Additional COVID Exposure for Landlords and Tenants: The COVID-19 Response (Management Measures) Legislation Bill

The New Zealand Government has introduced the COVID-19 Response (Management Measures) Legislation Bill (*Covid Bill*), which passed its first reading on 29 September 2021 before going to the Finance and Expenditure Select Committee. Submissions to the Committee are due by 5 October 2021, with the Committee to report to the House on 14 October 2021.

The Covid Bill amends several pieces of legislation. In this note, we focus only on the proposed amendments to the Property Law Act 2007 (*PLA*).

This is the second attempt at implying rent abatement provisions into commercial leases since Minister Little's proposals in 2020, which did not make it beyond a Cabinet paper.

The Bill has received criticism both within and outside of Parliament for cutting across existing commercial leasing contracts, and the press release by the Government announcing the Covid Bill did not indicate the extent to which a lack of rent abatements is a problem in commercial leases.

The Property Council and a number of significant figures in the property industry have come out in opposition, noting the issues around defining the quantum of a rent abatement. Interestingly, the Property Council is seeking to gather information from its members about abatements or deferrals already agreed. The results may be a useful indicator as to whether there is a widespread problem necessitating Government intervention, or otherwise.

Key proposed changes to the PLA

- **From 28 September 2021 a "no access in an emergency clause" (*implied clause*) is implied into leases that do not include such a clause that covers an epidemic:** Unamended ADLS leases from 2012 onwards already contain a similar clause and will not be affected by the proposed legislation, but other forms of leases such as Property Council leases and bespoke leases will need to be considered on a case by case basis.
-

The implied clause is triggered when a tenant "is unable to gain access to all or any part of the leased premises to conduct fully their operations from all or any part of the leased premises, because of reasons of health or safety related to the epidemic": What "fully" conduct means is to be determined and may cover situations where the tenant is operating in the premises sub-optimally, such as restrictions to capacity, customer access or social distancing requirements.

- **The implied clause provides that a fair proportion of rent and outgoings will abate under the lease during the period of the tenant's inability to access all or part of the leased premises, backdated to 28 September 2021 (but possibly earlier), and ending when the inability ceases:** A "fair proportion" is not defined and nor is there any guidance on this. Much will depend on the circumstances, and negotiated outcomes will vary depending on the nature of the tenant's business, the premises and the terms of the lease. The provisions around when the abatement commences are unclear. We expect these will be further developed in Select Committee.

- **The implied clause will not apply where the parties have already agreed contractually to vary the rent payable if access to the premises is restricted because of an epidemic (a "pre-commencement rent variation agreement") and the agreement applies to the period covered by the implied clause:** The implied clause might therefore apply for some of the period not covered by the pre-commencement rent variation agreement.

- **Until the landlord and tenant determine what a fair proportion is, a landlord cannot terminate a tenant's lease for non-payment of rent and outgoings:** Section 246 of the PLA has not been amended so, a landlord may still cancel a lease for breach of other covenants of the lease.

- **Any dispute about what is a "fair proportion" is to be referred to arbitration under the Arbitration Act 1996. Arbitration could be expensive and lengthy:** This does not preclude the parties from agreeing other methods of dispute resolution.

- **This rent abatement is specific to the COVID-19 epidemic:** It is expressly repealed when the Epidemic Preparedness (COVID-19) Notice 2020 expires or is revoked.

- **The implied covenant may be negatived, varied or extended by express agreement after 28 September 2021:** Relying on clauses in existing leases which exclude implied terms in the PLA will not be sufficient to exclude this implied covenant.

What can a landlord or tenant do?

Until the Covid Bill achieves Royal assent, landlords are not legally obliged to offer a rent or outgoings abatement where they do not have clause 27.5 of the ADLS lease (or a

similar clause) in their leases. This is obviously a hard-nosed approach to be taken by landlords, but not an illegal one. Though the Covid Bill is only proposed legislation, tenants have been given a certain level of bargaining power to start discussions to achieve a rent and outgoings abatement and landlords can expect to see an increase in requests of this nature. Similar requests occurred shortly after Minister Little's announcement in 2020.

Regardless of the passing of the Covid Bill, landlords and tenants are still free to come to agreement on a rent and outgoings abatement. Provided they agree from 28 September 2021, this will exclude the implied rent relief provisions in the Covid Bill entirely, perhaps in return for some other consideration. One particular incentive for the parties to agree an abatement is the lack of guidance over "fair proportion". It is our experience that parties often pre-agree fixed discounts that will apply for Alert Levels 3 and 4.

We strongly recommend that landlords do not take any action to terminate leases for non-payment of rent and outgoings without seeking advice first. Particular caution should also be exercised as to whether a landlord calls on a bank guarantee or other security in respect of rent and outgoings, which may later be found to be properly subject to abatement from 28 September 2021. The Courts have regularly made decisions favourable to tenants, where landlords have acted aggressively in uncertain situations.

What leases are intended to be caught?
Leases which already contain a "no access in an emergency clause" are excluded from rent abatement provisions in the Bill.

The proposed wording of the "no access in an emergency" provision is close to, but not the same as, the wording used in clause 27.5 of the ADLS lease. However, by way of example, the equivalent clause 7.5(c) of the Property Council office lease is less clear in that:

- the concept of "no access in an emergency" has slightly different triggers (such as the narrower concept of "inaccessibility"); and
- there is also an additional requirement before a tenant may obtain rent relief, being that the landlord must be able to collect loss of rent insurance.

Is clause 7.5(c) of the Property Council office lease a "no access in an emergency clause" for the purposes of the Covid Bill? It is questionable and will likely be the subject of legal debate. However, the overall intention appears to be that, if there is a clause in a lease that operates akin to clause 27.5 of the ADLS lease, the implied clause proposed pursuant to the Covid Bill will not apply.

Watch this space
The Covid Bill is proceeding quickly through the Select Committee process and we can expect some strong submissions and public comments to be made before the Covid Bill is passed.

If you would like any further information about the effect of the PLA changes or how to deal with them, please contact Antonia Shanahan, Steve Woodfield, Mark Hay, Simon Mee or any of our experienced property lawyers.

October 2021