

COVID-19 – COMMERCIAL LEASES

Resolving rent abatement disputes

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IT IS NOW OVER 30 DAYS AFTER many disputes have arisen between landlords and tenants as to the meaning of 'fair proportion' for the purposes of rent abatement under clause 27.5 of the Auckland District Law Society Inc (Sixth Edition) 2012 (ADLS Lease). Consequently, such parties are now faced with having their disputes formally resolved pursuant to clause 43 of that lease. This article looks at the options and issues arising.

Jurisdiction

The starting point is that the courts do not have jurisdiction to determine disputes under the ADLS lease. This is because of the arbitration clause in the ADLS Lease displaces the Court's jurisdiction by prescribing a negotiation-arbitration mechanism instead. If a party attempts to avoid these processes and instead files proceedings in the District or High Court, the Court is likely to find that it does not have jurisdiction to determine the dispute.

One important qualification to this is that the parties are generally free to agree to modify the arbitration clause or come to an alternative agreement around suitable dispute resolution at any time. For example, they can agree that the dispute be submitted to the High Court. Any variation or agreement about dispute resolution should be made in writing and signed by the parties to avoid any later dispute about the appropriate dispute resolution procedures.

Under the standard ADLS Lease, the available dispute resolution mechanisms are:

1. Negotiation and/or mediation



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2. Arbitration

3. Disputes Tribunal (necessary for small disputes).

Negotiation/mediation

The arbitration clause provides that, in the first instance, the parties must endeavour to resolve any dispute or difference by agreement or by mediation. A party cannot bring a claim in arbitration until 30 days have passed since the dispute or difference arose.

If negotiations are unsuccessful, attending mediation during those first 30 days may assist. There is no prescribed process for mediation, except that the parties must agree to the process. The parties could agree to appoint a particular individual as mediator or alternatively could come to an ad hoc agreement to fast-track the mediation process. Mediation is likely to be the least expensive and time-consuming dispute resolution method. Mediation is also a suitable dispute resolution method where the parties would like to amicably resolve the dispute to preserve their relationship, as is often imperative in long-term lease situations.

Arbitration

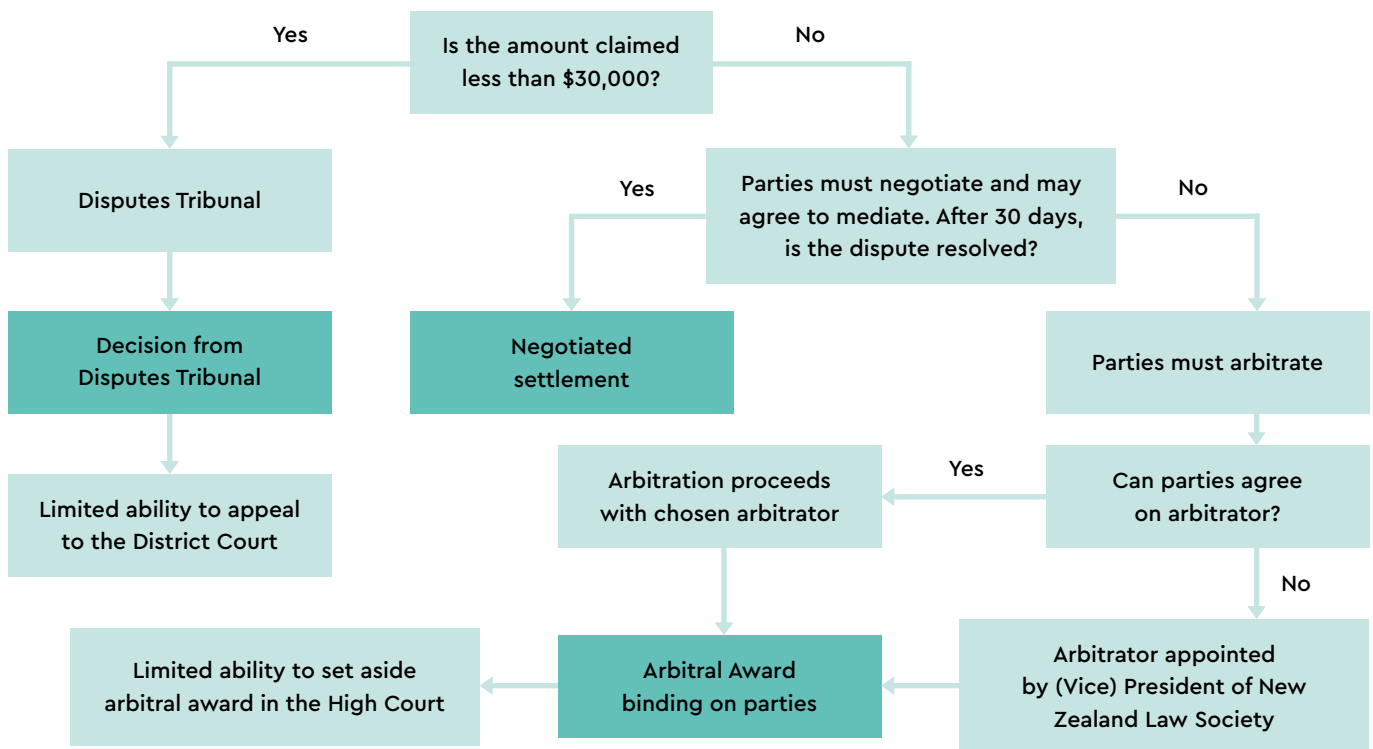
If negotiation/mediation has not been successful, the ADLS Lease requires the parties to submit their dispute to arbitration. This step only arises if they parties have been unable to reach an agreement within the first 30 days of the dispute – that is, 30 days from the date the parties began discussing how much rent ought to be paid/abated.

Arbitration is essentially a 'private court'. One arbitrator will conduct the arbitration in accordance to the Arbitration Act 1996, which lays out the procedural rules to be followed by the arbitrator. If the parties are unable to agree on the arbitrator, one shall be appointed by the President or Vice President of the New Zealand Law Society. This appointment is binding on the parties and cannot be appealed.

The purpose of arbitration is to reach a determination as to the appropriate rent abatement. The arbitrator will determine the dispute according to New Zealand law. The award of the arbitrator is binding on the parties. There are only very limited grounds for the High Court to set aside an arbitral award, for example where one party was unable to properly present its case.

Any dispute about a fair discount is well-suited to arbitration. Arbitration is faster and more flexible

Standard Dispute Resolution Process under ADLS Lease



than litigation in Court. Arbitration is likely to be more expensive than mediation, but there is room for the parties to agree to simpler (and cheaper) procedures for arbitration. Further, the parties may also appoint an arbitrator with specialist knowledge of the regional commercial property market. As a ‘private court’, the outcome of arbitration will remain between the parties and there will not be a publicly available judgment as is the case with litigation. The flipside is that arbitral decisions do not produce binding case law to guide future cases.

Note that arbitration will not prevent the landlord, under an ADLS Lease, from taking proceedings for recovery of rent or other money that is payable, or from exercising the rights and remedies in the event of default as prescribed in subclause 28.1 (e.g. if the tenant has become insolvent).

Disputes Tribunal

If the amount in dispute is less than \$30,000, the arbitration clause in the ADLS Lease does not apply. Instead, the dispute should be submitted to the Disputes Tribunal. The parties cannot contract out of the jurisdiction of the Disputes Tribunal for claims up to \$30,000. Where the dispute is within the jurisdiction of the Disputes Tribunal, the dispute may be submitted to the Tribunal at any time (the parties do not need to have attempted to resolve the dispute for 30 days first). As a result, the

Disputes Tribunal is a quick way to reach a binding resolution to the dispute.

The Disputes Tribunal is more flexible than Court. The Tribunal will attempt to assist the parties to negotiate an agreed settlement. Where this is not possible, the Tribunal will determine the dispute and issue a determination. The Tribunal must have regard for the law but is not bound to give effect to strict legal rights or obligations. It may apply a more general, fairness standard in reaching its decisions, and has powers to, for example, appoint an investigator to assist it to determine key facts. Lawyers are not allowed to appear in the Disputes Tribunal unless they are a party to the dispute. The decision of the Disputes Tribunal is binding on the parties. There are only limited grounds for rehearing in the Disputes Tribunal, and appeals to the District Court are only allowed where a referee or

investigator acted in a way that unfairly prejudiced one party.

Conclusion

In summary, the ADLS does not prescribe what a “fair proportion” of rent and outgoings is under the “no access in emergency” clause. Where the parties are unable to agree about what is a “fair proportion” to be discounted from the rent and outgoings, the parties must use the dispute resolution machinery prescribed in the ADLS Lease. Because of the arbitration clause in the ADLS Lease, the parties will generally not be able to step to the District or High Courts. However, for smaller cases, the parties must submit the dispute to the Disputes Tribunal. ■

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