IMPACT OF NO ACCESS CLAUSE IN COVID-19 TIMES

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During the various lockdowns last year, landlords and tenants were grappling with clause 27.5 (no access in an emergency) of the sixth edition of the ADLS Deed of Lease, including if it applied and the amount of the rent and outgoings abatement. Now the first case to consider clause 27.5 in the context of Covid-19 has been decided, providing some much needed guidance.

Coffee Culture Franchises Limited v Home Straight Park Trustees Limited

Coffee Culture operated a café in a multi tenancy building with the anchor tenant being the Inland Revenue Department (IRD. Under the lease Coffee Culture was required to operate the café from 9am to 5pm on each working day to serve the IRD staff and visitors to the IRD offices, not the public generally and it was acknowledged that Coffee Culture's business came from the IIRD staff and foot traffic to the IRD offices. When New Zealand went into Alert Level 2, in theory the tenant could open the café, albeit with some restrictions. However, it refused to pay the rent and Home Straight eventually issued a statutory demand for the rent owed from the date that New Zealand went into Alert Level 2. Home Straight argued that it accepted that clause 27.5 applied during Alert Levels 3 and 4. However from Alert Level 2 onwards Coffee Culture could open the café and therefore should be paying rent. Furthermore, the national state of emergency ended on 13 May 2020, so there was no reason for not opening the café. Coffee Culture argued that there was a substantial dispute as to the amount in the Statutory demand and that clause 27.5 was triggered and should still apply during levels 1 and 2 as IRD had encouraged its staff to work from home (which an email from the property manager confirmed). Accordingly, it did not have access to the premises and therefore the rent should be adjusted.

The Court emphasized that it was only deciding whether there was a substantial dispute as to the rental arrears. Clause 27.5 applied if there is an emergency (and the definition of emergency in the ADLS Deed of Lease included an epidemic) and the tenant is unable to gain access to the premises to fully conduct the tenant's business. *Access* should be considered in the sense that it is not restricted to the company, but the humans associated with it. To operate as a café, the tenant needed access to the premises for it and the staff, and access to customers. If customers cannot access the premises, then the business cannot operate. As IRD advised its staff to work from home (which would be a measure under clause 27.5 to reduce or prevent any hazard), this had a practical effect on its business. Accordingly, clause 27.5 was triggered when New Zealand went into Alert Level 2.
The Court did not go any further, but said that it had outlined the arguments for Coffee Culture to argue. It agreed with Coffee Culture that there was a substantial dispute and set aside the statutory demand.

Our comments

The Court has confirmed that clause 27.5 applies to the lockdowns, citing the definition of emergency in the Deed of Lease. For those tenants whose landlords argued that clause 27.5 did not apply and were not willing to provide rent abatements, this is a welcome (albeit late) decision.
Coffee Culture was able to argue that as it was set up to service the IRD staff and customers. Therefore, to have all staff working from home had a specific impact on its business. However, in any case, the expansion of the term '*access*' will have wider implications for those cafes near office

buildings where workers are working from home more than the office. Without access to customers, a café cannot pay any of its rent and outgoings.

Home Straight Park argued that if there was a dispute as to the rental amount, Coffee Culture should still pay the rent owed and the landlord would refund the required amount after the dispute was resolved, citing a previous case that supported this argument and noting that payment of rent is an obligation under the Lease. The Court disagreed, stating that in its opinion the previous case was wrongly decided. Th**e** Court said that clause 27.5 did not require a tenant whose business had collapsed to pay rent and claim it back as an overpayment. Rather, when clause 27.5 is triggered, it is a rent *re-set,* and a new rent is payable, even if the tenant does not know what that rent is. This point is interesting as landlords and tenants have interpreted the rent abatement under this clause to mean that no rent will be payable during that period of no access, but that the rent as agreed would be paid after the business was able to operate from its premises. It will need to be seen if other courts support this line of thinking.

Conclusion

The case is a welcome confirmation that clause 27.5 applies during lockdowns. Given that partial lockdowns can be implemented at short notice when there is a Covid-19 threat, tenants can be assured that a form of rental abatement will be applied. Moving forward, it will be interesting to see how other judges may interpret the findings in this case.

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