FOY & HALSE
BARRISTERS & SOLICITORS

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RENT ABATEMENT – 'NO ACCESS' IN AN EMERGENCY

The purpose of this information sheet is to briefly outline matters that a landlord should consider when a tenant requests an abatement of rent under clause 27.5 of the ADLS Deed of Lease 6th Ed.

Background

During COVID-19 alert levels 3 and 4, many commercial tenants were unable to legally access their premises. As a consequence, many of these tenants sought an abatement or suspension of rent from their Landlord. The ability of the tenant to claim a rent abatement, when premises cannot be accessed, depends on the terms of the lease.
This information sheet focuses on the standard ADLS 6th Edition "No Access in Emergency" clause 27.5.

In the absence of a 'no access' clause, a tenant will remain liable for rent, inspite of the inability to legally access its premises. There is currently no implied requirement for rent abatement in a commercial lease.

ADLS clause 27.5

The ADLS Lease 'no access' provisions were a response to the problems experienced in Christchurch where premises were not materially damaged by the earthquakes, but remained inaccessible on account of the red-zone cordon.

If the 'no access' clause is triggered, a 'fair' proportion of rent and operating expenses must be abated. The terms of the lease itself contain no definition of a 'fair' proportion or any formula as to how a 'fair' proportion can be calculated, nor is there any case law as to its interpretation (yet). What is a 'fair' proportion of rent will depend on the particular circumstances of each case.

Some relevant considerations for determining what is a 'fair' proportion may include:

1. What operations can be conducted from the premises in question? Can the Tenant's business operate fully or partially?

2. If the premises cannot be accessed, is there any other benefit that the Tenant derives from the premises during the no access period?

3. Whether or not weight should be given to the duration of the no access period?

4. What are others in the market doing?

In addition to those considerations which we have listed, the parties should also keep other commercial considerations at the forefront of their negotiations. Maintaining a good landlord-tenant relationship is important, and it may be better to agree to a compromise now, instead of negotiating hard and relying solely on legal arguments.

What happens if no agreement is reached?

Where parties disagree on what is a 'fair' abatement under the ADLS Lease, they must endeavour to resolve any difference by agreement, and if they can't agree, by mediation.

Unless a dispute is resolved by agreement or mediation within 30 working days of the dispute arising, the parties must refer the dispute to arbitration in accordance with the terms of the ADLS lease.

What's next?

In June 2020, the Government proposed legislation amending the Property Law Act 2007 by inserting an implied term into certain commercial leases requiring a fair reduction of rent where a business had suffered a loss of revenue due to COVID-19 if the lease was otherwise silent on the issue. The clause would have applied to New Zealand based businesses with up to 20 full-time staff at each leased premises where no agreement in response to COVID-19 had been reached. However, this has not gone ahead.

A proposal remains to subsidise the costs of arbitration up to $6,000, but no legislation has been passed and the matter is unlikely to be revisited (if at all) until after the election in October 2020.

How can Foy & Halse help you?

Foy & Halse act for a number of landlords and tenants and are involved in all aspects of commercial leasing. Our specialists are familiar with the current legislation and market standards and can assist you in expertly negotiating and preparing appropriate agreements to assist you with achieving the right outcome for your premises.

If you would like to talk to someone, please email Christine James at christine@foyhalse.co.nz or call us on 09 638 7151