

Time of the Essence

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Timing of contractual performance can be critical. The phrase 'Time of the Essence' is used in contracts, agreements and leases and if present signifies that any reference to time and dates are a vital element of the performance of the contract. Any failure to adhere to the time stated is a breach of the contract. The phrase can be key in contracts for sale of land, contract for purchase shares, in break clauses and also in rent review provisions to ensure that something happens by a specified time or date.

It is necessary, if time is to be of the essence, for parties to explicitly state this as time for performance in contract is not of the essence unless it is expressly agreed by the parties. Therefore, if time is not of the essence it may be that even though a contract may refer to a date or time, there is no obligation to adhere to this date or time.

Where an express provision has been included in the contract which makes time of the essence and if one of the parties to the contract fails to perform with the time specified in the agreement or fails to perform in accordance with the date specified in the agreement then the innocent party that is relying on the clause can both:-

- Terminate the agreement
- Claim damages

Not adhering to the time frames, if time is of the essence, is treated as a fundamental breach of contract.

Time Implied to be of the Essence

It is however also possible for time to be of the essence if it can be implied. If there have not been any express provisions that time is to be of the essence in an agreement then it may be implied either by the terms of the agreement or by the actions of the parties. It will be implied where the circumstances of the contract or the nature of the subject matter or the contract require that the time of performance is imperative.

It is also possible where time has not been expressed to be of the essence in the agreement to make it so, if one party serves reasonable notice on the other party requiring performance of the obligation by a particular time.

Time of the Essence and Rent Review Clauses

A question of whether time is of the essence is one of central importance in a rent review when advising both Landlords and Tenants. It had been thought that the matter of time of the essence had been settled in the *United Scientific Holdings Limited v Burnley Borough Council* (1978) case, but recent case law suggests that it is not. In *United Scientific Holdings*, the House of Lords held that there should be no implication that time is of the essence in respect of time limits in a rent review clause unless there are sufficient contra-indications in the express words of lease; in the surrounding circumstances; or arising from the relationship between the rent review clause and the other clauses in the Lease. Therefore without any of these contra-indications time is not to be of the essence for a rent review timetable.

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The case of *Lancecrest Ltd v Asiwaju* (2005) examined the issue where the Landlord served its rent review notice over one year "late" after the date specified in the Lease. Despite the fact that time was of the essence in relation to the tenant's counter notice the Court of Appeal held that time was not to be of the essence in relation to the Landlord's notice. The late notice served by the Landlord was therefore valid.

Clauses concerning whether time is to be of the essence often require very careful consideration to avoid any nasty pitfalls for both Landlords and Tenants. Time being of the essence is particularly important given the often high amounts at stake in many rent reviews and it is imperative that such clauses are given due consideration by your legal representative.

If you require further information please contact any member of our Property Team on 028 9024 3141.

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