SUPREME COURT OF QUEENSLAND

CITATION:	*Luxottica Retail Australia Pty Ltd v 136 Queen Street Pty Ltd trustee under instrument No 04350946* [2011] QSC 162
PARTIES:	**LUXOTTICA RETAIL AUSTRALIA PTY LTD ACN 000 025 758** (plaintiff/applicant) **v** **136 QUEEN STREET PTY LTD ACN 093 607 437 AS TRUSTEE UNDER INSTRUMENT NUMBER 704350946** (defendant/respondent)
FILE NO/S:	BS4688 of 2011
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	9 June 2011
DELIVERED AT:	Brisbane
HEARING DATE:	8 June 2011
JUDGE:	Ann Lyons J
ORDER:	**1. An interlocutory injunction be granted in the terms sought by the applicant,** **2. Costs reserved**
CATCHWORDS	EQUITY – EQUITABLE REMEDIES – INJUNCTIONS – INTERLOCUTORY INJUNCTIONS – where applicant leased premises from the respondent from which to operate their flagship store – where before registered lease expired the applicant and respondent, by its agent, entered into negotiations for a new leases – where negotiations continued after expiry of the registered lease whilst the applicant was holding over pursuant to the old lease – where applicant argues a lease agreement was formed – where respondent argues no lease agreement was formed – where this application seeks an interlocutory injunction restricting the respondent from taking any steps to retake possession of the property – whether injunction should be granted. *Electronic Transactions (Queensland) Act* 2001 (Qld), s 14 *Property Agents and Motor Dealers Act* 2000 (Qld) ss 128(1)(a), (e), 133(1), 160 *Property Law Act* 1974 (Qld), ss 11(a), 59

Alborn v Stephens [2009] QCA 384
Dixon v Keitch [2010] QCA 213
Kastro Pty Ltd v *ABD Holdings Pty Ltd* [2008] NSWSC 1291
Kellogg Brown & Root Pty Ltd v Australian Aerospace Ltd [2007] VSC 200
Live Earth Resource Management Pty Ltd v Live Earth LLC [2007] FCA 1034
Masters v Cameron (1954) 91CLR 353
Moffatt Property Development Group Pty Ltd v Hebron Park Pty Ltd [2009] QCA 60
One Stop Lighting (Queensland) Pty Ltd & Anor v Lifestyle Property Developments Pty Ltd [1999] QSC 57
Todrell Pty Ltd v Finch (No1) [2008] 1 Qd R 540

COUNSEL: J K Bond SC and M H Hindman for the plaintiff/applicant
D Clothier for the defendant/respondent

SOLICITORS: Norton Rose Australia for the plaintiff/applicant
Shand Taylor Lawyers for the respondent

[1] **ANN LYONS J:** The applicant in these proceedings, Luxottica Retail Australia Pty Ltd (Luxottica), has conducted a retail business selling sunglasses and accessories for the past 10 years at premises at 136 Queen Street on the corner of Queen and Albert Streets, Brisbane. It trades under the name of "Sunglass Hut".

[2] Pursuant to a registered lease dated 28 May 2007 the respondent 136 Queen Street Pty Ltd (136 Queen Street) leased those premises to Luxottica for a term of five years. It commenced on 1 February 2006 and expired on 31 January 2011. Clause 15 of that lease however permitted holding over after the termination date on a monthly tenancy terminable on one month's notice in writing.

[3] In late 2010 Luxottica commenced negotiations with the respondent by its agents for a new lease. The applicant says that those negotiations resulted in an agreement for the grant of a new lease on 20 April 2011 and that the agreed commencement date of the new lease was 1 March 2011.

[4] On 29 April 2011 the respondent through its solicitors gave Luxottica a formal notice ending the holding over and requiring it deliver up possession of the premises on 31 May 2011. Luxottica continues in occupation of the premises and has been paying rent under the holding over provisions of the registered lease.

[5] On 2 June 2011 Luxottica filed a claim and statement of claim in which it seeks specific performance of the agreement for the grant of a new lease.

[6] By this application filed on 2 June 2011 Luxottica seeks an interlocutory injunction restraining the respondent until trial from taking any steps to re-take possession of the premises.

Background

The letter of offer

[7] On 29 September 2010 Luxottica were advised by email by the respondent's agent Simon Purdy of CB Richard Ellis (C) Pty Ltd (CBRE) that no option was available in relation to 136 Queen Street. The applicants were advised that the lessor was to run an Expression of Interest campaign in relation to the premises and they would be invited to participate.

[8] Michael Hanscomb (Hanscomb) of CBRE, sent an email on 27 October 2010 to Anthony Hess (Hess), Director – Real Estate of the applicant company. That email attached an invitation from the respondent for the applicant to make an offer to the respondent in the form of the letter attached. The attached letter therefore essentially contained the terms which the respondent was asking for. The email stated: "I have attached a letter of offer on the landlord's asking rental for 136 Queen Street Mall. Please discuss with the business and come back with the best offer possible." The letter of offer contained the following terms:

1. The lessor
2. The lessee
3. The premises
4. The area (60 square metres ground floor
5. Permitted use – retail sale of sunglasses and accessories
6. Gross Rent per annum - $725,000 plus GST
7. Exclusivity
8. Term – 5 years
10. Commencement date – 1 March 2011
11. Rent review – CPI plus 2%
13. GST
14. Utility services
17. Rental bond
18. Insurance
20. Costs
21. Special conditions

[9] In that letter a paragraph on page 3 provided that "Upon acceptance of this offer by the Lessor a Lease will be prepared by the Lessor's Solicitors." At page 4 there were the following acknowledgements:

> "(a) I/We acknowledge that no promise, representation, warranty or undertaking has been made to me/us in relation to the potential of the premises to be leased or otherwise in relation to the Lease unless in writing with this offer and I/we further acknowledge that the Permissible Use does not imply any form of exclusivity.
>
> (b) I/we acknowledge that the written terms of this offer and any acceptance by the landlord and of the Standard Agreement to Lease and Lease will contain the whole of the agreement reached between me/us and the landlord."

[10] The applicants allege that in a meeting on 15 November 2011 between Hanscomb and Hess, Hess advised Hanscomb that Luxottica accepted all of the terms contained in the letter of offer of 27 October 2010 except for the issue of rent.

[11] Hanscomb agrees that a meeting occurred but denies that Hess indicated he agreed with all the terms of the letter other than rent. It would seem clear, however, that negotiations continued between Hanscomb and Hess and that those negotiations

were essentially in relation to issues of rent and floor size. On 22 November 2010 Hess emailed Hanscomb with two offers. The first was an offer of rent of $526,436 and the second option was an offer of rent of $375,000 on the basis that the size of the tenancy would be reduced to 38 square metres. Hanscomb subsequently advised that the respondent was not interested in reducing the size of the tenancy.

[12] On 28 February 2011 Hanscomb advised the minimum the respondent would accept was "$575,000 gross + GST".

[13] On 10 March 2011 Hess asked the landlord to consider accepting $550,000 gross in rent and he would "submit to Board on Monday for final approval".

[14] On 17 March 2011 Hanscomb advised that there was an offer from an alternate tenant which was $575,000 gross plus GST.

[15] Hess by return email stated "Luxottica will accept $575K Gross for a term of 5 years for the current tenancy. Could you please send thru the appropriate paperwork to formalise this arrangement."

[16] On 29 March 2011 Hanscomb informed Hess by email that the respondent had decided to proceed with the alternate tenant. By return email Hess asked "to speak to the landlord asap to change their minds".

[17] Hanscomb and Hess spoke by telephone on 13 April 2011. Hess states that Hanscomb indicated that the respondent was going to take the offer of the alternate tenant. Hess states that he then asked Hanscomb what it would take to get Luxottica to secure the lease and that Hanscomb indicated that he "would get the landlord to accept $600,000 gross with 5% increases". Hess states that he indicated that Luxottica agreed to those terms and he would get back to Hanscomb about the commencing rent amount as soon as possible.

[18] By email of 14 April 2011 Hess wrote to Hanscomb:

> "We have reviewed the rental structure after our conversation yesterday Luxottica will agree to $600K Gross for the Sunglass Hut existing tenancy with no refurbishment works Can you please arrange for the appropriate paperwork to reflect our agreement asap."

[19] Hanscomb responded by email on 14 April to Hess:

> "Can you confirm this is $600,000 gross + GST please After I will get instructions ASAP from the owner so we can finalise this."

[20] Hess responded by email three minutes later to Hanscomb that "The offer was for $600K gross plus GST."

[21] By email of 20 April 2011 at 4:34pm Hanscomb wrote to Hess:

> "We have now received acceptance for Luxottica's offer at 136 Queen Street:
> Starting gross rental $600,000 + GST
> 5 year lease
> 5% increases
> We will prepare formal lease documentation urgently
> We look forward to finalizing this matter for you."

[22] By email of 27 April 2011 at 3:31pm, Hanscomb wrote to Hess:

> "There has been some confusion over your offer for this (sic) premises. Even though the owner would prefer to accept your higher offer at $600,000 gross + GST, he had already accepted another offer in writing and feels that he has to honor that agreement – albeit at a lower gross rental.
>
> This means the owner will be giving notice ending your holding over of the premises. Formal notice will follow shortly.
>
> We apologise for the confusion."

[23] Hess responded within an hour by email to Hanscomb on 27 April 2011.

> "I do not see where there is any confusion. Your email dated 20 April 2011 advised me that you have received Landlord acceptance of your offer and that you will be sending thru the lease documentation.
>
> As far as I (sic) concerned this was not subject to any other conditions.
>
> We had a major problem with the agreement that you advised had been approved is not honoured for this site."

[24] The applicant seeks an interlocutory injunction on the basis that there is a serious question to be tried as to the existence of the alleged agreement for the grant of a new lease and because the balance of convenience favours the grant of an injunction.

The issues to be determined

[25] It is necessary to make two main inquiries in relation to applications for interlocutory injunctions namely, (i) whether the applicant has shown that there is a "serious question to be tried" as to the entitlement to the relief claimed; and (ii) whether the applicant has shown that the balance of convenience favours the granting of the relief claimed.

[26] A convenient summary of the law was recently expressed in *Live Earth Resource Management Pty Ltd v Live Earth LLC*[1] where Stone J summarised the position as follows:

> "[11] In *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57, the High Court has recently affirmed that in Australia, the principles relevant to the grant of an interlocutory injunction are those laid down in *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618 at 622-3 where the Court said that in dealing with applications for interlocutory injunctions it addresses itself to two main inquiries:

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1 [2007] FCA 1034.

> ‘The first is whether the plaintiff has made out a prima facie case, in the sense that if the evidence remains as it is there is a probability that at the trial of the action the plaintiff will be held entitled to relief... The second inquiry is ... whether the inconvenience or injury which the plaintiff would be likely to suffer if an injunction were refused outweighs or is outweighed by the injury which the defendant would suffer if an injunction were granted.’

[12] In *O'Neill*, Gummow and Hayne JJ (with whom Gleeson CJ and Crennan J in their separate joint judgment agreed) quoted this comment and, at 478, added the following explanation:

> ‘By using the phrase "prima facie case", their Honours did not mean that the plaintiff must show that it is more probable than not that at the trial the plaintiff will succeed; it is sufficient that the plaintiff show a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the trial.’

[13] Their Honours also referred to the additional comment in *Beecham* to the effect that the strength of the prima facie case required depends on the nature of the rights asserted by the applicant for relief and the practical consequences likely to flow from the order the applicant seeks. This latter comment illustrates that the two enquiries referred to by the Court in *Beecham* are interlinked so that the weight of considerations in regard to one may well affect the other.

[14] There are significant differences between the applicant's trade mark and the first respondent's logo (in its various forms) however the prominent use by both of the words, ‘Live Earth’ leads me to conclude that the applicant has made out a prima facie case as that term is used in *ABC v O'Neill.* In my view it is not a strong case but it may well be that with more consideration than I have been able to bring to bear in the time available that the applicant might succeed in its claim for infringement of its rights as registered owner of the trade mark.

[15] That brings me to the question of balance of convenience. In *Beecham* the Court quoted with approval comments made by Brett JA in *Plimpton v Spiller* (1876) 4 ChD 286 at 292-293 including the observation that whatever the decision in relation to interlocutory relief,

> ‘There will be a hardship on the one side or on the other, and the question is, on which side does the balance appear to lie?’.”

Is there a serious question to be tried?

[27] In relation to whether there is a serious issue to be tried, the applicant Luxottica argues that the respondent has entered into a binding agreement that the respondent would grant a lease to Luxottica.

[28] The respondent argues that there is no concluded or binding agreement and even if there was it does not comply with the requirements of the *Property Law Act* 1974 (Qld) (PLA).

The respondent's arguments

[29] The respondent notes that the applicant claims that the parties entered into a binding agreement for a lease for a 5 year term commencing 1 March 2011but argues that given its possession of premises at all relevant times, if it succeeds in establishing that agreement it has the effect of creating an equitable interest in the premises. The respondent submits that such an agreement is required to comply with the requirements of s 11(a) of the PLA and must be signed by the plaintiff or its agent lawfully authorised in writing. If this requirement is not complied with, the interest takes effect at will only.

[30] The respondent submits that the defendant does not point to documents which satisfy this requirement and that Hanscomb's 20 April 2011 email does not do that because:

(a) It does not identify all the essential terms of the alleged agreement. On the plaintiff's case those terms have to be found in other documents and, importantly, conversations; and

(b) It is not alleged that Hanscomb was lawfully authorised in writing as required by the section.

[31] It is also argued that s 59 of the PLA has not been complied with in respect of the alleged agreement. It requires a signed note or memorandum and Hanscomb's 20 April 2011 email does not identify all the essential terms of the alleged agreement. Nor, it is argued, does it refer to any other document or transaction. The respondent argues that for the applicant to make good its alleged agreement it must refer to conversations and that is what the PLA prohibits.

[32] It would seem clear that the requirement of a signature has in fact been satisfied given the provisions of s 14 of the *Electronic Transactions (Queensland) Act* 2001. That section provides that the requirements for a person's signature is taken to have been met for the purposes of electronic communication if a method is used to identify the person and the person's approval of the information communicated and that when the method was used the method was as reliable as was appropriate and the person to whom the signature was given consents to the requirement being met by the method used. It is clear that the electronic footer used conveys all the appropriate information as required by s 14(a); and s 14(b) is satisfied as both parties were content to engage in negotiation by email and the consent required by s 14(c) can be reasonably inferred in the circumstances.

[33] In relation to the denial of the authority of the agent ss 128(1)(a) and (e) of the *Property Agents and Motor Dealers Act* 2000 (Qld) (PAMDA) authorise a person holding a real estate agent's licence to negotiate the letting of land as an agent for a client for reward. Section 160 of PAMDA then provides that the letting of land for reward is unlawful unless done with the authority of a real estate agents licence.

Section 133(1) then provides that a real estate agent must not act unless the client first appoints the agent in writing. The letter from the respondent's solicitors of 29 April 2011 indicates that CBRE is referred to as the respondent's agent.

[34] In order for CBRE to have acted lawfully they would need to have a licence and to have been appointed by the respondent in writing. In *Dixon v Keitch*[2] Fraser JA with whom the other members of the court agreed stated that,

> "The presumption of regularity has been described as "a rule of very general application, that where an act is done which can be done legally only after the performance of some prior act, proof of the later carries with it a presumption of the due performance of the prior act'."

[35] Accordingly I agree with the applicant's submission that, absent evidence to the contrary, it is to be presumed that CBRE in negotiating the letting of the premises to the applicant had the appropriate written authorisation.

[36] The respondent also submits that there is no concluded or binding agreement because the applicant's argument is that the terms of the alleged agreement are to be found principally in the letter of offer, as accepted in the 15 November 2010 and Hanscomb's 20 April 2011 email. The respondent however argues that the commencement date of the lease is an essential term and that had not been agreed. It is submitted that the only evidence the applicant relies on to demonstrate that the commencement date was agreed is Hess' alleged acceptance on 15 November 2010 of the terms of the letter of offer other than rent.

[37] The respondent argues that it cannot be inferred or assumed that such a general discussion continued to govern the position when 1 March 2011 was months away, It is also argued that Hess himself made clear he had to get Board approval, the parties continued to indicate the need for the preparation of formal documents and by 20 April 2011 things had changed significantly given the lease had expired.

[38] The respondent submits that the evidence does not indicate that the parties intended to enter into a binding agreement and that the applicant's case relies essentially on the fact that they had reached consensus on the important terms. The respondent argues this is insufficient and that the question must be judged in a context where the dealings were about a very substantial subject matter. In particular the negotiations concerned a 5 year lease of prime retail premises in the heart of Brisbane for a very substantial rent. Furthermore the applicant occupied the premises under a formal registered lease and it was contemplated that any new lease would be registered. It had to be in order to be a legal lease and the letter of offer identified the need for registration fees to be paid. This course required the preparation and execution of formal lease documents which, in the normal course, would involve further dealings between the parties and their solicitors. The communications from both sides acknowledged the need for a lease to be prepared and signed.

[39] The respondent also points out that no documents had been signed by the parties themselves. There had been some correspondence exchanged and conversations between a representative of the applicant whose authority was apparently

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2 [2010] QCA 213 at [20].

constrained by the need to obtain board approval and the managing agent of the defendant. It is argued that neither Hess nor Hanscomb was apparently authorised to sign documents.

[40] It is also argued that the dealings occurred in relation to a retail shop lease and that both sides knew that there was legislation which governed the entry into such leases. That legislation required steps to be taken before a lease was entered into. The respondent argues that on the applicant's case, the respondent entered into the lease and, by that very act, breached the PLA and the terms of the lease incorporated by the statute. That failure would give the applicant the right to terminate the lease for a 6 month period at will.

[41] The respondent also notes that in the case of a commercial lease for term of more than 3 years, the usual expectation is that there will be no binding agreement until a formal agreement is signed and relies on *Kastro Pty Ltd v ABD Holdings Pty Ltd*[3] where Brereton J stated "it is improbable that parties intended to be bound before the terms of the formal lease were settled by solicitors and exchanged, especially if the parties had in mind the preparation of a formal document." The respondent argues that there are obvious reasons for this and that there is nothing in the circumstances of this case to displace that usual expectation.

[42] In relation to the specific arguments raised by the respondent in relation to the PAMDA requirements I note the following statements by Keane JA in *Moffatt Property Development Group Pty Ltd v Hebron Park Pty Ltd*[4] as follows:

> "**The PAMDA point**
> [39] A further criticism of the learned trial judge's approach was advanced. This point was not agitated at trial. This criticism relied upon the circumstance that the context in which the negotiations in the present case occurred included the *Property Agents and Motor Dealers Act* 2000 (Qld) ("the PAMDA"). This legislation requires certain formalities for the benefit of purchasers of residential land. These formalities do not impede the formation of a legally binding contract; but if these formalities are not complied with, the purchaser may, within a specified period, elect to terminate the contract.30 The argument which is put on behalf of Hebron Park is that it would be an extraordinary thing to hold a vendor bound unless and until the formalities necessary to bind the buyer irretrievably to the contract had been complied with.
>
> [40] It is necessary to bear in mind that when one speaks of the intention of the parties in this field of discourse, one is speaking of the objective intention of the parties, being their "intention as expressed".31 The negotiations between the parties did not advert to the need for compliance with the PAMDA requirements. The intentions actually expressed by the parties were not qualified or conditional by any concern to observe these requirements. That this was so is hardly surprising. As Mr O'Donnell QC, who appeared with Mr Shah for Moffatt, points out, this is not a case of the kind

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3 *Kastro Pty Ltd* v *ABD Holdings Pty Ltd* [2008] NSWSC 1291.

4 [2009] QCA 60.

> spoken of in the relevant provisions of the PAMDA where the contract is "given to the buyer by the seller". This is not a case of a sale of a residence to a consumer but of an acquisition of stock by a developer.
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> [41] In my respectful opinion, the unremarked existence of the formal requirements of the PAMDA do not afford a convincing basis for concluding that the parties' "intention as expressed" was not to make a legally binding agreement immediately." (footnotes omitted)

[43] I will address the essential arguments raised by the respondent in turn.

Have the Requirements of the PLA been satisfied?

[44] It would seem to me that the applicant's submission, that the requirements of the PLA are in fact satisfied by linking the documents of 27 October 2010 and 20 April 2011 pursuant to the doctrine of joinder of documents as discussed by Chesterman J in *Todrell Pty Ltd v Finch (No1),*[5] is indeed sustainable in the current circumstances;

> "The basic principle is that where two or more documents are relied upon as together constituting a written memorandum the signed document must refer to the other document in such a manner as to incorporate it, or them, so that they can be read together with the signed document. The point made by cases such as *Stokes* and *Timms* is that the reference to another document need not be express. A reference, express or implied, to a transaction rather than to a document will allow parol evidence to identify the other document."

[45] Whilst it is clear that, as the respondent argues, the decision in *One Stop Lighting (Queensland) Pty Ltd & Anor v Lifestyle Property Developments Pty Ltd*[6] makes it clear that the two documents cannot contain different terms, I do not consider that when read together the two documents in the current case in fact contain "essentially different terms" but do in fact fulfil the test espoused that "The two must fit together to make a coherent whole."[7] In particular I consider that the reference by Hanscomb in the 20 April 2011 email to "Luxotticas's offer" may be sufficient to fulfil the criteria in *Todrell* on the basis that it was a reference to the 27 October 2010 document.

[46] There is no doubt that there are factual disputes as to what happened at the meeting on 15 November 2010 and there is a further factual dispute as to what happened during the discussions on 13 April 2011.There are also some inconsistencies in some of the affidavit material before me in relation to negotiations with the other tenant. Those matters however are clearly matters for a trial.

[47] However for the purpose of determining whether there is a serious question to be tried I accept the applicant's submission that the course of negotiation can be summarized in the following way –

(a) Luxottica communicated acceptance of all the terms the respondent asked for on 27 October 2010 (except price) on 15 November 2010;

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5 [2008] 1 Qd R 540.
6 [1999] QSC 57.
7 [1999] QSC 57 at [33].

(b) The issue of price was finalized after negotiation by the respondent when -

(i) On 13 April 2011 Luxottica was invited to make an offer at $600,000 plus GST plus 5% increases;

(ii) On 13 April 2011, Luxottica agreed to the 5% increases, while foreshadowing a response ASAP on the proposed starting rent;

(iii) On 14 April 2011 Luxottica emailed its agreement to the $600,000 starting rent.

(iv) Later on that day, the issue that the rent was "plus GST" was clarified by exchange of emails.

[48] I accept that it is arguable that once Luxottica sent the 14 April emails, it must be taken to have made the offer it had originally been invited to make by the lessor's proposed letter of offer on 27 October 2010, modified only in relation to price in the way which had been clarified by the communications on and prior to those emails. It would then have been up to the respondent to advise whether it accepted the offer.

[49] Furthermore it is also clearly arguable that the respondent and its agent must be taken to have understood that to be the case because on 20 April 2011, the respondent communicated that it accepted Luxottica's offer.

[50] In my view, whilst I accept that the 14 April 2011 emails did not repeat each of the terms, the critical issue is that when the email of 20 April 2011 was received the arguably objective assessment of those emails is that the parties had indicated to each other that they had reached agreement on all issues of negotiation.

[51] I accept the applicant’s submission that if one applies an offer and acceptance analysis to the events that occurred it is possible to reach the following conclusions:

a. The offer from Luxottica was comprised of the l4 April 2011 confirmation that the offer was at $600,000 gross plus GST, the "offer" referred to being taken to have incorporated all the terms earlier agreed namely:

(i) the terms of the letter of offer of 27 October 2010 except where otherwise expressly agreed that were accepted orally on 15 November 2010; and

ii. the offer of 5% rental increases accepted orally on 13 April 2011.

b. The acceptance was the email dated 20 April 2011.

[52] It is arguable therefore that the *Masters v Cameron*[8] analysis of what happened is no different than if the offer had been made and accepted in exactly the way contemplated by the letter of offer of 27 October 2010.

[53] It would also seem to me that the relevant analysis is entirely factual and that there is no presumption that because the subject of the negotiation is the disposition of an interest in land, that the parties must be taken to have an intention that they would not be bound until a formal written agreement was put in place and executed particularly given the contents of the letter of 27 October 2010 which arguably

8 (1954) 91CLR 353.

indicated a contrary intention. It would seem that the letter may indeed have evidenced an intention that the parties would in fact be immediately bound consequent upon the offer being made and accepted and notwithstanding that it was contemplated that a lease would be subsequently drawn up by the respondent's solicitors.

[54] In this regard the decision of *Moffatt* is of assistance. In that decision Keane JA stated:

> "[22] In *S J Mackie Pty Ltd v Dalziell Medical Practice Pty Ltd*, McPherson J (with whom Macrossan CJ and Shepherdson J agreed) said that there is a strong traditional expectation that in the negotiation of sales of land the parties do not intend to be bound until a formal contract is executed. But it is clear from that case as well as the decision of this Court in *Teviot Downs Estate P/L & Anor v MTAA Superannuation Fund (Flagstone Creek and Spring Mountain Park) Property P/L* whether or not that expectation applies in a particular case depends on the totality of factual context. The passage which the learned trial judge cited from *Sheehan v Zaszlos* itself recognises that, where parties can be seen, from the course of their negotiations to be negotiating in accordance with a common practice, an inference may readily be drawn that they intend not to be finally bound until a formal contract is signed in accordance with that practice. Whether the parties to a transaction can be seen to be negotiating within a particular tradition or practice in mind is itself a matter of fact."

[55] It would seem to me that in the current circumstances this issue as to whether the parties intended to be bound prior to the execution of the formal contract is a question of fact for the trial judge.

[56] The applicant also relies on an alternative argument on the basis that the law recognizes that sometimes it is difficult to point to the precise moment at which an offer has been made and accepted in terms. The law recognises that a contract will be regarded as having been formed when there is sufficient manifestation of mutual assent to be bound. The applicant relies on the decision of Muir JA in *Alborn v Stephens*[9] as follows:

> "[51] The primary judge arrived at her conclusion that there was no binding agreement in respect of the Clontarf store arrived at about the time alleged by the respondents and that an agreement was reached on October 2001 by reference to the principles referred to by Heydon JA in the following passage from his reasons in *Brambles Holdings Ltd v Bathurst City Council:*
>
> > 'While the process by which many contracts are arrived at is reducible to an analysis turning on the making of an offer, the rejection of the offer by a counteroffer and so on until the last counter-offer is accepted, that analysis is neither sufficient to explain all cases nor necessary to explain all cases, Offer and acceptance analysis does not work well in various circumstances ... despite that Lord Greene MR

[9] [2009] QCA 384.

> observed of the practice: "Parties become bound by contract when, and in the manner in which, they intend and contemplate becoming bound. That is a question of the facts in each case ..." (*Eccles v Bryant and Pollock* [1948] Ch 93 at 104).'

[52] Of similar effect are the principles articulated in the following passage from the reasons of McHugh JA, with whose reasons Hope and Mahoney JJA agreed, in *Integrated Computer Services Pry Ltd v Digital Equipment Corporation (Aust) Pry Ltd*:

> 'It is often difficult to fit a commercial arrangement into the common lawyers' analysis of a contractual arrangement. Commercial discussions are often too unrefined to fit easily into the slots of "offer", "acceptance", "consideration" and "intention to create a legal relationship" which are the benchmarks of the contract of classical theory. In classical theory, the typical contract is a bilateral one and consists of an exchange of promises by means of an offer and its acceptance together with an intention to create a binding legal relationship ...
>
> Moreover, in an ongoing relationship, it is not always easy to point to the precise moment when the legal criteria of a contract have been fulfilled. Agreements concerning terms and conditions which might be too uncertain or too illusory to enforce at a particular time in the relationship may by reason of the parties' subsequent conduct become sufficiently specific to give rise to legal rights and duties. In a dynamic commercial relationship new terms will be added or will supersede older terms. It is necessary therefore to look at the whole relationship and not only at what was said and done when the relationship was first formed.'

[53] There is no particular novelty in the approach to the determination of the existence of a binding agreement considered in the above passages. Lord Denning MR said in *Port Sudan Cotton Co v Govindaswamy Chettiar & Sons*:

> 'I do not much like the analysis in the text-books of inquiring whether there was an offer and acceptance, or a counter-offer, and so forth. I prefer to examine the whole of the documents in the case and decide from them whether the parties did reach an agreement upon all material terms in such circumstances that the proper inference is that they agreed to be bound by those terms from that time onwards. That is, I think, the result of *Brogden v Metropolitan Rly* (1877) App Cas 666...'."

[57] In my view there is a serious question to be tried. I consider that the applicant has made out a prima facie case, in the sense that if the evidence remains as it is there is a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the trial.

[58] It is clear that in considering the question of balance of convenience many factors are taken into account including examining the impact of the grant or refusal of the injunction on third parties and the question of the adequacy of other possible remedies available to the applicant. In this regard it is necessary to consider whether the applicant can be properly compensated in damages.

[59] In considering whether or not to grant an interlocutory injunction pending a final hearing, the Court must weigh up all the relevant factors in order to take the course which appears to carry the lower risk of injustice. *In Kellogg Brown & Root Pty Ltd v Australian Aerospace Ltd*[10] Hansen J held:

> "[45] On the matter of the approach to the grant of an injunction pending the hearing and determination of a proceeding, in *Bradto Pty Ltd v State of Victoria* [2006] VSCA 89 at [35] the Court of Appeal in this State, constituted by Maxwell P and Charles JA, stated that: whether the relief sought is prohibitory or mandatory, the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been 'wrong', in the sense of granting an injunction to a party who fails to establish his right at the trial, or in failing to grant an injunction to a party who succeeds at trial."

[60] Having considered the affidavit material and the arguments of both Counsel I am satisfied that the balance of convenience favours the granting of the interlocutory injunction.

[61] I accept that this store, in this location, is of particular importance to Luxottica in terms of sales, profit, goodwill and brand awareness. It is a "flagship" store and they have traded form this position for over 10 years.

[62] If the relief sought is granted, Luxottica accepts its obligation to continue to pay rent to the respondent for the premises at the increased rate under the agreement to lease rather than the rate under the first lease.

[63] I do not consider that the respondent's evidence provides any reason to conclude that the balance of convenience lies any other way. There is no evidence that the respondent has entered into a binding agreement with another tenant.

[64] Accordingly there should be an interlocutory injunction in the terms sought by the applicant. I will hear from the parties as to the form of order and as to costs.

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10 [2007] VSC 200 at [45] to [48]