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Dear Colleague

NEW DEVELOPMENT - EPIDEMIC LOCKDOWN & ADLS 6th ED LEASE CLAUSE 27.5

We recently wrote about the strain between commercial landlords and tenants. We drew attention to the ADLS lease clauses 27.5 (fair proportion of rent and outgoings abatement) and 47.1(d)(1)…"epidemic". We have been providing valuation opinion in relation to the *"fair proportion of rent and outgoings [which] shall cease to be payable..."*

Both landlords and tenants would do well to consider an objective basis for the rent adjustment in the form of an independent valuation opinion. We provide opinion with regard to historic valuation concepts of fair value, equitable value and value in use. Our processes are aided by traditional valuation principles and some useful guidance from other rental rebate contexts. For example, in *Zheng Li Trustee Limited and MK Trustee (2013) Limited v Ewan Stuart Henderson*, HCNZ Wellington, 27 July 2015, at [81] and [82], we observe:

- the judgment had regard for both the physical constraints at the premises but also how they were relevant for the particular business operated there; and

- the Judge observed that valuation evidence could have been directed to the issue.

We observe comments from some in the legal fraternity which appear to suppose a 50/50 basis (50% rent abatement), is the right starting point. However, we do not consider that 50% is a reasonable or principled starting point for non-essential businesses during an Alert Level 4 lockdown. When interpreting a lease clause for valuation purposes the balance of the lease should be considered. If we turn, for example, to the partial destruction and no access in emergency clauses (26.1 to 27.6), we should consider other circumstances which could arise under these clauses.

For example, if an event occurred whereby there were significant damage making half of the premises unusable, but leaving half of the premises useable, a starting point might be a 50% abatement. There might be circumstances where an adjustment to that would be warranted such as surplus space or critical retail frontage etc. If 50% of the premises are not useable and 50% (of an equivalent value) is useable then surely a 50% starting point would be reasonable for that situation.

It seems quite unreasonable, by contrast, to say that a 50% abatement should then apply to circumstances where a leased premises cannot be accessed. Lawyers should be especially cautious of appearing to provide valuation advice (consider the liability risk). Valuers are available to do that.

It would seem then that where no access is available the starting point should be 100% abatement but necessarily adjusted for the types of benefits remaining to the tenant such as storage amenity, any existing signage and advertising, or perhaps a server or if the property is used for any essential work such as payroll processing or a proportion of essential work to the business. For some tenants other factors would apply. Under the proposed Alert Level 3 abatement is likely to be a more subtle percentage for many businesses.

The adjustment must be a proportion of the sitting rent and as such we doubt that 0% or 100% abatement would be appropriate in the event the clause is actually triggered. We also point out that ADLS contracts and clauses are usually written with a keen eye for balance. Therefore, it is unlikely that a "fair" proportion would result in a windfall gain to either party.

We appreciate that some matters need to be dealt with urgently, whilst other matters will be dealt with in due course and following temporary without prejudice allowances (perhaps relating to larger scale arrangements). We have rapidly built data sets and resources in this context and also have a wealth of experience and valuation principles to deal with these circumstances. If parties are having difficulty resolving disputes in an efficient manner, independent valuation advice is a useful means to an expedient resolution.

Valuation evidence can usefully inform negotiation, mediation, arbitration or court hearings. As the comments in *Zheng Li Trustee* indicate, this is a valuation issue and can be informed with valuation processes.

We are underway with such work and are presently allowing a modest three hour fee for an opinion letter for single occupancy small business tenancies. This can allow for all known types of lockdown restriction with variation of rebate rates for tenant business types and various alert level restrictions respectively. We are also available for instruction nationwide and on larger portfolios where more time will be required. We can also consider other lease contexts. This is a developing situation with impending Property Law Act 2007 changes.

We require provision of some information (such as the lease, invoices etc.). We can provide an opinion letter on a desktop or inspection basis by using established valuation principles to give a concise and qualified valuation opinion to meet the needs of parties in the current market.

Many landlords would not want vacancies and many tenants would want some path to holding their position for the time being. The lease mechanism and objective valuation advice appear to be both a principled and pragmatic way of achieving this. Please feel welcome to contact us if we can assist you or your clients.

Yours faithfully
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