

**MCGETTIGAN V. ELIRAN PTY LTD [1999] NSWSC 769**

Supreme Court of New South Wales – 22 July 1999

**FACTS**

Eliran was the trustee of a hotel business. McGettigan was one of three beneficiaries. The beneficiaries fell into dispute and the hotel business was to be sold to redeem the McGettigan interest. An auction of the hotel was unsuccessful and McGettigan sought to appoint a receiver. The parties agreed to terms which provided that:

Eliran had until 30 June 1999 to find an investor willing and able to invest sufficient funds to allow Eliran to pay McGettigan for its interest in the trust business.

If there was no investor found, the hotel was to be submitted to public auction by 31 July 1999.

Eliran negotiated with an investor before 30 June 1999 but they were unable to confirm that they would invest the sufficient funds by that date. However, the investor later offered to pay the funds by 23 July 1999. McGettigan sought a declaration that the find an investor clause had not been complied with and the hotel had to be sold at a public auction.

**ISSUES**

What was the meaning of the ‘find an investor’ clause and had that clause been complied with?

Was time of the essence for the “find an investor” clause?

**FINDING**

The clause simply provided that an investor had to be found by 30 June 1999, and there were no requirements for money to be paid before that date. However, finding an investor required Eliran to decide that the investor was willing to invest by 30 June 1999. This had not been proven.

A contract date will not be essential unless the parties intended it to be essential. The inclusion of the word “forthwith” and the drafting of settlement terms showed that the parties had agreed that it was essential that the investor be willing to invest by 30 June 1999.

**QUOTE**

Young J said:

*“The next question is whether as a matter of fact did the defendant not find such a person. The word “find” ordinarily means “meet with” or “come across”. It does not mean “discover for the first time”; see for instance Re R (1966) 3 All ER 613, 616. In the present context it means more than merely “come across” an investor. It means deal with the investor to such an extent that it is established that he or she is willing*

*and able to invest the funds when required, the requirement being to provide them within a reasonable time after the investor is found.” – paragraphs 20 of [1999] NSWCA 769*

*“There is no evidence from the investor. There is no strong evidence from those with whom the negotiations took place. All we have is the paragraph of the defendant’s solicitors’ letter of 29 June 1999, to which I have already referred, and a statement in Mr Graham McGuiness’ affidavit of 20 July, that the trustee had been negotiating with Messrs Dickenson, that as at 29 June they were able to confirm their investment in the trust. It was the next day that the defendant’s solicitors communicated that fact to the plaintiffs.” – paragraph 21 of [1999] NSWCA 769*

*“It seems to me on the proper construction of the present document time is essential. One finds that although the referee’s decision is not caught up in time provision almost every other provision is and the word “forthwith” appears in clause 4.” – paragraph 27 of [1999] NSWCA 769.*

## **IMPACT**

When making agreements which include time limits, it is important to consider whether the time limits follow on from each other. If the time limits are contingent on each other, then the time limits may be essential to the contract and a failure to comply with the time limit may allow the innocent party to end the contract and recover damages.

If a time limit is an essential accurately defined.

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