the root of the contract so that if it is breached, the innocent party may regard it as a fundamental breach and terminate the contract without notice.

    (d) That re-entry under such a contractual provision is essential only where the parties have stipulated that common law rights to terminate are excluded. The mere presence of a proviso in a lease giving an express power to terminate does not exclude the exercise of such common law rights as may otherwise be appropriate, and the landlord may be entitled to rely upon both the contractual and the common law right to terminate. Nevertheless, it is open to the parties by their contract to regulate the exercise of the common law power.

    (e) There is a difference between terminating for fundamental breach and for repudiation which is accepted: there can be one without the other, though they might overlap.

    (f) A provision that certain of the tenant's obligations are essential terms, *seem to serve no purpose other than the preservation of the right*

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under common law to terminate for breach of an essential term (para [113]).

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