

## Article Information

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## The signing and delivery of a lease by a tenant together with specific performance may not be sufficient to give rise to a binding lease commitment

**The NSW Supreme Court's decision in *Thorn Australia Pty Ltd v Centuria Property Funds Ltd* [2021] NSWSC 1217 (Thorn) demonstrates the challenges associated with enforcing a lease where it has not been fully executed and properly exchanged. In this context, the words and conduct of both the executing party and the party receiving delivery of any executed counterpart, together with the circumstances surrounding the execution of the lease by any one party, must be evaluated to objectively determine whether the executing party intended to be bound immediately.**

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### Background

In Thorn, the plaintiff was Thorn Australia Pty Ltd (an intended tenant of certain commercial premises in Eveleigh NSW) and the defendants were Centuria Property Funds Ltd and The Trust Company (Australia) Limited (comprising the registered proprietor of the commercial premises the subject of the dispute).

The plaintiff sought declaratory relief to the effect that it had not entered into a binding lease or agreement for lease in respect of certain commercial premises in Eveleigh NSW. By their Cross-Summons, the defendants sought declaratory relief to the effect that a binding lease or agreement for lease had come into existence between the parties. The question for consideration in Thorn primarily centred around whether the plaintiff delivered the lease documents (comprising a lease and incentive deed to be executed by deed) to the defendants so as to become bound by them such that the lease documents could not be recalled.

By way of background facts, the parties entered into a Heads of Agreement (HOA) which provided that the HOA did not constitute a binding lease and that either party could withdraw from and terminate the negotiations at any time prior to execution of any formal lease documents. Requirements of this nature are standard in most term sheets involving leasing transactions.

Subsequent to the execution of the HOA by the plaintiff and defendants, and shortly after agreement had been reached between the parties with respect to the form and substance of the formal lease documents, the plaintiff (in chronological order from earliest to latest in time):

1. paid to the defendants a deposit of \$25,000;
2. duly signed and delivered (by post and email) to the defendants' solicitor the formal lease documents;
3. provided to the defendants a certificate of currency in respect of the plaintiff's insurance pursuant to the lease;
4. paid to the defendant's solicitor \$201.40 on account of the lease registration fee and lodgement fee;
5. was granted early access to the premises for works relating to internet technology services; and
6. delivered to the defendants a bank guarantee.

In providing the lease documents to the defendants' solicitor, the plaintiff's solicitor advised that the defendants were not authorised to exchange the lease documents until such time as the plaintiff's solicitor had given its written authorisation to do so.

The defendants experienced delays in executing the lease documents on account of COVID-19. The plaintiff withdraw from negotiations prior to the defendants execution and delivery of the lease documents to the plaintiff. The defendants contended that the plaintiff was bound by the lease documents upon their signing and delivery to the defendant's solicitor.

### **Question and Consideration**

The Court considered whether the plaintiff evinced an intention to be immediately bound by the formal lease documents which involved an analysis of the words and conduct of the plaintiff and the circumstances surrounding the execution and delivery of the lease documents to the defendants solicitor. Intention in this context is a question of fact. In considering that question the Court considered it permissible and necessary to take into account later events, as well as circumstances prior to or contemporaneous with the alleged delivery of the lease documents to ascertain the intention of plaintiff at the time of execution.

If the relevant intention was found to exist, delivery of the formal lease documents would be taken to have been effected and the plaintiff would be bound by the lease documents.<sup>[1]</sup> If the relevant intention was not found to exist, the plaintiff would be free to withdraw from and terminate the negotiations.

### **Findings and Discussion**

The Court found that there was insufficient evidence to demonstrate an intention of the plaintiff to be immediately bound by the formal lease documents.

The Court had regard to the communications sent by the plaintiff's solicitor to the defendants' solicitor - of particular importance, the plaintiff's solicitor had made it clear that an exchange of the formal lease documents would not take place until a written authorisation was given by the plaintiff's solicitor. This particular exchange protocol was addressed in the plaintiff's solicitor's letter of 30 June 2021 to the defendants' solicitor which enclosed the plaintiff's signed versions of the lease documents. Specifically, the plaintiff's solicitor advised the defendants' solicitor that the defendants' solicitor must first provide to the plaintiff's solicitor the defendants signed versions of the lease documents for the plaintiff's solicitor to review and authenticate before the plaintiff's solicitor would provide its authorisation to give effect to the exchange of the lease documents. In addition, the letter also required the defendants not to complete the exchange of the incentive deed (which was held by the Court to be the first document which would be capable of giving effect to a binding commitment before the lease based on its contents and other ancillary communications) until the plaintiff's solicitor had given its written authorisation to do so. The Court presumed that the letter of 30 June 2021 was written in accordance with instructions given by the plaintiff and could be taken into account as bearing upon the plaintiff's intention at or around the time the lease documents were signed and sent to the defendants.

The Court also had regard to the fact that the plaintiff's solicitor had provided to the defendant's solicitor soft copies of the signed lease documents on 29 June 2021 and considered whether this gave rise to an intention of the plaintiff to be immediately bound by them. The Court found that the provision of the signed soft copies would not, when considered in the light of the HOA (and the right to withdraw contained in the HOA) and the earlier communications between the parties, be reasonably understood as evidencing an intention to be immediately bound by them.

The Court found that the procedure envisaged by a Document Return Checklist provided by the defendants (which contained a set of procedures for lease certification, execution, delivery and registration) was not necessarily inconsistent with the existence of a right to withdraw until formal lease documents had been executed by the parties as contemplated by the HOA. In circumstances where the right to withdraw (as enshrined in the HOA) had not been abrogated or abandoned, it remained the position that the parties had reserved to themselves the right to withdraw until such time as formal lease documents were executed by both sides.

In communications between the solicitors acting for the plaintiff and defendants on 2 July 2021 and 5 July 2021, the defendants' solicitor notified the plaintiff's solicitor that the plaintiff had only signed one incentive deed and that the defendants required the plaintiff to provide a further signed incentive deed. In their communications, the plaintiff's solicitor and the defendants' solicitor implicitly agreed to an execution protocol which required, first, the plaintiff's solicitor to provide plaintiff signed lease documents to the defendants' solicitor, secondly, the defendants to sign duplicates of the lease documents, thirdly, the defendant's solicitor to attend to the registration of the lease and, finally, the defendants' solicitor to provide to the plaintiff's solicitor copies of the fully signed lease documents. The Court found that this execution protocol envisioned no exchange of counterparts signed by one party; rather the lease documents would be signed first by the plaintiff, and then by the defendants. In addition to this finding, the Court also found that by giving the defendant the second signed incentive deed, the plaintiff was facilitating the execution protocol proposed by the defendant and that the plaintiff was merely complying with a procedural step in progressing the matter. The Court found that the execution protocol proposed by the defendants' solicitor, and implicitly accepted by the plaintiff's solicitor, was not inconsistent with the existence of a right to withdraw from the transaction.

The payment of the lease registration fee and the sending of the bank guarantee did not alter this conclusion - the Court held that such conduct evidenced a desire on the part of the plaintiff to have the transaction proceed but they were not inconsistent with maintaining a right to withdraw prior to the defendants committing to the transaction by signing the lease documents themselves. The Court also came to a similar conclusion with respect to requests for access and held that this was a further indication of the plaintiff's desire to have the transaction proceed.

The creation of any legal rights was the province of the dealings involving the solicitors and the plaintiff's solicitor was consistent with preserving the right to withdraw from the transaction - as the defendants had not signed the lease documents by the time the plaintiff's solicitor communicated the plaintiff's withdrawal, it followed that the plaintiff was entitled to withdraw from the transaction.

### **Conclusion**

Thorn highlights the importance of agreeing exchange protocols and the processes which will need to be complied with before lease documents becoming binding upon the parties.

In circumstances where a party requires the ability to withdraw, it will be integral to establish (and preserve without producing conflicting communications or engaging in conduct which evidences an intention to be bound) a right to withdraw which may be premised in a term sheet / heads of agreement and subsequently resonated in future communications.

There may be circumstances where a party may wish to proceed on more uncertain terms in an attempt to give rise to immediately binding rights in circumstances where there is a clear agreement on the form and substance of documents (without formal execution) which is supported by conduct manifesting an objective intention to be immediately bound. This will obviously be dependent upon the parties personal circumstances and market conditions.

Conduct and communications are critical to any analysis of intention. For that reason, specific performance at any level should be avoided until exchange has been properly concluded to avoid giving effect to immediately binding rights and obligations or an estoppel.

[1] *Realm Resources Ltd v Aurora Place Investments Pty Ltd* [2019] NSWSC 379