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# IMPACT OF NO ACCESS CLAUSE IN COVID-19 TIMES PART TWO

In May I discussed the impact of *Coffee Culture Franchises Limited v Home Straight Park Trustees Limited* which was the first case to consider clause 27.5 of the ADLS Deed of Lease in relation to the various Covid-19 shutdowns in New Zealand in 2020. Now more cases have come out regarding clause 27.5.

*Mountfort, Mountfort and Foster v Cheam*

The Tenant operated a bakery in Ellerslie. The Tenant's lease stated that there was a fixed increase of the rent of 3.5% every two years on 1 April. When New Zealand went into Alert Level 4 Lockdown on 25 March 2020, the Landlord first claimed that the Tenant must pay the rent in April and that the fixed rental increase applied. The Tenant disagreed and argued that clause 27.5 applied. Eventually the parties agreed on a rental payment plan in June 2020, with the rent slowly being increased each month with the aim being that the Tenant would pay the rental amount per the Lease (which included the fixed increase) from 1 November 2020. The Tenant was consistently late in paying the rent and did not pay the amounts as agreed between April 2020 and October 2020. On 21 October 2020 the property manager sent a letter to the Tenant setting out the arrears and advised that from 1 November 2020 the Tenant was required to pay the rent stated in the lease, which included the fixed increase from 1 April 2020. The Tenant denied that it was in arrears and argued that it thought the parties would meet each month and assess the rental amount to be paid. The rental payment on 1 November 2020 was late and did not take into account the fixed increase that was due on 1 April. Further correspondence between the parties did not resolve the issues. On 17 December 2020 the Landlord issued a Property Law Act (PLA) Notice to the Tenant, stating that the Tenant was in breach of the lease due to the arrears of the rent for October 2020 and November 2020 and the Landlord's legal costs. The PLA Notice expired and the Tenant did not make any of the payments required under the PLA notice. On 23 February 2021, The Landlord attempted to enter the premises which was denied by the Tenant. The Landlord then applied to the court obtain possession of the premises.

*Claims*

The Landlord claimed the Tenant refused to pay the rent as agreed between the parties, the PLA notice had expired without the Tenant remedying the breaches, the lease was accordingly and therefore the Landlord had the right to obtain possession of the premises. The Tenant argued the Landlord could not increase the rent, that it was entitled to monthly rebates of rent under 27.5 due to the ongoing effects of the Covid-19 restrictions and that the Landlord was estopped from claiming that the Lease was cancelled.

*Judgment*

The Court agreed with the Landlord that the language in the Lease regarding the fixed rental increase was clear and that the rent would increase every two years by 3.5%. The Court then turned to the effect of clause 27.5 in relation to the rent due in October and November 2020. The Court acknowledged Landlord's lawyer's submission that it accepted and agreed with *Coffee Culture's* assessment of the word 'access' but did not make any comment on that case's assessment. The Landlord agreed that during Covid-19 alert Levels 4 and 3, the Tenant could not access the premises and therefore clause 27.5 applied. However, the Tenant could access the premises in Covid-19 Alert

levels 1 and 2. in October 2020 Auckland was in level 2 for 7 days, after which Auckland moved back to level 1 for the rest of October and November 2020. The Tenant argued that clause 27.5 should be interpreted widely and consideration should be given to not only access but the effects the various Covid-19 lockdowns at any level had on the trading patterns and its ability to fully conduct its business when its business was restored. The Court disagreed and stated that clause 27.5 was only about access and that clause 27.5 did not apply during October and November 2020. The Court also found that the Tenant did not provide enough evidence to say that the Landlord was estopped from cancelling the lease, especially given it had found for the Landlord in the Tenant's other claims. The Court observed that the Tenant still had not paid any rent when the application was heard and the rental payments did not include the rental increase from 1 April. The Court said it was concerned given that the payment of the rent was an unambiguous legal obligation under the lease. However, failure to pay the rent (and the Court observed that the Tenant did not dispute the amounts owed) were not enough to allow the Landlord to take possession of the premises. The Court granted the Tenant relief against cancellation of the lease subject to conditions including the Tenant paying the rent owed which included the increase of the rent from 1 April, solicitors costs and the Landlord's costs for the application given it had asked for an indulgence.

*Comments*

*Coffee Culture* was decided in the context of a party opposing a statutory demand. One of the main issues in this case was whether clause 27.5 applied in the context of the Covid-19 lockdowns and the Court confirmed this, even if it did not follow the assessment of *Coffee Culture* that access needed to be interpreted widely.

*SHK Trustee Limited v NZDMG Limited*

The Tenant leased a warehouse and office space on two separate leases from the Landlord. On 23 March 2020 NZ moved to Level 3 and on 25 March 2020 NZ moved to level 4. The Tenant last paid the rent on 26 March 2020 for both leases. The Tenant tried to negotiate a reduction in the rent, arguing that clause 27.5 applied as it could not access its premises during Covid-19 Alert levels 4 and 3. The Landlord said there should be a partial reduction for Level 4 but disagreed that any rental reduction should apply during level 3. The parties could not agree on the application of clause 27.5 and negotiations failed. In August 2020, the Landlord served the Tenant notices under section 245 of the Property Law Act ('PLA Notices') due to the rental arrears and did not make any allowance for the various lockdowns. The Tenant did not comply with the PLA Notices which expired and the Landlord cancelled the lease by retaking possession of the premises. The Landlord commenced summary judgment proceedings for the unpaid rent.

*Claims*

The Landlord argued that their summary Judgment application should be granted as the Tenant owed rent from April to September 2020, costs incurred for removal of the equipment and losses suffered due to the unpaid rent and that clause 27.5 did not apply. The Tenant argued the Landlord had not taken into account the application of clause 27.5 during the various lockdowns. The lease was therefore unjustifiably cancelled and sought damages for their losses.

*Judgment*

The Court allowed the Landlord's summary application in part for the rental periods when Auckland was in Covid-19 alert levels 1 and 2, but clause 27.5 applied when Auckland was in Covid-19 alert levels 3 and 4. Therefore it could not grant the summary application in full given that the rent should

have been abated. However the Court also accepted that the PLA Notices were invalid as it claimed the rent in full with no allowance for the rental abatement allowed under clause 27.5. Therefore it was arguable that the Landlord was not entitled to cancel the lease. If this was successfully argued by the Tenant at trial, the Landlord would be found to have breached the Tenant's right to quiet enjoyment under the leases and therefore repudiated the lease, which would allow the Tenant could claim damages. The Court observed that practically the Tenant accepted that the lease was cancelled. But upon reentry by the Landlord, the Tenant's obligation to pay the rent and any associated costs was at an end. Additionally since it was the Landlord's invalid acts that caused the cancellation of the lease, the Landlord could not claim damages and losses after cancellation. The Landlord also had an obligation to mitigate its losses.

*Comments*

This was the first case in which the Landlord was unwilling to agree that clause 27.5 applied during levels 3 and 3– a position many Tenants would recognise. Unluckily for Landlords, this is the third case in which the Court stated that clause 27.5 applied during covid restrictions and this should send a clear message to Landlords that any section 245 notice that does not take this into account will be deemed invalid.

The Court recognised that Landlords also suffered during the lockdowns. However, pursuing Tenants that had no business and no assets did not assist them. Landlords had other ways to pursue unpaid rent such as suing for a determination and obtaining judgment for the amount owed, after which a section 245 PLA notice could be issued. Alternatively Landlords could seek payment of rent for periods when the covid restrictions did not apply. Landlords open themselves up to a valid dispute if the Tenant can show that the section 245 notices can be contested.

It is promising that the Court has unequivocally stated that clause 27.5 applies when the region in question is subject to covid 19 restrictions. Hopefully the next case to consider clause 27.5 will also provide guidelines on what exactly a '*fair proportio*

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