

Effect of COVID-19 on leases

As the impacts of the COVID-19 pandemic continue to grow all businesses will need to consider its current and future impacts on their commercial position.

A key commercial arrangement for many businesses is their leases. As we enter into a period of "lock down", businesses will need to consider their position under their leases.

We outline some key legal points that businesses should consider during this period of uncertainty

Does your lease contain a "no access" provision?

The most common form of lease in New Zealand is the Auckland District Law Society lease form. In the latest 6th edition, released in 2012, a "no access" provision is included in the terms which provides that tenants are entitled to rent and outgoing abatements when they are unable to access their premises due to an emergency. Our view is that these provisions apply once New Zealand enters Level 4 of the COVID-19 alert status.

Other bespoke leases may have similar types of provisions.

We can review your leases to determine whether they contain "no access" provisions or specific "force majeure" provisions so that you understand your legal position as landlord or tenant.

Frustration

The common law doctrine of frustration could apply in a "lock down" situation. Frustration operates to bring a contract to an end in circumstances where an intervening, post-contract event, has occurred through no fault of the parties, which:

- makes a contractual obligation impossible to perform; or
- transforms a contractual obligation into a fundamentally different obligation.

It is arguable that the Government enforcing "lock downs" will meet the first test, in making it impossible for the obligations under the leases to be performed. However, frustration is typically not easy to establish and does have a narrow scope.

Whether frustration applies in your relation to your lease arrangements will depend on the specific circumstances at the time, your lease terms and the period of the "lock down" or interruption. Incorrectly arguing a lease is frustrated could have significant consequences. It is important to take legal advice to get it correct before doing so. We are also able to advise tenants being required to pay rent during the "lock down" period.

Practical considerations

This is a unique situation that commercial parties have not have faced before. As such, we recommend the additional practical measures:

- Telephone your landlord or tenant to discuss how you will deal with the COVID -19 pandemic and the impact on your business.
- Consider whether any business interruption insurance will assist in this situation. Typically, business interruption insurance requires physical damage to the premises but we suggest checking with your broker or lawyer to obtain advice in respect of your policy.
- If you are an "essential business" that will remain open during the Level 4 COVID-19 alert status, consider what practical measures your business can take to protect employees, contractors or customers. Examples include ensuring there is hand sanitiser available, providing masks to your employees, only

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allowing a certain number of customers in the premises at a time.

- Be pragmatic. For example, for a landlord it may be better to have a tenant in the premises than no tenant when the trading environment improves.
- As a landlord, speak to your accountant, bank and any other trustees before agreeing to any rent concession that is not already provided in the lease.
- Clearly record in writing any agreed arrangements that are outside of the lease terms. For example, in relation to any outside of lease rent reductions, clearly record:
 - The rent reduction in writing – say by a simple letter signed by all parties (including guarantors).
 - Whether outgoings are to continue to be paid.
 - How long any rent reduction is to last.
 - Whether any rent reduction is to be "made up" in the future.
 - The rent reduction is to be disregarded for any future rent review.
- Have regular contact with your landlord or tenant regarding trading performance and market intelligence.

Want to know more?

We have the expertise to guide you through the legal issues that arise from COVID-19. Please contact our [commercial property team](#) if you would like further assistance.

This article was written on 25 March 2020. As this is an evolving and uncertain situation, our summary of the legal position may be subject to change.