

PropertySpeaking

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Welcome to the Winter edition of *Property Speaking*. As you will read, the focus of this edition is very much on the effects on the property sector from the COVID lockdown. We hope you find these articles to be useful.

To know more about any of the topics we have covered, or indeed on any property law matter, please don't hesitate to contact us – our details are on the right.



Commercial leases post-COVID

Clause 27.5 and inability to access premises

In the past three months most landlords and tenants would have become more familiar with the details of their lease. In particular, most will be looking at how clause 27.5 of the Auckland District Law Society lease applies to the lockdown and access to their premises.

We look at fairness factors that can be considered in assessing a rental reduction.

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Some temporary changes

The government has made temporary changes to the Residential Tenancies Act 1986 that take into account the effects that the COVID lockdown has had on the economy.

These changes restrict a landlord's ability to increase the rent or to end residential tenancies. If you are a landlord, you should read on to ensure you are not inadvertently breaching this temporary law change.

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Mortgages and loans for property owners

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Commercial leases post-COVID

Clause 27.5 and inability to access premises

In the past three months, most landlords and tenants would have become more familiar with the details of their lease. In particular, most will be looking at how clause 27.5 of the Auckland District Law Society (ADLS) lease applies to the government-imposed lockdown that we have all experienced as a result of COVID-19.

A bit of background

Following the Christchurch earthquakes, landlords and tenants were not permitted access to leased properties that were inside the 'red zone' while investigations into the structural integrity of buildings were being undertaken. In these instances, where the property had not been totally or partially destroyed, the parties were still required to meet their full obligations under their lease even though they were unable to operate from their leased premises.

As a result of the hardship this situation caused for tenants, clause 27.5 was added to the ADLS lease. It states that, where there is an emergency and a tenant is unable to gain access to the property to fully conduct their business, including by reason of a restriction on the occupation of the premises imposed by any competent authority, then a *fair* (our italics) portion of the rent and outgoings shall cease to be payable while the tenant is unable to gain access to the property.

This clause is as equally relevant to the COVID lockdown as it is to earthquakes as tenants seek a fair resolution to being prevented from accessing their leased premises.

What is 'fair'?

It is not fair (or realistic) to presume that because a landlord owns a commercial building, that they do not have their own obligations associated with that such as insurance, rates, etc. Those obligations continue whether rent is paid or not. Similarly, with tenants, other obligations of that business will continue. It is important that whatever arrangements are agreed in respect of clause 27.5 are fair to both sides.

Factors in considering fairness

Subsidies: Landlords and tenants should both explore the financial relief available to them from the government and their lender. Do this before having a discussion with the other party so you are fully informed on the relief packages available.

Business use: What the property is used for will have an impact on what is fair. A hairdresser or cafe will have had next to no use of their premises over the lockdown period. However, a professional services firm is likely to be in a different situation as employees can work from home and access the server remotely. Their premises will be



used for file storage and documents, desks, etc so the firm is still receiving some benefit of the premises. This has some value and it will differ depending on the circumstances, but for those reasons alone, a 100% rent reduction may not be appropriate for this type of business.

Length of time: It is important to note that clause 27.5 relates only to situations where a tenant is not allowed to access the premises due to the emergency. During COVID-19, most businesses could access their premises once Level 4 was lifted. From Level 3 downwards, clause 27.5 no longer applies and the parties must negotiate between themselves in order to reach agreement

in respect of any future rent or opex relief during Level 3.

Relevance to COVID: The lockdown situation with COVID may have highlighted to many businesses their inefficiencies regarding commercial space. Leasing obligations, however, remain in place and no contractual obligation exists to re-negotiate those, once access to the premises is restored.

Good faith: Landlords and tenants must together consider the principles of good faith when negotiating a situation such as this. Both sides need to come to the table and be prepared to negotiate the matter in good faith, considering the needs, wants and obligations of each party to the lease.

Residential tenancies post-COVID

Some temporary changes

Due to the COVID lockdown and the ensuing impact on the country's economy, the government has made temporary changes to the Residential Tenancies Act 1986. These changes restrict a landlord's ability to increase the rent or to end residential tenancies. If you are a landlord, you should read on to ensure you are not inadvertently breaching this temporary law change.

Over the period 26 March 2020 until 25 September 2020, landlords cannot increase the rent for a residential tenancy. This includes any rent increases about which you have already notified to your tenant, but had not taken effect before 26 March 2020. If you try to enforce a rent increase before 25 September 2020 you will be committing an unlawful act.

From 26 March until at least 25 June 2020, landlords may only end a residential tenancy in limited circumstances. These restrictions apply to all residential tenancies, including fixed term tenancies of 90 days or less. There is the possibility of extending the duration of these changes for a further three months, from 26 June through to 25 September 2020.

Ending a tenancy in this period

While these restrictions remain in force, you can only seek to end a residential tenancy in exceptional circumstances:

- » The sole tenant of the tenancy dies
- » The Tenancy Tribunal finds that your tenant has failed to pay rent for at least 60 days (instead of the usual 21 days) or, if your tenancy is a boarding house tenancy, they failed to pay rent for at least 28 days (instead of the usual 10 days). In both cases the Tenancy Tribunal must be satisfied that your tenant has not made reasonable endeavours to meet rental payments
- » Your tenant has, or has threatened to cause, substantial damage to your property
- » Your tenant has assaulted, or threatened to assault, you, your family, your agent or the neighbours of your property
- » Your property becomes uninhabitable as a result of your tenant breaching the tenancy agreement, or
- » Your tenant abandons your property.

Where your tenant is engaging in anti-social behaviour, such as harassment, you can also seek an order from the Tenancy Tribunal ending the tenancy. However, the Tribunal will not make an order if the application was retaliatory or 'doing so would be unfair because of the circumstances in which the behaviour occurred or the impact that terminating the tenancy would have on the tenant.'

Other issues around tenancies

If your tenant gave you notice to end the tenancy, and your tenant was still in possession of the property on 26 March 2020, your tenant can elect to stay in the property during this period instead.

If you have previously signed an agreement, where you agreed to give a prospective new tenant vacant possession of the property, that agreement is effectively cancelled. You will be released from all obligations to the prospective tenant and that person will have no right to occupy the property. However, as

soon as possible, you will need to advise the prospective tenant that the property is no longer available.

Notably, these restrictions will prevent tenancies being ended for the purpose of an upcoming house sale or where you, a member of your family or your employee, intends to move into the property. In these circumstances, negotiation with your tenant will be key as tenancies can still be ended if your tenant agrees.

It is unlawful for you to notify your tenant that the tenancy is being terminated, or for you to bring an application to the Tenancy Tribunal to

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Property briefs

In response to the COVID pandemic, changes continue to be made around tenancies – both residential and commercial – as well as mortgages and lending.

Healthy homes standards compliance

To accommodate delays arising from the COVID restrictions, the deadline for landlords to provide healthy homes standards compliance statements to their new tenants has been extended by five months.

The healthy homes standards have been introduced to ensure that all rental properties have, for example, adequate heating, insulation and ventilation. As part of the first stages of these standards, you must provide any new tenants or tenants renewing their existing agreement with information on whether your property meets the healthy homes standards. This is called a healthy homes standards compliance statement.

Originally, the healthy homes standards compliance statement was to be mandatory from 1 July 2020. However, the COVID restrictions have meant that some landlords have been unable to inspect their properties and gather the necessary information for their healthy homes standards compliance statements. To assist landlords in this position, the mandatory start date has been extended to 1 December 2020.

The deadlines for the later stages of the healthy homes standards remain unchanged and you will still need to meet the following deadlines for ensuring your property complies with the healthy home standards:

- » From 1 July 2021, you must ensure that your rental properties comply with the healthy homes standards within 90 days of any new tenancy, and
- » From 1 July 2024, all of your rental properties must comply with the healthy home standards, regardless of whether your tenants are new or existing.

The template for a healthy homes compliance statement is available [here](#) and further information on the healthy homes standards is available [here](#).

Landlord alert – changes to commercial tenancies

As of 1 April 2020, the process for ending commercial leases for the non-payment of rent has been altered. Usually, your commercial tenant must be at least

10 working days behind in rent before you can cancel the lease. Under COVID-related changes, this time period has been extended to 30 working days.

On 4 June 2020, the government announced it would pursue further changes around rent reductions for commercial tenants who are under financial pressure due to COVID. The proposed changes would require a fair reduction of rent for a commercial tenant with 20 or less full-time staff. However, no law changes have yet been made as we publish this edition of *Property Speaking*.

Mortgages and loans for property owners

To alleviate subsequent pressures on landlords and other property owners, policy initiatives have been introduced to provide short-term assistance with loans secured against property – such as the mortgage repayment deferral scheme and the Reserve Bank's associated removal of its loan-to-value ratio (LVR) restriction. The LVR

restrictions usually limit how much a bank may lend compared with a property's value.

Until 1 May 2021, it is likely to be easier to borrow more than 80% of a property's value. One benefit of this change for property owners is that it may allow access to the mortgage repayment deferral scheme even where existing lending is high.

These policy initiatives sit alongside law changes which are designed to slow the process to mortgage default and give you time to recover if your cash-flow is poor as a result of COVID. Temporary amendments to the Property Law Act 2007 have changed the timeframes for the enforcement of mortgage-related debt. If you are in default of your mortgage, you must be given at least 40 working days to remedy the default before your mortgagee can take control of your property or require its sale. This is extended from the usual 20 working day period.

Further information on the changes for commercial tenancies and mortgages can be found [here](#). ●



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Commercial leases post-COVID

Common sense and commercial sense

The reality of the current situation is that everyone has been affected by the COVID lockdown. Commercial leasing is an agreement which is entered into between two parties on an equal footing. There is not, or should not be, any disparity between the parties in terms of their negotiating power.

Clause 27.5 is fairly new and there is not yet any guidance from the courts about how it should be applied in practice. This means that landlords and tenants should have an open and frank discussion about their circumstances, and come to an agreement about what is a fair proportion of the rent and outgoings for their situation. This will inevitably mean that both contribute towards the loss suffered as a result of the situation which is neither party's fault. In the words of the Prime Minister, "we are all in this together."

If you would like some advice about the options and relief available to you, we are here to help. ●



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Residential tenancies post-COVID

have the tenancy terminated for any reason other than those listed on page 3.

Important to get it right

It's always important for landlords to keep up-to-date with tenancy laws, and particularly so at this time. Getting these rules wrong can be costly; there's a \$6,500 penalty for landlords who wrongly increase the rent, or unlawfully attempt to end a tenancy.

If you are considering increasing the rent or terminating your tenancy without your tenant's agreement, we can help with checking whether one of the exceptions applies. Otherwise, further information on residential tenancy issues during COVID-19 is available [here](#). ●



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