

Te Kāhui
Whaihanga
New Zealand
Institute of
Architects



COVID-19 Info

Rental obligations during mandatory closure of non-essential business premises

COVID-19: The circumstances which we are facing are unprecedented and will have wide ranging ramifications.

The Issue

All non-essential businesses closed their premises on midnight Wednesday 25 March 2020. This leaves commercial landlords and tenants questioning what lease payments remain payable.

In New Zealand there are three commonly used forms of lease:

1. The Auckland District Law Society Lease (see right column)
2. The Property Council New Zealand Retail Property Lease, and
3. The Property Council New Zealand Standard Office Lease.

Please note that this notice is for general information only and the terms of each lease should be considered on a case-by-case basis. It is not intended to be legal or insurance advice. Members should seek legal and insurance advice in relation to their own lease and situation.



Please note that any special lease terms will prevail over the standard form leases.

Auckland District Law Society Lease (“ADLS Lease”)

The extent to which annual rent and outgoings remain payable depends upon whether the lease is the Sixth Edition of the ADLS Lease (which was released in 2012), or an earlier edition. The edition details will be in the top right corner of the lease.

Sixth Edition ADLS Lease

1. Under the Sixth Edition ADLS Lease there is a “No Access in Emergency” clause which says that a “fair proportion” of the annual rent and outgoings will cease to be payable if:
 - there is an emergency (an “emergency” includes an epidemic such as COVID-19); and
 - the tenant is unable to gain access to the premises to fully conduct the tenant’s business from the premises because of reasons of safety of the public or the need to overcome any harm, loss or hazard associated with the emergency. (see clause 27.5 of the Sixth Edition ADLS Lease).
2. If a tenant is not an “essential business” and is therefore forced to close while we are at a COVID-19 Alert Level 4, then that tenant’s liability for rent and outgoings will likely reduce by a “fair proportion”. [1]
3. In terms of assessing what a “fair proportion” is, there is no one size fits all; it will depend upon the nature of each tenant’s business and the extent to which they are still able to use the premises during any mandatory closure. We have listed some matters to consider further below.

4. Please note that if the circumstances described above (there is an emergency and the premises are inaccessible) apply for a period of nine months (which we hope is not going to be the case), then rights of termination will likely arise.

Earlier Editions of the ADLS Lease

For tenants on an earlier edition of the ADLS Lease, the default position is that the tenant remains obliged to pay annual rent and outgoings in full.

Rental Payments to Reduce by a “Fair Proportion”

1. As discussed earlier, several lease forms provide for a “fair proportion” of rental and outgoings payments to abate when premises are inaccessible. What a “fair proportion” is, will depend upon each tenant and premises. Some relevant considerations are:
 - whether and how much a tenant ought to be charged for being able to “store” its property in the premises;
 - whether a tenant has servers or any other pieces of technology in the premises which it is still able to use (without accessing the premises); and
 - whether a tenant is in fact still accessing the premises (staff may be working from premises one at a time, for example).
2. A landlord and tenant should consider the above points and anything else which may be relevant to an assessment of what a “fair proportion” is.

Next Steps

Many tenants may be unable to pay rent when it is next due. In turn, some landlords may not be able to meet their mortgage commitments. In order to help minimise the risks and consequences associated with this, landlords and tenants should each:

- Open discussions between the landlord and tenant. Some questions tenants might want to consider are:
 - what type of lease have you signed?
 - does it contain an emergency access clause or a similar clause?
 - how is this likely to affect your business and what kind of reduction do you need?
 - whether or not the lease provides for any reduction, it is useful to understand how the lockdown will affect each party and their cashflow. A reduction or other arrangement might be the best option to ensure the continued viability of the lease;
 - what is a fair proportion of the rent and outgoings that should be abated?

- can you use the premises at all? The landlord may consider that storage areas are being used – if so, what proportion of the floor area is storage?
- what agreement has been reached with your landlord? You should clearly document any agreement reached. This could be recorded by email or a more formal agreement could be prepared;
- have you updated your bank? You should also talk to your bank during this time and keep them updated of any agreement reached regarding rent reduction. Note also that your landlord’s bank requires them to obtain written agreement of the bank to any rent reduction;
- what other support may be available to you during this time? Look at Government subsidies and other recently announced support options;
- do you have any insurance cover that applies? Speak to your insurance broker before you reach agreement with the landlord.

Engage with their banks as soon as possible;

Contact their insurers to check whether their business interruption insurance will respond [2];

Make enquiries to see whether they are eligible for any of the Government’s relief packages (such as the wage subsidy scheme); and

Seek legal advice regarding their circumstances and lease terms.

References

[1] For information regarding what is an “essential business”, please see the Government’s list [here](#)

[2] A business interruption policy is unlikely to respond to pandemic related losses. However, this will depend upon the wording of each policy (so it is worth checking).

Frequently Asked Questions

Do I have a written signed lease and what are the terms of it?

The NZIA understands that most property leases in New Zealand are likely to be in the form of Auckland District Law Society commercial deed of lease (ADLS Lease). This form is a standard form lease agreement which sets out the rules that apply during the lease term.

The current ADLS Lease form is the 2012 Sixth Edition but many leases may be in earlier forms and/or the terms may have been amended by the landlord or tenant.

In addition to the clauses discussed below, Members should carefully review their leases to consider a wide range of potentially relevant provisions, such as any material adverse change clauses, financial covenants, changes in law, cessation of business and termination, and take legal advice where required.

If the lease has not been signed by both parties again seek legal advice to determine whether agreement to the terms can be adequately evidenced to be binding, or which terms have any certainty of agreement.

Members are advised to urgently locate and read the terms of their lease agreement carefully.

Do I have to keep on paying rent and outgoings?

Clauses 27.5 and 27.6 of the Sixth Edition ADLS Lease concern situations such as an emergency where 'because of reasons of safety of the public or property or the need to prevent reduce or overcome any hazard, harm or loss that may be associated with the emergency' the tenant is not able to obtain access to the premises even if the building itself is not destroyed. These clauses allow for 'a fair proportion of the rent and outgoings shall cease to be payable for the period commencing on the date when the tenant became unable to gain access to the premises ... until the inability ceases.' Emergency includes under 2.7.5(c) "restrictions on occupation of the premises by any competent authority" Clause 47.1 defines an emergency to include "plague, epidemic".

Under the Sixth Edition ADLS Lease where access cannot or will not be able to be obtained for 9 months (being the ADLS Lease default period) or any other period agreed in an amendment, the tenant should be able to terminate the lease upon 10 working days' notice.

A tenant may also be required under its lease to pay a percentage of the "outgoings" of the building such as rates, insurance or repairs to certain parts of the premises under its lease. The actual figure the tenant would be liable for may not be known until further into the lease term. The Sixth Edition ADLS Lease (where unamended) should allow for an estimate of the likely outgoings to be determined on actual assessment. These outgoings may vary under the Level 4 Alert where the building is not being occupied or where landlords are given business relief.

The NZIA understands that these clauses were not included in previous versions of the ADLS Lease, so Members should check which version has been signed (top right-hand corner of lease).

There is also a legal doctrine of "frustration" which may apply where the performance of the contract, through no fault of either party, has been made impossible. The standard for frustration is a high bar, and this remedy should not be tested without legal guidance.

Members are advised to carefully check their own leases for the exact wording relating to this situation and seek legal advice on potential solutions.

What does 'a fair proportion of the rent and outgoings shall cease to be payable for the period' mean?

The NZIA understands that the general view is that the current Level 4 Alert will bring the suspension clause in Sixth Edition ADLS Lease into effect as there is an emergency where a competent authority has called for a restriction on occupation of business premises for health and safety concerns. It has been suggested that this might also apply to Level 3 Alerts.

Unfortunately, the ADLS Lease form has no guidance as to what would be considered a "fair proportion" of rent and outgoings in each situation. Anecdotal evidence appears to indicate a wide range of reductions. Where Members are not able to access premises, this will not necessarily provide a 100% reduction in rent and outgoings during the lockdown. Each situation is likely to vary depending on the specific financial impact on the Member of the inability to access premises. Any rent reduction will also depend on the specific terms of each lease, which will all vary. The NZIA understands that the rent reduction clause is unlikely to appear in any standard form of lease form pre 2012.

Consideration of the percentage reduction is likely to consider such factors as:

- Whether the tenant's business is still operating and viable;
- Whether the tenant is still operating equipment within the office premises albeit remotely e.g. servers, IT equipment;
- Whether and how much a tenant ought to be charged for being able to "store" its property in the premises;
- Whether the tenant is in fact still accessing the premises e.g. staff working on the premises one at a time to maintain certain services;
- Changes to the outgoings of the premises during the period of lockdown; and
- Partial occupancy where the business is carrying out essential services.

There remains uncertainty as to what would generally be appropriate, even when otherwise varied by specific situations. Members should seek legal advice in relation to their specific lease agreement.

Members should check that their lease has not been amended to limit rent suspension to that recoverable by the landlord under rent loss insurance (see below).

Members are advised to check the exact wording of their leases and assess any factors that would affect the assessment of a "fair proportion".

Do you have business interruption insurance that covers Alert Level 4?

The current general advice is that most business interruption cover is unlikely to cover the Level 4 Alert situation, as most policies are likely to exclude “interruption and interference resulting from a notifiable Disease under the Health Act 1956” or similar. This is likely to also apply to your landlord for loss of rent cover.

Members are advised to check the terms of their business risk insurance cover and talk with their insurers.

What Should I Do Next?

Members should try to contact their landlord, or the agency through which they obtained the lease, as soon as possible to initiate discussions concerning rent payment under the relevant terms of their lease, and in particular any ability to negotiate a proportionate rent suspension, if there is a clause similar to clauses (27.5 and 27.6) of the ADLS Lease above. Where this type of clause is not included it may be possible to negotiate a similar amendment to the lease or agree a rent deferment until after the lockdown with your landlord.

If a tenant decides to stop paying rent without any right within the lease to do so, this could amount to a repudiation of the lease. This is likely to give the landlord an ability to terminate the lease and/or recover damages from the tenant.

Members should seek legal advice before deciding to stop paying rent as this is likely to cause a breach of the lease.

Members are advised to initiate discussions with their landlords to discuss rental payments under their lease.

How Do I Discuss with My Landlord?

A friendly phone call and a meeting (online) to discuss any options with the landlord should be the initial step. Landlords are also likely to be under financial pressure to retain income stream but hopefully they can respond positively to any approach to resolve any uncertainty in good faith.

Members may be able to agree a rent holiday, a reduction in rent or deferred rental payments, even in line with current government mortgage payment deferrals. Interpretation of any “fair proportion” will vary with each lease, depending on the exact terms, and the specific circumstances of the lease in relation to rent and outgoings.

A reasonable landlord should prefer a continuing tenant at the end of the lockdown rather than a vacant property where a tenant becomes insolvent due to inability to pay business overheads and rent. Short term rental loss or even rent deferment are likely to be more favourable to a landlord than long term losses due to future vacancy of the premises when there is likely to be lower rental demand.

Members should be careful not to assert that they are not required to pay any rent at all or that the contract has been frustrated without legal advice as they may be found to have wrongfully terminated the contract and be liable for damages to the landlord (see above).

What else can I do?

Members would also be advised to review the terms of agreement of any leases for office equipment and services where they not being fully utilised or permitted during the lockdown e.g. photocopies, scanners, cleaning and maintenance services.

In addition to negotiating rent relief, both landlords and tenants can benefit from some of the government business financial initiatives, which include:

- Government wage subsidy scheme.
- Proposed six-month principal and interest payment deferment being offered by various banks on business loans.
- Tax measures such as (i) an increase in the provisional tax threshold, (ii) an increase in small asset depreciation threshold, and (iii) an allowance for depreciation on commercial buildings.

The Property Council is currently in discussions to provide guidelines to their members. The NZIA has contacted the Property Section of the Law Society and understand guidance to their members and clients is being discussed urgently. The government is understood to be considering mortgage relief extension to commercial landlords which may help to ease any current loss of rent during the lockdown.

The NZIA is continuing its enquiries and will provide further updates when information becomes available.

Concluding Comments

The circumstances which we are facing are unprecedented and will have wide ranging ramifications. Our thoughts are with you all throughout this difficult time. Please do not hesitate to get in contact with us.

Regards,

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Other helpful references

www.propertynz.co.nz/news/rent-payments-during-lockdown

www.hobec.co.nz/news-resources/2020/march/the-adls-lease-and-epidemics

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