**A picture containing calendar

Description automatically generated**

**Guide: Lease discussion & :landlord letter template – COVID-19**

[PLEASE NOTE. Restaurant Association members are strongly advised to seek guidance from the helpline team on 0800 737 827 if you have any questions. The Restaurant Association has taken all reasonable care to ensure that the information materials contained on our website are true and correct at the time of publication including this resource. The information provided is general information only and is not intended to constitute legal advice. Therefore, the Restaurant Association accepts no responsibility for any loss, errors or omissions which may arise pertaining to such reliance.]

**March 2022**

This guideline provides some general advice on leasing arrangements, as well as a sample letter template (on page 5) that members may adapt for use if approaching your landlord to discuss relief under the current lease arrangements.

Leases come in many shapes and sizes. The below is general advice only – the terms of each lease need to be carefully reviewed and considered. The general advice is aimed at tenants but it is also applicable to landlords.

As businesses continue to negotiate the different lockdown levels and regulations it is important to keep in touch with landlords to attempt to come to arrangements that mean the business can be sustained and that the landlord can live with.

**General**

The starting point is the tenant has signed a contract and the tenant is liable for the performance of the terms of the contract. That includes the payment of rent and outgoings, and maintenance and repair obligations.

There is no right to terminate the lease early unless the lease wording permits it, meaning the tenant must perform its obligations for the duration of the lease term. The lease term will end the day before the next lease renewal date, or if no renewal is exercised/available, on the expiry date. If a tenant is staying in the premises after the lease has expired or after a lease renewal date and the renewal was not exercised, the tenant is likely to be “holding over” which means the either the landlord or the tenant may cancel the lease on giving 1 month or 20 working days’ notice.

If the tenant walks away from the lease/premises without any right to do so, the tenant remains fully liable, and potentially so does any person who has guaranteed the lease. The landlord is not required to do anything. The landlord can sit and expect that the rent and outgoings and other provisions of the lease will be performed for the duration of the term.

If the landlord chooses to cancel the lease because the tenant has not performed its obligations, the landlord would then be under an obligation to mitigate the damages/losses. To the extent that the landlord is unsuccessful in mitigating loss, then the tenant remains liable for the landlord’s losses. The landlord must serve formal notice of its intention to cancel the lease because of a tenant default, and give the tenant at least 10 working days to remedy the default before actually cancelling.

Separately, any guarantor is liable for the performance of the tenant’s obligations under the lease, subject to the terms of any guarantee and limited by any limitation expressed in the guarantee.

The landlord cannot come onto the premises and take the tenants property in lieu of rent or other tenant payments that have not been made. The right to do that was abolished years ago.

**Government Imposed Lock out**

The later ADLS leases contain a clause that applies if due to safety reasons or the need to prevent any hazard the tenant is unable to gain access to the building because of a prohibited or restricted access cordon or prohibition on occupation by any competent authority. If this clause applies a fair proportion of the rent and outgoings cease to be payable for the period the tenant does not have access. If the lock out is longer than the time specified in the lease the tenant may be able to cancel the lease. This clause is only in some leases.

In October 2021, the Government amended the Property Law Act to imply a similar ‘no access in an emergency clause’ into commercial leases which do not already provide for adjusted rent payment terms during an epidemic emergency and where the landlord and tenant had not already come to some rent relief agreement.

**Dispute Resolution if there has been a Breach of the Agreement**

You may believe that the Landlord has breached a term of the Lease. If this occurs, all leases will provide for dispute resolution. The standard ADLS Lease provides for Arbitration as does the implied term introduced in the Covid legislation last year.

**Arbitration** is a legal process governed by the Arbitration Act 1996 where an arbitrator considers the evidence and decides matters in dispute according to the law. The process involves exchanging submissions and evidence from each party, which in these types of disputes may be evidence from accountants, bankers, or financial advisers. This would assist the arbitrator to decide whether the terms of the lease have been complied with.

Both parties must agree to participate and the cost of the Arbitration is generally shared. The arbitrator’s decision is binding on the parties and is enforceable in the court.

**Mediation** is a consensual, confidential, and informal negotiation process where parties to a dispute use the services of a skilled and independent mediator to help them to negotiate a mutually acceptable settlement that meets their interests and needs but doesn’t have to conform to strict legal rights.

The primary objective of mediation is to enable parties to negotiate and resolve disputes promptly, cost-effectively and confidentially rather than to have a decision imposed upon them by a judge or an arbitrator.

In the context of commercial lease disputes, there is significant merit in the parties mediating as this allows them to negotiate a flexible, creative and mutually acceptable outcome that meets their various short- and long-term needs and interests.

A successful mediated resolution results in a written settlement agreement that records the agreed outcome and is signed by all parties. Any settlement agreement will be legally binding on the parties, and any party may enforce the terms of the settlement agreement through the court. Settling parties will also be encouraged to reach an agreement about a framework for addressing future, similar, issues (eg consequences of any future COVID-related restrictions that the government may impose).

**Requesting Relief - Commercial Considerations**

Most landlords will realise that the pandemic has been a unique and devastating event for everyone, and especially for those in the hospitality sector. They should also appreciate that chasing a tenant and guarantor for money is expensive and there is no guarantee there will be any money at the end.

There are potentially options other than “walking away”. This is a fairly drastic step, so the decision will depend on individual circumstances, including consideration of what the terms of the lease may or may not allow.

The landlord may agree to a reduced rent or rent holiday for a period as finding a new tenant is likely to be difficult and expensive. Also, not having a tenant may diminish the value of the premises so reaching agreement with the tenant on terms that allows the tenant to survive may be attractive to the landlord.

Where a reasonable proposal can be put forward with evidence to support it, it may be possible to negotiate temporary relief, including the potential for a reduction in rent or opex, to ensure that the term of the lease can be completed. While you may be able to advance this with the landlord in the first instance, we recommend that you seek legal advice and/or representation.

Perhaps unlikely to be useful in the current environment, consider whether the premises can be assigned or sublet. To achieve an assignment or subleasing you may have to subsidise the rent for the assignee or sub lessee.

You may be able to buy your way out of the lease (a “surrender” of the lease). The landlord may accept a lump sum payment to allow the tenant to get out of the lease earlier than the expiry date.

The landlord will want to avoid uncertainty so talk to the landlord, but we suggest you do so understanding what your rights and obligations are first.

**Communication**

It is always best to be responsive and communicative with your landlord. Putting off difficult discussions can result in increased frustration and a resulting lack of cooperation from the landlord.

Know what relief, if any, is provided by your lease so that you have a firm basis for your request.

Be aware that any government support that you have had is available publicly and it is likely that your landlord has accessed this information and is aware of how much Resurgence Support Payment (RSP) received last year or more recently, any Covid Support Package (CSP) you have received. Since the purpose of the support has been to help businesses with fixed costs, including rent, you may find that your landlord may feel some entitlement to this.

Set out the impact of the last few months in front of your landlord - a simple spreadsheet can be very effective showing week by week:

● Sales

● Variable Costs

○ Wages (showing any Leave Support Scheme as well)

○ Materials cost

○ Power

○ Advertising etc

● Fixed Costs

○ Rental of equipment

○ Service contracts

○ Licenses

○ Telephone/internet

○ Any debt servicing

If you can give some pre-Omicron comparative revenue figures to give context your landlord should be able to see the extent to which your revenues have been affected, while your fixed costs remain the same, and they are more likely to understand that you may be simply unable to meet the lease payments.

Make sure that you keep very accurate records of any communications with the landlord.

**Use the letter template on the following page to instigate your discussions with your landlord.**

[Your letterhead]

[Landlord] [Landlord’s address]

By email: [landlord’s email]

[Date]

**Request to discuss lease**

Dear Mr/ Mrs [landlord]

We are writing to you about the lease of your property at the [full address – including unit number where applicable].

You will appreciate that the ongoing effects of Covid-19 over the past two years now has placed our business in serious difficulties. Our business has suffered a huge downturn in [customers, sales, turnover, revenue – use whatever is appropriate noting you may be asked for evidence to support this].

The business has been massively affected in the short term, and perhaps for the next few months - and due to the environment in which we have traded over the past two years we have no reserves on which to draw.

The extent of our loss is uncertain but we can say that our average weekly turnover for [earlier period e.g. feb 2021, or March 2021 or the period after which we came out of lockdown last year – demonstrate revenue drop] was approximately [amount], and the average weekly turnover for the past two weeks was approximately [amount]. [Add in any other relevant details about change to trading patterns or position]. This is obviously causing us a lot of stress and worry.

We have been a tenant at your property for [period] and we have been reliable with our rent payments to date. [Amend and/or add any other details that show you have been a good tenant.]

We really want to continue in business, support our staff using the Government subsidies as much we can, and trade through this so that we can continue to be a good tenant.

In these extremely tough times, we would like to [pick one option: option 1 – delete if not used: talk with you to ask whether you could agree to an arrangement about the lease until business returns to normal] or [option 2 – delete if not used: request a rent holiday for the next X months] or [option 3 – delete if not used: request a x% reduction in rent for the next y months]. If you require further information, we would be happy to meet with you or talk over the phone.

We very much appreciated the relief that you were able to extend over the lockdowns and we know that this may not be an easy time for you either. Hopefully, if we are all flexible and work together we can get through this in the best possible shape. Just so we know, can you please come back to me by [date – suggest 3 working days]. Thank you for your consideration.

Yours sincerely,

[Name]

[Business name]

[Contact number]

*Copyright © 2022 Restaurant Association of New Zealand Inc. All rights reserved. No individual, party, entity is permitted to share, adapt or reuse this work without the consent of the Restaurant Association of New Zealand Inc.*