

NSW commercial leasing: Did one sentence in an email amount to an effective exercise of option?, 09 November 2011

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The following decision from the NSW Supreme Court was concerned with the validity of a notice to exercise an option. The purported notice was contained in one line of an email. The case also examines whether an email could satisfy the formalities for service of a notice.

Facts

The plaintiff lessee carried on a seafood business under the name “Jordons” from premises situated in Darling Harbour, Sydney. The lease contained an option to renew. If the lessee wished to exercise the option, it was required to give or serve written notice on the lessor by leaving the notice at the address specified in the reference schedule of the lease.

Within the stipulated time to exercise the option, the lessee sent an email to the lessor, part of which read as follows:

“I am just considering and it is probably worth the lessors [sic] while as well, that we tie all the leases up for the full term that we can expect. I would like to have at least another 20 years with Jordons lease and tie that in with Cohibar and Watershed so that they are a composite asset in the books of Kavia. There are benefits both ways by doing such an agreement”.

The email was sent at the lessor’s prompting and addressed a number of separate matters, however, the email did not make express reference to any option renewal.

In response, the lessor replied that it would “not enter into new lease discussions re Jordons ...”

The lessee asserted before the New South Wales Supreme Court that the above email constituted a valid exercise of option to renew.

Decision

The court commented that it is well established that the appropriate question to ask is what a reasonable person in the lessor’s position would have clearly understood the email to mean. That question must be determined both by the language of the email and the circumstances of its receipt. All that needed to be clear to a reasonable person in the lessor’s position was that, having regard to the context, the lessee was giving notice of a desire to take a further lease of the premises for the further term set out in the reference schedule of the lease.

In determining that the option had not been effectively exercised, the court found that a reasonable person in the lessor’s position would have believed that the lessee’s email was “no more than a step in a negotiation” for the following reasons:

- the lessee’s email suggested that the lessee contemplated further negotiation. This was illustrated by the sentence “There are benefits both ways by doing such an agreement” and was reinforced by the final line of the lessee’s email which stated “My schedule has been extremely busy, however I intend that this week we finalise all the arrangements in respect of Cohibar, Watershed and Jordons”.
- the lessee wished to tie in the Jordons lease with the other two leases so that the three leases became “a composite asset in the books of Kavia”. This would have involved alteration to some or all of the leases to ensure that their expiry dates became coincident.

- even though the parties may have agreed to a formula for the exercise of an option by the lessee that was relatively undemanding, there needed to be reasonable clarity in the context and the absence of any qualification.

The court did however, find that the email satisfied the formalities for service of the notice. The email was found to satisfy the writing requirement of the lease. The requirement in the lease to leave the notice at the lessor's address was deemed not to require physical delivery.

Further, the requirement that the notice be signed was satisfied by the inclusion of the sender's name on the email. The court noted that the requirement for signing is intended to identify the sender and to authenticate the communication. That was sufficiently achieved by the email setting out the sender's name together with the email address from which the email was despatched. The name of the sender and his email address were readily and rapidly verifiable.

Citation: *Kavia Holdings Pty Limited v Suntrack Holdings Pty Limited* [2011] NSWSC 716.