Leasing during the pandemic – has New Zealand got the answer?

July 2, 2021

Although the long-term impact of the coronavirus pandemic is not yet clear, the social distancing requirements and health concerns, along with the shift towards remote working, reduced travel and increased online shopping have affected the landscape of commercial real estate globally.

Since the emergence of COVID-19, many tenants are now requesting COVID-19 pandemic or health closure clauses in their new leases. These clauses are similar to clauses contained in most leases which provide that if the premises or building in which the premises is located is destroyed or damaged, then rent and outgoings are abated in proportion to the tenant's inability to use or access the premises.

However, most landlords, in particular the larger landlords, are pushing back on these requests. The question is whether having these clauses in place will help provide some clarity for all parties.

After the earthquake occurred in Christchurch in 2011, the Auckland District Law Society introduced a 'No Access in Emergency' clause in its standard Auckland District Law Society format lease (ADLS Lease). It was introduced when many tenants were barred from entering their premises, regardless of the extent of the damage. The clause applies when there is an emergency and the tenant is unable to access its premises to fully conduct its business due to reasons of safety of the public or property. Interestingly, whilst the clause was introduced because of the earthquake, the definition of 'emergency' in the ADLS Lease includes an 'epidemic'.

By using the ADLS Lease, many landlords and tenants in New Zealand were able to work out a fair way to navigate the pandemic by relying on the 'No Access in Emergency' or similar clauses in their leases. This meant New Zealand did not introduce a code, similar to the National Cabinet Mandatory Code of Conduct – SME Commercial Leasing Principles (Leasing Code), which was introduced in Australia last year.

If, for example, the New South Wales Law Society lease had such a clause, and these clauses were more common in all leases, the need to introduce a further code or legislation may be avoided. The Leasing Code and all the resulting legislation arising from it created more confusion and uncertainty for businesses already suffering loss. In particular, it did not come out in a timely manner and there are still some landlords and tenants negotiating rent relief for periods dating back to the beginning of the pandemic.

Assuming that Australia adopted an approach similar to New Zealand, then apart from there being more certainty and clarity, the rent abatement would then be worked out based on specific criteria agreed between the landlord and tenant instead of having to wait for new legislation to be passed. Relevant criteria could include how much of the tenant's sales comprised online sales, how many other outlets the tenant has which can still carry on the business during the period of closure, what government subsidies has each of the landlord and tenant received, can office employees effectively work from home etc? With an abatement clause included in leases, landlords and tenants would have the benefit of certainty as to what relief (if any) a tenant would be entitled to, minimal legal costs (if any) would be incurred and relief (if any) would be resolved and given in a timely manner.

Lockdowns and restrictions (in particular snap lockdowns) are here to stay for a while. When Australia does reopen its borders, there will be more uncertainty as to how the States will manage COVID-19 outbreaks. It would therefore seem sensible in many circumstances for landlords and tenants to incorporate a clause in their leases similar to the New Zealand 'No Access in Emergency' clause.

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