

Property Law (Leases Affected by Covid-19 Outbreak) Amendment Bill

Applies from 4 June 2020 and involves an element of retrospectivity as it is not yet enacted. Ends 6 months after enactment (i.e. applies for slightly longer than 6 months.). The application is only to small firms where the lessor and lessee both have no more than 20 full-time 'personnel' (see below).

Provides for leases to contain an implied covenant relating to rent (with any conflicting implied covenant having no effect) if:

- A lessor is seeking to cancel a lease
- The lessee and the lessor are both based in New Zealand and neither has more than 20 full-time equivalent personnel – in the case of the lessee, personnel based on the leased premises.
Apart from overseas persons or an overseas person's associate as defined in the Overseas Investment Act (unless an exemption applies), 'personnel' also covers agents, employees, contractors or the lessor's or lessee's management (a wide definition). It excludes volunteers, clients or customers or other recipients of the lessor's or lessee's goods and services.
- There is no pre-commencement (pre 4 June) rent or outgoings variation agreement in place (made for reasons that include, for example, the effects of official Covid-19 requirements on the lessee's income. A pre-commencement variation may, but need not, be made under any terms of the lease relating to agreements about what rent, applicable outgoings or both are payable for the rental period.

The implied covenant will be available if:

- The lessee suffers a 'material' (more than insignificant or minor) loss of income for a rental period of which some or all is in the period from 4 June or at any time before it, or in both, and
- Official Covid-19 requirements prevent or prevented the lessee, in any of those periods, from fully conducting his or her business,
- Whether or not the lessee was unable to occupy all or any part of the leased premises.

The implied covenant requires:

- The lessee to pay a fair proportion of the rent and any contribution to outgoings otherwise payable for the rental period, and
- Agreement on what is a fair proportion - which may be all or any of:
 - No rent, no outgoings or both for a rental period
 - Reduced rent, outgoings or both for a rental period
 - Unchanged rent, outgoings or both for a rental period
 - The deferral or cancellation of scheduled rent, outgoings increases or both for a rental period meaning they are no longer payable for that period.

A fair proportion agreement doesn't prevent agreement to other variations, e.g.

- When the lessee will pay the rent, outgoings for a rental period, or both
- Subleasing

- The duration of the lease

Factors to be considered in determining a fair proportion are:

- The lessor's/lessee's and any other relevant party's financial position, including mortgage obligations, available financial support, revenue and profit levels of recent years, losses of income because of or including the effects of Covid-19 official requirements, their ability to survive financially the effects of official Covid-19 requirements
- The difference in size and resources between the lessor/lessee and any other relevant party.

Relevant party means: a sublessee, a lessor under a superior lease, a lessor's/lessee's parent company or any other reasonably relevant party.

If, either before or during the period from 4 June a lessor, inconsistently with a lease containing the implied covenant, applied or applies to cancel a lease because the rent was not paid, the lessor's action will be taken not to comply with the sections of the principal Act that otherwise allow this to happen. Enforcement action of this kind will be 'inconsistent' if:

- No rent or outgoings' variation was agreed pre 4 June (a 'pre-commencement variation')
- The right to cancel was exercised because of failure to pay the rent under the lease, and
- The action was taken before a fair proportion was agreed under the implied covenant.

The above will not affect:

- The protection provided to anyone who buys a mortgaged property from a mortgagee or receiver, or
- Provision made in the case of the transfer of an estate or interest in land for title by registration under the Land Transfer Act, or
- Any legislation that protects someone who, in good faith, acquires property for valuable consideration

If a proceeding commenced before or after 4 June has not been finally determined, any relief granted (e.g. on an application to cancel a lease or an order for possession of land) must not be inconsistent with the implied covenant the lease will temporarily contain if the legislation applies to it.

Implied covenant disputes go to arbitration under the Arbitration Act 1996.

The implied covenant provision and related provisions are repealed immediately after the expiry of the 6-month period from the Act coming into force but will still apply to:

- A lease containing the implied covenant immediately before the repeal
- Lessor and lessee agreements made under the implied covenant before or after the repeal

- A dispute arising under an implied covenant e.g. a dispute referred to arbitration before or after the repeal or otherwise before a court, tribunal or person acting judicially.