



When a lease is no longer a lease

A decision taken by our Supreme Court on 28 April 2023 provides a timely reminder to observe formalities when getting a new lease down on paper.

The case¹ involved vehicle repair premises in Rydalmere, Sydney.

The businesses lease was coming to an end on 14 March 2022. It contained an option for renewal for a further 3 years.

Unfortunately, the lessee failed to exercise the option for renewal formally.

Instead, the lessee sought to negotiate something better than those 3 years.

However upon failure of those negotiations, the lessor decided to serve on the lessee a lease termination notice.

Hence the lessee felt that he had no choice but to commence Court proceedings, even though there had previously been emails and discussions between the parties regarding a continuation of the lease.

The lessee had wished to remain on the premises to continue his business. So he had penned an email to the lessor's representative, in which he stated-

"I Would Like to Keep The Lease Going Till 2027 as Per The Option."

That confused the issue, the option being only for 3 years, the Court observed.

It was said to be no more than statement of the lessee's desire to take a new lease for 5 years.

The lessee also swore in his affidavit that he had followed up with the lessor –

"What's happening with a new lease" – and that he had in response been told by the lessor:

"... Don't worry – we have an agreement".

The problem with this was that the lessor denied in Court that those words were used – and that was ultimately accepted by the judge.

Additionally, there was further confusion in the conduct of negotiations because the lessor – absent exercise of option – wanted to increase the amount of the security deposit; and that increase the lessee was not well placed to pay and so had offered to pay by instalments.

The lessee maintained in the witness box that the lessor had agreed to accept those instalments.

The Court however held against the lessee on this point also, holding that this was no more than the lessee's counter-offer regarding the lessor's security deposit requirement.

In the words of the Court:

"There was no acceptance of that counter-offer, and the [lessor] thus remained at liberty to decline to proceed further towards a new lease with the [lessee]. The parties remained subject [only] to the monthly tenancy ... "

Significantly, in dismissing the lessee's claim for security of tenure, the legal costs of both parties were ordered to be borne by the lessee in connection with his unsuccessful proceedings.

That would constitute a significant financial impost to be borne by a lessee who was already struggling financially.

Also of note: During the proceedings it was revealed that the lessee had, in the course of negotiations, informed the lessor's representative:

"I Don't Have a Solicitor-- Just Forward the [draft] Lease to Me and I will Check It And Sign It."

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Lessons from the case:

- For the lessee to have properly exercised the 3 year option for renewal – that is, within the timeframe required by the lease – would have been 'a stitch in time'. It would have allowed him to continue trading from the Rydalmere premises for at least those 3 years. And consistent with this-
- Rather than being lumbered with the very high legal costs & uncertainty associated with Court proceedings, to have taken timely (and much cheaper!) legal advice from the start could have saved the day: It would have locked in that new 3 year lease term by proper & timely option exercise, even whilst a longer (5 + 3 year) tenure may have been negotiated subsequently, as desired by the lessee.

Andy Stucken

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¹ *One Stop Smash Repairs v. Alvarez*