

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## CIVIL DIVISION

### BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP592/2018

### CATCHWORDS

**RETAIL LEASES–GUARANTEE**–Guarantee of corporate tenant’s obligations allegedly signed by third respondent at a time when she was the domestic partner of the second respondent, one of the tenant’s shareholders–alleged in the alternative that it was signed by the second respondent as the third respondent’s agent, with the third respondent’s knowledge–signing by the third respondent and any knowledge of the guarantee denied by her–no direct evidence of signing–whether landlord had proved its signing by the third respondent on the balance of probabilities–on the facts, signing by the third respondent or by the second respondent as her agent could not reasonably be inferred so as to find that the applicant had discharged its burden.

|                          |   |
|--------------------------|---|
| <b>APPLICANT</b>         | DJM Group Pty Ltd   |
| <b>FIRST RESPONDENT</b>  | Calypso Sports Pty Ltd  |
| <b>SECOND RESPONDENT</b> | Darren Hall   |
| <b>THIRD RESPONDENT</b>  | Sharyn Louise Lloyd   |
| <b>WHERE HELD</b>        | Melbourne   |
| <b>BEFORE</b>            | A T Kincaid, Member   |
| <b>HEARING TYPE</b>      | Hearing   |
| <b>DATE OF HEARING</b>   | 31 October 2018-2 November 2018, 20 November 2018 (final written submissions 4 December 2018) |
| <b>DATE OF ORDER</b>     | 8 March 2019  |
| <b>CITATION</b>          | DJM Group Pty Ltd v Calypso Sports Pty Ltd (Building and Property) [2019] VCAT 325            |

### ORDERS

1. The first and second respondents must pay \$156,317.45 to the applicant.
2. The claim made in the proceeding against the third respondent is dismissed.
3. Costs reserved. If no costs application is made by **29 March 2019**, there will be no order as to costs.

4. Any application for costs must be made in writing and must be filed and served by 4 pm on **29 March 2019**. Any submission in opposition to a claim for costs must be made in writing and must be filed and served by **12 April 2019**. An order will subsequently be made on the papers, unless Member Kincaid considers that a short hearing is desirable.

A T Kincaid  
**Member**

**APPEARANCES:**

|                           |                                 |
|---------------------------|---------------------------------|
| For Applicant             | Mr W Drent, Counsel.            |
| For the First Respondent  | No appearance.                  |
| For the Second Respondent | No appearance.                  |
| For Third Respondent      | Mr A Dostizada, Solicitor (SA). |

## REASONS

- 1 The holder of a guarantee may have one of the guarantors undertake to obtain the signature of a co-guarantor. This case highlights the perils of the practice, where there is no direct evidence of a guarantee having been signed by a co-guarantor against whom a recovery proceeding is taken.

### Introduction

- 2 The applicant (“**DJM**”) is the owner of retail premises in Strong Avenue, Thomastown, Victoria (the “**premises**”). The premises were leased by the first respondent (“**Calypso**”) from DJM for use as an indoor sports centre.
- 3 The lease came to an end in March 2018, by DJM’s re-entry. In this proceeding, DJM seeks \$190,329.91 from Calypso pursuant to the terms of the lease, and damages.
- 4 DJM also claims this sum from the second respondent (“**Mr Hall**”) and the third respondent (“**Ms Lloyd**”) as alleged co-guarantors of Calypso’s obligations under the Lease.
- 5 The two documents the subject of the proceeding are:
  - (a) a Deed of Surrender which, DJM alleges, was signed on about 20 April 2016 by Mr Hall and Mr Jan as “the old guarantors”, and by Mr Hall and allegedly by Ms Lloyd as “the new guarantors” (the “**Deed of Surrender**”); and
  - (b) the Lease, which DJM alleges was also signed on about 20 April 2016 by Mr Hall and allegedly by Ms Lloyd (the “**Lease**”). I will refer to the Deed of Surrender and the Lease together as “**the disputed documents**”.
- 6 At the time of her alleged signing of the disputed documents in April 2016, Ms Lloyd was the domestic partner of Mr Hall and, on her evidence, their relationship came to an end in February 2018.
- 7 Ms Lloyd maintained throughout her evidence that she first became aware of the disputed documents, and of her signature allegedly being on them, on about 4 April 2018. This occurred, she states, upon her attendance at the Tribunal, when Calypso sought an injunction to be restored to possession of the premises.
- 8 An illegible signature appears as that of a purported witness to the signing by Mr Hall and to the signing of Ms Lloyd’s initials on the disputed documents. The identity of the alleged witness, if it be a person other than one of the parties, is unknown to DJM and, perhaps naturally given her case, to Ms Lloyd.
- 9 Mr Hall did not attend the hearing. If the identity of the purported witness is known to him, Ms Lloyd gave evidence that he has not offered any

information about that person to Ms Lloyd. He has not offered such information to the Tribunal.

## Facts

- 10 Ms Lloyd is the sole registered proprietor of a property at Short Street, Marino, in Adelaide (the “**Marino property**”) and Cedar Avenue, Brighton in Adelaide (the “**Brighton property**”).
- 11 Ms Lloyd and Mr Hall jointly own a property at Carly Terrace, Werribee in Victoria (the “**Werribee property**”).
- 12 In 2015 Mr Hall and a Mr Asif Jan (“**Mr Jan**”) were co-shareholders of Calypso.
- 13 In late 2015, Calypso bought an indoor sports centre business being conducted at the premises by Singh Sports Pty Ltd (“**Singh Sports**”).
- 14 The leases in respect of the premises<sup>1</sup> held by Singh Sports dated 28 December 2013 were duly assigned to Calypso on about 9 December 2015, and Mr Hall and Mr Jan became guarantors of Calypso’s obligations under them.
- 15 Calypso very soon fell into default under the leases. Solicitors for DJM issued a default notice dated 19 February 2016 in respect of unpaid rent for January and February 2016 in the amount of \$21,858.96.
- 16 Mr Hall and Mr Jan resolved not to continue their business relationship. They requested a meeting with Mr Matthews, the owner of DJM (“**Mr Matthews**”). Mr Matthews gave evidence that they met in Ivanhoe, Melbourne on 7 March 2016. The meeting was also attended by Mr Jan’s wife, Alison Jan (“**Ms Jan**”). Mr Hall and Mr Jan asked Mr Matthews if Mr Jan could be released from his obligations as guarantor. Mr Matthews agreed to the proposal, on the proviso that Ms Lloyd, who was referred to at the meeting by Mr Hall as Mr Hall’s fiancée, but who Mr Matthews had not then met, became a substituted guarantor.
- 17 New terms were subsequently agreed, providing for Calypso to lease the sports centre from 1 April 2016, and for the guarantors to be Mr Hall and Ms Lloyd.
- 18 Mr Hall emailed Mr Matthews on 8 March 2016 as follows:

We have discussed and will accept this offer.
- 19 Mr Matthews gave evidence that he assumed that Mr Hall had sent this email on behalf of both himself and Ms Lloyd, with Ms Lloyd’s full knowledge and agreement.

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<sup>1</sup> One lease was expressed as being in respect of that part of the premises concerned with “Volley Ball”. The other lease was expressed as being in respect of that part of the premises concerned with “Soccer & Cricket”.

- 20 Given that Mr Hall did not copy in his email to Ms Lloyd, it is impossible to find that on the basis of the email alone, that Ms Lloyd was aware of Mr Matthews's requirement that she must be guarantor in place of Mr Jan, or indeed that Mr Hall had then discussed the matter with Ms Lloyd. I do not accept DJM's submission that this email correspondence allows me to find otherwise.
- 21 By email dated 8 March 2016, Aughtersons, the solicitors for DJM wrote to Maddocks, solicitors who had acted for Calypso in the purchase of the sports business, confirming the proposed substituted guarantor arrangement. Mr Matthews having been informed by Mr Hall during the 7 March 2016 negotiations that Mr Hall would probably no longer be legally represented, Aughtersons asked Maddocks if they were at liberty to provide the draft documents directly to Mr Hall upon their finalisation.
- 22 Mr Matthews also emailed Mr Hall on 8 March 2016:
- Please supply name and address details of your fiancée [Ms Lloyd].
- Should [Aughtersons] be sending the documents to your solicitor or directly to you? You should understand that as you have had a solicitor involved already he is bound to deal direct with him unless you advise otherwise.
- 23 Mr Hall replied by email to Mr Matthews on 8 March 2016:
- Hi Darren, [Aughtersons] can send [the documents for signing] directly to me please.
- Sharyn Louise Llody (sic)  
5 Short Street Marino SA 5049.
- 24 I find that Mr Hall's reference to a Ms "Llody" was intended to be a reference to Ms Lloyd. I also find that about 8 March 2016 the documents were provided directly to Mr Hall.
- 25 By email dated 20 April 2016 Mr Matthews emailed Mr Hall and Mr Jan, copied to Ms Jan, that he is "yet to receive the executed documents for the lease". Mr Hall responded by email dated 21 April 2016 to Mr Matthews and Mr Jan, copied to Ms Jan, that "hard copies were delivered to [Aughtersons] yesterday".
- 26 By letter dated 20 April 2016 to Maddocks, Aughtersons confirmed that they had received "the executed original":
- (a) Deed of Surrender of Lease; and
  - (b) Lease.
- 27 Copies of the Deed of Surrender and Lease were enclosed with the letter. Both copies are undated.<sup>2</sup>

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<sup>2</sup> There is another copy of the Deed of Surrender in evidence, bearing the handwritten date "20 April 2016" in an unknown hand. There is another copy of the lease in evidence, purported to have been signed by all parties, and bearing the handwritten date "20/4/2016" written by Mr Matthews. The

- 28 It should be remembered that it is Ms Lloyd's case that she had no knowledge until April 2018 of the arrangement by which she was to be a guarantor of Calypso's obligations under the Lease. There is nothing in the correspondence to which I have referred, by which her knowledge, at this time, can be found as a fact or otherwise inferred.
- 29 Under the Lease, Calypso leased the premises for a period of 6 years and 9 months from 1 April 2016, with an option in respect of one further term of 5 years.
- 30 Calypso was locked out of the premises by DJM on 28 March 2018 for non-payment of rent.
- 31 On 4 April 2018 Calypso made an application for injunctive relief granting it possession. The application was adjourned for the filing of further material, but the injunction application was subsequently not pursued by Calypso.

## **LIABILITY**

### **DJM's case**

- 32 DJM submits that Ms Lloyd is liable as a co-guarantor of Calypso's obligations under the lease. DJM contends that Ms Lloyd was materially interested in the sports centre business conducted by Calypso and that, with full knowledge of the requirement that she become a co-guarantor and, in collusion with Mr Hall, she:
- (a) signed the disputed documents as guarantor, and insofar as the characteristics of her initials vary from her usual initials, this was because of the state of her health at the time of signature, or because she and Mr Hall thought that such an obvious variation would better enable her later to deny that she had signed them; or
  - (b) authorised Mr Hall to sign her initials in the disputed documents.

### **Ms Lloyd's case**

- 33 Ms Lloyd denies that her initials appear on the disputed documents.
- 34 Ms Lloyd contends that her initials were forged by Mr Hall without her knowledge, and that she is therefore not liable to DJM under the guarantees contained in the disputed documents.

### **The law**

- 35 It follows from the above matters that DJM could lead no direct evidence that Ms Lloyd signed the disputed documents.

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only original document tendered was a copy of the Lease, with original purported signings by Mr Hall and Mr Jan as directors of Calypso and Mr Hall and Ms Lloyd as purported guarantors.

- 36 Whether Ms Lloyd is liable to DJM as a co-guarantor, therefore, depends on whether DJM has otherwise proved on the balance of probabilities that the disputed documents were signed by her as co-guarantor.<sup>3</sup>
- 37 If DJM does so, and also proves the lease, the claimed subsequent breach, and the claimed loss and damage, then her liability to pay DJM will have been established.
- 38 In the face of Ms Lloyd’s denial that she signed the disputed documents, the issue before me is whether DJM has established on the balance of probabilities that she did so.
- 39 Where it is not possible for Ms Lloyd to produce any documentary evidence as supports her “negative proposition” that she did not sign the disputed documents, and noting that her alleged initials appear on them, Ms Lloyd must produce some cogent evidence to support her case that she did not sign them.<sup>4</sup> This she seeks to do by:
- (a) giving sworn evidence that she did not sign them;
  - (b) by contending that, by inference from the facts, she did not sign them;<sup>5</sup> and
  - (c) by calling a handwriting expert who provided opinion that someone other than Ms Lloyd signed the disputed documents.

If I find that one or more of these factors supports her denial that she signed the disputed documents, then it is open to me to find that DJM has not discharged its burden of proof.

- 40 With regard to the making of an inference of fact from undisputed facts, or from facts otherwise established by my findings, such an inference must be reasonably open on the facts.<sup>6</sup>
- 41 In order for an inference to be drawn, the circumstances relied on must give rise to a reasonable and definite inference. If there are conflicting inferences of equal probability, so that the choice between them is a matter of conjecture, I am unable to draw a particular inference.<sup>7</sup>

### **Statutory declaration by Mr Hall**

- 42 Ms Lloyd’s defence filed 17 August 2018 alleges that Mr Hall has confirmed to her that he signed the disputed documents without her knowledge or consent.
- 43 Mr Hall, whose signature to the disputed documents is not in doubt, failed to attend the hearing to give evidence, without adequate explanation. In

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<sup>3</sup> See *Singh v De Castro; Dhaliwal v De Castro; Brar v De Castro* [2017] NSWCA 241 at [119].

<sup>4</sup> *Singh v De Castro* (ibid fn 1) at [119].

<sup>5</sup> See, for example, the analysis in *Commonwealth Bank of Australia v Perrin [No 2]* [2012] QSC 78.

<sup>6</sup> See *Roads Corporation v Ducakis* [1995] 2 VR 508 at 520.

<sup>7</sup> See *Transport Industries Insurance Co Ltd v Longmuir* [1997] 1 VR 125 at 141.

consequence, I find that those matters raised in the defence and filed on behalf of himself and Calypso on 31 October 2018, have not been proved.

- 44 Ms Lloyd also relies on the form of a statutory declaration made by Mr Hall on 19 June 2018 (“**the statutory declaration**”), stating:

To whom it may concern

I Darren Edward Hall...Procurement Manager, acknowledge and confirm that I signed Sharyn-Louise Lloyd’s name to the personal guarantee relating to the lease UNDATED (sic) between Calypso Sports Pty Ltd ACN 607 498 939 trading as Thomastown Indoor Sports ABN 59 607 498 939 and DJM GROUP (name of landlord) without her consent or knowledge.

Sharyn-Louise Lloyd did not sign the personal guarantee and as a result is not liable for any and all default arising out of the lease. I am responsible.

- 45 Given that Mr Hall did not give evidence, the contents of the statutory declaration stand as hearsay evidence of the matters stated. The Tribunal is not bound by the rules of evidence,<sup>8</sup> and it is therefore open to the Tribunal to receive the statutory declaration into evidence, but to reduce the weight of its probative value. In a case of this sort, however, where the matters stated in the statutory declaration go to the very facts in issue, I give its contents no weight. It is also doubtful, absent this consideration, whether any weight should be given to the contents of a statutory declaration which, if true, reveals an offence under the criminal law. In consequence, I consider that I am required to be satisfied by other facts and matters upon which Ms Lloyd relies for any finding that she did not sign the disputed documents and otherwise had no knowledge of them, before I am able to conclude that she has produced the necessary cogent evidence to find that DJM has not discharged its burden of proof.
- 46 DJM submits, however, that the making of the statutory declaration and its contents stand not as evidence of the truth of its contents, but of an alleged collusive relationship between Ms Lloyd and Mr Hall, intended to avoid Ms Lloyd incurring liability under the disputed documents. In respect only of this submission, I have received the statutory declaration, and noted the fact that certain statements have been made by Mr Hall, along with other factors.

### **Facts relied on by DJM**

- 47 The basis on which DJM submits that a finding can be made, sufficient to conclude that she signed the disputed documents, or that they were signed by Mr Hall with Ms Lloyd having full knowledge of the requirement that Ms Lloyd be a co-guarantor, is:
- (a) On the evidence of Ms Lloyd’s personal diary tendered during the hearing, Mr Hall travelled to Adelaide to visit Ms Lloyd in the days

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<sup>8</sup> See section 98(1)(b) of the *Victorian Civil and Administrative Tribunal Act 1998*.



immediately before the disputed documents were provided to DJM's solicitors in Melbourne on 20 March 2016 and, DJM contends, it can be reasonably inferred that her initials were then applied to the disputed documents;

- (b) Ms Lloyd had a plain reason for undertaking an obligation as guarantor, because at all times she was materially interested in the sports business conducted at the premises by Calypso, shown by:
  - (i) her winding down of her own business, conducted by her company Diversitile Pty Ltd (“**Diversitile**”);
  - (ii) Diversitile's signing an earlier transfer of lease in respect of the premises;
  - (iii) Diversitile's payment of \$180,000 to Mr Hall to assist Calypso to purchase the business;
  - (iv) Ms Lloyd's subsequent occupation of the premises, and her participation in the sporting activities offered by Calypso, as a qualified fitness instructor; and
  - (v) her access to the books of account and business records of Calypso;
- (c) there being evidence of ongoing collusion between Ms Lloyd and Mr Hall to avoid any liability of Ms Lloyd under the disputed documents, including:
  - (i) the making of the statutory declaration by Mr Hall, which seeks to support Ms Lloyd's contention that she had no knowledge of the disputed documents;
  - (ii) Ms Lloyd's concession that she still sees Mr Hall from time to time, and there being no evidence, beyond her sworn assertion, that she has ended her relationship with Mr Hall;
  - (iii) Ms Lloyd's and Mr Hall's alleged joint renovation of the Werribee property;
  - (iv) notes found by DJM after retaking possession, allegedly demonstrating that they at all times saw each other as business partners;
  - (v) the same notes that allegedly show Ms Lloyd's capacity for moderately complicated strategic planning in relation to their joint assets; and
  - (vi) Ms Lloyd and Mr Hall arranging in October 2016 for the Marino property to be transferred from joint ownership to Ms Lloyd's sole ownership, demonstrating that Ms Lloyd and Mr Hall were confident about the prospects of Ms Lloyd successfully denying liability under the disputed documents;
- (d) a successful challenge to her credit, including:

- (i) Ms Lloyd tendering an alleged personal diary that recorded Mr Hall as being in Adelaide on 7 March 2016 when, on DJM's evidence, he was attending a meeting with Mr Matthews of DJM and others on 7 March 2016;
  - (ii) relying on evidence given by Ms Lloyd that the books of account of Diversitile are being audited by the Australian Taxation Office and that, Ms Lloyd, although a qualified certified practising accountant, does not follow best accounting practices; and
  - (iii) Ms Lloyd's failure to provide the same breadth of specimen handwriting material to the handwriting expert engaged by DJM, as she had provided to the handwriting expert called by her;
- (e) evidence of her conduct during the litigation, demonstrating that Ms Lloyd's evidence is of recent invention, including;
- (i) her failure to call the witness (whoever that may have been) to the purported signatures;
  - (ii) placing reliance on a declaration that was not made by Mr Hall until 19 June 2018, over 2 months after the return date of the injunction application, denying her involvement or knowledge in the transactions;
  - (iii) her failure to call Mr Hall to be examined as to the assertion in his declaration and/or the apparent witness to the signing of the disputed documents; and
  - (iv) her failure promptly to announce her position until early July 2018, and not in writing until her solicitor's letter to DJM's solicitors dated 8 August 2018; and
- (f) handwriting opinion to the effect that one possibility concerning the alleged initials is that they were written by Ms Lloyd, but have been disguised by her so as to assist her in disavowing authorship at a later date.

## **Discussion**

### Mr Hall's visit to Adelaide on 13-18 April 2016

48 DJM has asked the Tribunal to infer from the email correspondence to which I have referred that the unsigned documents were in the hands of Mr Hall on about 8 March 2016.<sup>9</sup> I have found that this was the case.

49 DJM's further submits that an inference can therefore be drawn that Mr Hall took them with him to Adelaide during his visit on 13-18 April 2016 as recorded in Ms Lloyd's diary, when they were signed by Ms Lloyd or by Mr Hall with her knowledge.

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<sup>9</sup> The reference to "18 March 2016" on page 3 of DJM's written submissions is taken to be an error.

- 50 I have reviewed the immediate background to that visit. Ms Lloyd gave evidence that prior to the purchase of the sports centre in late 2015, Mr Hall lived full time with her at the Marino property. During that time, he worked as a procurement manager in Adelaide. She said that after the purchase of the sports centre, he would return to Adelaide to visit her approximately every 2 weeks.
- 51 Ms Lloyd prepared a written statement concerning events from February 2016-March 2016. She was assisted in this by having access to Mr Hall's *Velocity* account, which she had used for the purpose of booking flights for herself and Mr Hall during their relationship. She confirmed in her evidence the matters set out in her statement. The statement shows her movements and those of Mr Hall as follows:

|   |  |
|---|--|
| January 2006                            | <b>Mr Hall drove to Melbourne</b>  |
| February 1 <sup>st</sup>                | <b>Mr Hall flew to Melbourne</b>   |
| February 2 <sup>nd</sup>                | Ms Lloyd flew to Melbourne   |
| February 3 <sup>rd</sup>                | Ms Lloyd flew to Adelaide  |
| February 8 <sup>th</sup>                | Ms Lloyd flew to Melbourne   |
| February 10 <sup>th</sup>               | Ms Lloyd flew to Adelaide  |
| February 15 <sup>th</sup>               | Ms Lloyd flew to Melbourne   |
| February 17 <sup>th</sup>               | Ms Lloyd flew to Adelaide  |
| February 29 <sup>th</sup>               | <b>Mr Hall flew to Melbourne</b>   |
| March 3 <sup>rd</sup>                   | <b>Mr Hall flew to Adelaide</b>  |
| March 6 <sup>th</sup>                   | Ms Lloyd suffers adverse medical outcome to an elective procedure.                 |
| March 14 <sup>th</sup>                  | <b>Mr Hall drove to Melbourne</b>  |
| March 20 <sup>th</sup>                  | Ms Lloyd flew to Melbourne   |
| March 23 <sup>rd</sup>                  | Ms Lloyd flew to Adelaide  |
| April 4 <sup>th</sup>                   | Ms Lloyd flew to Melbourne   |
| April 6 <sup>th</sup>                   | Ms Lloyd flew to Adelaide  |
| April 7 <sup>th</sup>                   | Ms Lloyd admitted to hospital with broken neck, following a fall from scaffolding. |
| April 7 <sup>th</sup> -11 <sup>th</sup> | Ms Lloyd in neurological unit  |
| April 10 <sup>th</sup>                  | Ms Lloyd has Aspen collar fitted.  |
| April 11 <sup>th</sup>                  | Ms Lloyd discharged.   |
| April 13 <sup>th</sup>                  | <b>Mr Hall flew to Adelaide</b>  |
| April 18 <sup>th</sup>                  | <b>Mr Hall returns to Melbourne</b>  |

- 52 The diary notes record that Ms Lloyd broke her neck on 7 April 2016. It occurred as a result of a fall from a scaffold. It is noteworthy that in connection with her subsequent emergency treatment, on 20 April 2016 Mr Hall signed a document called “Patient Registration PMI Update”. This was about the date when her purported initials were placed on the disputed documents.
- 53 To the extent that it may be conjectured that the disputed initials on the disputed documents are those of Ms Lloyd, but differ from her usual initials by reason of her injury, a proposition that I observe was only faintly contended by DJM, Ms Lloyd relies on this document to refute it. I find, by my own inspection of her signature in the “Patient Registration PMI Update” that it bears no observable dissimilarity in style or character from her other signatures in evidence. There being no other evidence as would support a submission to this effect, it is therefore rejected.
- 54 I am not satisfied from the mere fact of Mr Hall visiting Ms Lloyd, on the dates indicated, that an inference can fairly be drawn that Mr Hall travelled to Adelaide for this purpose, and that the purpose was there achieved. The inference cannot be drawn because it is equally likely, absent a successful attack on Ms Lloyd’s credit, that Mr Hall travelled there to provide comfort to Ms Lloyd following a severe injury, and to assist with her return home after her discharge from hospital.

#### Ms Lloyd’s alleged material interest in the Calypso business

Ms Lloyd’s winding down of her own business and lending of monies to Calypso

- 55 Ms Lloyd explained in evidence that she was at all relevant times a director and sole shareholder of Diversitile, which she described as an on-line freight broker.
- 56 DJM contends that in 2016, Diversitile suffered trading difficulties. This had the result, it contends, that Ms Lloyd resolved to commit her energies into the business of Calypso, with Mr Hall. This was partially effected, DJM submits, by Diversitile lending \$180,000 to Mr Hall in late 2015.
- 57 Ms Lloyd conceded that Diversitile suffered a financial reverse during the financial year ending 30 June 2017,<sup>10</sup> due to the loss of its prime customer, an automotive manufacturer in Adelaide. She denies however that Diversitile’s lending of monies to Mr Hall was part of a general strategy on her part to wind down Diversitile, and to pursue the sports business with Mr Hall.

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<sup>10</sup> As demonstrated by draft financial statements for Diversitile for year ended 30 June 2016 dated 12 November 2018 and for the year ended 30 June 2017 dated 14 November 2018, tendered by Ms Lloyd on 20 November 2018, the 4<sup>th</sup> day of the hearing.

- 58 Calypso paid Singh Sports about \$285,000 plus GST for its business.<sup>11</sup> Ms Lloyd's evidence was that at Mr Hall's request in about late October 2015, she agreed to partially fund the payment by arranging for a loan of \$180,000 from Diversitile to Mr Hall. This was because Calypso's other shareholder, Mr Asif, was having difficulty raising monies to contribute to the purchase price.
- 59 Ms Lloyd stated that her only financial involvement with Calypso was lending Mr Hall \$180,000 until Mr Jan was able to obtain his own funding for the purchase of the business. She said that the loan was always intended to be short term. She gave evidence that Mr Jan was subsequently unable to obtain the required finance to buy out her loan, and she thus became an unwitting investor in Calypso. She gave evidence that she attended Calypso's injunction application on 4 April 2018 not because she considered herself to be liable as a guarantor of Calypso's obligations, but because any reasonable prospect of obtaining repayment of her loan depended upon the viability of the sports business conducted by Calypso. She was therefore naturally interested in Calypso's attempt to be restored to possession of the premises.
- 60 DJM also relies on copies of two undated forms of transfer of lease to Diversitile that are in evidence (the "**Diversitile transfers**"). They bear Ms Lloyd's signature, purportedly on behalf of Diversitile as transferee of the lease, and the signature of Mr Hall as co-guarantor. The date "30 October 2015" appears beside Mr Hall's signature. The transfers also bear an attestation clause for Mr Jan as co-guarantor, but they are not signed by Mr Jan.
- 61 It was only as a result of the intended short-term loan, Ms Lloyd stated in evidence, that these two undated forms of transfer were prepared. It is clear from subsequent events that the transfer of the two leases to Diversitile never occurred.
- 62 I am not prepared to find as an inference from the Diversitile transfers, that it was always intended that Ms Lloyd, through Diversitile, intended to invest as a beneficial owner in the sports business conducted by Calypso. I find her account, absent a successful attack on her credit, as equally likely in the circumstances.
- 63 DJM also submits that the evidence of Ms Lloyd in this respect is unaccompanied by documents as would support her account that this was a short-term loan advanced until Mr Jan could fund his share of the purchase. I am not persuaded that this fact puts a lie to Ms Lloyd's account of why she lent monies to Mr Hall. It is not unsurprising, in my view, that the 2015 arrangement between Mr Hall and Ms Lloyd, who were then domestic partners, is not recorded other than by what appears in the accounts of Diversitile.

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<sup>11</sup> A Sale of Business Contract in evidence confirms this.

- 64 DJM also submits that the fact that Diversitile has not issued a recovery proceeding in respect of the alleged outstanding loan suggests that it never was one. There may be many reasons, I consider, why Diversitile has not sought recovery to date of the indebtedness. One may be that Mr Hall has no money, or that the value of his equity in the Werribee property, after the interests of other claimants having an interest in it, is minimal.
- 65 I am not persuaded that the circumstances surrounding the advance by Diversitile of \$180,000 to Mr Hall to assist Calypso's purchase of the business from Singh Sports fairly give rise to an inference that Ms Lloyd was an intending investor in the business of Calypso, and that she is therefore likely to have signed the guarantee, or to have had Mr Hall sign them on her behalf.

#### Ms Lloyd's occupation of the premises and claimed involvement in the business of Calypso

- 66 It was submitted on behalf of DJM that Mr Hall and Ms Lloyd jointly ran the sports business conducted by Calypso, demonstrating Ms Lloyd's material interest in the business, and from which it can be inferred that she signed the disputed documents, or had Mr Hall sign them on her behalf.
- 67 Mr Matthews of DJM gave evidence that he did not meet Ms Lloyd until mid to late 2017. That meeting took place at the premises when, he says, Mr Hall and Ms Lloyd were putting to him their plans for refurbishing the sports centre. From these discussions, together with what he had earlier been told by Mr Hall during the replacement guarantor discussions in March 2016 about Ms Lloyd's involvement, he formed the view that Mr Hall and Ms Lloyd were jointly operating the business. Mr Matthews also relied on an email from Mr Hall dated 21 April 2016, confirming the intention of Mr Hall to have Ms Lloyd commence aerobics classes and aerial yoga at the gym following her recovery from her broken neck. Indeed, I accept that Ms Lloyd, by reason of her athleticism, is highly proficient in contributing to the activities of the sports centre; she also gave evidence that she is trained in "body attack" fitness, which is a high energy workout that improves cardiovascular health, core strength, shapes lean muscle mass and improves fitness, speed, stamina and agility.
- 68 Ms Lloyd's evidence was, however, that there were three offices situated above the sports area. She stated that she, together with one of Diversitile employees, Ms Freeman, used one of the offices, expressly for the purpose of conducting the business of Diversitile. She said that other employees of Diversitile were based in Adelaide. Ms Lloyd gave evidence that from about February 2016, she flew to Melbourne about 2 days a week to operate the business and that the conduct of Diversitile's business from early 2016, in both Adelaide and Melbourne, had put strain on her relationship with Mr Hall.
- 69 There is no evidence that Ms Lloyd was ever involved as an officer or employee of Calypso. Moreover, she states, she only had an informal

involvement in the operations of Calypso's business, given particularly the proximity of Diversitile's office to the sports business on the ground floor. The nature of her involvement, she conceded, was conducting aerobics classes and aerial yoga. She also assisted with beach volleyball, and worked behind the counter to assist customers.

- 70 I find that the premises were used for the conduct of the businesses of both Calypso and Diversitile. Ms Lloyd therefore had an interest in being at the premises. I am unable to make any inference, from the nature of Ms Lloyd's acknowledged informal involvement in the sports business undertaken by Calypso, that Ms Lloyd also had an interest in the business of Calypso making it likely that she signed the disputed documents or had Mr Hall sign them on her behalf.

#### Ms Lloyd's access to the books and records of Calypso

- 71 Ms Lloyd did not deny having access to Calypso's books and records. I find, from Ms Lloyd's evidence, that she is a chartered public accountant of over 20 years' standing, and that it would not be unusual for her to be in the best position to assist Mr Hall in this respect. I also accept her submission that Diversitile having lent Mr Hall \$180,000 for the purpose of Calypso purchasing the business, which was not promptly repaid as agreed, it was understandable that she would have a material interest in Calypso's books and records.
- 72 I am unable to make the necessary inference, from the fact of Ms Lloyd's access to the books and records of Calypso, that she was materially interested in the business, making it likely that she signed the disputed documents or had Mr Hall sign them on her behalf.

#### Alleged evidence of ongoing collusion between Ms Lloyd and Mr Hall

- 73 I have carefully considered the matters referred above, as are said by DJM to support the proposition that Ms Lloyd's denial of liability is a feature of ongoing collusion between Ms Lloyd and Mr Hall.
- 74 Evidence given by Ms Lloyd of the current relationship between the two is relevant. The evidence given by Ms Lloyd concerning her relationship with Mr Hall was that they were in a domestic relationship from 26 January 2010 to 18 February 2018. On Ms Lloyd's evidence, this was some months before she discovered that her alleged initials were on the disputed documents.
- 75 After the separation, she stated, Mr Hall only came back to the Marino property to collect his things. When it was put to her that she still sees Mr Hall, she conceded, candidly I considered, that he still insists on coming to the jointly owned Werribee property in order to undertake renovation works. She said that he does not trust her to carry out any works on the house. She said that both of them have keys to the Werribee property, and that when he comes there, she goes to a nearby friend's house. She says that when mail addressed to Mr Hall comes to the Marino property, she

takes it to the Werribee property for collection by him on his next visit, whenever that may be.

- 76 Ms Lloyd denies cohabiting now with Mr Hall. She stated that she and Mr Hall are not on good terms. She offered some explanation, when pressed during cross-examination, of why their relationship has ended: first, that in 2017 she discovered that Mr Hall had commenced a physical relationship with another person, and secondly, that she had come to realise that there had been a severe “power imbalance” in their relationship, suggesting to me, in the compelling way she gave this evidence, that she was an abused acquiescent partner.
- 77 Her evidence of her current relationship with Mr Hall was not successfully challenged, and I otherwise could find no reason to doubt her credibility in this respect. I find that there is no present collusion between Mr Hall and Ms Lloyd, borne out of a continuing relationship, as would have Ms Lloyd deny having signed the disputed documents or having knowledge of them, or indeed allowing an inference to be drawn that she was well aware of her obligation as a guarantor in April 2016.
- 78 It follows from my findings concerning the breakdown of Ms Lloyd’s relationship with Mr Hall that I can draw no inferences from her failure to call Mr Hall as a witness.
- 79 I should make specific findings in regard to two further matters. First, Ms Lloyd and Mr Hall formerly owned the Marino property as joint tenants, but on 6 September 2016 they signed a transfer having the effect of Ms Lloyd becoming the sole registered owner on 27 October 2016. It is submitted by DJM that this transaction was in furtherance of a joint enterprise by Mr Hall and Ms Lloyd to reduce Mr Hall’s asset base should he be found liable to DJM on the disputed documents, in the expectation that she would not be found so liable. Ms Lloyd’s evidence was that this arose from a “repackaging” of the respective loans for the Marino property and the Werribee property. She said that the transfer was in recognition of the agreement, between her and Mr Hall that, in effect, she beneficially held the equity in the Marino property.
- 80 It might be said, contrary to DJM’s submissions, that Ms Lloyd would not have assumed a legal interest in respect of the whole Marino property if she was aware of her prospective liability under the disputed documents. Although there was little evidence to support Ms Lloyd’s account of this transaction, I am unable to find that it allows me to make any inference as to Ms Lloyd’s and Mr Hall’s allegedly collusive conduct in regard to her signing and/or knowledge of the disputed documents, or in regard to subsequently reducing the exposure of Mr Hall at the suit of DJM.
- 81 Secondly, Mr Matthews of DJM tendered some hand-written notes that he found in the premises upon DJM’s retaking of possession on 28 March 2018, that appear to record discussions between Mr Hall and Ms Lloyd headed “PROBLEMS”, which are described in the notes as being associated



with the cost of commuting from Adelaide to Melbourne, and the emotional difficulties of the separation that often resulted. It is submitted on behalf of DJM that the contents of the notes demonstrate a high degree of planning between Ms Lloyd and Mr Hall, and also the extent to which the pair saw Calypso as a business in which they were jointly interested. Ms Lloyd denied in cross-examination that she was the author of the notes.

- 82 The notes outline three perceived “options” for Mr Hall and Ms Lloyd in the face of the cost of travelling from the Marino property to Melbourne. “Option 1” includes an action “liquidate [Calypso]”; “Option 2” includes an action “partial split remain business partners” and “finish sports centre project using SMSF-sell or keep depending on results”; “Option 3” includes an action “operate Calypso Sports via SMSF”.
- 83 I am not satisfied from the contents of the notes, even if they are to be ascribed to the hand of Ms Lloyd, that they demonstrate that she saw herself as materially interested in the business of Calypso. They could equally speak of Calypso as business owned and managed by Mr Hall, but which was considered as part of the couple’s joint asset base.

#### Evidence of Ms Lloyd’s conduct during the litigation

- 84 I am unable to make any inference, from the matters relied on by DJM under this head, that Ms Lloyd’s evidence is of recent invention, making it more likely that she signed the disputed documents or authorised Mr Hall to do so on her behalf.

#### A claimed successful challenge to her credit

- 85 Much of my above findings are made in the absence of any successful challenge to the credit of Ms Lloyd. I was impressed with the way in which she gave her evidence, including the strength and content of her responses during an extensive cross-examination.
- 86 In essence, her account was that having already lent Mr Hall \$180,000 for Calypso’s purchase of the business from Singh Sports, and becoming an unwitting investor in the business upon Mr Jan failing to obtain finance to repay her loan, Mr Hall would have known that she would never also have agreed to be a co-guarantor of Calypso’s obligations as a tenant to DJM. She stated in her evidence, believably I consider, that given her professional knowledge of the nature of a guarantee, and the attendant risks to her interests in both the Marino property and the Brighton property should any judgment be obtained in respect of a guarantee given by her, she would never have entered into a guarantee of Calypso’s obligations under the lease.

### Other evidence led by Ms Lloyd

- 87 Ms Lloyd tendered documents,<sup>12</sup> from which I find that she has been in the practice of signing business and other documents in two ways: one way is by way of a signature, discernibly “Sharon L Lloyd”;<sup>13</sup> the other is by way of stylised looping initials, discernibly “SLL”. I find from the documents tendered by Ms Lloyd that she tends to use her initials, as others typically do, as an acknowledgment of an amendment to a document, or to accompany her marginal and incidental notations to documents that otherwise bear her signature. She submits that in keeping with her usual practice, she never would have signed the disputed documents using her initials, but by applying her signature, such as appears in the Diversitile transfers.
- 88 DJM contends that there is also evidence of Ms Lloyd having previously signed documents as “SL”,<sup>14</sup> sufficient to find that she did so on this occasion. I do not consider that there is sufficient evidence of this alleged practice as allows me to draw an inference that she signed “SL” in the disputed documents.
- 89 I therefore find from the evidence that Ms Lloyd has satisfactorily established that she is unlikely to have signed the disputed documents using her initials, and that that also militates against any inference that she did.

### **Expert Opinion Relied on by DJM**

- 90 Each of DJM and Ms Lloyd called a handwriting expert to provide opinion.
- 91 This is not a forgery case of the type that often arises where, to an eye untrained in forensic handwriting, the differences between the signings in the disputed documents and the subject’s proved historic signings are difficult to tell apart. The initials “SL” (or, less probably, “SLL”) appearing in the disputed documents differ markedly in character from the other examples of Ms Lloyd’s initials in evidence.
- 92 DJM relied on expert opinion provided by Mr Trevor Joyce, qualified forensic document examiner. Mr Joyce tendered his report dated 18 October 2018.
- 93 Mr Joyce had examined 11 examples of specimen documents on which Ms Lloyd wrote her initials (which, Ms Lloyd had stated in evidence, are a stylised form of “SLL”). Although Mr Joyce explained that his examination was limited by reproduced material of limited resolution, he concluded that variations existed (which he described in detail) between the specimen initials and the purported initials of Ms Lloyd in the disputed documents.
- 94 Mr Joyce concluded in his report:

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<sup>12</sup> Exhibit R3.

<sup>13</sup> Exhibit R3, pp 6-20.

<sup>14</sup> Exhibit R3, p 16 and her Facebook page.

7.18 ...the following hypotheses are relevant:

7.16.1 **‘Alternate Formation’ Hypothesis:** The Questioned Signatures are written by [Ms Lloyd], however, they vary due to unknown factors, such as health, environment or other; or

7.16.2 **‘Disguise’ Hypothesis:** The Questioned Signatures are written by [Ms Lloyd], however are disguised signatures so as to disavow authorship at a later date; or

7.16.2 **‘Different Writer’ Hypothesis’;** The questioned signatures are the product of another writer

7.19 Support appears to exist for the ‘Disguise’ or ‘Different Writer’ hypotheses, however the evidence is compromised by the reproduction material available and the general limitations of the evidence. Further examination of the original material will support [me] in developing an opinion that preferences either of these two hypotheses.

8.1 It is strongly recommended that the originals of the Questioned and also the specimen documents be examined in the laboratory environment.

8.2 The further examination would also more rigorously examine the documents for other evidence of relevance to this matter and which may assist myself...in developing a preference for the propositions advanced above.

95 When asked, in cross-examination, whether he could express a preference for one of his two hypotheses, Mr Joyce helpfully responded that where competing propositions or explanations exist for a signature differing in style from a person’s normal signature—as he has concluded in this case—it would be improper for him to hold a preference. This is because, he explained, the academic writings on forensic examination indicate that examiners can have difficulty in the process of preferring one hypothesis over another.<sup>15</sup>

96 The only original of the disputed documents that was tendered by DJM, as a direct result of my calling for any originals during the hearing, was the Lease. It contains the original signings by Mr Hall and Mr Jan as directors of Calypso, and Mr Hall and purportedly by Ms Lloyd as co-guarantors. I was informed that the original of the Deed of Surrender could not be located. It struck me as unusual that notwithstanding Mr Joyce’s recommendation, in the above sections of his report, for access to the originals of the disputed documents, as may better assist him in his forensic examination, no attempt had been made to put the original Lease before him.<sup>16</sup> I find that not all efforts were made by DJM as would have

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<sup>15</sup> See also *Journal of Forensic Document Examination* Vol 26 (2016) at p 54 to which Mr Joyce referred.

<sup>16</sup> Mr Joyce explained that the line quality of writings, and an examination as to whether writings are written with the same pen are enquiries that can be pursued by way of a stereo microscope

acquainted Mr Joyce with further documents as may have enable him to develop what was a tentative expression of opinion.

### **Expert opinion relied on by Ms Lloyd**

- 97 Ms Lloyd relied on expert opinion provided by Ms Melanie Holt, qualified forensic document examiner.
- 98 Ms Holt tendered her report dated 19 September 2018.
- 99 Ms Holt discounted the possibilities that the purported initials of Ms Lloyd in the disputed documents were:
- (a) made by Ms Lloyd in her natural handwriting;
  - (b) made by Ms Lloyd as an attempt to disguise her initials; or
  - (c) made by Ms Lloyd, but accidentally differed from her usual initials.
94. Her reason for discounting the “disguise” hypothesis, left open by Mr Joyce, is because:

In terms of potential disguise by [Ms Lloyd] of the specimen material [in the disputed documents], the nature of the divergences [Ms Holt] observed would not be expected in a disguised signature. Most notably, the differences observed in terms of the shape, size and spacing of the looped features as well as the baseline habits. Given the relative speed and fluency at which the initials were executed these features are more suggestive of another person’s writing habits than disguise.

95. Ms Holt concluded that the combination of observed differences that she recorded in her report resulted in a very low probability of the initials being written by Ms Lloyd but accidentally differing from Ms Lloyd’s usual initials.
- 100 Ms Holt concluded that:

However, the observed differences [between the initials in the disputed documents and the specimen initials of Ms Lloyd referred to in paragraph 17 of Ms Holt’s report] are expected under the alternative proposition that someone else, other than the writer of the specimen initials, signed the original of the [disputed] documents. Some of these features can be described as indicia of forgery.<sup>17</sup>...the questioned initials display some *pictorial similarity* to the specimen writer’s signature, however the differences noted above in terms of shape, size and spatial relationships are more suggestive of the writing habits of another person...this conclusion is a **Level 3** conclusion where the observed dissimilarities noted between the questioned and specimen writing strongly point to the nominated initials **NOT** being written by the writer of the specimen initials. The main limitations are

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<sup>17</sup> Ms Holt cites these indicia in a footnote to her report as “Slowness and deliberation in the writing; pen-lifts in places where pen lifts would not be expected to occur; blunt line endings or beginnings; lack of fluency in the writing; subtle patching or retouching of strokes.”

that all of the specimen signatures provided for examination were reproductions and the limited amount of writing present.

101 I have concluded that there are no reasonable grounds in the experts' evidence for a finding that the initials in the disputed documents were written by Ms Lloyd in an attempt to disguise her real hand. Ms Holt discounts the possibility, and Mr Joyce only goes so far as to leave the possibility open. I find that such a possibility is no more likely than the initials in the disputed documents being written by another hand.

### **Conclusion on liability**

102 Given that Ms Lloyd has not been successfully challenged on her credit, I find that the matters relied on by DJM, whether considered individually or collectively, are not sufficient to give rise to a reasonable and definite inference that Ms Lloyd signed the disputed documents.

103 I also find that there is no evidence from which I am able to conclude, as contended in the alternative by DJM, that Mr Hall or some other person signed the disputed documents with the knowledge of Ms Lloyd.

104 I find that in respect of the quantum proved by DJM, which I discuss below, both Calypso as tenant, and Mr Hall as a guarantor of Calypso's obligations under the Lease, are liable to DJM.

### **QUANTUM**

105 I find that DJM was unable to lease out the premises until early August 2018, but with a rent-free period until 1 September 2019. I find that the giving of a rent-free period to the new tenant was reasonable in the circumstances, and not inconsistent with general retail tenancy practice.

106 Mr Matthews gave evidence that DJM has granted an option to the new tenant to purchase the premises in July 2019, but that the price payable by the tenant is \$50,000 less than if Calypso had reinstated the premises as required under the lease, because the new tenant was to incur the immediate costs of removing all the sports related fit out and equipment. Mr Matthews tendered email correspondence dated 24 July 2018 and 26 July 2018 as evidence of this arrangement. In the absence of evidence of the new tenant's actual costs incurred in removing the fit out and equipment, I am prepared only to order that half the claimed \$50,000 loss is recoverable by DJM.

107 I find that DJM has therefore established its entitlement to damages of \$156,317.45, calculated as follows:

|  |                                    |
|--|------------------------------------|
| <b>Unpaid rent</b><br>March to August 2018<br>\$180,250 for calendar year under the lease, 5 months vacant to 31 July 2018, plus 1 month rent free throughout August 2018. | \$90,125.00 (GST not recoverable). |
|--|------------------------------------|

|  |                     |
|--|---------------------|
| <b>Interest on unpaid rent pursuant to lease.</b>  |                     |
| March to August 2018   | \$3,563.18          |
| <b>Unpaid outgoings</b>  |                     |
| Council rates 1 July 2017-30 June 2018   | \$11,092.69         |
| July and August 2018   | \$966.38 (pro rata) |
| Water rates  | \$804.43            |
| Insurance for July and August, \$6,985 p.a pro-rated for 2 months  | \$1,164.161         |
| Clean up costs   | \$946.00            |
| Re-leasing costs   | \$16,940.00         |
| Rent received under new lease from 1 September 2018-31 December 2018 less than payable under lease to first respondent (as particularised in Particulars of Loss and Damage dated 31 October 2018) | \$9,625.00          |
| Rent received under new lease from 1 January 2019-31 July 2019 than payable under lease to first respondent (as particularised in Particulars of Loss and Damage dated 31 October 2018)            | \$20,313.79         |
| Reduction in price achieved for sale of the premises on 1 August 2019, due to Calypso's failure to make good premises  | \$25,000.00         |
| <b>Costs recoverable pursuant to the lease</b>   |                     |
| Default Notices  | \$440.00            |
| Costs of re-entry  | \$1,331.00          |
| <b>SUB-TOTAL</b>   | <b>\$182,311.63</b> |
| <b>LESS Security deposit</b>   | <b>\$26,217.56</b>  |
| <b>TOTAL</b>   | <b>\$156,317.45</b> |

108 I make the orders attached, and I will reserve costs.

A T Kincaid  
**Member**