

WHEN IS TIME OF THE ESSENCE?

It goes (almost) without saying that when parties are considering the terms of a new lease, at the forefront of their minds will be how much they will have to pay/will receive by way of rent at the outset. That said, all but the shortest leases will also contain a rent review clause. The effect of this will be, usually, to review the rent - almost always upwards, or at least not downwards.

In terms of word length, the rent review clause will certainly be far longer than the covenant to pay rent. This is apparently so that the terms of the machinery of the clause can be spelled out in detail and therefore be established beyond doubt. However, rent reviews are still the subject of a disproportionately large amount of litigation. Much of this concerns either the assumptions, or the timing provisions, within rent review clauses.

The nature of assumptions within rent review clauses has been described as an 'Alice in Wonderland' view of the world. Here a tenant will be arguing for assumptions that are as onerous as possible to the 'hypothetical tenant', in order to try to lower the rent on review. Those assumptions, together with the (one would have thought unnecessary) 'presumption of reality', have created a body of caselaw which is beyond the scope of this article.

Instead, this piece will focus on the question of the mechanics of the rent review clause, in particular in relation to the obligations relating to timing that are set out in a clause.

Sensible rent review clauses generally contain few (if any) timing provisions that could trap either landlord or tenant, but many rent review clauses do include timing provisions that attempt to deal with the various stages of the review, notably:

- 1 - when a notice can be served;
- 2 - when a counternotice/other response can be served; and
- 3 - what happens after, in particular, the need to apply to a third party valuer in default of agreement.

A fundamental distinction to make is between those lease terms in which time is expressed or implied to be 'of the essence', and those where it is not. This is important because, to oversimplify, a party who misses a time limit where 'time is of the essence' has lost its chance to comply with its obligations, sometimes with disastrous consequences.

It had been thought that the subject of time of the essence had been settled once and for all by House of Lords in United Scientific Holdings v Burnley Borough Council (1978), but recent case law suggests that there is still room for doubt.

A typical rent review clause might require a landlord to serve a notice stating its suggested new rent. The clause might then go on to say that the tenant can serve a counternotice challenging that proposed rent within two months, time being of the essence, and in default of service of a counternotice, the landlord's rent will be deemed to be the new rent payable under the terms of the lease.

If the tenant misses its counternotice deadline, it will be burdened with the landlord's proposed rent for (probably) a number of years.

So far, so good. However, the courts have gone further than this apparently clear position. They have decided that even if a clause does not actually say that time is of the essence, such a term can be implied if the context of the clause, or other clauses in the lease, so require.

To take an example of the rent review clause mentioned above, what if a clause was identical but did not include the terms 'time of the essence'?

In that situation, the courts have decided that time can be implied as being of the essence even if those words are not actually used because of the deeming provision.

Another situation where the courts have implied the use of the time of the essence provision is where the time provisions in the rent review clause have a connection with other lease clauses, such as a right to break the lease early. Again, in that situation a court might find that time should be of the essence.

Things become further complicated where (as suggested above) there might be three or more time limits within the rent review clause, but some are stated as being subject to a time of the essence requirement, and others not. Each clause would need to be looked at in its own context. But, if the lease draftsman/men have omitted 'time of the essence' when it is specifically included elsewhere, there will be a strong presumption that its exclusion was intended to differentiate it from the other clauses.

The Court of Appeal earlier this year had the opportunity in Lancecrest v Asiwaju to consider the situation where a landlord served its rent review notice over one year 'late'. In that situation time was not expressed as being of the essence in relation to the landlord's notice, and was not implied as being so by the fact that time was of the essence in relation to the tenant's counternotice. The late notice was therefore valid.

Although the clauses referred to so far appear to work in the favour of a landlord, this is not always the case. In the case of First Property Growth Partnership LP v Royal & Sun Alliance Property Services Ltd (2002) a clause contained a provision that a rent review notice was to be served at any time in the twelve months before every fifth anniversary, '...but not at any other time...'. Those last words were held by the Court of Appeal to preclude service of landlord's notice after the fifth anniversary date had passed, although there was no express time of the essence clause. The landlord had failed to serve notice within the one year window available.

It might be that the Lancecrest case is the last such case for a while as those dealing with rent review clauses have once again been reminded of the USH v Burnley case. More likely, the state of rents in the market might drive parties to challenge lease terms, in particular those relating to rent, wherever possible. Those preparing rent review clauses should try to keep them as simple as possible. Those who have to try to make sense of them, should consider very carefully, very early on, the implications of a clause to avoid any nasty pitfalls.

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