

Commercial leases under Covid-19 lockdown

Landlords and Tenants under ADLS Standard Lease (6th Edition) should be aware of clause 27.5 which may give Tenants the right to negotiate a fair reduction in the rent and outgoing payments for their leased premises, if there is a state of emergency which prevents them from gaining access to those premises to fully conduct their businesses.

What constitutes a “fair” reduction in those payments will depend on the parties and their particular circumstances.

1. Clause 27.5 of the Deed of Lease can be summarised as providing that, if there is an emergency and the Tenant is unable to gain access to the leased premises to fully conduct the Tenant’s business from the premises because of reasons of safety of the public or the need to prevent or reduce any hazard or harm that may be associated with the emergency including a restriction on occupation of the premises imposed by any competent authority, then a fair proportion of the rent and outgoings for that Lease shall cease to be payable for the period commencing on the date when the Tenant became unable to gain access to the premises until the date that inability ceases.
2. This means that Tenants whose businesses have been forced to close by the current COVID-19 Alert Level 4, may be able to negotiate a fair reduction in the rental and outgoings payments they are responsible for under their leases.
3. Clause 27.5 was incorporated into the ADLS Deed of Lease as a result of the Christchurch Earthquakes, and contemplates an emergency situation where Tenants are prevented from accessing the buildings they lease for reasons out of their control. A pandemic is included in the definition of “emergency” in clause 47.1(d) of the Lease. It is clear that current circumstances are a qualifying emergency under the Lease, because the Government has declared a state of emergency in New Zealand and issued an epidemic notice. Effectively a pandemic is a worldwide epidemic.
4. Landlords and Tenants should consider the following:
 - a. Whether the Tenant is unable to gain access to the premises as a result of the Lockdown;
 - i. This is likely to be the case for most Tenants whose businesses are not essential services, given the Government’s restrictions on non-essential travel in New Zealand;
 - ii. Some Tenants may be continuing to partially access premises either remotely (for example accessing servers or computers stored at the premises) or physically for example providing products or services to essential services;
 - iii. Some Tenants may live at the premises, and therefore not be prevented from accessing them by the Government’s rules if the premises are where the Tenant is self-isolating;
 - iv. Essential business premises will continue to be accessed by Tenants.
 - b. Whether that inability to access the premises prevents the Tenant from fully operating their business from the premises;
 - i. This may not be the case if a Tenant is continuing to remotely access servers stored at the premises, and that Tenant’s business is fully operational under the lockdown;

- c. What a fair reduction in the rent and outgoing payments would be in light of the parties' particular circumstances. The parties should have regard to factors such as:
 - i. That COVID-19 is outside of the control of, and not caused by, the Landlord or Tenant, and that neither party is at fault;
 - ii. The extent that the Tenant is continuing to use the premises (e.g. to store its possessions or to operate computers remotely);
 - iii. The extent to which the Tenant's business has been financially impacted by the lockdown;
 - iv. The financial position of the Tenant's business;
 - v. The sum of any Government support package the Tenant may have received to assist with outgoings and rental or other expenses; and
 - vi. That the Landlord is also unable to use or re-lease the premises in the meantime;
 - vii. That the rental may be the Landlord's only income, and effectively the Landlord's business no longer has any income if rent and outgoings are not paid by the Tenant. That it is unlikely that either party will be able to claim against loss of rents or business interruption insurance under their insurance policies;
 - viii. The interests of continuing the Lease and remaining on good terms (given it may be difficult to find replacement premises and/or replacement Tenants post-lockdown); and
 - ix. Any other factors which seem relevant.
5. Ideally, the Landlord and Tenant will be able to agree on what constitutes a fair reduction in the rental and outgoing payments, otherwise the Dispute Resolution procedure under the Lease will kick in. In these sorts of circumstances, it is in everyone's best interests to negotiate, and to communicate rather than take an overly aggressive approach.
6. Under a strict reading of clause 27.5 the rental payments should return to normal as soon as the lockdown ends and the Tenant is again able to gain access to the premises and fully operate the Tenant's business. This clause does not deal with any ongoing economic effects from the lockdown and accordingly the parties may well choose to deal with the effects of the lockdown on a more holistic basis via negotiation which provides benefits to both parties.

In Summary

- If you lease premises under the standard ADLS 6th edition Deed of Lease; and
- You are unable to access those premises due to the lockdown; and
- You are unable to operate your business fully as a result; then
- The rent and outgoing payments for the leased premises could be reduced by a "fair" amount.
- The best fit is more likely to be achieved by negotiation rather than confrontation.

The opinions expressed in this article are general in nature and do not purport to be specific legal or professional advice. If you have a specific query, please contact one of our lawyers.