

NSW: Did lessor need to sign lease for it to become binding?, 10 November 2011

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The following decision from the NSW Supreme Court explores when an agreement becomes binding. The lessor attempted to withdraw from the agreement after the lessee had signed the documentation but before he had signed. However, the NSW Supreme Court held that the parties intended to be bound prior to execution by both parties.

Facts

The first defendant lessee had leased commercial premises from the plaintiff lessor pursuant to a lease until April 2011. The parties entered into negotiations for a new lease in 2011. It was important that the lessor obtain the new lease as it was encountering financial difficulties and needed to use the commitment of the lessee to satisfy its lender.

The lessor submitted a formal lease document containing all of the essential terms which the lessee had previously requested. The lessee returned the duly executed lease document to the lessor. However, prior to signing, the lessor changed its mind about entering into the new lease and refused to execute the documentation.

The lessee sought an order for specific performance of the lease. The lessor countered that, in the circumstances of the case, it should have been inferred that the objective intention of the parties was that neither party would be contractually bound unless and until the lease document was duly executed by both of them. It argued that it was free to withdraw from the transaction and had done so.

Decision

In finding in favour of the lessee, the court noted that the question of whether or not the lessor was bound by the lease was to be ascertained by the objective intention of the parties as disclosed in their correspondence and communications viewed in the light of the subject matter and the surrounding circumstances. On the facts of the case, the court did not think that an inference was reasonably open that either party regarded itself as being free to withdraw by the time the lessee had returned the executed lease document. This was because:

- looked at objectively, when the lessor embodied in a lease document the agreed commercial terms together with the remaining standard terms taken from the existing lease, and submitted that document to the lessee, it was making a final offer in a form capable of acceptance, leaving nothing for further negotiations. The lessee's subsequent execution of the lease document and the return of it to the lessor, signified its unqualified acceptance of that offer. In those circumstances, a reasonable bystander would have regarded the due execution of the document by the lessor as a formality.
- from the lessor's perspective, the purpose of submitting the lease to the lessee, and requiring its execution and return, was to secure the lessee's commitment. The lessor wanted the commitment of the lessee in order to satisfy its lender.
- there was nothing in the objective facts or the sequence of negotiations to suggest that the parties contemplated that once the lessee returned the duly executed lease, the possibility of a binding agreement remained at large, at the whim of the lessor.
- consistent with the agreement for lease embodied in the lease document, the lessee continued to occupy the premises. It paid rent in accordance with the proposed new lease, and not the expired lease. The conduct of the parties in this respect was in part performance of the agreement contained in the lease document.

Citation: *Wayne Edward John Streat v Fantastic Holdings Limited* [2011] NSWSC 1097.