

COVID-19 – Commercial Leases

Rent relief for some smaller tenants affected by COVID-19

June 2020

After much lobbying from business groups, the government has recently announced promised changes to leasing laws to provide some relief for small tenants that do not have a rent relief clause in their lease. The changes as announced will benefit far fewer tenants than originally proposed, and many tenants will be left with little relief.

A summary of the changes – which are yet to be drafted into law - is set out below.

Background

Many commercial leases have a rent abatement clause that provided a degree of rent relief in response to the COVID-19 related lockdown. A lot of other commercial leases do not have the abatement clause – generally these are older leases before the wider abatement clauses became common.

Tenants on leases that do not have an abatement clause have been left to try to negotiate with landlords for rent relief for a situation that was not envisaged when the lease was signed. Many landlords have taken a pragmatic view and offered relief to their tenants irrespective of whether their leases included an abatement clause. However, not all landlords have offered relief. Equally many tenants simply did not pay rent during the lockdown or unilaterally sought to reduce the rent payable. A significant number of landlords and tenants have not reached an agreement about rent abatement or deferral.

What are the changes?

More than 10 weeks after Alert Level 4 started, the government has announced that it intends to amend the Property Law Act 2007 (**PLA**) to provide some smaller commercial tenants with the right to seek an abatement of rent and outgoings where they have suffered a material loss in revenue due to COVID-19 restrictions.

The amendment will imply a clause into certain commercial leases (see the eligibility criteria below). The implied clause will reduce a *fair proportion* of rent where the tenant's business has suffered a *material loss of revenue* due to the impact COVID-19 restrictions.

The amendment will provide guidance around what is considered to be a *fair proportion* of rent and outgoings to be deducted. If commercial tenants and landlords cannot

agree on a fair proportion, then the fair proportion will be determined by arbitration.

What will constitute a *material loss* of revenue for a tenant remains to be seen. For example, what period of time will the material loss relate to, and what if there has been an increase in revenue as the Alert Level restrictions have reduced.

Who is a qualifying tenant?

Commercial tenants that are eligible to have the new clause implied into their leases are:

- Businesses that have 20 or fewer full-time employees per lease site;
- Businesses that are New Zealand based; and
- Businesses that have not already come to a binding agreement with their landlord for rent abatement.

Clause to be implied in all eligible leases (even if existing abatement clause)

The government is proposing to imply the new clause into all eligible leases – including leases that already include a rent abatement clause (such as clause 27.5 of the Auckland District Law Society Lease).

What is a 'fair proportion' of rent and outgoings?

The Government has said that the amendment will provide criteria and guidance for landlords and tenants to determine what is a fair proportion of rent and outgoings to be reduced. The criteria is likely to be based on the financial positions of both the landlord and the tenant and the impact of COVID-19 on both parties. The Government has said that this includes the impact of restrictions that are no longer in place, whether under Alert Levels 2, 3 or 4.

The amendment will allow the following to be taken into account:

- the impact of the COVID-19 restrictions on the tenant's business, including the impact of restrictions that are no longer in place;
- any mortgage obligations relevant to the leased premises;
- any financial support available to the parties;
- the parties' revenue and profit level in recent years;

COVID-19 – Commercial Leases

- the parties' ability to survive financially the effects of official requirements to counter an outbreak of COVID-19;
- any difference in size and resources between the lessor, the lessee, and any other relevant party; and
- any other relevant factors.

Fair reduction will be determined by arbitration if parties cannot agree

It is recommended that landlords and tenants negotiate and determine a fair proportion of the rent and outgoings to be reduced that is suitable for both parties.

However, if an agreement cannot be reached, then it will be compulsory for parties to enter into arbitration. The Government will subsidise each eligible arbitration up to \$6,000 including GST. Parties will have to pay their own legal fees and other costs. To claim the subsidy, the specific providers that have been approved by the Ministry of Justice must be used.

When will the temporary change apply?

The Government has not passed the law to enact this temporary change to the PLA. It has been suggested that this may occur at the beginning of July 2020.

However, when enacted, the amendment to the PLA will apply from 4 June 2020, which was the day that the Government announced the change. The temporary change will apply for six months after the change is made.

It is not clear if the rent and outgoings abatement will apply to rent and outgoings due in the lockdown period before 4 June 2020. If it does not, it will only provide limited relief for many businesses.

Next steps

The final form of the legislation is yet to be released and some of the key detail is yet to be announced. We will provide more information once the draft legislation is released.

If you are a commercial landlord or tenant, we recommend you discuss any issues that you may have with rent due to COVID-19 restrictions with the other party to try to come to a solution that suits both parties.

If you would like further information on the proposed law change or if you would like us to assist with negotiations with your landlord or tenant, please get in touch with the contacts listed, or your usual Jackson Russell adviser.

KEY JACKSON RUSSELL CONTACTS

Darryl King PARTNER
BUSINESS LAW TEAM

DDI +64 9 300 6935 | M +64 21 326 087

E darryl.king@jacksonrussell.co.nz

David Alizade PARTNER
BUSINESS LAW TEAM

DDI +64 9 300 6937 | M +64 21 224 8055

E david.alizade@jacksonrussell.co.nz

Isabel Jenner ASSOCIATE
BUSINESS LAW TEAM

DDI +64 9 300 6913 | M +64 21 132 5853

E isabel.jenner@jacksonrussell.co.nz



Disclaimer: The information contained in this document is a general overview and is not legal advice. It is important that you seek legal advice that is specific to your circumstances.