

The government subsidised arbitration and mediation service for commercial lease disputes due to COVID-19 restrictions

By Maria Cole

As all New Zealanders know, the lockdown periods necessitated by the COVID-19 crisis have had a considerable impact on the ability of businesses in New Zealand to continue to function. For most businesses, normal trade has been turned on its head. Many have struggled to meet day-to-day running costs, of which rental and outgoings due under commercial leases are often a major component. The flow-on of this is that many affected landlords also struggled to meet their financing obligations.

Although commercial leases in New Zealand make provision for foreseen emergencies, the unforeseen nature of the COVID-19 lockdowns went beyond the scope of those clauses. As a consequence, leases didn't provide struggling parties with an avenue to remedy the problems they were facing.

In May 2020, the Government responded by amending the Property Law Act 2007. It extended the notice period before cancelling a lease because of overdue rent from 10 working days to 30 working days. The notice period a lender must give before taking possession of, or selling, a mortgaged property was also increased. These amendments are temporary and currently expire on 23 December 2020. While these changes allowed some scope for relief for businesses, they didn't provide a platform for tenants of commercial leases to address the specific problems around access to their premises that the lockdowns had created.

Leases in New Zealand and states of emergency

Over the last decade, a declared state of emergency that has led to normal business operations being halted has occurred around eight times

throughout New Zealand due to earthquake, fire, or flooding. The longest was after the Christchurch 2011 earthquakes, when tenants were unable to access leased commercial property in the red zone over a 66-day declared state of emergency period. Leases in place at that time were inadequate to deal with this.

The Christchurch earthquakes led to the Auckland District Law Society (ADLS) commercial lease form being amended in 2012 to include clause 27.5: the no access in an emergency clause. Clause 27.5 provides that, where a tenant is:

...unable to gain access to the premises to fully conduct the tenant's business from the premises for reasons of public safety... or the need to prevent, reduce or overcome any hazard, harm or loss that may be associated with the emergency ... 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 to fully conduct the Tenant's business from the premises until the inability ceases.

An 'emergency' is defined in clause 47.1 as including an epidemic. For tenants with the 2012



ADLS commercial lease, these provisions provided a welcome ability to seek relief and reduce outgoings over Level 4 and 3 Lockdown periods. However, not every commercial tenant has this lease in place and, even where they do, questions around access and establishing what a *fair proportion of the rent and outgoings* are have presented their own issues.

The Scheme

On 30 July 2020, the Government announced its intention to address these issues through a non-legislative scheme which would provide a subsidised arbitration and mediation service (the Scheme) to eligible parties with a qualifying dispute. Participation in the Scheme is entirely voluntary, even for parties to ADLS leases which include clause 27.5. Parties must agree to enter into these processes in order to access the Scheme. The Ministry of Justice contracted three dispute resolution suppliers to provide the services under the Scheme, including NZDRC. There are differences in the processes and services provided by the three suppliers, including that NZDRC is currently the only supplier offering fully subsidised/funded arbitration under the Scheme for all cases (under the Scheme, suppliers are entitled to charge eligible parties an additional \$2,000.00 over and above the government subsidy for arbitration – the fee for mediation is fixed).

Accessing the Scheme

Parties to a dispute will be eligible to access the Scheme if:

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1. the dispute is a Qualifying Dispute;
2. at least one of the parties to the Qualifying Dispute meets the eligibility criteria; and
3. the applicants have not previously accessed subsidised mediation or arbitration services with a supplier contracted to the Ministry of Justice in respect of the Qualifying Dispute in question.

A dispute is a Qualifying Dispute if:

1. it is about the payment of rent and outgoings where the lessee to the lease has experiences a material loss of revenue during the Lockdown Period because of government restrictions put in place to combat COVID-19; and
2. the payment of rent and outgoings during the relevant Lockdown Period has not been the subject of an arbitral award between the parties to the dispute.

A business will be an Eligible Party for the purposes of the Scheme if:

1. the business is New Zealand based; and
2. it has 20 or fewer full-time equivalent staff:
 - a. in the case of the lessee, per lease site; or
 - b. in the case of the lessor, in total.

Arbitration or Mediation?

Eligible parties can only access fully subsidised mediation or arbitration (not both) under the Scheme. Accordingly, to the extent parties choose to mediate, this means they will be unable to access the subsidised arbitration service in the event of failure to settle at mediation. However, they may still access NZDRC's private low cost and fixed fee arbitration scheme if they agree to do so. This is discussed further below.

Mediation

If the parties elect to have their dispute mediated, enabling the parties to have a facilitated discussion and reach an agreement between themselves, any settlement agreement will be signed by all parties, making it a legally binding and enforceable order. There does not need to be a rent abatement clause in the lease agreement in order to access the subsidised mediation service under the Scheme. Mediations under the Scheme conducted through NZDRC will be controlled by its bespoke COVID-19 Commercial Lease Mediation Rules, and Commercial Lease Dispute Mediation Protocol. These provide a clear framework for parties entering into mediation, giving structure and certainty to the process.

Appointments will be provided within 1-2 business days of application and the mediation will typically take half-a-day (some may require longer). Prior to mediation, each party will provide the mediator and every other party with an analysis of the dispute, which identifies both the quantum and legal issues in dispute. These are provided at least three working days prior to mediation, to give each party and the mediator an opportunity to become better apprised with the issues at hand. All mediation is to be conducted through videoconference. Support is available to parties who may be new to this software, as well as for technical assistance during the mediation.

Arbitration

As there is no general right at law for rent reduction for a tenant in the event that the tenant cannot access its leased premises in an emergency, parties will need to have a lease agreement that includes the provisions in clause 27.5 no access in emergency, or a similar provision, to found an arbitration claim for rent abatement under the Scheme or otherwise.

Arbitration provides parties in a commercial lease dispute the opportunity to put their issues before an experienced independent arbitrator. The arbitrator will prepare a confidential binding

arbitral award which is enforceable by action or upon application for entry of the award as a judgement of the High Court. Arbitration under the Scheme will be conducted in accordance with NZDRC's COVID-19 Commercial Lease Arbitration Rules. This provides for an on the papers procedure, which means parties do not have to attending a hearing in person, resulting in a final award being issued within 45 days or less from the commencement date.

In reaching a decision, the arbitrator is limited to the question of whether the lessee is entitled to any reduction in the payment of rent and outgoings where the lessee has experienced a material loss of revenue during a Lockdown Period because of government restrictions put in place to combat COVID-19.

While the arbitration fee is fully met by the Ministry of Justice, each party will bear their own legal/expert costs if they incur any.

Relevant Considerations

Any provider of arbitration or mediation services under the Scheme is required to consider the interests of both the lessee and the lessor in determining a fair reduction of rent and outgoings. Relevant considerations to assist a commercially fair outcome may include:

1. The respective financial positions of the parties,
2. Did either party have any applicable insurance cover?
3. Did the lessee have physical access to the premises, either in full or in part?
4. Was the lessee still able to generate income from their business?
5. Did the lessee obtain benefits from the premises, for example:
 - a. storage or refrigeration of stock or having secure premises for important/valuable equipment; or

b. having virtual access to enable them to continue to operate their business off-site by using servers located on the premises; or
c. maintaining an IT system in a suitably air-conditioned environment.

6. Did the lessor have mortgage/finance obligations to meet for the premises?
7. Did the lessee access the government wage subsidies?
8. Did the parties qualify for government cashflow incentives?
9. What essential outgoings were still being paid by the lessor for the premises, for example rates, insurance, essential maintenance?

What if I am not eligible?

For those non-eligible parties who have rent relief disputes and wish to access mediation or arbitration services, NZDRC offers a low cost and fixed-fee service. This service was launched by NZDRC at the start of New Zealand's first COVID-19 level 4 lockdown.

Additionally, NZDRC provides arbitration and mediation services for parties who have other disputes regarding commercial leases. This comprehensive service may be accessed for any commercial lease dispute, including disputes of rent renewals, reinstatement and repair of premises, replacement and maintenance of the

property, premises, fixtures and fittings.

Final notes

The Scheme aims to provide relief to small and medium sized businesses which have suffered significant hardship because of the COVID-19 level 3 and 4 lockdowns. Parties can access a new, fully funded dispute resolution process for every lockdown period*. The subsidised Scheme will be open to new applications until 31 March 2021. After this date, the alternative avenues to settlement available under NZDRC's special COVID-19 low cost and fixed fee arbitration and mediation service for rent relief disputes will continue to be available. For more information about the Scheme, eligibility and options for non-eligible parties please contact the NZDRC Registry staff or go to its website.

** This will be subject to the terms of any prior agreement(s) reached between the parties that provide otherwise.*

ABOUT THE AUTHOR



Maria Cole

Knowledge Manager

NZDRC is recognised and respected as the country's most experienced and trusted provider of private commercial arbitration and mediation services and has been delivering commercial mediation and arbitration (including expedited arbitration) services under its institutional rules for over 30 years



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