

NEWS ALERT 19.03.20

A GUIDE TO RESPONDING TO *requests for rent relief*

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As the current health and economic crisis unfolds on an hour by hour basis, our property managers and landlords are receiving increasing requests from tenants for rent relief. Here is a useful guide from partner Kristy Dorney explaining some key points landlords should consider in these increasingly difficult times, including:

- How can landlords assist tenants to keep operating?
- If a decision is made to provide formal rent relief, what are the options for landlords?
- What are the hot topics around tenants' rights?

GO SLOWLY

There is no question the COVID-19 pandemic is impacting business operations worldwide and many tenants simply will not be able to meet their rental obligations moving forward.

Landlords clearly have a vested interest in assisting their tenants to remain viable throughout this time and continue operating out the other side of the crisis.

However, as this situation is unfolding on a day by day if not an hour by hour basis, it is

near impossible for landlords to assess what relief is, and will continue to be, appropriate.

In the short-term, a landlord might consider simply offering a moratorium on taking action for late or short payment of rent. By doing this, the landlord preserves their right to recover rent but also allows the tenant some comfort in the short-term. Tenants should be encouraged to keep communicating with their landlord, including providing details of trading figures over the coming weeks and months.

WAIVER OR DEFERMENT?

If a decision is made to provide formal rent relief, there are several options for landlords.

One option is to defer a portion of the rent which will preserve the landlord's right to recover the rent at a later agreed date. This could be repaid by instalments to commence in say six months' time and repaid over an agreed period. It could also include an obligation to pay interest. Importantly, an agreement now does not preclude the landlord from extending further relief if it deems it appropriate in the coming months. However, it

is very hard to retract relief if it is later considered to be more generous than what was actually required unless a mechanism to do so is agreed and documented in writing.

The other option is for the landlord to waive collection of a portion of the rent altogether. This may be appropriate for example where a tenant is nearing the end of its lease or as a short-term one off whilst the impact of the current situation unfolds. However, from our recent discussions with landlords, there is not enough information or certainty to know if this would be enough. In the short-term, a deferment agreement seems to be the most prudent option.

Whichever way forward, the agreement for relief should be recorded in writing. If rent is waived altogether then it is recommended the tenant acknowledges in writing the rent is waived on the condition it is set off against any claim the tenant may later bring against the landlord under the lease (whether related to COVID-19 or otherwise). Generally, this relief will be voluntary on the part of the landlord and should be taken into account if the landlord is later found liable

IN OUR EXPERIENCE, AN ABATEMENT CLAUSE DOES NOT USUALLY COVER A SITUATION WHERE ACCESS TO THE PREMISES IS RESTRICTED DUE TO A GOVERNMENT DIRECTIVE TO ALL PARTIES TO CEASE BUSINESS OPERATIONS.

to the tenant for some other reason. This is particularly important for tenants under the Retail Shop Leases Legislation where tenants are granted rights to compensation for certain actions which cannot be waived or contracted out of. If this is not documented, then a set off is generally not available.

TENANT'S RIGHTS – HOT TOPICS

In most leases, the tenant is not entitled to any relief or abatement in connection with the current economic downturn and the Retail Shop Leases Legislation does not offer any assistance either.

However, as matters unfold and the Government releases its updated response each day, this may change. We are also receiving feedback that tenants negotiating leases now are looking to secure protection in new lease deals. Below is a short explanation of some lease concepts that are likely to be hot topics in the weeks or months to come.

ABATEMENT CLAUSE

An abatement clause usually entitles the tenant to a full or partial abatement of its rent where there has been some form of damage or destruction to the premises which means it cannot be accessed or used by the tenant.

In our experience, an abatement clause does not usually cover a situation where access to the premises is restricted due to a Government directive to all parties to cease business operations. Depending on the wording, it may extend to closure of a building to address an infection event not arising within the tenant's own premises.

BREACH OF 'QUIET ENJOYMENT'

With a lease comes the tenant's right to occupy, use and enjoy the premises without disturbance from the landlord or other tenants. A breach of this right at the hand of the landlord entitles the tenant to recover its loss and damage from the landlord. Disruption to use or access for the cleaning of contaminated areas is one example that could give rise to a breach.

However, a lease often carves out rights for a landlord to cause disruption in specified circumstances which will often include responding to an emergency. This and similar claims available to a tenant covered by the Retail Shop Leases Legislation in each state will need to be reviewed on a case by case basis.

FORCE MAJEURE CLAUSE

A force majeure clause is a common contract clause which, in our experience, is rarely included in a lease, for the tenant's benefit at least.

A force majeure clause allows the parties to end a lease should the events or circumstances specifically identified in the clause arise. Usually, the events identified are those outside of the control of either party rendering performance of the agreement impossible.

Will they apply where trade from the premises is restricted by a Government directive? Maybe. It will require a good look at the clause, if there is one, and identifying what act is preventing performance.

FRUSTRATION

A contract will be considered 'frustrated' (and capable of termination) where a contract becomes impossible to perform, through no fault of a party and due to events arising after the contract was entered. Then, the contract may be brought to an end under the principal of 'frustration'.

Frustration is not lightly found; the courts are loath to interfere with the parties' contractual agreements. Prolonged or

indefinite access to premises due to a Government directive in responding to the COVID-19 outbreak may in theory support a finding a lease has been frustrated. However, this would not be the case where the tenant's inability to continue the lease is a result of a reduction in trade caused by the outbreak.

WE CAN HELP

Whether you're a landlord, a property manager, or a tenant, you can call partner Kristy Dorney or another member of our Real Estate team to talk through your concerns and options.