JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA IN CIVIL
CITATION	**:**	HASSELL -v- YATES [2021] WASC 389
CORAM	**:**	SMITH J
HEARD	**:**	12 & 13 AUGUST 2021
DELIVERED	**:**	11 NOVEMBER 2021
FILE NO/S	**:**	CIV 1686 of 2020
BETWEEN	**:**	MARGERY ANNE HASSELL ANTHONY WOLLASTON BOUCHER HASSELL Plaintiffs AND LEONIE ANNE YATES ALEXANDER SASHA TUFEKCIC Defendants LEONIE ANNE YATES ALEXANDER SASHA TUFEKCIC Plaintiff by counterclaim MARGERY ANNE HASSELL ANTHONY WOLLASTON BOUCHER HASSELL Defendant by counterclaim

Catchwords:

Contract - Sterling New Life Lease scheme - Exclusive Management Authority for Residential Premises agreement - Residential Tenancy Agreement

Contract - Whether Residential Tenancy Agreement varied or whether an agreement entered into to enter into a new residential tenancy agreement

Contract - Whether Payment Direction Deed incorporated into the terms of the Residential Tenancy Agreement

Residential Tenancies Act 1987 (WA) - Effect of s 27A and s 82 and reg 10AA(a) of the *Residential Tenancies Regulations 1989* (WA) requiring prescribed form of lease in Form of Part A, Part B (standard terms) and Part C - Effect of standard term cl 3 prevails over the terms of the Payment Direction Deed

Estoppel by conduct or representation - Promissory estoppel - Not satisfied defendants entered into Sterling New Life Lease in reliance on representations made or assumptions induced for or on behalf of the plaintiffs

Legislation:

Residential Tenancies Act 1987 (WA) s 27A , s 27B, s 82
Residential Tenancies Regulations 1989 (WA), reg 10AA, reg 18

Result:

Judgment for the plaintiffs
Counterclaim dismissed

Category: B

Representation:

Counsel:

Plaintiffs	:	M Blandford
Defendants	:	In Person
Plaintiff by counterclaim	:	In Person
Defendant by counterclaim	:	M Blandford

Solicitors:

Plaintiffs	:	Taylor Smart
Defendants	:	In Person
Plaintiff by counterclaim	:	In Person

Defendant by counterclaim : Taylor Smart

Cases referred to in decision:

Allied Pastoral Holdings Pty Ltd v FCT [1983] 1 NSWLR 1
Australian Securities and Investments Commission v Theta Asset Management Ltd [2020] FCA 1894
Awap Sgt 26 Investment Ltd v CN 2000 Holdings Ltd [2020] WASCA 74
Bembridge v G-K-R Karate Australia Pty Ltd [1998] WASCA 15
Black v Slee [1934] NZLR 108
Chou v Awap Sgt 26 Investments Ltd [No 3] [2018] WASC 383
Coopers Brewery Ltd v Lion Nathan Australia Pty Ltd [2005] SASC 400; (2005) 93 SASR 179
Forbes v Git [1922] 1 AC 256
Gurfinkel v Bentley Pty Ltd (1966) 116 CLR 98
Hudson v Arap 1 (NSW) Pty Ltd [2015] NSWCA 126; (2015) 90 NSWLR 477
Leonie's Travel Pty Ltd v International Air Transport Association [2009] FCA 280; (2009) 255 ALR 89
Litigation Capital Partners Llp Pte Ltd (Registration No 200922518m) v Acn 117 641 004 Pty Ltd (In Liquidation) (formerly known as Vale Cash Management Fund Pty Ltd) [2021] WASC 161
Murphy Toenies v Family Holdings Pty Ltd as trustee for the Conway Family Trust [2019] WASC 423
National Gallery of Australia v Douglas [1999] ACTSC 79
Pagnan SpA v Tradax OceanTransportation SA [1987] 3 All ER 565
Polsky v S & A Services Ltd [1951] 1 All ER 1062
Queensland Alumina Ltd v Alinta DQP Pty Ltd [2006] QSC 391
Radaich v Smith [1959] HCA 45; (1959) 101 CLR 209
Skips A/S Nordheim v Syrian Petroleum Co Ltd [1984] QB 599
Soussa v Thomas [2021] WASC 172
Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd [2004] HCA 52; (2004) 219 CLR 165
Warrington Management Pty Ltd v Kingslane Property Investments Pty Ltd [2019] WASC 2

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SMITH J:

1.0 Introduction

1 These proceedings concern four individuals, the plaintiffs, Mr and Mrs Hassell as lessors, and the defendants, Ms Yates and Mr Tufekcic as lessees, who are all retired. Each were drawn into a scheme, known as a Sterling New Life Lease, whereby retirees and seniors were encouraged by the promoters of the scheme to enter into a Sterling New Life Lease as lessees and lessors. As part of the Sterling New Life Lease scheme, lessees were encouraged to pay a lump sum to a Sterling company, which was intended by them to be sufficient to pay all of their rent to the lessors for the term of the lease. This scheme ultimately failed.[1]

2 The failed Sterling New Life Lease scheme has left:

(a) the plaintiffs without payments of rent for over two and a half years for a property leased to the defendants; and

(b) the defendants without the sum of $210,000, being a once-off upfront payment of which they paid the majority to the Sterling Income Trust and the balance to Sterling Corporate Services Pty Ltd to enter into a 40 year Sterling New Life Lease of a property owned by the plaintiffs, namely unit 2, 9 Beam Road, Silver Sands, more particularly described as Lot 2 on Strata Plan 69016 and the whole of the land described in Certificate of Title Volume 2927 Folio 626 (the property).

3 The plaintiffs contend the issues raised in these proceedings are:

(1) First, whether the Sterling New Life Lease was varied on or about 31 July 2019, or, alternatively, whether a new agreement to lease was entered into, which provided for a lower amount of rent to be paid directly from the defendants as lessees to the plaintiffs as lessors. If the court finds the Sterling New Life Lease was varied or that a new agreement to lease the property was entered into, the second, third and fourth issues fall away.

[1] Other lessors and lessees have been drawn into the failed scheme; ***Murphy Toenies v Family Holdings Pty Ltd as trustee for the Conway Family Trust*** [2019] WASC 423; ***Soussa v Thomas*** [2021] WASC 172. Action was taken by ASIC against the trustee of the Sterling Investment Trust, Theta Asset Management Ltd, and its directors for breach of the *Corporations Act 2001* (Cth) relating to misleading statements made in product disclosure statements; ***Australian Securities and Investments Commission v Theta Asset Management Ltd*** [2020] FCA 1894.

(2) Second, whether the Payment Direction Deed forms part of the Sterling New Life Lease, and whether the plaintiffs are bound by the Payment Direction Deed.

(3) Third, if the plaintiffs are bound by the Payment Direction Deed, is the proper construction of the deed an agency agreement, and whether the defendants as lessees remain liable to pay rent to the plaintiffs, despite the failure of Sterling Corporate Services to pay rent since 10 April 2019 on behalf of the defendants.

(4) Fourth, whether the plaintiffs are estopped from insisting on a contractual right to terminate the Sterling New Life Lease and recover outstanding rent payments, and from requiring the defendants to pay rent for the remainder of the term of the lease.

2.0 Background

2.1 The Sterling New Life Lease - the identities of the Sterling Group whose dealings are relevant to the action and counterclaim

4 The Sterling Group companies who entered into contractual agreements with the parties to the proceedings are as follows:

(a) Rental Management Australia Pty Ltd; engaged by the plaintiffs (by a written agreement dated 12 December 2016 titled Exclusive Management Authority for Residential Premises), as their agent to rent and manage the property and to execute a Sterling New Life Lease;[2] and

(b) Sterling Corporate Services; the duly authorised investment manager for the Sterling Income Trust.[3]

5 The defendants executed a Residential Tenancy Agreement in the form prescribed by reg 10AA of the *Residential Tenancies Regulations 1989* (WA), on 21 April 2017, in the presence of Mr Ryan Kentore Jones,[4] at the registered office and principal place of business of Rental Management Australia in Port Kennedy.[5] Mr Ryan Jones executed the

[2] Exhibit A, 4 - 15.
[3] Exhibit A, 122 - 123; appointed by the responsible entity of the Sterling Income Trust, Theta Asset Management Ltd.
[4] Exhibit A, 33 and exhibit 3, [24] - [28].
[5] Exhibit 6; exhibit A, 4, 50, 53, 56, 59, 62 and 65.

lease and other documents, including the Payment Direction Deed, on behalf of the plaintiffs, in the presence of the defendants.[6]

6 At the time the plaintiffs entered into the Exclusive Management Authority for Residential Premises, Mr Ryan Jones was a director of Rental Management Australia.[7] However, Mr Jones had ceased to be a director of Rental Management Australia on 10 April 2017, being 11 days before the defendants executed the Residential Tenancy Agreement.

7 At the time the defendants executed the Residential Tenancy Agreement, Mr Ryan Jones was an alternate director of Sterling Corporate Services Pty Ltd,[8] a director of Sterling First (Aust) Ltd,[9] and a director of Sterling First Projects Pty Ltd.[10]

8 From 22 January 2016 until 12 April 2017, a Sterling First salesman who assisted the defendants to locate a property that they could lease through the Sterling New Life Lease scheme, Mr Isaac Philip Lucks, was a director of Sterling First (Aust) Ltd.[11]

2.2 The action and the counterclaim

9 The plaintiffs are the registered proprietors of the property, together with two other units that they built on a vacant block of land at 9 Beam Road, Silver Sands in 2017. Prior to the completion of the three units, including the property, the plaintiffs received an unsolicited visit at their home by Mr Travis Jones and his father, during which the Sterling First scheme of leasing was explained to them. As a result of that meeting, on 12 December 2016 the plaintiffs executed an Exclusive Management Authority for Residential Premises appointing Rental Management Australia to act as the property manager for the property for a minimum term of five years and a maximum term of 40 years from 12 December 2016 until 11 December 2036,[12] which agreement was only to apply if a Sterling New Life Lease was procured with a Sterling New Life Lease lessee entering into a Sterling New Life Lease to occupy the property.[13]

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[6] ts 183 - 184.
[7] Exhibit 6.
[8] Exhibit 8.
[9] Exhibit 9.
[10] Exhibit 10.
[11] Exhibit 9.
[12] This date appears to be a typographical error. However, no issue is raised in these proceedings in respect of this issue.
[13] Exhibit A, 5 and 12.

10 On 12 April 2017, the defendants viewed the property with Mr Lucks from Sterling First Projects Pty Ltd and executed a Life Lease - Reservation Form to reserve the property for a period of 21 days from and including 12 April 2017 by paying to the 'Lessor's agent' a reservation payment of $1,000, which was to be held in trust on the lessor's behalf by the lessor's agent until the reservation period ended or until an offer to enter into a 40 year (initial five year term with 7×5 year options) Sterling New Life Lease for the property was entered into (for a price of $210,000).[14]

11 The Reservation Form bore the logo of 'sterlingnewlife The Smart Housing Solution' and the name of one of the Sterling Group companies, Sterling First Projects Pty Ltd.

12 It does not appear, however, that the sum of $1,000 was paid to Rental Management Australia as the bank account details for the deposit were in the name of Sterling New Life Trust Account,[15] and, in any event, it is Mr Tufekcic's uncontested evidence that he paid the amount of $1,000 in cash to Mr Lucks.

13 The defendants paid the amount of $210,000 in three instalments. On 19 April 2017, the defendants paid an amount of $100,000 by cheque to an account in the name of Sterling New Life. On 20 April 2017, the defendants paid a further amount of $89,960 by cheque to the same account, together with an amount of $20,040 in cash, which they gave to Mr Ryan Jones.[16]

14 On 21 April 2017, the defendants entered into a Residential Tenancy Agreement to lease the property. At the same time the defendants executed (or initialled) a number of documents contained in a Sterling New Life Lease Sign Up Pack, which included the following documents:

(1) 'Sterling New Life Lease - Settlement Summary', which indicated an amount of $189,960 had been paid as an investment sum to the Sterling Income Trust, $18,480 to Sterling Corporate Services Pty Ltd as an application fee, and $1,560 for the first month's rent to Sterling Corporate Services Pty Ltd.[17]

[14] Exhibit 3, 20 - 21.
[15] Exhibit 3, 21.
[16] Exhibit 3, [35] - [36].
[17] Exhibit 3, 26.

(2) 'Form 1AC, Information for Tenant *Residential Tenancies Act 1987* (WA) Section 27B'.[18]

(3) 'Residential Tenancy Agreement', Part A, Part B, Part C, with Annexures Part D - Special Conditions, Annexure 3 - Option to Renew Lease, Form 2 - Notice of Termination, Form 3 - Privacy Statement, Form 4 - Management Statement and Form 5 - Utilities Condition.[19] It was a term of the Residential Tenancy Agreement that the rent payable for the property was $360 per week.

(4) 'Payment Direction Deed Sterling New Life Lease'.[20]

(5) 'Financial Services Guide', which appears to have been authored by Sterling Corporate Services Pty Ltd, as the authorised representative of Theta Asset Management Ltd (the trustee of the Sterling Income Trust), setting out some information about the Sterling Income Trust, including amounts paid to Rental Management Australia Pty Ltd.[21]

(6) An undated letter from an authorised representative of Sterling Corporate Services Pty Ltd referring to an attached Product Disclosure Statement, dated 31 January 2017, for the Sterling Income Trust (which does not appear to have been attached) and a Sterling Income Trust application form.[22]

15 On signing the documents, Mr Ryan Jones provided the defendants with keys to the property and the defendants have occupied the property as tenants since that date.

16 The defendants' case is that upon payment of $210,000, they expected, on the basis of representations made to them, that the income from the investment in the Sterling Income Trust would be used to pay their rent, and any surplus would be reinvested to increase their capital over time.[23]

17 In early 2019, the Sterling New Life Lease scheme failed and on 3 May 2019 an administrator was appointed to Rental Management

[18] Exhibit 3, 27 - 28.
[19] Exhibit 3, 29 - 79; each of these annexures expressly formed part of the lease pursuant to cl 7 of Part C; see 41.
[20] Exhibit 3, 80 - 92.
[21] Exhibit 3, 95 - 96.
[22] Exhibit 3, 97 - 111.
[23] Exhibit 3, 11.

Australia. By this time the plaintiffs had ceased to receive any payments of rent, having been paid rent from the commencement of the defendants' tenancy up to and including 10 April 2019.[24]

18 On 20 June 2019, the plaintiffs entered into a property management agreement with another property management company, H & N Perry.[25]

19 The parties agree the following facts in respect of the collapse of the Sterling Group:[26]

> 12. On 3 May 2019, Wayne Anthony Rushton was appointed as administrator of RMA.[27]
>
> 13. Mr Rushton's appointment as administrator of RMA ceased on 27 June 2019.
>
> 14. On 27 June 2019, Mr Rushton was appointed as administrator of RMA under a Deed of Company Arrangement (DOCA).
>
> 15. Mr Rushton's appointment under the DOCA ceased on 11 November 2019.
>
> 16. On 3 May 2019, Mr Martin Bruce Jones and Mr Rushton were appointed as administrators of SCS.[28]
>
> 17. Mr Jones' and Mr Rushton's appointment as administrators of SCS ceased on 10 June 2019.
>
> 18. On 10 June 2019, Mr Jones and Mr Rushton were appointed as liquidators of SCS pursuant to a creditors voluntary winding up. SCS remains in liquidation.
>
> 19. On or about 26 July 2019, the Defendants received from Alisha Cessford, Property Manager of H&N Perry (being the Plaintiffs' managing agent for the Property) a letter attaching a Form 1B Notice of Termination for Non-Payment of Rent pursuant to section 61(a) of the *Residential Tenancies Act 1987* (WA). [29]

20 On 31 July 2019, the plaintiffs' son, Mr John Hassell, after speaking to his parents, and obtaining their verbal authority to negotiate with the defendants on their behalf, visited the defendants at the property and had a discussion with the defendants about whether a

[24] Exhibit A, 94.
[25] Exhibit A, 82 - 93.
[26] Statement of Agreed Facts filed 27 May 2021.
[27] Rental Management Australia Pty Ltd.
[28] Sterling Corporate Services Pty Ltd.
[29] Exhibit A, 94.

resolution could be reached about the non-payment of rent. The plaintiffs claim that during that meeting the defendants agreed to vary the terms of the existing lease by paying a weekly rent of $225 per week directly to the plaintiffs (but not to a property manager). Alternatively, the plaintiffs claim that the effect of the oral agreement was an agreement to enter into a new lease of the property, for a periodic term of one week, alternatively two weeks, alternatively one month, for $225 per week to be paid directly by the defendants to the plaintiffs, whereby the remaining terms of the agreement to lease were those implied by div 2 of pt IV of the *Residential Tenancies Act*.

21 The defendants agree that they met with John Hassell but deny that the terms of the lease were varied or that they entered into a new agreement to lease, and claim that the only agreement reached was that they agreed to assist the plaintiffs financially by making payments of $225 a week until their (the defendants') rights pursuant to the terms of the Sterling New Life Lease and their right to compensation for their loss (of their lump sum payment) were resolved.

22 Following the meeting on 31 July 2019, the defendants made payments which equated to an amount of $225 a week from 1 August 2019 to 6 September 2019.

23 It appears, however, that despite these payments, the second of which was made on 23 August 2019 and the last of which was made by the defendants on 6 September 2019, that on 28 August 2019 the plaintiffs commenced these proceedings when their property manager, H & N Perry, filed in the Magistrates Court at Mandurah an application for Court Order under the *Residential Tenancies Act*, seeking orders for compensation for rent owed (being an amount of $6,061.69 stated to be arrears from 7 May 2019 to 27 August 2019), termination of the agreement and possession of the property to be delivered up to the lessor. The application gave notice that the application had been set down for hearing in the Magistrates Court at Mandurah on 11 September 2019 at 9.00am. On service of the application, the defendants ceased to make any further payments to the plaintiffs.

24 On 5 June 2020, by consent, the proceedings in the Magistrates Court were remitted to the Supreme Court by an order made by Master Sanderson.[30] The grounds of the application for remittal were that the action should be dealt with by the Supreme Court because of its complexity or because of the questions of law involved, and the

[30] ***Yates v Hassell*** CIV 1594 of 2020.

defendants sought to raise a defence and counterclaim that was outside the jurisdiction of the Magistrates Court.

25 On 15 January 2021, the defendants filed an amended defence to statement of claim and counterclaim in which they raised a plea of estoppel by conduct or representation, that the plaintiffs induced the assumptions to be held by the defendants, among other assumptions that:

(a) apart from paying an initial upfront lump sum amount to the Sterling Group, the defendants would not be required to pay any further rent, fees, or any other cash contributions in respect of the property for a period of 40 years if the options to renew were so exercised;

(b) in the event that Sterling Corporate Services Pty Ltd became insolvent or was not otherwise able to pay the rent, the plaintiffs would bear that risk; and

(c) the plaintiffs could not unreasonably evict the defendants, and at no time could the defendants be asked to make a cash contribution to pay any rent shortfall to the plaintiffs.

2.3 The evidence of the circumstances which led to the defendants entering into a Sterling New Life Lease

26 Mr Tufekcic is 83 years old. Prior to his retirement, he worked as a surveyor and petrochemical processing engineer. He is also an architect. Prior to her retirement, Ms Yates was a general and psychiatric nurse.

27 The defendants had no contact with and did not meet either of the plaintiffs until after they entered into Sterling New Life Lease and took possession of the property.

28 At the trial, Mr Tufekcic gave evidence. His evidence in chief was in part contained in a witness statement.[31] He gave oral evidence about a meeting he attended after entities in the Sterling Group went into external administration at which a number of people spoke, including consumer advocate, Ms Denise Brailey. Mr Tufekcic also gave oral evidence in his evidence in chief of the discussion he had with John Hassell on 31 July 2019.

[31] Exhibit 3.

29 Ms Yates did not give evidence at the trial. Mr Tufekcic tendered into evidence a medical certificate written by Dr Rebecca Lee on 6 July 2021 in which Dr Lee stated that she had assessed Ms Yates to be unfit to give evidence.[32]

30 Mr Tufekcic first heard about the Sterling New Life Lease scheme in early 2017 when Ms Yates' sister, Maureen, said to him and Ms Yates that the Sterling Group provided a good option for retirement, and the Sterling New Life Lease was ideal for seniors looking for a comfortable and affordable retirement without the ongoing high fees you have to pay in a retirement home.

31 At about the same time, Mr Tufekcic read advertisements for Sterling New Life Leases in a free newspaper called 'Seniors', and he heard advertisements for Sterling New Life Leases on 6PR radio. Mr Tufekcic said the following statements in the advertisements attracted him to the idea of a Sterling New Life Lease:[33]

> (a) you pay upfront a lump sum amount and in return you get a long term 40 year lease where all of the rent is dealt with through returns on the upfront lump sum amount;
>
> (b) once you had paid the upfront lump sum amount, you had no further rent, expenses or maintenance to pay for the lifetime of the 40 year lease (except for certain things like water and electricity);
>
> (c) there were no management fees, which I had heard were very high in aged care homes and retirement villages; and
>
> (d) if you moved out of the property, you would be repaid your lump sum payment.

32 In or around March 2017, Mr Tufekcic discussed with Ms Yates the prospect of entering into a Sterling New Life Lease and visited an office of Sterling in East Perth, where they met Mr Lucks and another man. Mr Lucks told Mr Tufekcic he had been a director of Sterling, but following investments by some wealthy investors, he was no longer a director, and he was a salesperson for Sterling. Mr Lucks said to Mr Tufekcic in the presence of Ms Yates words to the effect that:[34]

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[32] Exhibit 4.
[33] Exhibit 3, [5].
[34] Exhibit 3, [9].

> (a) the Sterling New Life leases are a very good option for seniors, as you get to choose a property where you want to live and pay upfront a lump sum amount and in return you get a long term 40 year lease;
>
> (b) the lump sum payment would be placed into a trust account and invested;
>
> (c) the investment fund was the biggest in the country and makes enough income to pay the rent for the 40 year period and, once you had paid the upfront lump sum amount, you had no further rent, expenses or maintenance to pay for the lifetime of the 40 year lease; and
>
> (d) if Leone and I changed our minds we could get out of the Sterling New Life lease by giving 6 months' notice and we would get our total lump sum payment back.

33 Mr Lucks gave Mr Tufekcic and Ms Yates some marketing material. One pamphlet that Mr Tufekcic read before signing the lease to rent the property was a document titled 'Retirement just got better sterlingnewlife',[35] which contained statements under four points similar to the statements made by Mr Lucks and was consistent with what Mr Tufekcic had understood from the advertisements on the radio and in the newspaper. These four points were as follows:[36]

> 1. Choose the property you want to live in with Sterling New Life. At this stage you sell your existing property and pay out any associated loans or arrange settlement of your Sterling New Life lease with other funds.
>
> 2. Initial Payment is made for the Sterling New Life Lease which will be used for the application fee and the first months rent, the balance is invested in the Sterling Income Trust.
>
> 3. The income from the investment in the Sterling Income Trust is used to pay your rent. Any surplus is reinvested which increases your capital over time.*
>
> 4. You live in the property with security of tenure without any additional costs (excluding your utility costs) until you decide to leave, at which stage the money invested in the Sterling Income trust will be returned to you or your estate.**
>
> * Reference to past performance is not a reliable guide to future performance

[35] Exhibit 3, [12] and AST-1, 8 - 19.
[36] Exhibit 3, 11.

> No distribution rate is guaranteed. Returns may be more or less than historical returns and the target returns stated. Please refer to the PDS for details and read the key risk sections
>
> ** Conditions Apply

34 After reading this pamphlet Mr Tufekcic sought legal advice about the Sterling New Life Lease scheme.[37]

35 After Mr Tufekcic sought legal advice, Mr Lucks arranged for Mr Tufekcic and Ms Yates to attend a lunch with him and two people whose names were Roy and Sylvia, who had entered into a Sterling New Life Lease about six months prior. During lunch, Mr Lucks asked Roy and Sylvia to explain the Sterling New Life Lease to Mr Tufekcic and Ms Yates. Mr Tufekcic does not recall exactly what they said but recalls they said words to the effect that:

> (a) the Sterling New Life leases had been a very good option for them and would be a good option for people like us;
>
> (b) you get to choose a property where you want to live and get a long term 40 year lease; and
>
> (c) you pay upfront a lump sum amount and, once you had paid that amount, you paid no further rent or any other maintenance expenses during the lease.

36 As a result of what Mr Tufekcic had read and heard in the advertisements and what was said by Mr Lucks about the Sterling New Life Lease, and confirmed by Roy and Sylvia, Mr Tufekcic formed the opinion that the Sterling New Life Lease was an ideal option for him and Ms Yates.

37 Mr Tufekcic and Ms Yates subsequently visited six properties with Mr Lucks. On 12 April 2017 they viewed the property, and Mr Tufekcic told Mr Lucks they would like to secure it. Whilst at the property, Mr Tufekcic and Ms Yates signed the Life Lease - Reservation Form and Mr Tufekcic gave Mr Lucks $1,000 in cash (as a reservation payment).

38 In mid-April 2017, Mr Tufekcic received a telephone call from Mr Lucks who told Mr Tufekcic that they would need to go to the office of Rental Management Australia in Port Kennedy to sign the documents for a Sterling New Life Lease. Mr Lucks arranged an

[37] ts 172 - 173; Exhibit A, 178 - 179.

appointment for both Mr Tufekcic and Ms Yates to attend the office in Port Kennedy to sign the documents.

39 On 21 April 2017, Mr Tufekcic and Ms Yates met Mr Ryan Jones at the Port Kennedy office. Mr Jones introduced himself by name and told Mr Tufekcic he was the licensed estate agent for Rental Management Australia and a director of 'Sterling First Lease'.

40 Mr Tufekcic and Ms Yates sat at a table with Mr Ryan Jones, where they each signed the documents in a 'SNLL Sign Up Pack', which included, among other documents, the Residential Tenancy Agreement and the Payment Direction Deed. Mr Jones told Mr Tufekcic and Ms Yates that all the documents in the pack were pretty standard. He did not give Mr Tufekcic or Ms Yates any time to read through the documents. Mr Jones did not say anything about the Sterling New Life Lease and Mr Tufekcic did not ask any questions.

41 Importantly, Mr Tufekcic testified that he saw Mr Ryan Jones execute the Residential Tenancy Agreement and the Payment Direction Deed on behalf of the plaintiffs, in their capacity as lessor of the property.

42 After Mr Tufekcic and Ms Yates had signed all of the documents in the SNLL Sign Up Pack, Mr Ryan Jones gave them keys to the property and Mr Tufekcic was very happy.[38]

3.0 Were the terms of the Sterling New Life Lease varied after Rental Management Australia went into liquidation, or did the parties agree to enter into a new lease?

3.1 Mrs Margery Hassell's and Mr John Hassell's evidence about an agreement to make payments on 31 July 2019

43 After the plaintiffs ceased to receive rent in April 2019, the plaintiffs had engaged H & N Perry as their property manager to manage the property.

44 Mr John Hassell is a farmer and the son of the plaintiffs. On 31 July 2019, he received an email at 7.16am from his sister, Elizabeth Adamson, who was away overseas. Ms Adamson assists the plaintiffs to manage their investments and had been assisting them to obtain legal advice after they had been informed that Rental Management Australia

[38] ts 183 - 184.

was in liquidation and they had not received rent for the property for some months.

45 After receiving the email from his sister, John Hassell went to see the plaintiffs. It is John Hassell's evidence that the plaintiffs authorised him to speak to the defendants to see if an agreement could be reached whereby the defendants would agree to pay some rent for the property.

46 John Hassell went to the property on 31 July 2019 unannounced, and after being invited in he discussed with the defendants whether an agreement could be reached. Mr Hassell was of the opinion that he was hopeful an agreement could be entered into that would suit both the plaintiffs and the defendants. What he meant by this was an agreement that would enable the defendants to continue to stay in the property by paying a reduced amount of rent until they could sort out their financial situation and pay full rent in arrears.

47 It is common ground that the conversation was amiable. John Hassell told Mr Tufekcic and Ms Yates that he had sympathy for their situation that was not of their making but that it was unfortunate that his parents were dragged into their poor investment. He also told Mr Tufekcic and Ms Yates that his parents could not afford to let them stay in the house rent free forever after.

48 Mr Tufekcic told him that they had received advice from Ms Brailey about their situation, but he was keen to try and help resolve the situation by paying some rent. After some negotiation they agreed that the defendants would pay rent of $225 a week directly into the plaintiffs' bank account and not to the plaintiffs' property manager. It is also John Hassell's evidence that at this time, he was unaware that the plaintiffs had a three-year agreement with H & N Perry, and that payments (of rent) had to be paid through them.[39]

49 John Hassell also had a discussion with Mr Tufekcic and Ms Yates about the arrears of rent. John Hassell said when giving evidence that the defendants told him they would be able to pay the full amount in time because:

(a) they had an opportunity to sell some assets and could possibly pay the arrears that way; and

[39] ts 139.

(b) they had been informed by Ms Brailey that they would be able to get some money from the government or someone (by way of compensation).

50 John Hassell gave Mr Tufekcic and Ms Yates his mobile telephone number so that 'they could confirm the payments of the rent into the bank account once they had made them'.[40]

51 After he spoke to Mr Tufekcic and Ms Yates, John Hassell returned to his parents' home and told them they had some kind of resolution and that they would continue to receive rent, albeit at a discounted rate. He also told them that the money would be paid directly into their account and he would be notified as to when the rent was paid via text message.

52 Mrs Hassell cannot recall what was said when their son came to speak to them on 31 July 2019. Mrs Hassell, however, did make contemporaneous notes of the conversations she and her husband, Mr Anthony Hassell, had with their son, John Hassell. Mrs Hassell does recall that John Hassell came to see them and, after they spoke to him about him going to see the defendants, he returned after doing so and reported to them what had been discussed with the defendants.[41]

53 Mrs Hassell recorded in her notes in red pen, as follows:[42]

John (31/7/19)

$250 for 4 weeks

Then revert to 360 + owing backpay

Check with Alisha

John thinks tenants should stay there and get rid of Perry's.

54 Mrs Hassell identified a signature in black pen that appears immediately under the first note in red pen as the signature of her husband, Mr Anthony Hassell, and said that he had signed the notes during the discussion when their son first came to their house to indicate his agreement to this proposal. Mrs Hassell explained the reference to the name 'Alisha' was the person they dealt with at H & N

[40] ts 138 - 139.
[41] ts 127.
[42] Exhibit 2.

Perry.[43] On the following day, Mrs Hassell wrote next to the words '$250 for 4 weeks', in black pen, 'seems they paid 225 !! 1/8'.

55 In her notes, Mrs Hassell recorded under her husband's signature in red pen that 'John wants the eviction notice lifted'. It is not clear from her notes as to whether she made this note prior to John Hassell visiting the defendants or upon his return. However, on the following day she added to this note in red by making a further note in black pen that stated, 'done for the time being 1/8'.

56 It appears from Mrs Hassell's notes that she made another note in red pen, after John Hassell had returned to their home, which stated, 'John accepted their (tenants) terms and is sacking RE agent as from tomorrow'. Mrs Hassell made another note on the following day in black pen which added to this note that stated 'until further notice only unit (1)'. When giving oral evidence about this addition to the notes she said that 'only unit 1 was anything to do with Sterling First'. Her evidence on this point is not correct because unit 2 was leased to the defendants, there were other tenants in unit 3 who had entered into a Sterling New Life Lease, and at that time unit 1 was the only unit that was not subject to a Sterling New Life Lease.[44] Her evidence on this point, however, is not material.

57 Mrs Hassell also said when giving oral testimony that the eviction notice was lifted until the next day,[45] but she did not explain what she meant by that. However, it appears from the court records that 'the eviction notice was not lifted' because H & N Perry filed the application for a Court Order in the Magistrates Court at Mandurah on 28 August 2019, seeking orders, among other orders, for compensation for rent arrears from 7 May 2019 to 27 August 2019, at the rate of $360 a week.

58 On 1 August 2019, the defendants paid $900 into the plaintiffs' bank account by electronic funds transfer with a payment description of 'Rent Leonie Yates'. On 23 August 2019, the defendants made a further payment of $450, and on 6 September 2019 the defendants made a final payment of $450, each with the same payment description 'Leonie Yates Rent'.

59 On 1 August 2019, John Hassell received a screenshot of a payment made by Ms Yates for $900 to which he responded, 'Thank

[43] Exhibit 2.
[44] ts 129.
[45] ts 126.

you'. He then received a text message in response stating, 'All paid thankyou Leonie and Alex Yates Next Payment will be the 23rd of aug then fortnightly after that'.[46]

60 On 23 August 2019, John Hassell received the following text message from Ms Yates:[47]

> Hi John just got confirmation of the rental payment for 450 dols 23/8/19 till 6/9/19 will email to your parents as dont seem to have your email address. Hope we can resolve this dispute. Also if you sign up with Denise she is fighting for each owner for lost money and putting a stop on mortgages for owners. It is difficult to sign a new lease at present even Sandi and Ron arent able to sign on their new place while its a crime scene. We love it here and found you very reasonable to work with and hope we can resolve this without evicting us Regards Leonie

61 In response, on the same day, John Hassell sent the following text message to Ms Yates:[48]

> Thank you Leonie, we have sadly found that mum and dad have a three year contract with the rental agent so we will keep trying to get a resolution with you and Alex BUT it has to include the agent. I know you don't want that, but so much stuff has happened that we were not party to that we have to work with. We have everything on hold until we see what you can come up with but please don't exclude the agent. Best John

62 John Hassell received the following text message in response from Ms Yates:[49]

> Thanks John do you mind sending me mums email address thanks hope we can resolve this waiting to hear back from Denise and will talk to tenancy people are you coming back next thurs? Understand your dilemma all my anxiety has come back again

63 Ms Yates sent a further text message to John Hassell on 26 August 2019 as follows:[50]

> Hi John spoke with Denise at length, says we cannot sign a lease due to crime scene till this is resolved. She is hoping this will be in about 8wks hopes. If we sign we dissolve our right for compensation and we can not do that obviously. I guess now the ball is in your court what

[46] Exhibit A, 68 - 69.
[47] Exhibit A, 182.
[48] Exhibit A, 183.
[49] Exhibit A, 76 - 77.
[50] Exhibit A, 77 - 79.

> you guys decide. Sorry it has come to this as we love our home. Warm regards Leonie

64 On 26 August 2019, John Hassell sent the following text message to Ms Yates in response:[51]

> Leonie am ok with no lease but a plan to get us back on track is ok with me. The agreement for rent is only between us and separate to any deal you have with SF. also see no reason as there is only short term leases with mum and dad why you can't get rent assistance. If you can see your way around a proposal ASAP (tomorrow) I would hope we can move ahead. Regards John

65 After Mr Tufekcic and Ms Yates ceased to make any further payments, John Hassell visited Mr Tufekcic and Ms Yates again. He asked Mr Tufekcic why they were not paying rent, and Mr Tufekcic told him that he had been advised that they were not meant to be paying rent anymore.

3.2 Mr Tufekcic's evidence about the agreement to make payments to the plaintiffs on 31 July 2019

66 After hearing that the Sterling Group had collapsed, Mr Tufekcic attended a meeting at the Mandurah Bowling and Recreation Club on 21 June 2019 with a large number of other Sterling New Life Lease lessees and landlords. Ms Brailey spoke at the meeting and told the audience not to enter into any new agreements, not to pay rent but to enter into discussions with the landowners to see if some kind of arrangements could be made to financially help the landowners to meet their mortgage obligations.

67 It is Mr Tufekcic's evidence that on 31 July 2019, when John Hassell came to the property, they invited him in, and he stayed for about 45 minutes, during which they had a friendly discussion about what had happened. During the course of the discussion, John Hassell said to Mr Tufekcic and Ms Yates that his parents could not afford to allow them to live at the property rent free. Mr Tufekcic told John Hassell that they had received some advice from Ms Brailey at the meeting, which was not to pay rent, not to enter into any new agreements, but to offer landowners assistance in payment of mortgages. After some negotiation an agreement was reached whereby

[51] Exhibit A, 184.

Mr Tufekcic and Ms Yates agreed to pay $225 a week to the plaintiffs.[52]

68 It was put to Mr Tufekcic in cross-examination, and he agreed that he said to John Hassell that he wanted to make the payment direct to the plaintiffs rather than through an agent.[53]

69 It was also put to Mr Tufekcic in cross-examination that John Hassell gave them his mobile telephone number. Mr Tufekcic agreed and then claimed in an unresponsive answer to the question that the word 'rent' was not mentioned until John Hassell said to Ms Yates, 'Would you please mark this as "rent" so I can know where it's coming from'. The plaintiffs argue that this evidence should not be accepted as it infringes the rule in ***Browne v Dunn***.[54]

70 The rule in ***Browne v Dunn*** is that unless notice has already been given of the cross-examiner's intention to rely upon such matters, it is necessary to put to an opponent's witness in cross-examination the nature of the case upon which it is proposed to rely in contradiction of his evidence.[55] This is because the rule requires that a witness be given an opportunity to comment on or explain some matter about which the opposing party intends to make comment on.

71 In this matter, the use of the word 'rent' is significant. In the text messages sent by Ms Yates, it is relied upon by the plaintiffs as post-contractual conduct, which conduct is said to be evidence of the weekly payments of $225 a week were in satisfaction of an agreement reached by the plaintiffs and the defendants to vary not only the amount of rent to be paid each week but also the method of payment of rent.

72 The defendants in their amended defence to statement of claim and counterclaim plead in para 8 that they made gratuitous payments of $900 on 1 August 2019, $450 on 23 August 2019 and $450 on 6 September 2019 to the plaintiffs to help them with their financial hardship resulting from Sterling Corporate Services Pty Ltd entering into voluntary administration and Rental Management Australia ceasing to make rent payments on behalf of Sterling Corporate Services Pty Ltd to the plaintiffs, however this was not rent. This pleading, whilst clearly putting the defendants' case, does not constitute notice of Mr Tufekcic's evidence that John Hassell requested that the defendants

[52] ts 190 - 192.
[53] ts 191.
[54] ***Browne v Dunn*** (1893) 6 R 67 (HL).
[55] ***Allied Pastoral Holdings Pty Ltd v FCT*** [1983] 1 NSWLR 1, 16**Error! Bookmark not defined.** (Hunt J).

describe the payments as rent. For these reasons, I have applied the rule in ***Browne v Dunn*** and not had any regard to Mr Tufekcic's evidence on this point.

3.3 Ms Brailey's evidence

73 Ms Brailey gave evidence on behalf of the defendants. Unfortunately, when she gave evidence, it was clear that Ms Brailey misunderstood what was required of her as a witness, and misunderstood the nature of the proceedings. Despite being repeatedly informed that she was required to listen to the questions and to answer each of them by responding specifically to the issues raised, Ms Brailey did not do so. It was apparent that she regarded her role in the proceedings to appear as an advocate on behalf of the defendants. She was argumentative, reluctant to answer questions, and, when she did answer, the answers to most questions were non-responsive to the subject matter. She also made repeated attempts to make unsolicited statements about what she considered to be the injustice the defendants and other Sterling New Life lessees had suffered as a result of entering into a Sterling New Life Lease.

74 However, what Ms Brailey did say in her written witness statement that is admissible is that she arranged for a presentation at the Mandurah Bowling and Recreation Club to provide advice to tenants of Sterling New Life Leases on 21 June 2019, and that she spoke at the meeting that Mr Tufekcic described as a rally. At the meeting, Ms Brailey spoke about a number of matters and made the following points:[56]

> (a) tenants of Sterling New Life Leases should not move out of their properties;
>
> …
>
> (c) tenants of Sterling New Life Leases should not enter into any new contracts with their landlords' representatives and should not start paying any rent for their properties;
>
> (d) if a landlord of a Sterling New Life Lease was threatening to have the tenant evicted and/or to take the tenant to court, the tenant should speak with the landlord and see if they can offer some financial assistance while the issues with Sterling are being resolved. Any agreement to pay financial assistance must be paid directly to the landlords and not a property manager or

[56] Exhibit 5, [7].

> any other third party (as the payments were not to be confused with rental payments); and
>
> …

3.4 Relevant terms of the property management agreement the plaintiffs entered into with H & N Perry

75 The material provisions of the Exclusive Management Authority for Residential Premises the plaintiffs entered into with Sale Leader Pty Ltd, who trades as H & N Perry (as property manager of the property), on 20 June 2019, which relate to any variations in the amount and method of payment of rent or entering into a new lease are as follows:

(a) item 6 of the Schedule provides, when read with the definition of Term in cl 2, that the Term of the exclusive management agreement is from 30 May 2019 until 29 May 2022;

(b) pursuant to cl 1, the plaintiffs appointed and authorised H & N Perry as the plaintiffs' property manager on a sole exclusive basis to provide the Services (defined in cl 2 to mean the services specified in item 7) in respect of the Premises (the property) for the term of the agreement in accordance with the terms and conditions of the Exclusive Management Authority for Residential Premises;

(c) in item 7 of the Schedule 'Services' are listed and fees for each service is specified. In item 7.3(b), a Management Fee of 9.35% is prescribed for Gross Collections (defined to mean in cl 2 the total dollar value of all monies collected by H & N Perry or the plaintiffs from the tenants or other sources), and whilst in item 7.3(j) no fee is specified for rent reviews and the item is noted as not applicable, this service is not struck through to indicate that it is not a service that is to be provided;

(d) pursuant to cl 5.3.2, H & N Perry are required to use reasonable endeavours to collect the Gross Rental (defined to mean in cl 2 the total dollar value of all rental revenue collected or to be collected by H & N Perry from the tenants before any deductions) and other monies (if any) from the tenants; and

(e) pursuant to cl 5.1.4, H & N Perry are required to negotiate the terms and conditions of tenancy with any prospective tenants and required, pursuant to cl 5.3.1, to negotiate and sign leases on behalf of the plaintiffs. However, when these provisions are

> read with cl 6.2 it does not appear that during the currency of the exclusive management agreement the plaintiffs were prohibited from entering into any new lease on their own behalf, as cl 6.2 contemplates that if the property is let by any other means during the Term the plaintiffs are required to pay to H & N Perry the Property Manager's Fees for letting the property.

3.5 Relevant principles - oral contracts

76 For the plaintiffs to prove their claim that the terms of the lease were varied, the plaintiffs need to establish, on the balance of probabilities, that the defendants agreed to pay $225 a week rent directly to the plaintiffs.

77 To find that what was agreed by the parties was in fact an agreement to pay rent, rather than, as the defendants contend, financial assistance to the plaintiffs for a period to enable the defendants to seek relief in respect of the failure of the Sterling New Life Lease scheme, involves objectively determining the common intention of the contracting parties, having regard to the language used, the surrounding circumstances known to the parties and the purpose of the transaction.[57]

78 As the learned author of *Heydon on Contract* observes, contracts resting wholly or partly on oral conversations are more likely to be imprecise than contracts that are wholly or largely in writing, for oral conversations are often misheard, misconstrued, erroneously remembered or reconstructed in light of later perceptions of self-interest.[58]

79 The difficulties in construing whether parties have reached an enforceable agreement which relies upon an oral discussion were considered by Vaughan J in ***Warrington Management Pty Ltd v Kingslane Property Investments Pty Ltd***, in which, his Honour observed:[59]

> The dealings were oral. That alone creates difficulties. The type of conversations referred to in the evidence involved nuance and emphasis and thus might, depending on context, bear more than one meaning. Although stated in relation to a misleading conduct claim, the observations of McLelland CJ in Eq in ***Watson v Foxman*** are apposite:

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[57] ***Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*** [2004] HCA 52; (2004) 219 CLR 165 [40].
[58] J D Heydon, *Heydon on Contract*, Lawbook Co (2019) [8.90].
[59] ***Warrington Management Pty Ltd v Kingslane Property Investments Pty Ltd*** [2019] WASC 2 [37] - [39] (footnotes omitted).

> Where the conduct is the speaking of words in the course of a conversation, it is necessary that the words spoken be proved with a degree of precision sufficient to enable the court to be reasonably satisfied that they were in fact misleading in the proved circumstances. In many cases (but not all) the question whether spoken words were misleading may depend upon what, if examined at the time, may have been seen to be relatively subtle nuances flowing from the use of one word, phrase or grammatical construction rather than another, or the presence or absence of some qualifying word or phrase, or condition. Furthermore, human memory of what was said in a conversation is fallible for a variety of reasons, and ordinarily the degree of fallibility increases with the passage of time, particularly where disputes or litigation intervene, and the processes of memory are overlaid, often subconsciously, by perceptions or self-interest as well as conscious consideration of what should have been said or could have been said. All too often what is actually remembered is little more than an impression from which plausible details are then, again often subconsciously, constructed. All this is a matter of ordinary human experience.

In determining whether there was an agreement - and, if so, its terms - the matters referred to in that passage speak equally as to the difficulties in proof that arise where, in the absence of a reliable contemporaneous record or other corroboration, a party relies on spoken words to found a claim.

Also relevant are the observations of Hammerschlag J in ***John Holland Pty Ltd v Kellogg Brown & Root Pty Ltd***:

> Where a party seeks to rely upon spoken words as a foundation for a cause of action, including a cause of action based on a contract, the conversation must be proved to the reasonable satisfaction of the court which means that the court must feel an actual persuasion of its occurrence or its existence. Moreover, in the case of contract, the court must be persuaded that any consensus reached was capable of forming a binding contract and was intended by the parties to be legally binding. In the absence of some reliable contemporaneous record or other satisfactory corroboration, a party may face serious difficulties of proof. Such reasonable satisfaction is not a state of mind that is obtained or established independently of the nature and consequences of the fact or facts to be proved.

80 Recourse can be had to extrinsic evidence of surrounding circumstances where the real intention is in doubt to establish conclusions about the character of a transaction, that is the substance of the transaction, such as whether a conveyance or transfer of land is in fact by way of a mortgage, whether an apparent sale and hire purchase

agreement was an unregistered bill of sale, or whether an absolute assignment was an assignment to secure payment of a debt.[60]

81 Post-contractual conduct may be relevant and admissible to the determination of whether parties have varied the contract or to determine whether parties have made a new contract in substitution for the old. In ***Chou v Awap Sgt 26 Investments Ltd [No 3]***, Allanson J set out the established principles as follows:[61]

> The court can have regard to the commercial context, and to both pre-contractual and post-contractual conduct as relevant to determining whether an agreement has come into existence between the parties. Subsequent conduct may also be admissible as evidence where the terms of an oral contract are in issue. As Sakar J said in ***King v Adams***:
>
> > Ascertaining the existence and terms of an oral contract is a question of fact …Consideration of surrounding circumstances and post contractual conduct is permissible when the existence or terms of an oral contract are in issue.

3.6 What was agreed between John Hassell and the defendants on 31 July 2019?

82 It should be noted that the Exclusive Management Authority the plaintiffs had entered into with H & N Perry did not prohibit the plaintiffs or a person authorised by them to negotiate a variation of the existing lease that related to either the amount of rent to be paid or the method of payment of rent, as the terms of that agreement simply required the plaintiffs to pay a Management Fee of 9.35% to H & N Perry on any rent payments received by the plaintiffs.

83 I am satisfied that John Hassell was authorised by the plaintiffs to enter into an agreement with the defendants to vary the existing terms as to payment of rent, but I am not satisfied that the plaintiffs have proved that he acted within the scope of his authority, because it appears from Mrs Hassell's notes that John Hassell had the authority to negotiate the payment of $250 rent a week for four weeks and then to revert to the full amount of $360 a week and the making of payments for backpay. Consequently, there is insufficient evidence before the

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[60] ***Gurfinkel v Bentley Pty Ltd*** (1966) 116 CLR 98, 108 (Barwick CJ in dissent), 115 (Windeyer J); ***Hudson v Arap 1 (NSW) Pty Ltd*** [2015] NSWCA 126; (2015) 90 NSWLR 477 [40] (Bathurst CJ) (Bergin CJ in Eq agreed); ***Polsky v S & A Services Ltd*** [1951] 1 All ER 1062; ***Black v Slee*** [1934] NZLR 108; see also ***Bembridge v G-K-R Karate Australia Pty Ltd*** [1998] WASCA 15 [24] (Ipp J).

[61] ***Chou v Awap Sgt 26 Investments Ltd [No 3]*** [2018] WASC 383 [134]; appeal dismissed ***Awap Sgt 26 Investment Ltd v CN 2000 Holdings Ltd*** [2020] WASCA 74.

court to infer that John Hassell had the authority to negotiate an ongoing rent of $225 a week.

84 Although it could be said that the plaintiffs ratified the terms negotiated by John Hassell with the defendants by acquiescing to the payments being made into their bank account, the fact that they did so is not determinative of acceptance of those terms by the plaintiffs because it can be clearly inferred that, despite the fact that they received those payments, they did not provide instructions to H & N Perry not to pursue the defendants for non-payment of rent for the full amount of $360 a week.

85 Even if I was satisfied to reasonable satisfaction that John Hassell did have the authority to negotiate a variation of the terms of the existing lease of an ongoing payment of rent of $225 a week or to negotiate a new lease on these terms, I am not satisfied to the requisite standard that the terms of the agreement reached with the defendants was to vary the terms of the existing Sterling New Life Lease, or enter into a new lease.

86 To ascertain objectively the common intention of the plaintiffs and the defendants, it is necessary to have recourse to the pre-contractual and post-contractual conduct of the parties.

87 The pre-contractual conduct of the defendants shows that they had received advice, at the meeting where Ms Brailey spoke, to not enter into a new lease and to not make any payments of rent, but simply to offer some financial assistance to their landlord. It is not in dispute that Mr Tufekcic received that advice or that he told John Hassell that he had received some advice from Ms Brailey. Nor was it put to Mr Tufekcic in cross-examination that he did not tell John Hassell that they would not enter into another agreement or that he did not tell John Hassell that he had been told at the meeting to offer land owners assistance in payment of mortgages but not to make a payment of rent.

88 Whilst the three payments made by Ms Yates to the plaintiffs' bank account were described by her as rent, and she had referred in her text message to John Hassell on 23 August 2019 that a rental payment of $450 had been made for the period of 23 August 2019 until 6 September 2019, Ms Yates in that text message, and in her other messages, made it very clear that the defendants did not intend to enter into a new lease agreement. The fact that the payments were referred to as rent does not necessarily make the character of those payments to be

rent and does not necessarily constitute evidence of a binding variation of the lease between the plaintiffs and the defendants to pay $225 a week on an ongoing basis. The law requires that the nature of rights conferred by the terms of an agreement are to be determined by the real subject matter of the transaction rather than the reference to the use of a particular word or formula used by the parties.[62]

89 The content of the text messages between John Hassell and Ms Yates shows that the issue of the non-payment of rent of $360 a week had not been resolved between the plaintiffs and the defendants. Further, and importantly, the post-contractual conduct of the plaintiffs by their agent, H & N Perry, to file the application in the Magistrates Court on 6 September 2019, when on the plaintiffs' case the defendants had paid rent up until that date, is inconsistent with a finding that the parties had reached a concluded agreement to vary the terms of the Sterling New Life Lease.

90 For these reasons the plaintiffs' claim that the parties entered into an agreement for a new lease also fails.

4.0 Whether the plaintiffs are bound by the Payment Direction Deed, and whether the Payment Direction Deed forms part of the Sterling New Life Lease

4.1 Relevant principles - incorporation of terms from another document into a contract

91 Determining what terms are incorporated into a contract depends primarily on construing the words of incorporation in the light of the ordinary principles of statutory construction. In ***Coopers Brewery Ltd v Lion Nathan Australia Pty Ltd***, Bleby J set out the applicable principles as follows:[63]

> The fundamental principle is that where parties expressly incorporate terms into a contract, the incorporated terms must be construed as if they have been written out in full in the contract, and accordingly must be construed in the context of the contract into which they have been incorporated.
>
> In ***Tradigrain SA v King Diamond Marine Ltd***, Rix LJ, with whom Brooke and Henry LLJ agreed, said:

[62] ***Radaich v Smith*** [1959] HCA 45; (1959) 101 CLR 209, 214 (McTiernan J), 219 (Taylor J), 220 - 221, (Menzies J), 221 - 222 (Windeyer J) (Dixon CJ agreed).
[63] ***Coopers Brewery Ltd v Lion Nathan Australia Pty Ltd*** [2005] SASC 400; (2005) 93 SASR 179 [26] - [29] (footnotes omitted).

> The first rule relating to the incorporation of one document's terms into another document is to construe the incorporating clause in order to decide on the width of the incorporation … A second rule, however, is to read the incorporated wording into the host document in extenso to see if, in that setting, some parts of the incorporated wording nevertheless have to be rejected as inconsistent or insensible when read in their new context: see eg ***Porteus v Watney*** (1877-78) LR 3 QBD 534 at 542, per Lord Justice Brett:
>
> > But then there is another rule which applies, which is, that if taking all the conditions to be in the bill of lading, some of them are entirely and absolutely insensible and inapplicable, they must be struck out as insensible; not because they are not introduced, but because being introduced they are impossible of application.
>
> Sometimes the two rules have been read together, as in ***Hamilton & Co v Mackie & Sons*** (1889) 5 TLR 677, but more recently they have been recognized as distinct approaches, see ***Skips A/S Nordheim v Syrian Petroleum Co Ltd*** [1984] QB 599. In determining that second question, the Court has to have regard to the wording of both documents, to the extent that the charter-party is prima facie incorporated.

Incorporated terms may not always be entirely appropriate to the contract into which they are incorporated, and this will involve application of the second rule mentioned by Rix LJ. By way of illustration, in ***Hamilton & Co v Mackie & Sons***, the judgment of Lord Esher MR, with whom Cotton and Lindley LJJ agreed, is summarised as follows:

> The Master of the Rolls said that the law on the subject had been laid down several times. Where there was in a bill of lading such a condition as this, "All other conditions as per charterparty," it had been decided that the conditions of the charterparty must be read verbatim into the bill of lading as though they were there printed *in extenso*. Then if it was found that any of the conditions of the charterparty on being so read were inconsistent with the bill of lading they were insensible, and must be disregarded. The bill of lading referred to the charterparty, and therefore when the condition was read in, "All disputes under this charter shall be referred to arbitration," it was clear that that condition did not refer to disputes arising under the bill of lading, but to disputes arising under the charterparty. The condition therefore was insensible, and had no application to the present dispute, which arose under the bill of lading.

> The process of qualifying the imported terms was described by Buckley LJ in ***Modern Buildings Wales Ltd v Limmer & Trinidad Ltd***, in the following terms:
>
> > … Where parties by an agreement import the terms of some other document as part of their agreement those terms must be imported in their entirety, in my judgment, but subject to this: that if any of the imported terms in any way conflict with the expressly agreed terms, the latter must prevail over what would otherwise be imported.

92 Where a clause seeks to incorporate by general terms only the terms of another contract the clause will not incorporate any terms of the latter which are outside the scope and nature of the first.[64] If any terms in the incorporated document clearly conflict with the contract, the contracted terms should be interpreted as prevailing.[65]

4.2 Are the terms of the Payment Direction Deed incorporated into the Residential Tenancy Agreement?

93 In ***Soussa v Thomas***, the defendants entered into a Sterling New Life Lease on 26 July 2017, in the form of a Residential Tenancy Agreement prescribed by s 27A of the *Residential Tenancies Act*, which had attached a number of annexures, which included a Payment Direction Deed.[66]

94 In ***Soussa v Thomas***, I described the effect of s 27A and s 82 of the *Residential Tenancies Act*, and then went on to consider the effect of Part A, Part B and Part C of the prescribed form of a residential tenancy agreement as follows:[67]

> Section 27A of the *Residential Tenancies Act* creates an offence for a lessor to enter into a written residential tenancy agreement except in the prescribed form. Further, s 82 of the *Residential Tenancies Act* provides that:
>
> **82. Contracting out**
>
> (1) Except as provided under this Act -
>
> (a) any agreement or arrangement that is inconsistent with a provision of this Act or purports to exclude, modify or restrict the

[64] ***Skips A/S Nordheim v Syrian Petroleum Co Ltd*** [1984] QB 599, 618.
[65] See the discussion in *Heydon on Contract* (2019) [8.1450].
[66] ***Soussa v Thomas*** [2021] WASC 172.
[67] ***Soussa v Thomas*** [2021] WASC 172 [69] - [73].

> operation of this Act is to that extent void and of no effect; and
>
> (b) any purported waiver of a right conferred by or under this Act is void and of no effect.
>
> (2) A person must not enter into any agreement or arrangement with intent either directly or indirectly to defeat, evade or prevent the operation of this Act.
>
> Penalty for this subsection: a fine of $10 000.

> Pursuant to reg 10AA(a) of the *Residential Tenancies Regulations 1989* (WA), the prescribed form for a written residential tenancy agreement that is not a social housing tenancy agreement is set out in sch 4 Form 1AA, and reg 18 provides that the forms set out in sch 4 are prescribed in relation to the matters specified in those forms. The prescribed form in Form 1AA contains three parts: Part A, Part B and Part C.
>
> Part A of Form 1AA provides for details to be completed, including the names of the lessor and tenant, the names of the lessor's property manager, the means of giving of notices, the term of the agreement, the address of the residential premises, the maximum number of occupants, the amount of rent, the method by which the rent must be paid, the security bond, and how rent increases are to be calculated.
>
> Part B of Form 1AA contains standard terms that are applicable to all residential tenancy agreements.
>
> Part C of Form 1AA provides for additional terms to be included in the agreement but does not expressly prescribe any particular terms. However, the effect of Part C is that it prescribes that any additional terms may only be included if they do not conflict with the provisions of the *Residential Tenancies Act*, the *Residential Tenancies Regulations* and the standard terms of the agreement (that is, the standard terms in Part B).

95 In ***Soussa v Thomas***, the rent was specified in Part A of the Residential Tenancy Agreement as $390 a week payable weekly in advance starting on 26 July 2017, and the method by which the rent was required to be paid was specified in Part A as:[68]

> Refer to the Payment Direction Deed
>
> For the first month of the tenancy, from the commencement date to the last day of that month, payable on the twenty first of that month. For the second and subsequent months of the tenancy, from the first of that

[68] ***Soussa v Thomas*** [2021] WASC 172 [76].

> month to the last day of that month, payable on the twenty first of that month.
>
> For the last month of the tenancy, from the first of that month to the termination date of the lease, payable on the twenty first of that month.

96 Clause 7 of Part C of the Residential Tenancy Agreement entered into by the parties in ***Soussa v Thomas***, expressly provided that the Payment Direction Deed formed part of the lease. Because the Payment Direction Deed in that matter was expressly incorporated as part of the additional terms in Part C, I found that the terms of the deed were additional terms of the lease, in respect of which the legislative consequences of the operation of s 27A and s 82 of the *Residential Tenancies Act* were to the effect that any term of the Payment Direction Deed that was inconsistent with or purported to exclude, modify or restrict the operation of, or purported to waive a right under the prescribed terms of a residential tenancy agreement in Form 1AA was void and of no effect.[69]

97 I also found in ***Soussa v Thomas*** that because the terms of the Payment Direction Deed could only take effect as additional terms, no term of that deed could prevail over any standard term (in Part B) in the case of any inconsistency between a standard term and a term of the Payment Direction Deed.[70] I also observed in ***Soussa v Thomas*** that although the Payment Direction Deed was referred to in Part A of the lease, no terms of the Payment Direction Deed were incorporated into Part A.[71] This observation was by way of obiter, and, in any event, because the Payment Direction Deed in that matter expressly formed part of the additional terms of the lease, that is, the deed formed part of the Residential Tenancy Agreement, it was not a separate document that was incorporated into the contract.

98 In this matter, the Payment Direction Deed, which material terms are for purposes identical to the express terms of the Payment Direction Deed in ***Soussa v Thomas***, is not expressly incorporated into Part C of the Residential Tenancy Agreement executed by the defendants. The only reference to the Payment Direction Deed in the Residential Tenancy Agreement executed by the defendants is in Part A, which reference is identical to the reference in Part A of the Residential Tenancy Agreement executed by the parties in ***Soussa v Thomas***, set out in [95] of these reasons.

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[69] ***Soussa v Thomas*** [2021] WASC 172 [88].
[70] ***Soussa v Thomas*** [2021] WASC 172 [90].
[71] ***Soussa v Thomas*** [2021] WASC 172 [89].

99 In this matter, the plaintiffs rely upon the finding made in ***Soussa v Thomas*** that the Payment Direction Deed was not incorporated into the lease by it being referred to in Part A of the lease, and contend that it necessarily follows that it should be found in this case that the Payment Direction Deed executed by the defendants does not form part of the lease that binds the plaintiffs.

100 However, the findings made in ***Soussa v Thomas*** must be considered in their context, which was that there was a specific provision in Part C of the Residential Tenancy Agreement that expressly incorporated the Payment Direction Deed as part of the additional terms in Part C (cl 7). The effect of that provision was that, when the whole of the Residential Tenancy Agreement was considered, the reference in Part A could not be construed as incorporating the deed as a separate document into the lease, because the deed formed part of the lease as additional Part C terms. The effect of cl 7 of Part C was that all of the terms of the deed were additional terms, and not simply incorporated terms.

101 In construing the terms of the Residential Tenancy Agreement in this matter, a relevant background fact, which is a fact that goes to the scope of the authority conferred by the Exclusive Management Authority entered into by the plaintiffs with Rental Management Australia, is that that the Exclusive Management Authority was only operative if a Sterling New Life Lease was procured with a Sterling New Life Lease lessee entering into a Sterling New Life Lease to occupy the property.[72]

102 In this matter, the Payment Direction Deed does not form part of the lease by an express term in Part C of the Residential Tenancy Agreement, but is simply referred to as the method by which the rent must be paid in Part A.

103 The method by which the rent must be paid is a prescribed term of Part A as it forms part of the Form 1AA, which is prescribed by reg 10AA(a) and reg 18 of the *Residential Tenancies Regulations 1989* (WA). The rent clause of Part A of Form 1AA is prescribed as follows:

> **RENT**
>
> The rent is $[insert amount] per week/calculated by reference to tenants income [insert calculation] payable weekly*/fortnightly* in advance [*delete as appropriate] starting on [insert date].

[72] Exhibit A, 12, Annexure to Schedule, item 6.

> The method by which the rent must be paid [strike out where applicable]:
>
> (a) by cash or cheque; or
>
> (b) into the following account or any other account nominated by the lessor:
>
> BSB number:
>
> account number:
>
> account name:
>
> payment reference:
>
> or
>
> (c) as follows
>
> …

104 Whether terms are incorporated into a contract depends upon intention. The actual terms of the contract are those that the parties objectively intended to include in it. To constitute a term of the contract, it must have been incorporated into the contract at the time of the formation of the contract.

105 In this matter, the defendants each signed the Residential Tenancy Agreement on 21 April 2017. Mr Ryan Jones signed the agreement, in the presence of the defendants, on behalf of the plaintiffs. The plaintiffs do not claim that they were not bound by the terms of the Residential Tenancy Agreement, even though at the time the agreement was executed Mr Ryan Jones had ceased to be a director of Rental Management Australia 11 days prior to the execution of the agreement, and it was Rental Management Australia that had, pursuant to cl 5.3 of the Exclusive Management Authority for Residential Premises, the authority to negotiate and sign leases on behalf of the plaintiffs.

106 The words in the Residential Tenancy Agreement, 'The method by which the rent must be paid… Refer to the Payment Direction Deed' must be construed in the context of the words that follow, 'For the first month of the tenancy, from the commencement date to the last day of that month, payable on the twenty first of that month…', and in the context of the whole of the agreement. In the absence of referring to the Payment Direction Deed, there are no particulars of how or by what

means the rent is to be paid, as expressly contemplated in Part A of prescribed Form 1AA.

107 The language in the method of rent clause in Part A of the Residential Tenancy Agreement effects incorporation of the Payment Direction Deed. Without incorporation, the terms of method and means of payment of rent are incomplete.

108 The Payment Direction Deed expressly provides for the method and means of payment of rent. It also provides for other matters.[73]

109 The material terms of the Payment Direction Deed, which provide for the method and means of payment of rent, are, when the material definitions in cl 1.1 are read in, as follows:

(1) The plaintiffs[74] (as Landlord), the defendants (as Tenant) and Sterling Corporate Services Pty Ltd (as Manager), agree, in consideration of, among other things, the mutual promises contained in the deed.[75]

(2) Clause 2.1 provides that the deed is conditional upon:[76]

(a) the Tenant paying the Application Fee (a fee payable to Sterling Corporate Services Pty Ltd equal to 8.8% inclusive of GST of the Investment Amount) to the Sterling Corporate Services Nominated Bank Account;

(b) the Tenant paying the Initial Rent Payment (an amount equal to one month's Rent (Rent means the rent by the Tenant (as tenant) under the Sterling New Life Lease)) to the Sterling Corporate Services Nominated Bank Account;

(c) the Tenant paying the amount of the Investment Amount (being the amount specified in item 4 of the Reference

[73] Clause 2.6 provides for the consent of the tenant to Sterling Corporate Services Pty Ltd releasing particular information to Rental Management Australia and cl 3.1 contains an acknowledgement by the tenant that they had had an opportunity to obtain independent legal and financial advice prior to entering into the deed and the Sterling New Life Lease.

[74] It is noted that the names of the plaintiffs specified as the landlord in item 1 of the Reference Schedule are incorrect in that Margery Anne Hassell is named as Margaret Anne Hassell and Anthony Wollaston Boucher Hassell is named as Anthony Wollaston Butcher Hassell, Exhibit A, 195. It is also noted that the same errors are made in the names of the plaintiffs specified in Part A of the Residential Tenancy Agreement under heading Lessor 1 and Lessor 2; Exhibit A, 18.

[75] Exhibit A, 187.

[76] Exhibit A, 190.

Schedule, which is an amount of $210,000) less the Application Fee and the Initial Rent Payment to the Product Disclosure Statement Nominated Bank Account; and

(d) the Tenant making an application pursuant to the Product Disclosure Statement to invest the Investment Amount less the Application Fee and the Initial Rent Payment in Units (subscribed in the Sterling Fund, being the registered managed investment scheme specified in item 5 of the Reference Schedule as the Sterling Income Trust) by the end of the Application Period (being the period of 10 Business Days commencing on the date of the deed).

(3) Clause 2.2 provides that the Tenant acknowledges and agrees that all distributions from and the proceeds of any redemption of the Tenant's Units (the Units issued to the Tenant as a result of the Investment Amount less the Application Fee and the Initial Rent payment being invested in accordance with this deed) will be paid into the Sterling Corporate Services Nominated Bank Account, to be held in accordance with the terms of cl 2.

(4) By cl 2.3(b)(i), (iii) and (iv) Sterling Corporate Services and its officers are jointly and severally to be appointed the attorney of the Tenant to perform among other functions:

(a) upon the Term ending, apply to redeem any of the Tenant's Units and to have the proceeds of redemption paid into the Sterling Corporate Services Nominated Bank Account for the purpose of paying any Rent (the rent by the Tenant under the Sterling New Life Lease) that is due at the end of the Term that has not been paid;

(b) upon the situation where the Distributions from the Tenant's Units have been insufficient to pay any Rent that is due, apply to redeem any of the Tenant's Units and to have the proceeds of redemption paid into the Sterling Corporate Services Nominated Bank Account for the purpose of paying any Rent (the rent by the Tenant under the Sterling New Life Lease) that is due and which has not been paid; and

(c) do anything and to execute any document for any of the purposes set out in cl 2.3(b)(i), (ii) and (iii) as fully and effectually as the Tenant could do.

(5) By cl 2.4 the Tenant authorises Sterling Corporate Services to pay the Rent (the rent by the Tenant under the Sterling New Life Lease) monthly in arrears during the Term out of the money held in the Sterling Corporate Services Nominated Bank Account in accordance with cl 2.

(6) By cl 2.5 the Tenant irrevocably authorises and directs Sterling Corporate Services to deal with each distribution from the Tenant's Units received by Sterling Corporate Services into the Sterling Corporate Services Nominated Bank Account; first, to pay any Rent (the rent by the Tenant under the Sterling New Life Lease) that is due and which has not been paid.

(7) Clause 2.7 provides, despite any provision to the contrary contained in this deed or the Sterling New Life Lease (the residential tenancy agreement in respect of the Residential Premises entered into between the Landlord as lessor and the Tenant as tenant dated on or about the date of this deed):

(a) the liability of the Tenant to pay the Rent (the rent by the Tenant (as tenant) under the Sterling New Life Lease) under the Sterling New Life Lease is limited to the payments made pursuant to the distribution from the Tenant's Units or the redemption of the Tenant's Units under clauses 2.5(a)(i), 2.5(a)(ii) and 2.5(b)(i) (**Distribution and Redemption Payments**); and

(b) if there is a shortfall between the amount of the Distribution and Redemption Payments and the amount of the Rent, the Tenant is not liable to pay that shortfall.

110 The character of these provisions are such that they can be said to be within the scope and nature of the method by which the rent must be paid and provide particulars of how that was to occur. For these reasons, these provisions were terms that were incorporated by reference into Part A of the residential tenancy agreement entered into by the plaintiffs and the defendants.

111 Having found that the Payment Direction Deed was incorporated into Part A, it is immaterial whether there is no evidence the Payment

Direction Deed was executed by a person who had the actual or ostensible authority of Rental Management Australia to execute the deed on behalf of the plaintiffs, in particular whether Mr Ryan Jones was a person so authorised. For this reason, the issue of authority to execute the Payment Direction Deed necessarily falls away.

112 Turning to the issue of whether any of the terms referred to in [109] of these reasons are rendered inoperative because they are inconsistent with any other term of the Residential Tenancy Agreement, requires consideration on two grounds. First, on contractual principles, and second by operation of the statute, namely pursuant to s 27A and s 82 of the *Residential Tenancies Act* on grounds that a term of the Payment Direction Deed is inconsistent with a standard term in Part B of the Residential Tenancy Agreement.

113 In respect of the second issue, it is a standard term in Part B of the Residential Tenancy Agreement that the tenant must pay rent on time or the lessor may issue a notice of termination and, if the rent is still not paid in full, the lessor may take action through the court to evict the tenant.[77] In respect of this standard term and the effect of cl 2.7 of the Payment Direction Deed, I found in ***Soussa v Thomas***:[78]

> Because this clause is a standard term prescribed as such by Part B of Form 1AA, the effect of s 27A and s 82(1)(b) of the *Residential Tenancies Act* is that the right conferred on Mr Soussa as the lessor of the Harrisdale property by the standard term in cl 3 of Part B of the lease cannot be waived by any other agreement or arrangement. In addition, to the extent that cl 2.7 of the Payment Direction Deed is inconsistent with this right, or purports to exclude, modify or restrict the operation of the standard term in cl 3, pursuant to s 82(1)(a) of the *Residential Tenancies Act*, cl 2.7 must be construed as void and of no effect.
>
> …
>
> It cannot be found that the terms of the Payment Direction Deed discharged the obligation of the defendants under the terms of the lease to pay rent if there are no funds left in the Sterling Income Trust to make the monthly payments of rent. Such a construction, if accepted would raise a direct inconsistency with the obligation in the standard term in cl 3 of Part B of the lease that the defendants must pay rent on time or Mr Soussa may issue a notice of termination, and, if the rent is still not paid in full, Mr Soussa may take action through the court to evict the defendants. The effect of the direct inconsistency is

[77] Exhibit A, 22.
[78] ***Soussa v Thomas*** [2021] WASC 172 [112], [116], [117].

> that pursuant to s 27A and s 82 of the *Residential Tenancies Act* to this extent, cl 2.7 of the Payment Direction Deed is void and of no effect.
>
> The standard term in cl 3 of Part B of the lease has the effect of entitling Mr Soussa to terminate the lease by issuing a notice of termination. This term of the lease, however, does not on its own entitle Mr Soussa to recover any arrears of rent, and to this extent no inconsistency arises between the standard term in cl 3 of Part B of the lease and cl 2.7 of the Payment Direction Deed.

114 Because the whole of the terms of the Payment Direction Deed formed part of the lease as additional terms in Part C of the Residential Tenancy Agreement in ***Soussa v Thomas***, the issue of whether any of the terms of the Payment Direction Deed, by the application of principles applying to construction of contracts, raised an inconsistency between the terms of the deed and the whole of the terms of the Residential Tenancy Agreement, did not arise.

115 An inconsistency arises where there is a contradiction or conflict between one provision and another, with the result that it is not possible to give effect to both.[79] An inconsistency does not necessarily arise where one clause merely qualifies another. In ***Forbes v Git***, the House of Lords set out the applicable principle as follows:[80]

> The principle of law to be applied may be stated in few words. If in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant and the earlier clause prevails. In this case the two clauses cannot be reconciled and the earlier provision in the deed prevails over the later. Thus if A covenants to pay 100*l.* and the deed subsequently provides that he shall not be liable under his covenant, that later provision is to be rejected as repugnant and void, for it altogether destroys the covenant. But if the later clause does not destroy but only qualifies the earlier, then the two are to be read together and effect is to be given to the intention of the parties as disclosed by the deed as a whole. Thus if A covenants to pay 100*l.* and the deed subsequently provides that he shall be liable to pay only at a future named date or in a future defined event or if at the due date of payment he holds a defined office, then the absolute covenant to pay is controlled by the words qualifying the obligation in manner described.
>
> ***Furnivall v Coombes*** is an illustration of the former case: ***Williams v Hathaway*** is an illustration of the latter.

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[79] ***Pagnan SpA v Tradax OceanTransportation SA*** [1987] 3 All ER 565, 575 (Bingham LJ) (Woolf LJ agreed), 578 (Dillam LJ); ***National Gallery of Australia v Douglas*** [1999] ACTSC 79 [37]; ***Queensland Alumina Ltd v Alinta DQP Pty Ltd*** [2006] QSC 391 [90] - [92]; ***Leonie's Travel Pty Ltd v International Air Transport Association*** [2009] FCA 280; (2009) 255 ALR 89 [57].

[80] ***Forbes v Git*** [1922] 1 AC 256, 259 (footnotes omitted).

> In the latter case there could be no question if the later provision of the deed were introduced by the word "but" or the words "provided always nevertheless," or the like. But there is no necessity to find any such words. If a later clause says in so many words or as matter of construction that an earlier clause is to be qualified in a certain way, effect can be given and must be given to both clauses.

116 To ascertain whether an inconsistency arises between the Payment Direction Deed and the Residential Tenancy Agreement, it is necessary to have regard to the terms of the whole of the agreement. Although the effect of cl 3 of Part B is that the defendants are required to pay rent on time, either personally or through their agent, the effect of cl 2.3(b)(iii) and cl 2.3(b)(iv) of the Payment Direction Deed is that the defendants appointed Sterling Corporate Services to be their attorney, that is their agent (to make payments of rent to the plaintiffs). As I found in ***Soussa v Thomas***, the word 'attorney' in these provisions can only be properly construed as an appointment as the defendants' agent to do anything as fully and effectually as the defendants could do for the purpose of paying any rent that is due and which has not been paid.[81]

117 The effect of standard term cl 3 of Part B of the Residential Tenancy Agreement does not on its own entitle the plaintiffs to recover any arrears of rent, and to this extent, as I found in ***Soussa v Thomas***, no inconsistency arises between cl 3 of Part B of the *Residential Tenancy Act* and cl 2.7 of the Payment Direction Deed.

118 The question that arises, however, is whether the effect of cl 2.7(b) of the Payment Direction Deed which provides that the defendants are not liable to pay any shortfall owing in rent from Distribution and Redemption Payments (being a distribution from their units or the redemption of the units in the Sterling Income Trust) is inconsistent with any other provision of the Residential Tenancy Agreement in Part A, Part B or Part C.

119 However, there is no provision in the Residential Tenancy Agreement that expressly provides for the payment of arrears, or otherwise deals with the payment of arrears of rent, other than cl 3 of Part B, which enables the plaintiffs to take court action to evict the defendants if rent falls into arrears.

120 When cl 2.7 of the Payment Direction Deed is read together with cl 3 of Part B of the Residential Tenancy Agreement, the effect is if, as

[81] ***Soussa v Thomas*** [2021] WASC 172 [114].

has occurred, the defendants fall into arrears in the payment of rent because the Sterling Income Trust has failed, which has resulted in their agent, Sterling Corporate Services, failing to pay rent to the plaintiffs since 10 April 2019, the plaintiffs were entitled to, as they did on 26 July 2019, issue a notice of termination.[82] The fact that pursuant to cl 2.7 of the Payment Direction Deed the defendants are not liable for the arrears of rent is not inconsistent with cl 3 of Part B.

4.3 Arguments put by the parties which flow from a finding that the parties are bound by the material terms of the Payment Direction Deed

121 The defendants' attorney (agent), Sterling Corporate Services, is in liquidation.[83] The plaintiffs argue that if the court finds that the plaintiffs are bound by the Payment Direction Deed, they seek a declaration that upon the winding up of Sterling Corporate Services the Payment Direction Deed comes to an end either automatically or as a matter of law.

122 The difficulty with this argument is that Sterling Corporate Services has not been wound up, nor is there any evidence before the court that it will be or that its winding up is imminent. In these circumstances, any declaration to the effect sought by the plaintiffs would simply be a bare declaration without any current foreseeable consequences. Justice Hill recently summarised the applicable legal principles, which make it clear that in such circumstances a bare declaration should not be made. In ***Litigation Capital Partners Llp Pte Ltd (Registration No 200922518m) v Acn 117 641 004 Pty Ltd (In Liquidation) (formerly known as Vale Cash Management Fund Pty Ltd)*** her Honour said:[84]

> A declaration is a formal statement by the court which pronounces on a legal state of affairs; it is not an order which is capable of enforcement. However, as was noted by the Full Court of the South Australian Supreme Court in ***Macks v Viscariello***:
>
> > [D]eclarations have legal consequences. They operate in law either as a *res judicata* or an issue estoppel. Further, declarations may take effect as a proprietary remedy - for example, a declaration that a party holds a property on a constructive trust. However, the effect of a declaration is not to create rights but to merely indicate what they have always been.

[82] Statement of Agreed Facts filed 27 May 2021 [19].
[83] Exhibit A, 96 - 102.
[84] ***Litigation Capital Partners Llp Pte Ltd (Registration No 200922518m) v Acn 117 641 004 Pty Ltd (In Liquidation) (formerly known as Vale Cash Management Fund Pty Ltd)*** [2021] WASC 161 [225] - [227] (footnotes omitted).

As Gaudron J observed in ***Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd***:

> There may be cases where a bare declaration that some legal requirement has been contravened will serve to redress some or all of the harm brought about by that contravention. ***Ainsworth v Criminal Justice Commission*** was such a case. But a declaration cannot be made if it 'will produce no foreseeable consequences for the parties'. That is not simply a matter of discretion. Rather, a declaration that produces no foreseeable consequences is so divorced from the administration of the law as to not involve a matter for the purposes of Ch III of the Constitution. And as it is not a matter for those purposes, it cannot engage the judicial power of the Commonwealth.

In ***Agricultural Land Management Ltd v Jackson***, Edelman J stated that:

> [C]ourts only make declarations concerning the rights of parties. Legal rights include claimed rights, powers, privileges and immunities. They do not include observations about breaches of duty that have no legal consequence. Declarations are not granted where they will produce no foreseeable consequences for the parties.

123 The defendants argue that by the payment of the lump sum of $210,000 they have paid all of the rent for the entire 40 year term of the Residential Tenancy Agreement, and that no further payments of rent are due and payable to the plaintiffs.

124 This argument has no prospect of success. The express terms of the Sterling New Life Lease, in particular the Rent clause in Part A of the Residential Tenancy Agreement, expressly provides for payments of $360 per week payable weekly, and cl 2.1, 2.2 and 2.3 of the Payment Direction Deed expressly required that the lump sum less the Application Fee was to be invested in units in the Sterling Income Trust, from which distribution and redemption payments were to be used for the payment of rent, and cl 2.4 and 2.5 of the Payment Direction Deed required Sterling Corporate Services to pay rent on behalf of the defendants to the plaintiffs as it fell due.

5.0 The defendants' defence and counterclaim of estoppel by conduct or representation

125 The defendants' plea in pars 35 to 37 of the amended defence and counterclaim is understood to be a plea that if the proper construction of cl 2.7 of the Payment Direction Deed is found not to operate as a bar

to the right of the plaintiffs to terminate the lease on grounds of non-payment of rent, then the defendants plead in defence and make a counterclaim of estoppel by conduct or representation.

126 The defendants' estoppel case is put on the basis the plaintiffs are estopped from denying the assumed state of affairs on which the parties have conducted themselves, being that the defendants were to pay $210,000 to the Sterling Group to obtain a 40 year lease over the property, and were not required to make any further rental payments for the term of the lease, for any reason, the consequence of which is that the plaintiffs could not take steps to evict them for non-payment of rent, in the event of the future of the Sterling New Life Lease scheme.

127 In ***Soussa v Thomas***, I set out the principles that apply to estoppel by conduct (representation) and promissory estoppel,[85] which principles are applicable in this matter and have not been repeated in these reasons.

128 To make out a claim of estoppel by conduct or promissory estoppel, the defendants must prove that they were so influenced by conduct of the plaintiffs amounting to encouragement or representation which was a significant factor that they took into account when deciding to enter into a Sterling New Life Lease. In particular, they must prove that this conduct which so influenced them or was a significant factor in their decision to enter into a Sterling New Life Lease was the conduct of the plaintiffs either themselves or their agent, Rental Management Australia, which conduct had the requisite causal effect resulting in them forming the assumed state of affairs, that is once they had paid the upfront lump sum payment of $210,000 they would obtain a lease of the property and not have to pay any further payments of rent for the entire term of the 40 year lease.

129 There is, however, no evidence before the court upon which it could be found that the defendants acted on any oral or written representations or conduct made by, or for or on behalf of, the plaintiffs which caused the defendants to form the assumed state of affairs.

130 Whilst it can be inferred that when Mr Lucks made representations about the terms and conditions of a Sterling New Life Lease, which representations were made prior to the inspection of the property by the defendants, there is no evidence that would support an inference that

[85] ***Soussa v Thomas*** [2021] WASC 172 [124] - [135].

Mr Lucks was an employee of Rental Management Australia or otherwise authorised to act as an agent of the plaintiffs.

131 Mr Tufekcic's evidence is that he and Ms Yates had decided to enter into a Sterling New Life Lease, and had formed the assumed state of affairs after reading and hearing advertisements for the Sterling New Life Lease scheme, obtaining independent legal advice about the scheme and having heard what Mr Lucks (a salesman who is engaged in the promotion of the Sterling New Life Lease scheme and a former director of Sterling First (Aust) Ltd) and Roy and Sylvia (participants in and other lessees of a Sterling New Life Lease) had said at a lunch prior to inspecting the plaintiffs' property.

132 It is clear from his evidence that each of the defendants formed the assumptions prior to the inspection of the property, because when they inspected the property on 12 April 2017, Mr Tufekcic liked it, and after discussing the property with Ms Yates they told Mr Lucks that they would like to secure it. Whilst at the property Mr Tufekcic paid $1,000 in cash to Mr Lucks and the defendants each signed the Life Lease - Reservation Form to reserve the property until they entered into an Offer to Enter into a 40 year Sterling New Life Lease. It appears, however, that the defendants did not enter into an Offer to Enter, but subsequently executed the Residential Tenancy Agreement and all of the documents in the Sterling New Life Lease Sign up Pack.

133 Further, and in any event, the Sterling New Life Lease scheme was not a scheme of the plaintiffs' making, and in circumstances where the plaintiffs had no control of the funds the defendants invested in the Sterling Investment Trust, the part that the plaintiffs played in entering into the Sterling New Life Lease cannot be found to have causally induced the assumptions made by the defendants so as to raise any issue of unconscionability by the departure from the assumptions, when those assumptions were in fact induced by those who promoted the Sterling New Life Lease scheme.

134 Unfortunately, in this matter, and in ***Soussa v Thomas***, the court is not in a position to right any unconscionable conduct in these proceedings, because these proceedings are between the victims of a failed scheme who are not responsible for the failure of the scheme.

6.0 Disposition of the plaintiffs' action and the defendants' defence and counterclaim

135 As set out in [120] of these reasons, I have found that the notice of termination for non-payment of rent issued to the defendants on 26 July 2019 requiring vacant possession by 8 August 2019 was effective. However, despite the fact that the notice of termination is valid, the operative effect of cl 2.7 of the Payment Direction Deed continues. Consequently, the plaintiffs are not entitled to recover any outstanding rent, which includes amounts claimed as outstanding rent post 10 April 2019.

136 The defendants' defence to the action cannot succeed, and their counterclaim should be dismissed.

137 For these reasons, a declaration should be made that the lease between the plaintiffs and the defendants for the property is terminated on the basis of the defendants' breach of the terms of the Residential Tenancy Agreement caused by non-payment of rent, and an order should be made that the defendants deliver up vacant possession of the property.

138 An order should also be made that the counterclaim be dismissed.

139 I will hear the parties further as to the specific orders that should be made to reflect these reasons, including orders as to costs.

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

VV
Associate to the Honourable Justice Smith

11 NOVEMBER 2021