

Commercial landlords and tenants - Payment of rent and outgoings during Covid-19 Alert Levels 4 and 3

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Following the latest Covid-19 outbreak and reintroduction of alert levels, many commercial tenants have been restricted from accessing their business premises. While Auckland remains in Alert Level 4, and the rest of the country is drawing breath returning to Alert Level (delta) 2 from 11.59pm tonight, both landlords and tenants are looking to their lease agreements to determine their rights and obligations relating to payment of rent and outgoings during this time.

Leases commonly include a 'no access' provision, where rent and outgoings abate during periods where access to the premises is not permitted. At Alert Level 4, the 'no access in emergency' provisions in the widely-used Auckland District Law Society Deed of Lease form (the ADLS Lease, clauses 27.5 and 27.6), are likely to be triggered. The ADLS Lease generally provides that in an emergency, if the tenant is unable to gain access to its premises due to reasons of safety of the public, or the need to prevent or reduce harm that may be associated with the emergency, including a restriction on occupation of the premises by any competent authority (ie Alert Level 4), the tenant may cease paying a fair proportion of rent and outgoings for that period. During the last lockdown in 2020, what is a 'fair proportion of rent and outgoings' for the purposes of the ADLS Lease was a hotly debated topic among landlords and tenants. What was a 'fair proportion' was not defined and had to be assessed in light of the specific circumstances.

During the last lockdown, whether or not the relevant lease contained a no-access provision, in many situations, landlords and tenants were able to get together to decide what rent and outgoings abatements should apply. For an ADLS Lease this meant determining what the 'fair proportion of rent and outgoings' looked like. In other cases, it may have been difficult for the parties to reach agreement. For this lockdown, we generally expect that any arrangements agreed upon last year are a good starting point for discussions this time around. Where circumstances, or the parties' positions, have changed this may not be feasible.

In our experience, landlords often want to work constructively with tenants in discussing possible rent relief, rather than requiring the tenant to pay full rent when they are unable to, and having to deal with expensive enforcement action, and possible default by a tenant. Tenants are often also keen to engage proactively with their landlords to discuss the options available, prior to ceasing or reducing to pay any rent. In most cases, the most practical way forward is usually early engagement with the other party, to assess what options are within each party's means.

We also suggest the parties explore the government subsidies they may be entitled to and review their business interruption insurance, as this may provide some relief.

Please get in touch with our [property and construction team](#) should you wish to discuss your options under your lease terms.

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