



Commercial Leases: When is Time of the Essence?

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It is well settled that when a Lease contains a clause which expressly stipulates that time is of the essence, the parties have agreed to be strictly bound by timeframes imposed in the Lease.

However, if a commercial Lease does not contain a 'time is of the essence' clause, yet still imposes certain timeframes on the parties, are those timeframes of the essence of the Lease? That is, are these timeframes so essential that if not met, constitute a breach of Lease?

This issue was considered in detail by the New South Wales Court of Appeal in *GR Mailman & Associates Pty Ltd v Wormald (Aust) Pty Ltd* (1991) 24 NSWLR 80 (**GR Mailman**).

The case concerned a Market Rent Review mechanism in a commercial Lease which stipulated that within 60 days prior to the expiration of the Rent Review Period, the Landlord must serve its Rent Review Notice stipulating the market rent.

Within 14 days of receiving that Notice, the Tenant, if it disagreed with the stipulated market rent, was required to serve a notice disputing that market rent. Absent that Notice of Dispute, the market rent stipulated in the Market Rent Notice would become the rent payable.

The Landlord served its Rent Review Notice within the 60-day timeframe, however the Tenant served its Notice of Dispute more than a month after the Rent Review Notice, outside of the prescribed 14-day timeframe.

The Court was tasked with considering whether, absent an express 'time is of the essence' clause, a similar obligation could be implied into the Lease so as to determine whether the Tenant's Notice of Dispute was viable, or whether the Landlord's stipulated market rent would be payable.

As a starting point, the Court referred to *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904 (at 930) (**United Scientific Holdings**) which is authority for the



proposition that there is a general presumption that time is not of the essence in commercial Leases.

That presumption may only be rebutted where:

1. the parties expressly stipulate that conditions as to time must be strictly complied with (express term); or
2. the nature of the subject matter of the contract or the surrounding circumstances show that time should be considered to be of the essence (implied term).

The Court considered various authorities on the issue of the implication of a 'time is of the essence' clause. The weight of these authorities favoured the interpretation that such a clause may be implied in a commercial Lease where the consequences of a failure to comply with the time limit are expressly provided for in the Lease.

Accordingly, the Court in GR Mailman found that because the Lease expressly prescribed the

consequence of the Tenant's failure to provide a Notice of Dispute, that is that the market rent proposed by the Market Rent Notice would be payable if not disputed, time was of the essence in respect of the obligation to provide a Notice of Dispute.

Conversely, as the Lease did not provide a consequence for the Landlord's failure to provide a Market Rent Notice, being a separate obligation, the general presumption from United Scientific Holdings took effect and time was not of the essence in respect of this obligation.

This requirement of implication which arose from GR Mailman has been referred to in more recent decisions including in *Sentinel Asset Management Pty Ltd v Primo Moraitis Fresh Pty Ltd* (2014) QSC 200 and *Griffiths v Williams* [2021] QDC 338.

These cases serve as a pertinent reminder to consider whether it is beneficial to include an express 'time is of the essence' clause when negotiating commercial Leases.

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