THE PROPERTY LAWYER

September 2019 · Volume 20 Issue 1

PROPERTY LAW SECTION
NEW ZEALAND LAW SOCIETY
NZLS EST 1869

Enforceability of Lease Transactions

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Another case has come before the Courts looking at the question of whether or not a party to a lease transaction is bound, notwithstanding that formal documentation has not been signed.

In the High Court decision in *Banbrook v Tan Che Hoe & Sons (Pte) Ltd* [2019] NZHC 1415 the Court held that a tenant was bound by the transaction, despite no signed Deed, for reasons including an electronic signature by email and acts of part performance.

Background

The case concerned an application by a tenant, Mr Banbrook, against a decision of the District Court holding him liable for unpaid rent and outgoings. Mr Banbrook leased premises from Tan Che Hoe & Sons (Pte) Limited. The lease was to expire on 30 November 2014 with no further rights of renewal. In May 2014, Mr Banbrook wrote to the landlord's property manager indicating that he wished to take a renewal of the lease. The District Court accepted that the reference to renewal was in error and that Mr Banbrook was in fact seeking an extension of the lease on existing terms and conditions.

Discussions then took place between Mr Banbrook, the property manager and the lessee of adjacent premises who was looking for additional space. Subject to authority from the landlord, they agreed that Mr Banbrook would extend the lease to 30 November 2017 but with a reduction in his floor area and a corresponding increase in the floor area of the adjacent tenancy (which essentially involved an office that was being leased by Mr Banbrook to be instead leased to the adjoining tenant).

On 18 June 2014, the property manager wrote to Mr Banbrook and the adjoining tenant confirming that he had the authority to proceed from the landlord and setting out the terms of the variation and extension for Mr Banbrook and the adjoining tenant's leases. The terms included details of the works to be carried out in order to remove the relevant office from Mr Banbrook's lease and incorporate it into the lease for the adjoining tenant. The costs of these works were to be shared 50% by the landlord and 25% each by Mr Banbrook and the adjoining tenant.

Both the adjoining tenant and Mr Banbrook confirmed their acceptance to the terms. Mr Banbrook's confirmation was by email on 23 June 2014 and included his full letterhead and contact particulars.

> "Mr Banbrook's email of 23 June 2014 could be considered sufficient signature in writing for the purposes of an agreement entered into that day

The property manager then arranged for the relevant works to take place and billed both Mr Banbrook and the adjoining tenant for their share of the works which they paid. On 20 November 2014, the property manager forwarded to Mr Banbrook a Deed of Partial Surrender and Extension of Lease (Deed). The Deed was never signed by Mr Banbrook.

Mr Banbrook stopped paying rent after his last payment on 1 February 2017. On or about 20 February 2017, the landlord served a Property Law Act notice, but the default was not remedied.

District Court decision

The landlord applied for a summary judgment in the District Court for unpaid rent and outgoings through to the end of the extension period. One of Mr Banbrook's arguments in the District Court was that he was a monthly tenant as the Deed was never executed. The District Court found in favour of the landlord and held that under the relevant provisions of the Contract and Commercial Law Act 2017 (CCLA), Mr Banbrook's email of 23 June 2014 could be considered sufficient signature in writing for the purposes of an agreement entered into that day. The District Court was also prepared to find actions of part performance, by which Mr Banbrook was bound to the terms of the partial surrender and extension.

High Court decision

The tenant appealed this decision on the basis that the District Court proceeded on a fundamental flaw, being that the parties had executed the Deed when this never occurred. However, the High Court rejected this argument, saying that the District Court had in mind deemed entry into the Deed by virtue of the email exchange between the landlord's property manager and Mr Banbrook. The High Court found that the exchange of emails constituted an agreement for partial surrender and extension and that all relevant terms were set out with sufficient certainty. Equity will therefore treat as done what ought to be done.

To the extent that Mr Banbrook's signature was required for the extension of lease to be enforceable under sections 24 and 25 of the Property Law Act 2007, this requirement could be taken as met by Mr Banbrook's email of 23 June 2014. This email was on his letterhead and clearly and unequivocally accepted the

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include ways to manage and mitigate the identified risks;

4. Your risk assessment must describe how you will keep the assessment of risk up-to-date;
5. You must review your risk assessment and AML/CFT programme to ensure they are current and audit them every two years; and
6. You must also prepare an annual report on your risk assessment and AML/CFT programme which is provided to DIA.

A risk assessment should be a well thought out and accurate document. DIA may ask to see the supporting documentation relating to how you went about conducting your assessment and how you derived the ultimate risk rating.

How to develop an AML/CFT programme

Ensure you have completed your risk assessment before starting to develop your AML/CFT programme. Your programme must consider the risks your business can reasonably be expected to face from money laundering and the financing of terrorism.

What is an AML/CFT programme?

An AML/CFT programme is a written record of the:

- **Policies** (a set of expectations)
- **Procedures** (day-to-day actions required to be undertaken to meet the expectations set)
- **Controls** (tools to ensure the business meets the expectations set by undertaking the required procedures) you have in place to manage the risks you've identified in your risk assessment and comply with your AML/CFT obligations.

The AML/CFT programme must provide adequate and effective policies, procedures and controls to address the risks identified in your risk assessment. This includes:

- Managing and mitigating the risks identified in the risk assessment;
- Vetting of staff (if you have any);
- Training of relevant staff (if you have any);
- Applying appropriate customer due diligence (CDD);
- Reporting suspicious activities;
- Prescribed transaction reporting;
- Ensuring adequate record keeping;
- Keeping the AML/CFT programme up-to-date;
- Preventing products and/or transactions that favour anonymity being used for ML/TF;
- Ensuring your business adheres to its AML/CFT programme; and
- Reviewing your AML/CFT programme and getting it audited.

The Department expects you to have a risk assessment that reflects your unique business and considers your own risks. We want to see what you have implemented in your business is the same as what you have documented in your risk assessment and AML/CFT programme.

"In some instances, we've also seen written risk assessments and compliance programmes with content that is almost entirely generic and lifted from a template. It is important that your risk assessment and compliance programme are specific to your clients, and the services, activities and transactions that are conducted," says Trish Millward, Deputy Director Operations, AML Group, DIA.

"DIA is committed to helping businesses comply with their AML/CFT obligations and supporting them as a proactive and effective regulator."

Go to dia.govt.nz/amlcft to access the following guidelines

- **AML/CFT Risk Assessment Guideline**
- **AML/CFT Programme Guideline**
- **AML/CFT information for Lawyers and Conveyancers**
- **Risk Assessment and Programme: Prompts and Notes for DIA reporting entities**
- **Real Estate Agents Guideline**

1. *https://www.dia.govt.nz/AML-CFT-Information-for-Lawyers-and-Conveyancers*
2. *https://www.dia.govt.nz/AML-CFT-Information-for-Lawyers-and-Conveyancers#Prog-Guide*
3. *https://www.dia.govt.nz/AML-CFT-Information-for-Lawyers-and-Conveyancers*
4. *https://www.dia.govt.nz/diawebsite.nsf/Files/Phase-2-AMLCFT-Sector-Risk-Assessment/$file/Phase-2-AMLCFT-Sector-Risk-Assessment.pdf*
5. *https://www.dia.govt.nz/AML-CFT-GuidelineLawyers-and-Conveyancers*

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property manager's proposal. The High Court therefore found that the District Court was correct in concluding that Mr Banbrook's email of 23 June 2014 included an electronic signature which satisfied the requirements of section 226 of the CCLA.

The High Court also accepted the District Court's finding of part performance, which included Mr Banbrook occupying the premises in accordance with the agreement entered into in June 2014 and the provisions of the draft Deed. There was also evidence establishing that Mr Banbrook had surrendered part of his leased premises in favour of the adjoining tenant and he paid 25% of the costs for the works. There were multiple acts of part performance of the agreement for partial surrender and extension.

Commentary

In this case, the parties had reached agreement on the terms of the partial surrender and extension of lease so there could be no doubt there was a 'meeting of the minds' and every intention to be bound. Although, in large commercial lease transactions, there is a presumption that parties are not bound until formal documentation is signed, this case illustrates that that presumption can be rebutted. Further, an email will be sufficient electronic signature for the purposes of the writing and signing requirements of section 25 Property Law Act 2007.

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