SUPREME COURT OF QUEENSLAND

CITATION:	*Mainchime P/L t/a Inala Plaza News v Inala Plaza P/L* [2003] QSC 250
PARTIES:	**MAINCHIME PTY LTD** trading as **INALA PLAZA NEWS (ACN 010 762 802)** (plaintiff) **v** **INALA PLAZA PTY LTD (ACN 081 899 247)** (defendant)
FILE NO:	S 2004 of 2003
DIVISION:	Trial Division
PROCEEDING:	
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	5 August 2003
DELIVERED AT:	Brisbane
HEARING DATE:	17 July 2003
JUDGE:	Byrne J
ORDER:	
CATCHWORDS:	CONTRACTS – PARTICULAR PARTIES – PRINCIPAL AND AGENT – RELATIONS BETWEEN PRINCIPAL AND THIRD PERSONS – RIGHTS AND LIABILITIES OF PRINCIPAL IN RESPECT OF CONTRACTS OF AGENT – IN GENERAL – No actual or ostensible authority to conclude Agreement for Lease *Barrier Wharfs Ltd v W Scott Fell & Co Ltd* (1908) 5 CLR 647 *Crabtree Vickers Pty Ltd v Australian Direct Mail Advertising & Addressing Co Pty Ltd* (1975) 133 CLR 72 *Marek v Australasian Conference Association Pty Ltd* [1994] 2 Qd R 521 *Toyota Motor Corporation Australia Ltd v Ken Morgan Motors Pty Ltd* [1994] 2 VR 106
COUNSEL:	Mr S L Doyle SC with Mr LF Kelly for the plaintiff Mr J S Douglas QC with Mr M Gynther for the defendant
SOLICITORS:	Beven Bowe & Associates for the plaintiff Corrs Chambers Westgarth for the defendant

[1] **BYRNE J:**

Principals and Agents

[2] The plaintiff conducts a newsagency from shop 44, Inala Town Centre. The defendant owns the Centre. The plaintiff's lease[1] expired by effluxion of time on 19 November 2002.

[3] Last year, the plaintiff retained Remnus Pty Ltd, whose representative is Mr Curtis, to negotiate the terms of the new demise with the Centre manager, Chesterton International (Qld) Pty Ltd ("Chesterton").

Issue

[4] The question is whether, by Mr Curtis's letter of 1 November to Mr Anderson, a director of Chesterton's Property Management section, the parties to this litigation concluded an agreement for lease of the shop.

Early days

[5] On 2 July, Mr Curtis sent to Mr Sciarretta, a Chesterton employee, "an Offer to Lease" signed by the plaintiff. The proposal, which was addressed to the defendant, identified the premises, nominated a commencement date of 20 November 2002, provided for an initial term of five years, with two, five-year options to renew, stipulated for a "gross" rent of $69,300 for the first year, anticipated a 3% increase in annual rent and an adjustment of rent upon exercise of an option to renew, and contained other suggested terms. The document envisaged endorsement by the defendant of any acceptance of "the terms … of this offer".

[6] Mr Sciarretta responded by letter dated 9 July, mentioning several points remaining for discussion. These included a need for information to support the "request of a lower rental" than that then payable; that "only one option will be allowed"; and that "4% is the standard we are achieving on all new leases" for annual rent review.

Plaintiff's 18 September Offer to Lease

[7] Concerned at what he regarded as less than satisfactory progress in the negotiations, on 18 September, Mr Curtis wrote to Mr Anderson, asking him to oversee the negotiations because "communications … with Gabe Sciarretta have not produced results …". An amended "Offer to Lease", again addressed to the defendant, was enclosed. It proposed a first year rent of $73,000. Otherwise, the terms were[2] those contained in the "Offer" submitted in July. Although in form the "Offer" contemplated execution by the plaintiff, it was unsigned.

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1 Strictly a sub-lease, as the defendant's title derives from a Perpetual Town Lease.

2 Materially.

Negotiations continue

[8] On 20 September, Mr Anderson told Mr Curtis that the plaintiff wanted a higher gross rent – $78,000 pa. Mr Curtis replied that such a rent was above accepted levels for a newsagency. Mr Anderson agreed to revert to Mr Curtis the following Tuesday. He did not do so but, on 3 October, he wrote to Mr Curtis. The letter began by referring to Mr Curtis's September "Offer to Lease". Mr Anderson then argued his client's case for a higher rental. The letter concluded:

> "In the interests of the tenant and your Offer to Lease, the Lessor is prepared to accept the lowest figure on our comparison scale of $473 m^2 being a Gross Rent of $78,000 per annum.
> We recommend your acceptance of the Lessors offer. All other items of your Offer to lease appear to be in order with exception to turnover figures, however we will make our recommendation to the Lessor once we have agreed on the rent amount."

[9] Next day, Mr Curtis called Mr Anderson, mainly to discuss the data and methodology Mr Anderson had used in his 3 October letter to support the $78,000 figure. They could not agree. At the end of a heated exchange, Mr Curtis said that he would consult with Mr Bowe, a director of the plaintiff, and get back to Mr Anderson. During the conversation, Mr Curtis indicated that the plaintiff would agree to submit the "turnover figures" mentioned in the last sentence of the letter.

A contentious point

[10] By letter dated 14 October, Mr Curtis informed Mr Anderson that "the lessee does not accept the rental demands of the lessor". This letter proceeded to advance arguments to support the plaintiff's rent proposals. It concluded by announcing that, absent agreement by the end of the week, "the lessee must proceed to make alternative arrangements …".

[11] On 23 October, this letter was faxed by Mr Curtis to Mr Anderson:

> "We refer to our previous fax of 14th. October, 2002 to which there has been no response other than a further visit to our client by Gabe Sciarretta which achieved nothing towards finalisation of outstanding matters.
> It appears that by the conduct of the Lessor and/or its leasing agents, the presence of a newsagency in the centre is no longer required by the Lessor.
> Under these circumstances our client finds it necessary to forthwith commence arranging an alternative structure for its contractual requirements for servicing its territorial obligations in the Inala area.
> We advise that from Monday next, 28th. October, 2002 our client will commence informing the community of Inala of the failure to negotiate an acceptable lease with the landlord and will provide all necessary information for the public's convenience regarding

> proposed alternative arrangements for the provision of newsagency products and services in the area.
> Prior to commencement of the above public information program we are instructed to communicate direct with Adrian Abbott in Sydney and forward him copies of all correspondence between ourselves and Chesterton together with a detailed explanation of why Inala Town Centre in no longer a viable proposition for a newsagency tenancy under the rental terms demanded by the Lessor."

[12] Mr Abbott, a practising accountant, controls the defendant.

[13] Next day, Mr Curtis rang Mr Anderson to say that gross rent offer was increased by $1,000 to $74,000 pa. Mr Anderson replied that he would get back to Mr Curtis with the defendant's response.

Pressure

[14] On 25 October, Mr Curtis wrote to Mr Anderson, saying:

> "We refer to our fax of 23rd. October, 2002 regarding the matter of failure to reach agreement on the terms of a new lease on the above premises.
> Our client received a report from the Queensland Newsagents Federation yesterday immediately following a telephone call to them from Gabe Sciarretta making inquiries regarding the obtaining of an alternative newsagent for the centre. We are advised that Mr. Sciarretta was given the same information regarding sub-agency structures that was provided to you in our letter of 18th. September, 2002.
> The inquiries made by Mr. Sciarretta confirm our belief that the Lessor does not require a newsagency in the centre and obviously our client's intentions as outlined in our fax of 23rd. October must proceed.
> It is also probable that this issue will be aired in the daily and local press and electronic media and no doubt both Adrian Abbott and Chesterton will be approached for comment by the media...".

[15] Despite the less than conciliatory note struck by this fax and the expressions of intention to vacate, the plaintiff preferred to stay. So at about 10 am on 1 November, Mr Curtis telephoned Mr Anderson to try to resolve the impasse over the $4000 pa difference over the rent. There is no record of the content of this conversation; and neither Mr Anderson nor Mr Curtis has been completely consistent in affidavits and testimony concerning it. This much, however, is established:

- Mr Anderson reiterated that the defendant would not accept less than $78,000; and he said, in effect, that the defendant would look to find

another newsagent prepared to pay that amount if the plaintiff would not, or the defendant might just "go back to" its "original demand";[3]

- The two men argued about whether a newsagency other than the plaintiff's could lawfully be conducted from the shop, during the course of which Mr Anderson asserted that earlier restrictive territorial arrangements affecting newsagents were "over";
- No mention was made of the 3 October letter.

[16] About three hours later, presumably in ignorance of that exchange,[4] the defendant's solicitors wrote to Mr Curtis. The letter refers to correspondence between Chesterton and Mr Curtis – no doubt the 23 and 25 October letters – and continues:

> "We are instructed that Chesterton … negotiates on behalf of and with the full approval of our client. Accordingly, we see no benefit in you contacting the principal of our client directly …
> You will appreciate that our client is also concerned about the potential loss of a newsagency from the centre and regrets that it has been unable to reach agreement with you regarding rent for a renewal of this lease. Accordingly, our client has made enquiries of relevant authorities and other interested parties as to whether it will be able to identify an alternative newsagency operator for the centre …"

[17] Shortly before 4pm that day, Mr Curtis received a fax from Mr Anderson, which said:

> "Further to our discussion earlier, we understand that the final offer on behalf of the Newsagent at Inala is $74,000 (gross) per annum.
> Can you please confirm this at your earliest convenience."

Critical communication

[18] Mr Curtis then spoke to Mr Bowe, before sending this fax to Mr Anderson:

> "We refer to our telephone discussion earlier today and your fax received at 3.50 PM today regarding rent negotiations for the new lease on the above premises and advise that we have received further instructions from our client.
> Whilst our client has already expressed its view on the appropriate market rent for the newsagency tenancy we are instructed that in order to avoid the necessity of making alternative arrangements for the servicing of its contracted territorial obligations for the Inala District our client agrees to the terms set out in your facsimile letter to us dated 3rd. October, 2002."

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[3] Referring to an invitation to treat that had emanated from Chesterton months before the 3 October letter.

[4] The letter makes no reference, direct or indirect, to the conversation between Mr Anderson and Mr Curtis.

Defendant's inactivity

[19] Not having received any response, a week later, Mr Curtis asked for a draft lease to be prepared. Three days afterwards, Chesterton[5] replied:

> "…We assume that the gross rental of $78,000 identified in previous correspondence is your clients final offer…
> Please confirm your clients final offer to me ASAP."

[20] Other, presently immaterial, exchanges ensued.

A concluded agreement?

[21] The notion that Mr Curtis's 1 November fax brought into existence a contract is attended with several difficulties. It more than suffices to discuss two.

No contract

[22] Mr Anderson's 3 October letter was not an offer which, upon a communication of acceptance of its terms, would, without more, mature into an enforceable agreement for a lease. The letter itself made that plain: by its express reference to the prospect of Chesterton's making a favourable "recommendation" to the defendant "once" the negotiating agents reached a consensus "on the rent amount". The concluding words of the letter[6] unmistakably reveal an intention that the defendant was not to be contractually bound by any purported acceptance of the proposals canvassed in the letter.[7] So the acceptance claimed for the 1 November fax did not create a contract.

No authority in Chesterton to bind

[23] Moreover, Chesterton had no authority to conclude an agreement for lease. It was authorised to negotiate the terms of an arrangement, which, if acceptable to Mr Abbott, could lead to a lease.[8] But the agent lacked authority to commit the defendant to the assumption of an enforceable obligation to lease.

[24] Chesterton had no such actual authority. Mr Abbott[9] had told Mr Anderson as much, and more than once, well before the negotiations with Mr Curtis began.

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5 Through another employee, Mr McGrath.

6 More fully extracted at para [8].

7 cf *Toyota Motor Corporation Australia Ltd v Ken Morgan Motors Pty Ltd* [1994] 2 VR 106, 168-170.

8 Or an agreement to lease.

9 Whose evidence on the topic is preferable to that of Mr Anderson (if there be a material difference in their accounts).

[25] In an attempt to demonstrate that, despite Mr Abbott's repeated instructions to the contrary, Chesterton had actual authority to conclude a contract for the new lease of shop 44, reliance was placed on a document, which, or so Mr Anderson believes, was despatched in February 2000 to Mr Fowler. According to Mr Abbott, Mr Fowler is a "project manager … I work closely with". The document was Chesterton's draft of a proposed agreement, stating the terms on which Chesterton was to manage the Centre. At a meeting in late December 1999, at which Mr Abbott was present, submission of such a proposal was requested, expressly for submission to the defendant's solicitors for their advice.

[26] Mr Abbott did not receive the discussion draft. No reference was made to it on either side after its despatch.[10] The relations between Chesterton and the defendant were not conducted in reliance on the draft. Nonetheless, it is contended that the document governed the relationship between the defendant and Chesterton. The idea is, I gather, founded on the notion that, after Mr Anderson sent the document, the defendant continued to deal with Chesterton as Centre manager and thereby became bound to its terms. This is scarcely a promising foundation for a finding that the document takes precedence over the defendant's insistence to Chesterton that it was not to commit the defendant to such new deals as renewed tenancies.

[27] In any event, the draft does not authorize Chesterton to make – as distinct from negotiate towards – contracts for tenancies. Both the two specific provisions concerning the agent's involvement in new tenancies[11] are opposed to the idea that, in terms, the discussion draft authorizes the agent to commit his client contractually to new leases.

[28] By an amendment allowed on the day of trial, a case of "apparent or ostensible authority" in Chesterton to conclude an agreement to lease between the defendant and the plaintiff was propounded. The particulars to support the contention rely on three matters: the contents of the 3 October letter extracted earlier;[12] the reference in the defendant's solicitors' letter of 1 November to Chesterton's negotiating "on behalf of and with the full approval of" the defendant; and that "Chesterton had at all material times acted as the managing agent"[13] of the Centre.

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10 To what address the evidence does not reveal.

11 Clause 9 provides that "In the event of any lettable part of the property becoming vacant the agent shall … negotiate terms and conditions of Tenancy Agreements with prospective Tenants upon such terms and conditions as are acceptable to the Owner…"
Clause 11 stipulates:

> "The Agent shall negotiate terms and conditions for Tenancy Agreement Renewals as and when the same shall fall due and in accordance with the terms and conditions of any subsisting Tenancy Agreement and the written instructions of the Owner, which instructions shall be requested by the Agent, from time to time, and the Agent shall prepare Tenancy Agreements for Tenancy Agreement Renewals or have them prepared by solicitors acceptable to the Owner."

12 at [8].

13 Further Amended Statement of Claim, paragraph 6(b)(iii).

[29] The letters do not assist this new case, for two reasons. First, neither letter emanated from the putative principal.[14] Secondly, neither represents an authority to do more than conduct negotiations; and "it is one thing … to settle what are to be the terms of an agreement, if it should be made; and quite another thing to make the agreement".[15]

[30] That the defendant held out Chesterton as the Centre Manager is not material either. No evidence was adduced to suggest that Chesterton had previously committed the defendant to new tenancies, or, if it matters, that managers of other shopping centres had, or were even supposed by anyone ever to have had, authority to create new tenancies – an omission which is unsurprising.[16]

Disposition

[31] No agreement for lease was concluded by Mr Curtis's 1 November fax.

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14 *Crabtree Vickers Pty Ltd v Australian Direct Mail Advertising & Addressing Co Pty Ltd* (1975) 133 CLR 72 at 78.

15 *Barrier Wharfs Ltd v W Scott Fell & Co Ltd* (1908) 5 CLR 647, 650 per Higgins J, in a passage often cited with approval: eg in *Marek v Australasian Conference Association Pty Ltd* [1994] 2 Qd R 521, 529.

16 cf W D Duncan *Commercial Leases in Australia*, 3rd ed, LBC Information Services, Sydney, 1998, pp 1-2.