

### INTRODUCTION

The impact of COVID-19 is already widespread and having a massive impact on businesses around the world. Every day New Zealand is seeing further disruption due to COVID-19.

New Zealand is now at Alert Level 4 and a state of emergency has been declared. Stringent measures are in force to ensure that everyone self-isolates at home. The Government has declared that Alert Level 4 will be in place for at least four weeks (and this period seems likely to be longer). Only “essential businesses” may operate from their premises during the Alert Level 4 period. A list of essential business can be found at: <https://covid19.govt.nz/government-actions/covid-19-alert-level/essential-businesses/> However, the list is continually being updated and businesses should check it regularly.

Clearly, the increasing disruption caused by COVID-19 and the implementation of Alert Level 4 is causing significant concern for commercial tenants and landlords. Set out below are some key issues for landlords and tenants to consider.

As a general comment, it is important to understand your rights under the lease but whether you are a landlord or a tenant, we recommend that you communicate with each other as a priority and try to work together through what is hopefully a relatively short-term temporary issue. For landlords, it may well be better to keep an existing tenant than face the prospect of losing the tenant and trying to find a replacement tenant in the current circumstances. For tenants who may be going through a tough time financially, it may be possible to negotiate a temporary rent reduction or some other financial accommodation with a landlord, and perhaps look to offer an extension to or renewal of the lease term as a sweetener.

### DO TENANTS HAVE TO KEEP PAYING RENT IF THEIR PREMISES ARE CLOSED BECAUSE OF COVID-19?

Whether tenants need to keep paying rent while their premises is closed due to COVID-19 depends on:

- The terms of the lease; and
- The circumstances surrounding the closure of the premises.

#### “No access” clauses

Most modern leases contain some form of “no access” clause. These provisions came about due to physical damage from the Christchurch earthquakes and the resulting “Red Zone” which precluded access to the public

for public safety. Many of these clauses focus on access restrictions due to a physical obstacle such as a restricted access cordon or restrictions imposed by law.

The “no access” clause in the current version of the Auckland District Law Society (ADLSi) lease also extends to the situation of a tenant being unable to access the premises in an emergency due to either:

1. reasons of safety of the public; or
2. to overcome any hazard, harm or loss associated with the emergency, which includes a restriction on the occupation of the premises by any competent authority.

Since New Zealand is now at Alert Level 4 and a state of emergency has been declared, the “no access” clause in the ADLSi lease should apply. This clause allows for an abatement of a *fair proportion* of rent *and* outgoings for the period of restricted access to the premises.

The Property Council New Zealand’s CEO has expressed a view that a good faith negotiation of a fair reduction of the rent is required *whether or not* leases include a “no access” clause. Other commentators say that there is a strong moral obligation on property owners to consider reduced rentals while tenants are unable to earn anything from affected sites. Of course many landlords themselves will be in a difficult position if their income reduces significantly.

#### What is a fair proportion?

What is a *fair proportion* of rent and outgoings and how this is calculated is not set out in the ADLSi lease. Currently there is also no judicial guidance on what comprises a *fair proportion* of rent and outgoings.

The individual circumstances of the building and tenant should be considered. For example:

- a warehouse could arguably be treated differently from an office as the warehouse tenant gets the benefit of continuing to be able to store goods but the office tenant cannot continue operating from the office;
- some landlords of retail stores are providing a greater reduction as smaller retail stores often have limited resources to pay rent while they are closed – and some larger foreign-owned tenants are trying to pay no rent at all;
- some landlords are agreeing to a 50% reduction in rent on the basis that logically any proportion other than 50% means that one party is favoured more than the other which they see (in the absence of any judicial guidance) as unfair. However, at the

same time landlords are not wanting to reduce OPEX under the lease as they continue to pay outgoings over this period;

- other landlords are assessing the capacity of the tenant to pay and providing further assistance on the basis that it will be likely to be difficult and expensive to replace the tenant.

You may wish to consider reserving your position on the rental pending a judicial determination of what is an appropriate reduction in the rent and outgoings. This could result in an increase or decrease from the amount otherwise agreed.

### *Termination for prolonged no access*

Many leases (including the ADLSi lease) also provide a right for either party to terminate if the tenant is unable to gain access for a specified no access period or either party is able to establish with reasonable certainty that the tenant is unable to gain access for that period. The default no access period in the ADLSi lease is 9 months (but this can be varied in the lease).

### *What should you do?*

The issue you will need to consider is whether the specific circumstances fall within the clauses in your lease and allow the tenant to claim a rent and outgoings abatement while the premises are temporarily closed due to COVID-19.

If agreement cannot be reached between the landlord and tenant on the amount of the abatement, most leases will contain a dispute resolution process which could be invoked by either the landlord or tenant. In the ADLSi lease,

this process involves mediation and then arbitration, after failure to agree the abatement.

### **MANDATED CLOSURE OF BUSINESS PREMISES**

Given that New Zealand is now at Level 4 for at least four weeks, tenants will not be able to access their premises unless they are an “essential business”. In these circumstances and as mentioned above, the “no access” clause of the ADLS lease should apply. However, for each lease, the terms of the lease, the circumstances surrounding the non-access to the premises and the specific circumstances of the tenant would need to be considered carefully.

As the country transitions out of Level 4, it may be more difficult to apply a “no access” clause to a situation where a tenant is permitted to access the building but cannot fully conduct its business due to an order that applies only to the type of business conducted by the tenant (or a limited number of businesses) – for example an order requiring gyms and restaurants to close. The building may otherwise be available for access and use. Again, it will be important to consider the specific circumstances.

### **CONCLUSION**

As mentioned above, we recommend that you discuss the issues that you face with your landlord or tenant to see if you can come to a reasonable resolution in the circumstances.

In this regard, we recommend that you are prepared for any such discussions by understanding your legal position beforehand. We can review your leasing documents and advise you on them accordingly.

We can also assist you to negotiate with your landlord or tenant, upon request.

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