

# DISTRICT COURT OF QUEENSLAND

CITATION: *Colvin v Lennard & O'Brien* [2012] QDC 71

PARTIES: **COLVIN, John Maxwell**  
(Plaintiff)  
v  
**LENNARD, Philip**  
(First Defendant)  
and  
**O'BRIEN, Susan Margaret**  
(Second Defendant)

FILE NO: DIS 3661/08

DIVISION: Civil

PROCEEDING: Trial

ORIGINATING COURT: District Court, Brisbane

DELIVERED ON: May 1, 2012

DELIVERED AT: Brisbane

HEARING DATE: April 30, 2012

JUDGE: Koppenol DCJ

ORDER: **1. Judgment for Plaintiff against Defendants for \$113,317.87 plus interest of \$37,969.77 and costs (including reserved costs, if any);**  
**2. Defendants are to pay Plaintiff's costs on and after September 1, 2009 on indemnity basis.**

CATCHWORDS: CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – INTENTION TO CREATE LEGAL RELATIONSHIP – AGREEMENTS CONTEMPLATING EXECUTION OF FORMAL DOCUMENTATION – WHETHER BINDING CONTRACT – where letter of intent with details of agreement signed by all parties – where Defendants alleged letter of intent was mere lease application form – where works agreed to be done were in issue – where agreement between parties was not concluded with formal lease – where creation of formal lease in fuller terms with no different effect than letter of intent was to be created – whether letter of intent constituted concluded lease contract.

*Masters v Cameron* (1954) 91 CLR 353, applied  
*Niesmann v Collingridge* (1921) 29 CLR 177, applied  
*Moffatt Property Development Group Pty Ltd v Hebron  
Park Pty Ltd* [2009] QCA 60, applied

COUNSEL: P Ahern for the Plaintiff  
First Defendant appeared on his own behalf  
No Appearance for the Second Defendant

SOLICITORS: Norton Rose for the Plaintiff  
First Defendant appeared on his own behalf  
No Appearance for the Second Defendant

- [1] The Plaintiff owns a commercial property in Fortitude Valley. On July 17, 2006, following various discussions between the parties and the Plaintiff's real estate agent, the Defendants signed a letter of intent to lease the property. The letter was then signed by the Plaintiff's predecessor in title (his mother, who has since died) on or about July 18, 2006 and the Defendants were informed of that the next day. On July 25, 2006 the Defendants paid the deposit of \$8,429.66. Two days later, the Defendants purported to terminate the arrangement. The Plaintiff regarded that as a repudiation. The Plaintiff accepted the Defendants' repudiation and terminated the arrangement by letter dated August 4, 2006 to the Defendants. No formal lease instrument was ever prepared or executed.
- [2] The Plaintiff argues that the letter of intent was a binding agreement and accordingly the Defendants are liable for the quantified damages of \$113,317.87—as the property was not re-let until January 2007.
- [3] The Defendants say that the letter of intent was really just an application form for a lease to enable the Plaintiff to assess their lease-worthy capacity. They also say that the Plaintiff (a) revised the bank guarantee requirement so as to require its provision by the Defendants; (b) did not complete certain required works; and (c) did not remove the "For Lease" signs on the property.
- [4] The executed letter of intent (omitting trade referees) was as shown below:



Blocksidge & Ferguson Building  
144 Adelaide St Brisbane Qld 4000  
Telephone: 07 32 333 899  
Facsimile: 07 3229 5636  
Email: help@blocksidge.com.au

PO Box 10266 Brisbane  
Adelaide Street Qld 4000

**Blocksidge Property Services**

• Residential Property Management 07 32 333 988  
• Commercial Property Management 07 32 333 933  
• B&F Body Corporate Management 07 32 333 977  
Pty Ltd ABN 57 076 340 086

• Auctioneers & Valuers  
• Real Estate Agents



17 July 2006

Mr Philip Lennard & Ms Susan Margaret O'Brien  
Photography Events  
1/132 Stafford Road  
Gordon Park  
QLD 4031

Dear Philip and Susan,

**Re: Letter of Intent to Lease "whole of land" and building at 86 Arthur Street, Fortitude Valley – RPD: Lot 87 RP 8955 County Stanley Parish North Brisbane.**

**Lessor:** Marjorie Peace Colvin.

**Lessor's Solicitor:** Deacons Solicitors 175 Eagle Street, Brisbane.  
Phone: (07) 3309 0888, Fax: (07) ..... , E-mail: [info@deacons.com.au](mailto:info@deacons.com.au)

**Lessor's Agent:** Blocksidge & Ferguson Limited. 144 Adelaide Street, Brisbane.  
Phone: (07) 32 333 999, Fax: (07) 3229 5636, E-mail: [help@blocksidge.com.au](mailto:help@blocksidge.com.au)

**Lessee:** Philip Lennard & Susan Margaret O'Brien T/A The Artzdome.  
Phone: (07) 3357 9175, Fax: (07) ..... , E-mail: [philipphotography@gmail.com](mailto:philipphotography@gmail.com)

**Lessee's Solicitor:** .....  
Phone: (07) ..... , Fax: (07) ..... , E-mail: .....

**Lessee's Registered Trading Names:** PL Photography, [www.plphotography.net](http://www.plphotography.net)  
ArtZdome, [www.artzdome.com](http://www.artzdome.com) Photography Events, [www.photographyevents.net](http://www.photographyevents.net)

**Lease Term:** 3 Years.

**Options to renew Lease:** 3 Options of 3 Years each.

**Commencement date:** The Lease & Rental & Outgoings Recoverable payments will commence on 1 August 2006.

**Possession:** The Lessor will grant possession to the Lessee only after:  
1) the Lessee has signed the Lease and  
2) the Lessee has paid 2 months rent and  
3) the Lessee has arranged a Bank Guarantee to the value of \$50,000.00  
**Area of building:** 418 sq metres (more or less).

[www.blocksidge.com.au](http://www.blocksidge.com.au)

**Net Commencing Rental:** \$91,960.00 + \$9,196.00 GST = \$101,156.00 pa payable in Calendar Monthly increments of \$7,663.33 + \$766.33 GST = \$8,429.66.

**Outgoings Recoverable:** These are currently estimated at \$13,500.00 + \$1,350 GST = \$14,850.00 per annum. Outgoings Recoverable will be payable by the Lessee within 14 days of receiving a correctly rendered invoice from the Lessor. Outgoings to be paid are: Lessor's insurance, Repairs & Maintenance other than as a result of reasonable wear and tear, Utilities including water, electricity, telecommunications, ambulance levy and any service, tax, duty or levy included in utility bills, rates and any service, tax, duty or levy included in rates bills."

**Deposit:** Upon signing this Letter of Intent to Lease the Lessee will pay to the Lessor's Agent's Trust Account as consideration the sum of \$8,429.66 which will be accepted as Rent (including GST) for the month of August 2006.

**Rental Review:** The Rental will be increased by CPI on each anniversary of the commencement date of this lease for the second and third years of each 3 Years Term and to Market for the first year of each Option. If a valuation is required for a market rent review, the Lessor and the Lessee to each pay half of the cost of valuation.

**Lessee's Use:** The Lessor consents to, but does not provide any warranty that, the Lessee's Use of the premises is legal or appropriate. The Lessee proposes to use the premises for the display of art and photography and as a venue for functions arranged by the Lessee and his associates. The Lessee believes that his use is not a Retail use.

**Insurances:** The Lessee is required to have Public Liability insurance in the sum of \$10,000,000.00, glass for replacement value, (both of the above noting the Lessor's interest in the property), as well as plant and equipment, fixtures and fittings, furniture and stock insurance such that the Lessor is indemnified from any claim whatsoever.

**Property Management:** The Lessor does not retain a Property Manager and requires Rent to be paid monthly, directly deposited as cleared funds into a Bank Account to be nominated by the Lessor from time to time on the first day of each Calendar Month. The lessee will be in default if these payments are 7 days overdue. Outgoings to be paid as and when they fall due.

**Restatement and redecoration:** The Lessor requires the Lessee to return the premises to the same standard and condition as they are at the commencement of this Lease within 90 days of validly exercising his Option to renew the lease every 3 years or prior to vacating the premises if the Lease is terminated for any reason.

**Trade Referees:** The Lessee is required to provide the names & contact details of 4 trade referees so that the Lessor may make enquiries about the credit of the Lessee.

1) Business: Contact:  
Telephone: E-mail:

2) Business: Contact:  
Telephone: E-mail:

3) Business: Contact:  
Telephone: E-mail:

4) Business: Contact:  
Telephone: E-mail:

**Statement of Assets & Liabilities:** The Lessee will provide to the Lessor a Statement of his Assets & Liabilities so that the Lessor may consider granting this Lease on a more informed basis. The Lessee understands that this information will be kept "Strictly Confidential" and will be used for no other purpose than as stated herein.

**Repairs & maintenance:** The Lessor warrants that the building will be maintained to the highest standards provided the Lessee informs the Lessor of any problems of a Capital nature that need attention.

**Air conditioning:** The Lessee is required to retain a contractor to maintain the air conditioning systems throughout the building at his own expense. An Airconditioning Maintenance Contract must be retained in writing by the Lessee and available to be shown on demand to the Lessor when requested. If there is no evidence that maintenance has been performed the Lessor may perform the maintenance and require the cost to be paid by the Lessee. If there is a plant failure due to neglect of the maintenance obligation on the part of the Lessee, then the Lessor may demand that the Lessee replace the failed air conditioning plant at the Lessee's expense.

**Lessor's works:** The Lessor will provide air conditioning plant as inspected or equivalent except for the replacement of the 2 wall mounted split systems installed on the rear wall of the building that may be removed by the Administrator winding up the affairs of the past Lessee. If these air conditioners are removed, the walls will be repaired without cost to the Lessee.

The Lessor will arrange to supply and install a disabled person's rail in the disabled person's toilet in the premises without cost to the Lessee.

The Lessor has required the Administrator winding up the affairs of the past Lessee to leave cat' 5 cables laid in the premises such that arrangements may be made by the Lessor to install a termination rack on the wall of the office under the rear stairs of the mezzanine level without cost to the Lessee. The cat' 5 cable suspended from the cable trays in the rear warehouse area will be lifted and laid on the cable tray such as to be available for future applications.

There are also four electrical cables attached to power circuits hanging from the cable tray which may be of use to the tenant. The Lessee should instruct the Lessor as to whether these should be lifted and laid in the cable tray or whether the Lessee wishes to use them.

There is a speaker system connected to the office under the rear stairs and may be utilised by the Lessee on an as is basis.

The Lessor will complete the unfinished electrical works in the Boardroom including wiring of the light above the Boardroom table.

If the above summary correctly reflects your understanding of an agreement made in discussion with the Lessor and the Lessor's Agent, please sign where indicated below and pay the Deposit required to the **Blocksidge & Ferguson Limited Trust Account**.

The Lessor's Solicitor will then prepare a lease that incorporates the terms herein together with usual terms applicable to a lease of this type and submit this to you or your Solicitor as soon as it can be available for your perusal and signature.

Yours faithfully,  
**Blocksidge & Ferguson Limited**

  
**Jonathan Blocksidge**  
Director

Cc: John Colvin

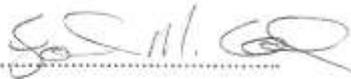
We, **Philip Lennard & Susan Margaret O'Brien**, of Brisbane wish to take a lease over the premises owned by **Marjorie Peace Colvin** on the terms and conditions outlined herein and subject to the final acceptance by the Lessor of the terms and conditions herein:

  
.....  
Signature

  
.....  
Witness

I, **Marjorie Peace Colvin**, of Brisbane accept the offer of lease made by **Philip Lennard** and **Susan Margaret O'Brien** over the land and improvements that I own on the terms and conditions outlined herein together with the usual terms applicable to a lease of this type.

  
.....  
Signature

  
.....  
Witness

We, **Blocksidge & Ferguson Limited**, of Brisbane confirm that we have received to our trust account the Deposit herein prescribed as consideration in this agreement.

.....  
Signature

.....  
Witness

Dated this .....day of July 2006.

- [5] As is evident, the letter specifies the property, the parties (lessor and lessee), the lease term, renewal options, commencement date (August 1, 2006), when possession will be granted, rental outgoings recoverable, deposit payable, rental review, lessee's proposed use, insurance required, property management, reinstatement and decoration requirements, trade referees, the need for a statement of the lessee's assets and liabilities, repairs and maintenance, air conditioning and lessor's works. The letter concluded by stating that once it was signed, the lessor's solicitor would prepare a lease incorporating the letter's terms together with the usual terms applicable to a lease of that type, and submit it for perusal and signature.
- [6] The Defendants signed the clause that they wished to take a lease over the subject premises on the terms and conditions outlined therein and subject to the lessor's final acceptance. The lessor signed the clause which accepted the Defendants' offer of lease on the terms and conditions outlined therein, together with the usual terms applicable to a lease of that type.
- [7] Attached to the letter of intent were (a) written verification by the Defendants that a bank guarantee by the second Defendant's mother (Ms Carol O'Brien) for \$50,000 was provided and (b) the Defendants' statement of personal assets and liabilities.
- [8] In *Masters v Cameron* (1954) 91 CLR 353, 360-2, the High Court said that where negotiating parties reach agreement upon terms of a contractual nature and also agree that the matter will be dealt with by a formal contract if the parties have reached finality in arranging all of the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fuller and more precise but no different in effect, then a binding contract has come into effect at once for the parties to perform the agreed terms whether the contemplated formal agreement comes into existence or not.
- [9] In determining this situation, the decisive issue is the intention of the parties, as objectively ascertained from the terms of the document, when read in light of the surrounding circumstances: see *Niesmann v Collingridge* (1921) 29 CLR 177, 181; *Moffatt Property Development Group Pty Ltd v Hebron Park Pty Ltd* [2009] QCA 60, at [40], [42].
- [10] An analysis of the terms of the letter of intent demonstrates that all of the principal terms of the agreement have been identified and provided for: the property, the identities of the lessor and lessee, the lease period, the options to renew, the rent payable, the obligation to pay outgoings, the mechanics of payment etc, are all clearly expressed. None of the letter's obligations are calculated by reference to the execution of a formal agreement: the commencement date clause states that the lease and rental and outgoings recoverable payments will commence on August 1, 2006; the possession clause provides that the lessor will provide possession when the lessee complies with the 3 requirements prescribed; and the deposit clause requires payment of a month's rent upon signing the letter.

- [11] The letter also uses the language of a binding agreement: the last page of the agreement asks the lessees to sign the letter and pay the deposit “*if the above summary correctly reflects your understanding of an agreement made in discussion with the lessor*” and the execution clause uses the language of offer and acceptance. The statement requiring “*the usual terms applicable to a lease of this type*” to be included is not uncertain or incomplete because, as Keane JA said in *Hebron Park* at [56], the facilitation of the mechanical details of the implementation of the parties’ agreement could be supplied by implied terms and considerations of reasonableness which obviated the need for further express agreement.
- [12] In my opinion, the objective intention of the parties, ascertained from the terms of the letter of intent was to create an immediately binding agreement. Contrary to the Defendants’ submissions, the letter does not use the language of a lease application form and I see no reason to think that it could be so viewed.
- [13] The Defendants also relied heavily upon an alleged communication between the Plaintiff and the First Defendant on July 25, 2006, to the effect that the Plaintiff needed a bank guarantee by the Defendants and not by the Second Defendant’s mother. Therefore, the Defendants submitted that without that particular guarantee—and none was forthcoming, no lease agreement was concluded. The Plaintiff could not recall that conversation but conceded that it may have occurred.
- [14] However, whether or not that conversation occurred does not impact upon the conclusion of the lease agreement but rather, as the letter of intent makes clear, whether and when the lessor will grant the lessee possession. The provision of the bank guarantee was a pre-condition to possession, whereas the various other obligations in the letter (such as to pay the rent and outgoings) are quite separate and more fundamental.
- [15] Next, the Defendants complain that certain works (adding a skirting board to the boardroom, evening out an uneven floor in the rear warehouse, attaching a rear sliding door and pruning an overgrown vine), which the Plaintiff agreed to perform, were not done. With respect, this point really leads nowhere because the Defendants terminated the agreement before those works could have been completed. I reject any proposition that the non-completion of those works by the time the Defendants terminated the agreement has the result that the principal lease agreement never came into being. However, some other works referred to in the letter of intent and by the Defendants in their Notice of Defence (provision of an air conditioning plant, supply and installation of a rail in the disabled person’s toilet, relaying of electrical cables and completing some electrical works in the boardroom) were completed by July 21, 2006.
- [16] Finally, the Defendants submitted that the property was never taken off the market—and therefore, inferentially, no lease was ever concluded because the “For Lease” signs remained on the premises and the property was still listed on the internet for lease. However, the Plaintiff gave evidence (which I accept) that the removal of the signs and listings was a matter for his real estate agent

and that would eventually have been done. In my view, it does not lead to the conclusion advanced by the Defendants.

[17] I have therefore concluded that none of the points advanced by the Defendants alters my finding that the letter of intent created an immediately binding agreement between the Plaintiff and the Defendants.

[18] The remaining issue is quantum. The amount sought is \$113,317.87 and was supported by invoices. The Plaintiff submitted that it was calculated on the following basis:

- (a) First, by calculating the rent payable by the Defendants for the initial 3-year period of the lease (August 1, 2006 to July 31, 2009), including the CPI increases to which the parties agreed at the commencement of the second and third years of the lease;
- (b) Secondly, by adding the outgoings paid by the Plaintiff for the period between the commencement date of August 1, 2006 and January 27, 2007, which is the date from which the next tenant started paying rent and outgoings. The Defendants were required to pay outgoings pursuant to the letter of intent;
- (c) Thirdly, by adding costs incurred by the Plaintiff in re-letting the property. Mainly, those costs included advertising costs, agent's commission and certain works required by the new tenant, before it would lease the property; and
- (d) Finally, by deducting the rent paid by the new tenant, for the period January 27, 2007 to July 31, 2009.

[19] The Defendants did not dispute quantum. It is taken to be admitted under Uniform Civil Procedure Rules, r 166 and I see no reason to not accept the Plaintiff's calculation. I therefore find that the total amount of loss and damage which was suffered by the Plaintiff as a result of the Defendants' repudiation of the lease agreement was \$113,317.87.

[20] In all of the circumstances, I give judgment to the Plaintiff against the Defendants in the sum of \$113,317.87 together with interest pursuant to the *Supreme Court Act 1995* (calculated at \$37,969.77) and costs (including reserved costs, if any).

...

[21] The Defendants are to pay the Plaintiff's costs on and after September 1, 2009 on an indemnity basis.