SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Case Title:	**United Cinemas Australia Pty Ltd v Gungahlin Lifestyle Pty Ltd**
Citation:	**[2016] ACTSC 376**
Hearing Date:	6 December 2016
Decision Date:	20 December 2016
Before:	Mossop AsJ
Decision:	See [103]
Catchwords:	LEASES – CORPORATIONS – CAVEAT – Whether caveat should be continued pending trial of substantive proceedings – Whether equitable interest arising from lease or an agreement for lease – Whether agent of defendant "properly authorised in writing" for purposes of ss 201 and 204 of the *Civil Law (Property) Act 2006* (ACT) – Whether assumptions under ss 128, 129 of the *Corporations Act 2001* (Cth) avoid operation of s 204 – Whether company taken to have executed document by operation of s 126 of the *Corporations Act 2001* (Cth) – Serious question to be tried – Caveat not discharged
Legislation Cited:	*Civil Law (Property) Act 2006* (ACT), ss 201, 204, Dictionary *Corporations Act 2001* (Cth), s 126, 127, 128, 129 *Court Procedures Rules 2006* (ACT), rr, 480, 482(3) *Imperial Act (Substituted Provisions) Act 1986* (ACT) *Land Titles Act 1925* (ACT), s 107(2)(b) *Law Reform Miscellaneous Provisions Act 1955* (ACT), s 54 *Leases (Commercial and Retail) Act 2001* (ACT), s 12 *Legislation Act 2001* (ACT), Dictionary *Statute of Frauds 1677* (UK), s 4
Cases Cited:	*Adamson v Hayes* [1973] HCA 6; (1973) 130 CLR 276 *Australia and New Zealand Banking Group Ltd v Frenmast Pty Ltd* [2013] NSWCA 459; (2013) 282 FLR 351 *Deputy Commissioner of Taxation v Corwest Management Pty Ltd* [1978] WAR 129 *GR8 Constructions Pty Ltd v O'Donnell* [2011] ACTSC 92 *Halloran v Minister Administering National Parks and Wildlife Act 1974* [2000] HCA 3; (2006) 229 CLR 545 *Ken Tugrul v Tarrants Financial Consultants Pty Ltd (In liquidation) [No 2]* [2013] NSWSC 1971 *Marist Brothers Community Inc v The Shire of Harvey* (1994) 14 WAR 69 *Masters v Cameron* [1954] HCA 72; (1954) 91 CLR 353 *NZI Insurance Australia Ltd v Baryzcka* [2003] SASC 190; (2003) 85 SASR 497 *Pirie v Saunders* [1961] HCA 4; (1961) 104 CLR 149 *Richardson v Landecker* (1950) 50 SR (NSW) 250 *Ruhe v Patel* [2015] ACTSC 169 *Sorna Pty Ltd v Flint & Anor* [2000] WASCA 22; (2000) 21 WAR 563

	The Official Trustee In Bankruptcy As Trustee for The Property of David Maxwell James, A Bankrupt v James & Anor [2001] WASC 66 *Theodore v Mistford Pty Ltd* [2005] HCA 45; (2005) 221 CLR 612 *Thompson v White & Ors* [2006] NSWCA 350 *Walsh v Lonsdale* (1882) 21 Ch D 9
Texts Cited:	Butt, P, *Land Law* (Thomson Reuters, 6th ed, 2010)
Parties:	United Cinemas Australia Pty Ltd (Plaintiff) Gungahlin Lifestyle Pty Ltd (Defendant)
Representation:	**Counsel** S Bogan (Plaintiff) D Hand (Defendant) **Solicitors** William Roberts Lawyers (Plaintiff) Minter Ellison (Defendant)
File Numbers:	SC 417 of 2016

MOSSOP AsJ:

Introduction

1. The issue in these proceedings is whether or not a caveat that has been lodged by the plaintiff should be continued. That issue arises in circumstances where there are proceedings on foot in which the existence of the equitable interest said to provide a basis for the caveat is to be determined.

2. The terms of the caveat in question identified the interest in land as an "equitable interest as lessee under an unregistered agreement for lease and an unregistered lease". The lease or agreement for lease is alleged to have arisen out of the signing of a document described as "Heads of Agreement" (**the HOA**) on 16 February 2016. It was signed by the plaintiff in accordance with s 127 of the *Corporations Act 2001* (Cth) and by a person who had facilitated negotiations between the plaintiff and defendant, Mr Rodney Thompson. The contention raised by the defendant in opposition to the continuation of the caveat is that Mr Thompson was not the defendant's "agent properly authorised in writing" within the meaning of s 204 of the *Civil Law (Property) Act 2006* (ACT) (**CLP Act**) and as a consequence the document signed by the plaintiff and Mr Thompson was not one upon which proceedings could be brought.

Background

3. The defendant, Gungahlin Lifestyle Pty Ltd (**Gungahlin Lifestyle**), was successful in a tender to the ACT Land Development Agency for the purchase and development of land at Block 1 Section 12 Gungahlin. The purchase of that land was completed on 30 October 2015. On 25 January 2016 Mr Thompson circulated material seeking

expressions of interest (**EOI**) for the leasing of a cinema in the proposed new development to Hoyts Cinemas Ltd (**Hoyts**), Amalgamated Holdings Ltd trading as Event Cinemas (**Event Cinemas**) and the plaintiff, United Cinemas Australia Pty Ltd (**United Cinemas**).

4. Mr Thompson was a director of Core Retail Management & Development Pty Ltd. The request for EOI was signed by him as "Director" below the statement "Core Retail Management & Development Pty Ltd on behalf of Gungahlin Lifestyle Pty Ltd".

5. On 27 January 2016 there was a meeting in Goulburn attended by:

   (a) John Krnc: a director of the defendant and of Krnc Bros Investments Pty Ltd;

   (b) Rodney Thompson: the sole director of Core Retail Development and Management Pty Ltd;

   (c) Roy Mustaca: Chairman of the Board of Directors of United Cinemas and the father of Sam Mustaca;

   (d) Sam Mustaca: Chief Executive of United Cinemas; and

   (e) Vanessa Benitez: an architect engaged by United Cinemas.

6. On 4 February 2016 Event Cinemas and Hoyts provided responses to the EOI material.

7. On 12 February 2016 there was another meeting at Goulburn between Mr Krnc, Mr Thompson, Roy Mustaca, Sam Mustaca and Ms Benitez.

8. At each of the meetings proposed designs for the cinema and the terms of any leasing arrangement were discussed. Before and after the meetings there were conversations between Sam Mustaca and Mr Thompson in relation to leasing terms. There were also different plans of the layout of the proposed cinema complex prepared by Ms Benitez and sent to Sam Mustaca. These plans contemplated a design compliant with the EOI size requirement of 3200 m² as well as an alternative layout involving a size of 3800 m².

9. On 16 February 2016 and the early morning of 17 February 2016 there were a series of emails which resulted in the HOA alleged to have formed a lease or an agreement for lease. The emails will be referred to in more detail later in these reasons, however, they may be identified as follows:

   (a) 10.00 am: email from Rodney Thompson to John Krnc attaching a document referred to as a LOO (Letter of Offer) to be provided to United Cinemas.

   (b) 2:23 pm: email from Rodney Thompson to Sam Mustaca attaching a document referred to as a Heads of Agreement.

   (c) 7:19 pm: email from Rodney Thompson to Sam Mustaca attaching a further amended Heads of Agreement.

   (d) 12:25 am: email from Sam Mustaca to Rodney Thompson attaching the 7:19 pm version of the Heads of Agreement signed by Roy Mustaca and Josephine Mustaca.

   (e) 8:29 am email from Rodney Thompson to Sam Mustaca acknowledging receipt of the HOA.

10. At 11:14 am on 18 February 2016, Mr Thompson emailed Sam Mustaca advising that Gungahlin Lifestyle had decided to proceed with the Hoyts offer and not with the United Cinemas offer. It explained the reasons for the decision.

11. On 16 March 2016 a caveat was lodged by United Cinemas over Block 1 Section 12 Gungahlin. The interest described in the caveat was:

> The caveator claims an equitable interest as lessee under an unregistered agreement for lease and an unregistered lease.

12. On 6 September 2016 a lapsing notice was served. On 16 September 2016 United Cinemas commenced proceedings seeking to have the caveat maintained, proceedings SC 417 of 2016 (the caveat proceedings).

13. On 14 October 2016 United Cinemas commenced substantive proceedings seeking specific performance of the agreement constituted by the HOA, proceedings SC 462 of 2016 (the substantive proceedings).

14. The caveat proceedings came before Penfold J sitting as duty judge on 16 September 2016 and again on 12 October 2016. On both occasions the caveat was continued. Proceedings were first before me on 21 October 2016. The defendant indicated that it wished to contest the continuation of the caveat pending the determination of the substantive proceedings. Subsequently on 8 November 2016 it identified that the issue which it submitted should lead to the discharge of the caveat was whether the plaintiff could have an interest in the land having regard to the terms of s 201 of the CLP Act. In particular that was said to be in issue because of the absence of any authorisation of the defendant's agent in writing as required by that section. The matter was listed for hearing on 6 December 2016 and directions made resulting in the exchange of written submissions.

15. When the matter was called on 6 December 2016 the defendant sought to amend its defence in the substantive proceedings so as to raise the operation of s 204 of the CLP Act. That arose because the written submissions exchanged in the course of the preparation of the matter had focused attention on the operation of that section rather than s 201. I refused leave to file an amended defence in the substantive proceedings because the operation of the section was not properly pleaded in the proposed amended defence. However, for the purposes of the argument on the caveat, the hearing proceeded on the basis that the argument in relation to s 204 could be raised notwithstanding that the defendant had previously raised the operation of s 201. The substantive point relating to whether or not the defendant's agent was duly authorised in writing was the same under s 204. The operation of s 204 had been addressed in the written submissions of the parties and was the subject of further oral submissions at the hearing.

The pleaded claim

16. The statement of claim (**SOC**) filed in the substantive proceedings alleges that Core Retail Management and Development Pty Ltd and its director Mr Thompson acted at all material times as the agents of the defendant: SOC [5].

17. It alleges that on or about 16 February 2016 the plaintiff and the defendant entered a legally binding agreement, referred to as the Contract, under which the defendant would:

a. Provide to the plaintiff a draft agreement for lease and lease including the terms and conditions agreed between the parties on or about 16 February 2016; and

b. Acting reasonably and in good faith use all reasonable endeavours to agree and finalise the agreement for lease and the lease as expeditiously as possible.

18. Particulars of the contract are set out. It is first alleged that the contract was in writing and comprised the HOA dated 16 February 2016. Alternatively it is alleged that it was partly in writing and partly oral, namely, the HOA and then an oral agreement that the area of the cinema was to be 3200 m² unless the parties subsequently agreed to build a larger cinema of up to 3800 m².

19. The plaintiff claims that the defendant refused to provide a draft agreement for lease and lease as required by the contract and had denied that contract was legally binding upon the defendant: SOC [8], [10]. The plaintiff claims an order for specific performance of the contract or, in the alternative, damages.

20. The defence filed 7 November 2016 alleges that the HOA, dated 16 February 2016, "formed part of ongoing and evolving commercial negotiations between the plaintiff and the defendant about the proposed development of the property": defence [6](b). It alleges that neither party intended that the document would immediately give rise to an agreement for lease and lease, but would rather form the basis of ongoing and evolving negotiations: defence [6](c). It alleges that the plaintiff was aware that the defendant was also in commercial negotiations with other parties and had yet to make a decision about which party it would invite to enter into an agreement to lease and lease: defence [6](d). It contends that the HOA is not an agreement to lease or a lease as the land said to be the subject of the agreement to lease or the lease is not described with sufficient certainty: defence [6](e).

21. As pointed out above, it is likely that the defence will be amended so as to incorporate a defence based on s 204 of the CLP Act and possibly s 201 of that Act.

22. A reply to the defence has been filed. It simply puts in issue those things which would be put in issue in any event by r 482(3) of the *Court Procedures Rules 2006* (ACT) and the rules expressly state that filing a reply merely to join issue is not necessary: r 480(2). It was therefore unnecessary. However, in the light of the issues raised in the caveat proceedings, it is likely that an amended reply would be filed in relation to any defence which raised ss 204 or 201 of the CLP Act.

Provisions relevant to extension of caveat

23. The caveat proceedings are proceedings under s 107(2)(b) of the *Land Titles Act 1925* (ACT) for an order that the caveat be continued. In the *GR8 Constructions Pty Ltd v O'Donnell* [2011] ACTSC 92 at [24-[27] Refshauge J outlined the nature of such proceedings:

> 24. The decision as to whether to extend the caveat or discharge it has been held to be akin to an application for an interim injunction. This was held by the Privy Council in *Eng Mee Yong v Letchumanan* (1980) AC 331. That authority has generally been followed in Australia, though it is said the analogy cannot be pressed too far: see *Australian Security Estates Pty Ltd and Bluecrest Holdings Pty Ltd* (1991) 9 BPR 17,533 (at 17,534). It has generally been followed in this Territory: see *N & J Efkarpidis Holdings Pty Ltd v Tancred Brothers Pty Ltd* (ACTSC, Gallop J, 2 July 1986, unreported).
>
> 25. This requires ordinarily that the caveator discharge an onus to show that its claim "has or may have substance" since, as Santow J put it in *Vella & Anor v Aliperti & Anor*

(1995) NSW ConvR 55-750 at 55,772: "...[T]he registered proprietors have a prima facie right to deal freely in their land." His Honour went on to say (at 55,772):

> It is sufficient for the caveators to establish that a claim of substance may be raised after the caveator has had the opportunity of discovery, inspection and interrogatories, particularly where the caveators' position will be irretrievable after the registration of the competing dealing. (footnotes omitted)

26. That is to say there must be a serious question to be tried.

27. Similarly, the balance of convenience must favour the extension of the caveat as opposed to other options.

24. His Honour then went on to discuss the issue of the balance of convenience and whether an undertaking as to damages was required.

25. In *Deputy Commissioner of Taxation v Corwest Management Pty Ltd* [1978] WAR 129 at 141 Brinsden J, following a review of the authorities, summarised the approach as follows:

> These authorities establish that the jurisdiction granted by s 138 should not be exercised so as to remove a caveat unless the case is one in which it is patently clear that the estate or interest sought to be protected cannot be made out and that degree of clarity will not emerge if there are disputed questions of fact, when the respondent should be left to proceed by way of action to establish the claimed interest or estate

26. In *The Official Trustee In Bankruptcy As Trustee for The Property of David Maxwell James, A Bankrupt v James & Anor* [2001] WASC 66 at [1], Wheeler J said:

> Although it is for the caveator to establish that there is a serious question to be tried as to whether a caveatable interest exists, a caveat will not generally be removed pending trial unless it is "patently clear" that the interest in the land sought to be protected cannot be made out: *Deputy Commissioner of Taxation v Corwest Management Pty Ltd* [1978] WAR 129 at 141 per Brinsden J, *Custom Credit v Ravi Nominees Pty Ltd* (1992) 8 WAR 42 at 48.

27. This formulation was adopted by Refshauge J in *Ruhe v Patel* [2015] ACTSC 169 at [53] (*Ruhe*). While the decision in *Ruhe* was relied upon by the plaintiff in support of a submission consistent with there being a different test for the removal of a caveat – "patently clear" that the interest cannot be made out – I consider that the statement is simply the inverse of the proposition that in order to maintain a caveat it is necessary to establish a serious question to be tried. It reflects the fact that a caveat has the effect of a statutory injunction to protect an interest in property and that where the existence of that interest is in contest it should be determined after a final hearing when the relevant facts can be finally found. In order to ensure that the interest is not lost pending hearing, the position is protected so long as there is a serious question to be tried and the balance of convenience favours its maintenance. In this way the authorities reflect the reluctance of courts not to protect alleged interests in land pending a final hearing given that if the caveat is justified, a unique interest in land may be irretrievably lost prior to the case being heard.

Emails and other transactions leading to the HOA

28. It is necessary to go into some more detail about the transactions between the parties giving rise to the HOA.

29. The email from Mr Thompson sent to the cinema operators on 25 January 2016 comprised an email which attached a letter signed by Mr Thompson seeking an EOI. To that letter was annexed an acknowledgement of acceptance and a "Commercial

Terms Sheet" which outlined the proposed terms of a lease including plans and specifications relating to landlord's works and cinema design.

30. The letter identified that it was seeking expressions of interest "based on the terms and conditions as detailed in the attached commercial terms sheet". The letter made it clear that the outcome of the process was intended not to create a binding legal relationship. The relevant part of the letter provided:

> All expressions and offers are subject to and conditional upon the following:
>
> - Gungahlin Lifestyle Pty Ltd board of directors approving the final proposed terms and conditions; and
> - both parties (acting reasonably and in good faith) agreeing on the final terms and conditions of the agreement for lease and the lease which will document more fully the terms and conditions set out in this letter of offer.
>
> This process is not intended to be, binding on either party. Despite the acceptance of any offer under the EOI process, no legally binding agreement for the lease of the premises will arise between the parties unless and until the agreement for lease and of the lease have been signed by both parties.

31. At 10:00 am on 16 February 2016 Mr Thompson wrote to Mr Krnc saying:

> Sam has asked us to send through a signed LOO that will give them the deal.
>
> Roy is having dinner with his Chinese business partner tonight. Sam wants to put the acid on them to sign what we want.
>
> I have attached a marked up LOO of what I think we could sign off.
>
> Give me a call to discuss ASAP.

32. The relevant point to note is that the letter annexed to this email maintained those provisions which indicated that any acceptance was subject to the decision of Gungahlin Lifestyle's board and that the process was not intended to be binding on either party.

33. The evidence of Mr Thompson was that Sam Mustaca requested that he remove the "subject to board approval" clause because it would "mean a lot more to Roy". Mr Thompson said that he agreed, but stated that "the final decision still needs to be made by John and his brothers". The evidence of Mr Mustaca did not specifically respond to this allegation. However, his version of the conversation is not consistent with that of Mr Thompson.

34. The email sent at 2:23 pm by Mr Thompson to Sam Mustaca attached a document referred to as a "Heads of Agreement". The email provided:

> As discussed please find attached proposed based [sic] commercials for a HOA.
>
> This is the absolute final position the family are happy to proceed on.
>
> I have made all changes from the original EOI document visible and have them in italics.
>
> Let touch base tomorrow first thing, to see if you have got it signed.

35. That email was copied to Mr Krnc.

36. The letter signed by Mr Thompson which attached the commercial terms sheet had removed from it the two elements which were previously included and which had made it clear that the document was not intended to create legal relations. The letter therefore included the statement:

The HOA is conditional upon:

- both parties (acting reasonably and in good faith) agreeing on the final terms and conditions of the agreement for lease and of the lease which will document more fully the terms and conditions set out in this letter of offer.

37. An email resending the 2:23 pm email was sent at 2:35 pm to fix some imperfect scanning of the attached document.

38. At 3:00 pm Mr Mustaca sent a text message saying "is it signed by JK?"

39. Mr Thompson replied at 3:02 pm saying "No… Me on there [sic] behalf… jk has approved it and it only subject to afl and lease. JK on the new farm working."

40. At 7:19 pm a further email was sent to Sam Mustaca and copied to Mr Krnc. It provided:

> Please find attached with the minor changes we discussed.
>
> In short-
>
> options to 2 X 10 years-Tenant pays rego costs so no consequential.
>
> Exclusivity on popcorn and confectionery
>
> Marketing removed from outgoings
>
> Landlord works to include the trust designed to allow Dolby Atmos sound. Tenant to be involved in design and coordination of structure.
>
> Tenant signage to be mutually agreed
>
> Redecoration every 7 years only
>
> Enjoy dinner and good luck.

41. The commercial terms document was amended consistently with this summary.

42. At 9:47 pm Sam Mustaca sent a text message to Mr Thompson saying "Question is being raised that I knew Roy would ask! "when is John signing?"" No response was sent by Mr Thompson at that point.

43. At 12:25 am on 17 February 2016 Sam Mustaca sent back the signed HOA. The version that had been signed was the version sent with the 7:19 pm email on 16 February 2016. The email provided:

> Please see your attached HOA signed by Roy & Josephine at Dinner this evening.
>
> It's been some time coming and look forward to working up and finalising the Da asap.

44. The execution of the HOA by United Cinemas appeared below the following text:

> ACKNOWLEDGEMENT OF ACCEPTANCE
>
> United Cinemas Australia Pty Ltd confirms its acceptance of the terms and conditions as set out in this letter of offer, and requests that all required legal documentation be drawn up to reflect the same:

45. At 8:29 am on the 17 February 2016 Mr Thompson sent an email to Sam Mustaca saying:

> Thanks Sam HOA received.
>
> We will come back to you formally following our PCG at 2 pm today.

Characterisation of the transactions

46. The recitation of the evidence in relation to the transactions on 16 and 17 February 2016 is sufficient to indicate that there will be a contest at trial over, in particular, the significance of the removal of the two elements of the letter in the HOA which had previously made it clear that execution of the HOA was not intended to create any binding agreement. That in turn will be dependent upon what was said in conversations between Mr Thompson and Sam Mustaca during the course of 16 February 2016 as well as the content of their text messages. These are not matters upon which it is appropriate to make any final findings for the purposes of an interlocutory application such as this. That is particularly so when the final evidentiary position may be influenced by what emerges during discovery or cross-examination, neither of which has occurred at the present stage of proceedings.

47. The starting point of the defendant's submissions was that the HOA formed part of evolving and ongoing discussions and negotiations between the parties about a potential lease and agreement for lease of an, as yet, undetermined portion of the shopping centre.

48. It submitted that the agreement used terminology which indicated that it was antecedent to any agreement for lease. In particular it referred to cl 23 of the agreement which provided that the parties undertook to "use all reasonable endeavours to agree and finalise the agreement for lease and the lease as expeditiously as possible after the date on which the EOI is accepted". That clause also required the defendant to provide "drafts [of the agreement for lease] and lease for the tenants review". The defendant submitted that it would be to pile fiction upon fiction to treat as a lease an agreement for an agreement for lease.

49. The plaintiff contended that the HOA fell into the first or second category of agreement identified in *Masters v Cameron* [1954] HCA 72; (1954) 91 CLR 353 (*Masters*). In other words, either the parties:

    (a) intended to be bound immediately although expressing a desire to draw up their agreement in a more formal document at a later stage; or

    (b) intended to be bound immediately, but wished the operation of a particular clause or term to be delayed pending the drawing up of a more formal document.

50. The defendant contended that, in the context of the dealings between the parties up to that point, the document was in the third category described in *Masters*, namely, a document reflecting an intention to postpone the creation of contractual relations until a formal contract was drawn up and executed.

51. In my view, the contention of the plaintiff is arguable. In other words there is a serious question to be tried as to whether or not the document that was signed was a document creating legal relations and constituted an agreement for lease. The omission from the document of the two elements which clearly stated that it was to be not legally binding gives rise to a reasonable contention that, in the context of the dealings between the parties, the omission of those terms reflected a change from an offer not intended to create legally binding obligations to an offer the acceptance of which would create legally binding obligations. The text message communications are not such as to put the issue beyond doubt. Although the evidence of Mr Mustaca did not specifically respond to the evidence of Mr Thompson regarding what he was told

about whether the document remained subject to board approval notwithstanding that those requirements had been removed from the written document, I consider, consistently with what I have said above, that is not appropriate to attempt to make a final determination of a question of fact in order to resolve an interlocutory issue about the continuation of the caveat.

52. The defendant contended that if there was any agreement it was not an agreement for lease but one step antecedent to that, being an agreement to enter an agreement for lease. The defendant contended that the principle in *Walsh v Lonsdale* (1882) 21 Ch D 9 therefore did not apply. It pointed to the fact that on its own terms the document did not identify the area to be leased, identifying it as "approximately 3200 m² – 3800 m² based on the plan provided by the tenant". The plaintiff on the other hand pointed to the antecedent dealings between the parties so as to characterise the obligation as relating to a 3200 m² lease with the possibility that, subject to further agreement, that area might be increased to 3800 m². That was consistent with the alternative manner in which the contract was particularised in the SOC. The plaintiff also pointed to the immediate obligation in cl 23 of the HOA which provided that "[f]ollowing acceptance the landlord will provide draft [agreement for lease] and lease for the tenant's review".

53. The essential characteristics for an enforceable agreement for lease were summarised in *NZI Insurance Australia Ltd v Baryzcka* [2003] SASC 190; (2003) 85 SASR 497 at [31]. Having regard to the level of detail in the HOA it is, in my view, arguable that although contemplating a further agreement for lease, the HOA was itself an agreement for lease which could be specifically enforced. It is at least arguable that the area of the proposed tenancy is sufficiently defined having regard to:

    (a) the evidence as to the discussions of area prior to the HOA; and

    (b) the manner in which the contract is particularised in the SOC in the alternative as including, in addition to the HOA, an agreement arising from those discussions as to a possible future agreement to increase the area to be leased from 3200 m² to up to 3800 m².

Section 201

54. Section 201 of the CLP Act provides:

> 201 Instruments required to be in writing
>
> (1) An interest in land cannot be created or disposed of by a person except—
>
> (a) by writing signed by the person or by the person's agent properly authorised in writing; or
>
> (b) by the person's will; or
>
> (c) by operation of law.
>
> ...
>
> (4) This section—
>
> (a) does not affect the creation or operation of a resulting, implied or constructive trust; and
>
> (b) is subject to section 202 (Creation of interests in land by word of mouth).

55. The defendant submitted that it applies to any alleged lease. It relied upon the decision in *Adamson v Hayes* [1973] HCA 6; (1973) 130 CLR 276 for the proposition that the

corresponding provisions of the Western Australian legislation applied to the creation of equitable interest in land as well as the creation of legal interests. It therefore submitted that, for the HOA to have created the equitable leasehold estate alleged by the plaintiff, the requirements of s 201 had to be complied with and were not because of the absence of an arguable case that the interest was created or disposed of by "the person's agent properly authorised in writing".

56. The plaintiff submitted that this involves a misunderstanding of the relationship between ss 201 and 204. In particular it relied upon the subsequent decision of the Full Court of the Supreme Court of Western Australia in *Marist Brothers Community Inc v The Shire of Harvey* (1994) 14 WAR 69 (*Marist Brothers*) which was to the effect that the equivalent of s 201 was directed to the creation of interests in land and not directed to agreements as such: see *Sorna Pty Ltd v Flint & Anor* [2000] WASCA 22; (2000) 21 WAR 563 at [7].

57. Having regard to these submissions, the fact that the plaintiff in its submissions placed emphasis upon the HOA being an agreement for lease as opposed to a lease and the fact that the defendant did not appear to contest the conclusion arrived at in *Marist Brothers*, it is not necessary to further consider the operation of s 201 as opposed to s 204.

Section 204

58. Section 204 of the CLP Act provides:

> Proceedings do not lie on certain unwritten agreements
>
> (1) A proceeding does not lie against a person on a contract for the sale or other disposition of land unless the agreement on which the proceeding is brought, or a memorandum or note of the agreement, is in writing signed by the person or by the person's agent properly authorised in writing.
>
> (2) This section—
>
> (a) applies to contracts whenever they were made; and
>
> (b) applies to land under the Land Titles Act 1925 ; and
>
> (c) does not affect the law about part performance or sales by a court.

59. The Dictionary to the Act provides:

> "conveyance" includes an assignment, appointment, lease, settlement or other assurance by deed of any property.
>
> ...
>
> "disposition" includes—
>
> (a) a conveyance; and
>
> (b) an acknowledgment under the Administration and Probate Act 1929

60. The Dictionary to the *Legislation Act 2001* (ACT) provides:

> "interest", in relation to land or other property, means—
>
> (a) a legal or equitable estate in the land or other property; or
>
> (b) a right, power or privilege over, or in relation to, the land or other property.

61. The defendant submitted that the formalities imposed by s 204 applied to contracts which give rise to equitable as well as legal interests in land. That arises from the terms of the section and the definitions set out above.

62. The defendant contended that the HOA is not an agreement for lease, but rather an agreement to continue the parties' negotiations with a view to reaching an agreement on the terms of an agreement for lease and, in turn, a lease. It submitted that even if the plaintiff was the beneficiary of an unregistered agreement for lease, then an equitable interest would only arise if any such agreement was an agreement of which specific performance would be ordered. The defendant submitted that in order for the HOA to be specifically enforceable there was a requirement to comply with the rules imposed by s 204. Because the requirement for the defendant's agent to be authorised in writing was not satisfied, it submitted that the HOA was not specifically enforceable and hence no equitable interest arose.

63. The plaintiff put forward several answers to these contentions.

64. The plaintiff submitted that the interest contended for by the defendant was in the nature of a constructive trust and, having regard to the historical antecedents of s 204 in s 4 of the *Statute of Frauds 1677* (UK), s 204 should not be interpreted as extending to an interest in the nature of a constructive trust. The plaintiff did not explain in its submissions whether it is alleged that s 7 or s 9 of the Statute of Frauds continued in operation in the Territory other than to the extent identified in ss 201 to 204 of the CLP Act. Nor did it explain how this might be the case having regard to the terms of the heading to sch 2 pt 11 of the *Imperial Act (Substituted Provisions) Act 1986* (ACT). However, it contended that the equitable interest it asserted did not involve proceedings "on a contract" within the meaning of s 204. Having regard to my conclusions in relation to the other arguments put by the plaintiff it is not necessary to consider this argument any further.

65. The plaintiff also asserted that ss 128 and 129 of the Corporations Act gave rise to a statutory estoppel which precluded the defendant from denying that Mr Thompson was duly authorised in writing.

66. The plaintiff also relied upon the operation of s 126 of the Corporations Act which, it submitted, had the effect of making the signature of Mr Thompson the signature of the company and hence avoiding any issue as to whether or not Mr Thompson, as an agent, was "properly authorised in writing".

67. Finally the plaintiff submitted that the requirements of s 204 were somehow outflanked by the definition of lease in s 12 of the *Leases (Commercial and Retail) Act 2001* (ACT) (**Leases Act**).

The relationship between ss 201 and 204

68. Notwithstanding the differences in wording between the provisions that exist in different states, the authorities on equivalent provisions establish that s 204 and its equivalents are concerned not with dispositions, but with the bringing of actions upon contracts for the sale or other disposition of land or any interest in land whereas s 201 and its equivalents are essentially directed to the creation of interests in land and not directed to agreements as such: *Halloran v Minister Administering National Parks and Wildlife Act 1974* [2000] HCA 3; (2006) 229 CLR 545 at [45]; *Theodore v Mistford Pty Ltd* [2005] HCA 45; (2005) 221 CLR 612 at [4], [29]; *Thompson v White & Ors* [2006]

NSWCA 350 at [120] – [122] (*Thompson*). Section 201 and its equivalents are only attracted to an agreement which is intended to have immediate dispositive or creative effect: *Thompson* at [132]. A provision such as s 204 may apply to an agreement to grant a lease: *Pirie v Saunders* [1961] HCA 4; (1961) 104 CLR 149.

69. P Butt, *Land Law* (Thomson Reuters, 6th ed, 2010) states at [1543]:

> Also, an agreement to grant a lease cannot be the subject of an order for specific performance (and so cannot come under the doctrine of *Walsh v Lonsdale*) unless the agreement, or some note or memorandum of it, is in writing and signed by the party to be charged or by some person whom he or she has authorised. This requirement, derived from the *Statute of Frauds,* is now to be found in s 54A of the *Conveyancing Act 1919* (NSW). It is, however, subject to the law of part performance and to any contrary statutory provision.
>
> [Footnotes omitted]

70. Although the provision in s 54A is different from s 204 in that it does not require that the agent be authorised in writing, the general proposition articulated in this paragraph can be applied to s 204. Therefore the position is that the plaintiff cannot succeed unless the requirement in s 204 is met or somehow avoided.

The requirement for written authorisation

71. The requirement under s 204 that an agent be authorised in writing was added to the requirements imposed by Territory legislation in 2006 when s 204 was enacted as part of the CLP Act. The previous provision, which was otherwise reproduced in s 204 and which had been contained in s 54 of the *Law Reform Miscellaneous Provisions Act 1955* (ACT), did not include such a requirement. It only required that the writing be signed "by another person duly authorised by that person to do so". The extrinsic materials associated with the enactment of the CLP Act do not shed light on the reasons for this change. In particular, the explanatory statement for the *Civil Law (Property) Bill 2005* made no reference to the change in wording.

72. The parties did not identify any authorities which determined what was required by the phrase "properly authorised in writing". The plaintiff contended that this did not necessarily require a written agency agreement expressly authorising the conduct, but instead might arise by reason of other communications between principal and agent. The prima facie position was that there was no written agency agreement between the defendant and Mr Thompson or his company and that both Mr Thompson and Mr Krnc denied that Mr Thompson was authorised to enter into any binding agreement on behalf of the defendant. It is not necessary to explore for the purposes of this application precisely what is required in order that an agent be "properly authorised in writing" and, having regard to the absence at this stage of any required discovery, it would not be appropriate to do so.

Operation of s 128-129

73. Sections 128 and 129 of the Corporations Act provide:

> **128. Entitlement to make assumptions**
>
> (1) A person is entitled to make the assumptions in section 129 in relation to dealings with a company. The company is not entitled to assert in proceedings in relation to the dealings that any of the assumptions are incorrect.
>
> ...

(3) The assumptions may be made even if an officer or agent of the company acts fraudulently, or forges a document, in connection with the dealings.

(4) A person is not entitled to make an assumption in section 129 if at the time of the dealings they knew or suspected that the assumption was incorrect.

129. Assumptions that can be made under section 128

...

Officer or agent

(3) A person may assume that anyone who is held out by the company to be an officer or agent of the company:

(a) has been duly appointed; and

(b) has authority to exercise the powers and perform the duties customarily exercised or performed by that kind of officer or agent of a similar company.

...

74. There are relatively few cases dealing with the operation of these provisions. *Australia and New Zealand Banking Group Ltd v Frenmast Pty Ltd* [2013] NSWCA 459; (2013) 282 FLR 351 dealt with the threshold question as to what constituted "dealings" for the purposes of s 128(1). In the light of that decision, Mr Thompson was clearly "dealing" with the plaintiff. The contest between the parties focused on other issues.

75. The plaintiff submitted that by reason of the operation of s 129(3), the company was precluded from denying the authority of Mr Thompson because it had held out Mr Thompson as its agent. It submitted that s 129 was, in effect, a statutory estoppel which precluded the defendant from relying upon the requirement for written authorisation of its agent under s 204.

76. It submitted that if there was a contest over whether or not the power to enter a binding contract was a power or duty "customarily exercised or performed by that kind of officer or agent of a similar company" then that was clearly a matter dependent upon evidence to be led at a final hearing and not a matter which disclosed that there was no serious question to be tried.

77. The defendant contended that at the time of signing the heads of agreement Sam Mustaca was aware that Mr Thompson was not authorised to enter into legally binding agreement on behalf of the defendant. As a consequence it submitted that s 128(4) applied so as to prevent the plaintiff from being entitled to make the assumption under s 129 (3). It pointed to an exchange of text messages sent between Mr Mustaca and Mr Thompson as to when Mr Krnc might sign the document. In response to this, the plaintiff pointed to the earlier exchanges of text messages which showed that Mr Krnc had already approved the document which became the HOA.

78. There is clearly a serious question to be tried as to the plaintiff's claim that in the light of its dealings with Mr Thompson he was held out by Gungahlin Lifestyle to be an agent of the company. There is also clearly an issue as to whether or not in signing the HOA he was performing the duties customarily exercised or performed by that kind of an agent of a similar company. Resolving that issue will be dependent upon findings of fact about precisely what kind of agent he was held out to be by the company, which in turn will be dependent upon findings of fact about what was said and done, in particular, by Mr Krnc and Mr Thompson in their interactions with Mr Mustaca.

79. So far as the possible application of s 128(4) is concerned, the state of knowledge of Mr Mustaca is clearly a fact in issue and something which can only be properly determined after a final hearing when facts have been found. In those circumstances I am satisfied that there is a serious question to be tried as to whether or not s 129 operates in the circumstances. The relationship between s 129 of the Corporations Act and a provision such as s 204 of the CLP Act has not been conclusively determined and I consider that for present purposes it is arguable that an assumption under s 129 may preclude a company from denying that its agent was not properly authorised in writing for the purposes of s 204.

80. The defendant contended that s 126(2) of the Corporations Act preserves the operation of s 204 of the CLP Act from any assumption made under s 129. The terms of s 126 are set out below. The plaintiff submitted that s 126(2) did not qualify the separate statutory provisions in ss 128-129 which appeared in a different part of the Act. Rather, s 126(2) only qualified s 126(1). On this point I accept the plaintiff's submission. Having regard to the terms of the subsection, the section in which it appears and the context in which it appears I do not consider that s 126(2) has the effect of preserving the operation of a provision such as s 204 despite the operation of ss 128 and 129.

Section 126

81. Section 126 of the Corporations Act provides:

> Agent exercising a company's power to make contracts
>
> (1) A company's power to make, vary, ratify or discharge a contract may be exercised by an individual acting with the company's express or implied authority and on behalf of the company. The power may be exercised without using a common seal.
>
> (2) This section does not affect the operation of a law that requires a particular procedure to be complied with in relation to the contract.

82. The plaintiff contended that this section operated prior to the application of a provision such as s 204. The effect of that submission would be that the requirement for authorisation of an agent in writing did not arise because s 126 had operated first so that the relevant act was that of the company. Because the act was by Commonwealth statute determined to be the act of the company, the requirements relating to the actions of an agent set out in s 204 would not be triggered.

83. The plaintiff relied upon the decision of *Richardson v Landecker* (1950) 50 SR (NSW) 250. In that case one of the issues was whether or not a lease which had been signed by a director of a company, but not under the companies seal, was effective notwithstanding the requirements of s 23C of the *Conveyancing Act 1919* (NSW). Section 23C is the equivalent of s 201 and provided that no interest in land could be disposed of except by writing signed by the person conveying the same or by his agent thereunto "lawfully authorised in writing".

84. The relevant facts were that the lease had been signed by a Mr Hutchinson who was one of three directors of the registered proprietor and also the manager of the company. The company's name was printed on the document at the place of his signature. It was part of the company's ordinary business to manage the building in which the premises were contained and the lease of the suites therein. Mr Hutchinson as manager had control and supervision of that portion of the company's business and the general duty of arranging the tenancies and leases of the various suites.

85. A Full Court of the Supreme Court of New South Wales found that it was not necessary to establish that Mr Hutchinson had been authorised in writing to enter into the lease. Street CJ who delivered the judgment of the Court said:

> A company requires some human agency in order to manifest its intention, and the signature by Hutchinson merely gave an operative effect to the name of the company already printed on the document. Hutchinson's authority was not disputed, and it appears to me that the matter is completely covered by the terms of s 348(1)(b) of the *Companies Act*, 1936, which expressly provides that contracts on behalf of a company which is made between private persons would be by law required to be in writing signed by the parties may be made on behalf of the company in writing signed by any person acting under its authority, express or implied. Here, as I have said before, Hutchinson's general authority was not disputed, and this section of that Companies Act specifically permits him to sign a contract such as the present for the company.

86. The plaintiff submitted that, notwithstanding any difference in wording between the legislation, similar reasoning can be applied in relation to the signing of the document by Mr Thompson. The defendant pointed to the differences in the circumstances of the cases, Mr Hutchinson being a director and manager of the company's business whose general authority was not disputed, whereas Mr Thompson's relationship to Gungahlin Lifestyle was much more remote.

87. While, in my view, the plaintiff's contention would give a very significant operation to s 126 at the expense of inconsistent Territory provisions, having regard to the limited authority on the operation of the section it is not possible to say that the contention is not seriously arguable. I do not consider it appropriate to attempt any final resolution of either the scope of s 126 or its application in the present circumstances in the absence of findings of fact that might be made after a final hearing.

Leases (Commercial and Retail) Act

88. The plaintiff submitted that it was difficult to see how ss 204 or 201 could have any application to the lease provided for in the HOA because of the terms of s 12 of the Leases Act which "appears to remove the requirement that a lease governed by the Act be in writing".

89. The defendant submitted that s 12(5) operates solely for the purposes of s 12 and not for the purposes of provisions such as s 204 of the CLP Act. It also submitted that the Leases Act operates on the relationship between the parties after entry into and during the period of a lease, leaving the procedures for entry into the lease to be dealt with by provisions such as s 204.

90. The parties appeared to accept (and no submissions were made to the contrary) that the Leases Act would apply to a lease granted over the premises because they were retail premises other than "large excluded premises" within the meaning of s 12(1)(a).

91. Under the Leases Act the term "lease" is defined as a lease within the meaning of s 12 of the Act to which the Act applies. Section 12(5) provides:

> (5) For this section, a lease includes-
>
> (a) an agreement, whether in writing or not, that provides for the occupation of premises exclusively or otherwise, whether for a fixed term, periodically or at will; and
>
> (b) a sublease or licence.

92. Section 17 of the Act provides that the Act applies to a dispute about a matter mentioned in table 17 column 1. Columns 2 and 3 of that table identify when the lease, proposed lease or provision of the lease to which the dispute relates came into existence and the date when the conduct causing the dispute must have occurred in order for the Act to apply.

93. Item 10 in column 1 of table 17 provides:

item	column 1 type of disputed matter	column 2 time lease entered into etc	column 3 time of conduct
10	any other matter not covered in column 1 of items 129 in relation to a lease or negotiations for entry into a lease or in relation to the use or occupation of premises to which the lease relates	any time	any time

94. An application may be made in relation to a dispute to which the Act applies, namely the disputes identified in s 17 and table 17. The Magistrates Court is given jurisdiction in relation to applications made under the Act: s 144. That jurisdiction is not said to be exclusive of the jurisdiction of the ACT Supreme Court, but the statutory provision empowering the making of applications in relation to disputes to which the Act applies is suggestive of it being a statutory entitlement in relation to which jurisdiction is given to a particular court. Section 152 of the Act permits proceedings to be transferred to the Supreme Court.

95. The contention of the plaintiff appeared to be that the definition of lease in the Leases Act avoided the necessity for compliance with ss 201 and 204 in the CLP Act. This involves a question of statutory interpretation which, having regard to my conclusions as to the arguability of other aspects of the plaintiff's claim, it is not appropriate to attempt to finally resolve for the purposes of this application. However, having regard to the terms of s 202 (creation of interests in land by word-of-mouth but only as interests at will) and s 203 (which permits leases for terms not less than three years at the highest rent reasonably obtainable), it is possible to read the provisions of the two statutes in a manner which does not significantly cut back the scope of the provisions of either. On the assumption that the legislature should be taken to have intended that the two statutes create a harmonious rather than conflicting scheme in relation to property rights of commercial significance, an interpretation of the effect of the definition of "lease" in s 12 which does not qualify s 204 an apparently attractive one.

Summary on serious question to be tried

96. Having regard to the facts presently disclosed in the evidence, the terms of s 204 of the CLP Act and ss 126, 128-129 of the Corporations Act, as pointed out at [51], [53], [78], [79], [80] and [86] above, I am satisfied that there is a serious question be tried as to whether or not the HOA was a legally binding agreement for lease which would be specifically enforced. I am therefore satisfied that there is a serious question as to whether the plaintiff has an equitable interest in the land under the principle articulated in *Walsh v Lonsdale*.

Balance of convenience

97. Having regard to the basis upon which the continuation of the caveat was set down for a separate hearing I do not consider that it is open to instead run the application on the basis of discrete balance of convenience issues.

98. In any event, the only basis upon which the balance of convenience was raised involved, in effect, denying to the plaintiff the potential to make its claim for specific performance and confining it to a claim to damages. It was not suggested that the plaintiff's interest could be accommodated in some manner short of maintenance of the caveat.

99. The defendant relied upon material in support of the contention that the balance of convenience did not favour continuing the caveat because of the obvious commercial imperative to have the dispute resolved in a swift manner. The particular issues relied upon were:

    (a) the decision by the defendant to proceed with Hoyts;

    (b) the reluctance of Hoyts to enter into any binding agreement so long as the caveat remained in place;

    (c) the obligation under the Crown lease to develop the site within a particular time frame; and

    (d) the need to have an agreement in place with a cinema operator prior to being able to obtain construction finance.

100. These commercial considerations are obviously significant but not overwhelming. In my view, in the light of there being a serious question to be tried as to whether or not the plaintiff has an equitable interest in the land, the balance of convenience would favour the maintenance of the caveat for the relatively modest period that it will take to have the matter heard and determined on a final basis. That is all the more so having regard to the fact that it is only due to the defendant's determination to contest the continuation of the caveat that the substantive proceedings are not further advanced towards an early hearing date which, at least at the time when the present issue was set down for hearing, would have been available.

Reasons for rejecting the tender of MFI A

101. I deferred ruling on the admissibility of the letter tendered and marked as MFI A. That was a letter tendered in relation to the balance of convenience issues which had not otherwise been addressed in the evidence put on by the plaintiff. It was an undated letter relating to the financial standing of the plaintiff with the Commonwealth Bank. It appears to have been provided in relation to a tender completely unrelated to the present case. Although it identifies the signatory, it does not even identify what status that person has within the bank. I refuse to admit MFI A because:

    (a) having regard to the fact that it was undated, written by a person whose position remained unidentified and related to a different project, it could only be of very limited probative value;

    (b) I did not consider that the issue of the balance of convenience was one which properly arose having regard to the issue identified by the defendant as the basis upon which it contended that the caveat should not be continued; and

(c) in any event, the matters pointed to by the defendant were not sufficient to cause the balance of convenience to favour the discharge of the caveat.

Email of 16 December 2016

102. On 16 December 2016 the plaintiff's solicitor sent additional factual material by email to my associate. The material related to steps by the defendant to register a mortgage over the property. That material was not sent with the consent of the defendant. No application was made by the plaintiff to reopen its case in order to tender that additional material. The provision of that material was not within the scope of any existing order or direction of the Court which would have permitted it to be tendered or provided to the Court. In those circumstances the communication and the provision of the material attached to it was not appropriate: see *Ken Tugrul v Tarrants Financial Consultants Pty Ltd (In liquidation) [No 2]* [2013] NSWSC 1971 at [19]-[22]. I have therefore ignored the communication and its contents.

Orders

103. Having regard to the fact that order 7 made on 21 October 2016 continued the caveat in effect until further order, it is not necessary to make any order in proceedings SC 417 of 2016. In those circumstances I will simply hear the parties as to the directions that need to be made in order to prepare proceedings SC 462 of 2016 for a final hearing and in relation to the costs of the hearing on 6 December 2016.

I certify that the preceding one hundred and three [103] numbered paragraphs are a true copy of the Reasons for Judgment of his Honour Associate Justice Mossop.

Associate:

Date: 20 December 2016