

With New Zealand now in lockdown, it would be prudent for businesses with a commercial lease (whether as a landlord or tenant) to carefully consider what impact this has on their rights and obligations under their respective leases given that most tenants are now unable to gain access to the leased premises.

The pertinent question being just how much rent and outgoings are payable by tenants during the lockdown period.

Current ADLS Lease

The current standard ADLS lease states:

"27.5 If there is an emergency and the Tenant is unable to gain access to the premises to fully conduct the Tenant's business ... then a fair proportion of the rent and outgoings shall cease to be payable ..."

As you may be aware this clause was inserted to the standard ADLS lease after the Christchurch earthquakes.

The term "emergency" is defined in clause 47.1(d) of the standard ADLS lease and includes an epidemic that may cause loss of life or illness and such an event is not due to the act or omission of the landlord or tenant. It can certainly be argued that COVID-19 fits into this definition.

Referencing the above parts of the clause, our view is that those parts obligate a fair abatement of both the rent and outgoings.

What is "Fair"?

The obvious question is what is considered "fair" rent and outgoings abatement.

We suggest that sharing the burden on a 50/50 basis is difficult to argue with, but we know others have stronger views. It is only natural that landlords and tenants will have differing views. Particular circumstances will also be relevant and should be carefully considered on each occasion, although we do not see either party's individual financial circumstances as being relevant to the leasing contract. It may be up to the courts to give some guidance in the future, and meanwhile we suggest any arrangements made be done on a without prejudice basis to further negotiations.

Standard No Access Period

Under clause 27.6 of the current ADLS standard lease, either party can terminate the lease by notice if the tenant is unable to gain access to the leased premises for a certain period due to an emergency. The standard no access period under the ADLS lease is 9 months.

Because the parties are free to negotiate the length of the no access period, it is important to check the previously agreed period under the relevant lease.

Other Forms of Commercial Lease

Please note that earlier versions of the ADLS lease and many other forms of commercial leases do not contain the “no access period due to an emergency” clause. This means that tenants under such leases would likely be required to continue to pay rent and outgoings in full during the lockdown period.

Despite this, it is not difficult to foresee tenants feeling the financial strain during this unprecedented period may nevertheless attempt to negotiate with landlords the amount payable under their respective leases. Any change in the payable amount will require agreement of both parties.

Avoiding Lease Obligations

A tenant wanting to avoid payment under the lease may attempt to argue frustration of the lease i.e. due to the lockdown, performing the lease has become impossible or radically different from what the parties previously agreed. The temporary nature of the lockdown likely means that this would not constitute a frustration event. Because of the high threshold required for arguing frustration, careful consideration should be given before making this assertion.

Whether a tenant can rightfully avoid their lease obligations would also depend on the specific terms of the lease. An example of this is a force majeure clause. This clause enables a party to be excused from performing certain obligations or enables the lease to be terminated if the stated specific events were to arise. It is therefore important to check whether the specific events (e.g. acts by governmental authority or epidemics) described in a force majeure clause would enable a party to avoid certain lease obligations or terminate the lease.

Where to From Here?

Ultimately, the leases need to be carefully reviewed in each case in order to determine the extent of the obligation to pay and whether parties wanting to terminate their lease can in fact rightfully do so.

Obviously matters of goodwill and a tenant’s ability to pay are very relevant.

At the same time, landlords would naturally be wary of tenants attempting to take commercial advantage during this lockdown period.

We recommend that the parties turn their attention to the terms of their leases and start liaising with each other (if not done so already) about the amount of the rent and outgoings payable in the coming months.

If you have any questions or concerns relating to your lease obligations arising from the outbreak of COVID-19, please contact Director Peter Liao or Lawyer Janki Patel at:

peter.liao@carsonfox.co.nz
mob: +64 27 290 0897

or

janki.patel@carsonfox.co.nz
mob: +64 27 298 1910