Is that email binding? When your agreement as to rental levels may not be an agreement at all

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The status of email communications and their ability to bind parties to agreements in relation to property was recently discussed in the High Court.

The case of *MFT Properties Ltd v Country Club Apartments Ltd* (6/5/11, Woolford J, HC Auckland CIV-2010-404-5913) concerned, amongst other issues, the question of whether a reduced rental accepted by the lessor constituted a binding variation of the lease between the parties.

Country Club Apartments Limited (**Country Club**) was the lessee of a number of serviced apartments at the Quest on Mount, Auckland. Country Club had been experiencing financial difficulties, and at its request the lessor of the apartments, MFT Properties Limited (**MFT**), allowed Country Club to pay a reduced rental, from mid-2006.

This reduced rental was continued for a number of years, and reference made to it in an email between the parties in 2009. At issue was whether this email met the requirements of section 2(2) of the Contracts Enforcement Act (the **CEA**), which provides that in order to be enforceable, contracts for the disposition of land must be in writing and signed by the parties. A variation of lease is a disposition of land and so for the email to be an enforceable variation of the lease document the requirements of the Act for writing and a signature must be met.

"Gary" from Country Club had emailed MFT in 2009 advising that he was concerned about the rental amount contained in the lease between the parties, and that he considered the reduced rental that was being paid at the time to be reasonable. The question, then, was whether the email was sufficient to be a contract for the disposition of land "in writing" and whether the name "Gary" typed at the end of the email was sufficient to be considered "signed" by him on behalf of Country Club. MFT submitted to the Court that the arrangement contained in the email proposing a reduced rental, was unenforceable due to failure to comply with s 2 of the CEA and that, therefore, the higher rental contained in the lease ought to be paid by Country Club. Country Club maintained that the rent review email, even though dated some three years after the parties made the agreement regarding the reduced rental, met the CEA requirements.

The Court noted that there were two difficulties with Country Club's position. The first was that the email may not in fact have accurately represented the rent payable, in that there was doubt as to whether the figure contained in the email was supposed to be GST inclusive or exclusive.

The second difficulty was submitting that the word "Gary" in the email was a signature, in the sense of whether it evidenced the writer's intention to bind MFT to the contents of the document.

Not assisting Country Club's argument were the terms of the email itself. "Gary" had been writing of his concern about the rental payable, and his view that the rent should stay reduced. The email did not of itself show an intention to bind Country Club to a proposed level of rental. Accordingly, the requirements of s 2 of the CEA were held to not be met.
requirement may be stepped up. Employers may have to reveal that not only did they take some time, but

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what they turned their minds towards in taking that time.

That being the case, the Court next considered the doctrine of "part performance". Where there is insufficient documentation of a contract for the disposition of land, this doctrine can be used to nonetheless establish a binding contract. The doctrine asks the following questions:

1 Was there a sufficient oral agreement such as would have been enforceable but for the CEA?

2 Has there been part performance of that oral agreement?

3 Would it be unconscionable to allow the other party to rely on the Act so as to deny that there was a contract?

The Court considered whether these elements of the part performance doctrine had been established so as to allow Country Club to rely on the arrangement in 2006 to reduce rent. The Court found that Country Club had not acted to its detriment in relation to this oral agreement, but rather had benefitted enormously from a reduced rental for an extended period. MFT were arguing that it would be unconscionable to allow Country Club to enforce the oral agreement for Country Club's benefit. MFT wanted to go back to the original lease document and charge the original rent.

Having reviewed the situation, the Judge held that it was not unconscionable to allow MFT to deny the variation, that the original rental stood, and that therefore MFT was entitled to terminate the lease due to Country Club's breach.

The result is that Country Club, despite being granted an indulgence by MFT for a number of years, was not entitled to rely on that indulgence, and rather, it seems, ought to have assumed all along that it would need to at some stage pay the unpaid portion of the rental. There is a lesson here for lessees: the rental agreed to is the rental that must be paid, unless there is a clear agreement in writing, signed by the parties. Temporary indulgence granted by the landlord does not necessarily permanently bind them.

The CEA was repealed in 2007 and replaced by the provisions of the Property Law Act 2007 (the **PLA**). The PLA, however, has replicated s 2 of the CEA and so provides (at s 24) that contracts for the disposition of land will not be enforceable unless the contract is in writing and the contract is signed by the party against whom the contract is sought to be enforced. Accordingly the findings in the MFT case are relevant to future cases that will be determined according to the PLA.

Country Club has appealed the decision to the Court of Appeal and so a further statement of the law applying to this situation can be expected.

Shelley Eden is a Senior Associate in Shieff Angland's commercial litigation team with particular expertise in employment law. Contact her on +64 9 336 0844 or shelley.eden@shieffangland.co.nz

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