# “No access in emergency” clauses: interaction with right to issue PLA notice of cancellation

New Zealand’s COVID-19 alert level restrictions have placed under scrutiny "no access in emergency" provisions in leases. These provisions generally require an abatement of rent and outgoings when a tenant is unable to fully access the leased premises to carry out its business due to an emergency. In most cases, these clauses will apply during Covid-related lockdowns. In this article we examine recent case law on their interaction with the statutory right to cancel for breach.

Under sections 245 and 246 of the Property Law Act 2007, a landlord can cancel a lease after serving notice on a tenant for non-payment of the rent or a breach of other obligations under a lease (such as the obligation to pay outgoings). The recent High Court case of *SHK Trustee Company Limited v NZDMG Limited* serves as a warning to landlords who intend to cancel a lease for non-payment of rent and outgoings during an emergency.

The landlord leased an office and a warehouse space to a kitchen manufacturer under two separate leases. The leases were on the widely-used Auckland District Law Society (*ADLS*) deed of lease, which includes a “no access in emergency” provision at clause 27.5. The tenant ceased rental payments from the first day of the first alert level 4 lockdown on 26 March 2020 and claimed a rent abatement under the “no access” clauses in the leases.

In August 2020, the landowner served a notice on the tenant informing the tenant that it was in default of its obligation to pay the rent and outgoings and requiring that the outstanding sums be paid within 30 working days. The notice made no allowance for the required abatement of rent and outgoings due to the “no access in emergency” clauses. After the tenant did not comply with the notice, the landlord cancelled the leases, took possession of the premises and later commenced summary judgment proceedings to recover the rent arrears.

The High Court declined the landlord’s application in respect of the amounts claimed as the landlord had failed to provide for an abatement of the rent in light of the ongoing pandemic.

As this was a summary judgment application for unpaid rent, the Court was not able to assess what the “fair proportion” abatement should have been (as this is “an evaluative exercise that cannot be done on a summary judgment application”) or determine whether the landlord’s breach notice was invalid. If the breach notice was invalid, the cancellation of the leases would have been unlawful. The Court stated that it was arguable that the breach notice was invalid on the basis that it did not make an allowance for the required abatement of rent and outgoings under clause 27.5 of the leases. The Court recommended that the landlord ought to have obtained an authoritative determination of the rent payable by suing the tenant and obtaining a formal judgment of the unpaid rent, or to have only served the breach notice for the undisputed rent arrears.

The case is an illustration of the risks involved in serving breach notices. Where claimed rent arrears

relate to a period during which the rent abates under the terms of the lease or due to a statutory entitlement, landlords must draft breach notices with caution. Landlords might choose to rely on outstanding rent or outgoings payable in respect of non-abatement periods, agree the abated “fair proportion” with tenants or obtain judgment through legal proceedings as to the amount owing under the lease during the abatement period. Landlords also need to consider statutory interventions due to the COVID-19 pandemic (such as the COVID-19 Response (Management Measures) Legislation Bill) – relying on the words of the deed of lease alone may not be sufficient.

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