

'Essential Services Now Defined'

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Clause 7.1.3 (the "Essential Services Clause") of the standard NSW Law Society Commercial Lease provides that:

"The Lessor must...maintain essential services."

On 30 June 2010, the Supreme Court of New South Wales held that 'essential services' within the meaning of clause 7.1.3 include air-conditioning, toilet facilities, hot water, and a fully functional and compliant fire-protection systemⁱⁱ, and that it is a term implied into such contracts by the *Butt v McDonald* principleⁱⁱⁱ that the Lessor must first *install* and then *maintain* those services.^{iv}

Background

In December 2008 the plaintiff entered into an agreement to lease a sealed six-storey commercial building which was, at that time, in a state of construction. Annexed to and forming part of the agreement was a copy of the NSW Law Society's standard commercial lease, which contained the above Essential Services Clause.

In November 2009, the plaintiff executed a five-year lease for the property (with two further five-year options), in a form identical to the lease annexed to the Deed, in reliance upon representations that the property would be completed by January 2010. The lease provided for a 'rent holiday' of four months, during which time the plaintiff was to fit-out the premises.

On 6 March 2010, when the 'rent holiday' expired, the defendant called upon the plaintiff for the first rent instalment. However the building still lacked an air-conditioning system, toilet facilities and a hot water system, and the fire-protection system was deficient in several regards. The plaintiff claimed that, by its failure to install and commission these services, the defendant was in breach of clause 7.1.3 of the lease, and that rent should abate until those services had been installed, commissioned and certified.

Expedited Proceedings

On 5 May 2010, White J granted expedition of the matter, concluding that, whilst the balance of convenience was even, "It is seriously arguable that the defendant is in breach of the lease in not having provided essential services and in not doing what is necessary to be done on its part to enable the plaintiff to proceed with its fit-out. ... I think it is seriously arguable that the plaintiff is entitled to damages arising from the delay in being able to proceed with its fit-out and thereby being delayed in its ability to occupy the building and sublet the building."^v

Damages Not Appropriate?

Whilst it was common ground between the parties that the building lacked certain services, when the matter came on for hearing before Rein J the defendant argued that there was no chain of causation between the absence of such services and any loss or damage claimed by the plaintiff. The defendant said that any detriment suffered by the plaintiff was *not* as a result of the defendant's failure to maintain essential services, but because the plaintiff was either unable or unwilling to commence its fit-out of the premises.

Finding

On 11 June 2010, Rein J gave *ex tempore* judgment in favour of the plaintiff, concluding that "toilets, hand basins, hot water, air conditioning and operative commissioned and properly installed fire safety equipment are unquestionably essential services for a commercial office block"^{vi}, and that breach of the Essential Services Clause entitled the plaintiff to damages "equivalent to the amount of the rent payable...until the time the defendant has established that all essential services in the building...have been completed."^{vii}

His Honour also held, importantly, that a promise to maintain *essential services* implied a promise to *install* 'essential services'^{viii}, which implication was available on the authority of Griffith CJ in *Butt v McDonald* (1896) 7 QJ 68 at [70-71], subsequently confirmed by Mason J in *Codelfa Construction Pty Ltd v State Rail Authority of NSW* [1982] HCA 24; (1982) 149 CLR 337 at 347.

Conclusion

This case stands for the principle that standard documents - such as the NSW Law Society

commercial lease - serve as a starting point for practitioners to evidence agreements reached by their clients. That the standard NSW Law Society commercial lease is silent as to the definition of terms such as 'essential services' is a reminder of the importance of thorough pre-contractual negotiations, and for solicitors to identify and clarify any such ambiguities before disputes arise.

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ⁱⁱ *Workcare Management Pty Ltd v Gajic Holdings Pty Ltd* [2010] NSWSC 919, per Rein J at [21].

ⁱⁱⁱ (1896) 7 QJ 68, per Griffith CJ at 70-71.

^{iv} *Workcare Management Pty Ltd v Gajic Holdings Pty Ltd* [2010] NSWSC 919, per Rein J at [34].

^v *Workcare Management Pty Ltd v Gajic Holdings Pty Ltd* [2010] NSWSC 479, per White J at [19].

^{vi} *Workcare Management Pty Ltd v Gajic Holdings Pty Ltd* [2010] NSWSC 919, per Rein J at [21].

^{vii} *Workcare Management Pty Ltd v Gajic Holdings Pty Ltd* [2010] NSWSC 919, per Rein J at [65].

^{viii} *Workcare Management Pty Ltd v Gajic Holdings Pty Ltd* [2010] NSWSC 919, per Rein J at [34].