



Out of Time

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How, and when, documents should properly served under the terms of a contract is a common, but important issue. While proper service may appear straightforward, getting it wrong can detrimentally affect the exercise of contractual rights under a particular contract.

This was recently considered by the Courts in NSW in *Mirvac Funds Management Ltd v Value Lodging Pty Ltd* [2022] NSWSC 787.

Key takeaways

- Notice and service provisions in a commercial contract are important.
- In the *Mirvac Funds Management* case, the Court looked at the fact that a notice was received by a party on a particular date, and therefore considered that it had been brought to their attention on that day, even though it was delivered after 5.00pm which according to the contract, meant that it was deemed served the next business day.
- However, Courts can apply a strict interpretation of the notice provisions in a contract to determine if a document was properly served.
- When parties to a contract are corresponding with a particular person, or by email only, they may overlook the terms of the contract which determine who a notice should be served on, and how it should be served.
- If you fail to properly consider and follow the notice and service provisions in your contract, your rights under the contract may be affected, and you might find yourself in a legal dispute, such as the one determined by the Court in this case.

Background

Mirvac Funds Management Ltd (**Mirvac**) (the Lessor) was the owner or head lessee of hotels that were leased to Value Lodging Pty Ltd (**Value Lodging**) (the Lessee). In 2021 Mirvac entered into a contract for sale of its interests in the hotels.

Under the terms of the lease, Mirvac was entitled to terminate the lease if it elected to sell the properties. However, termination required Mirvac to serve notices to this effect. Mirvac issued a termination notice which was received and signed by way of acknowledgment by an employee of the Lessee at 6:15pm on 30 March 2022. The Court accepted this as actual service. However, the parties disputed the date of service.

Under the lease, termination could only occur three months after service. Mirvac's notice required termination and vacant possession on 30 June, being three calendar months after 30 March. But the lease deemed notices delivered on non-business days or after 5.00pm to have been received on the next business day. This would mean service occurred on 31 March and that vacant possession could not be required until at least 31 July, possibly rendering the notice invalid.

The question was whether the notice, delivered at 6.15pm, was deemed to have been served on the next business day even if Mirvac could prove actual service on the Lessee at the time of delivery.

Decision

The Court held that the notice was served on 30 March 2022, and not the next business day, for the following reasons:

- The deemed service provision did not apply where the Lessor could prove the Lessee actually received the notice.
- The date of service was the date on which the Lessee actually received the notice, even if after 5.00pm, not the next business day.
- The lease's clear intention was that the deemed service provision dealt with cases other than where a party could prove actual service.
- Reasonable businesspersons in the position of the parties would not have understood the provision to apply where actual receipt was proven.

Importantly, the date of service affected Mirvac's termination rights under the lease, as the date of service determined the date on which termination would take effect. Although service occurred on 30 March, the Court's construction of 'months' meant that vacant possession could not be required until 1 July so that the validity of the notice was in dispute. This threatened Mirvac's exercise of the right to terminate.

Ultimately however, the Court found the notice was valid even if it required vacant possession before the lapse of the required period. A reasonable recipient of the notice would be in no doubt that the Lessor was exercising their right to terminate under the contract, and would simply challenge the date specified by the notice.

What does this mean for you?

The Mirvac Funds Management case reminds parties of the importance of proper service. In particular, parties should be aware of contractual rights that may depend on the validity and timing of service.

This case also shows that the Courts are likely to take a practical approach to recognising proper service despite the possible application of deeming provisions.

In general, parties are encouraged to take steps to obtain a counterparty's acknowledgment of documents to be served as such acknowledgment is likely to be recognised as proper service.

If you would like any further information or would like to discuss your legal rights, please contact [Chris Kintis](#) or your usual ClarkeKann contact.