



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2020] NZDT 1318

APPLICANT **JC and QN**
 As Trustees of the JCT Trust

RESPONDENT **GCQ Incorporated**

The Tribunal orders:

1. GCQ Incorporated is to pay JC and QN (as trustees of the JCT Trust) \$2,129.43 by Wednesday 16 December 2020.

Reasons

2. The claim relates to what is a fair reduction for rent during the Level 4 lockdown.
3. The JCT Trust (Trust) (represented at the hearing by JC) is claiming \$7,363.70 being:
 - a. \$2,129.43 for balance of rental they say they are owed during lockdown (based on a 20% reduction in rent which takes into account the rent already paid at 25%).
 - b. \$82.27 (penalty interest).
 - c. \$5,152.00 legal costs.
4. Mr Kevin Hague representing GCQ Incorporated (GCQ) says:
 - a. The Tribunal does not have jurisdiction to hear the claim.
 - b. The interpretation of clause 27.5 of the Auckland District Law Society lease (ADLS lease) means no rent is payable during the period of no access.
 - c. The costs claimed are unreasonable.
5. The issues to be determined are:
 - a. Does the Tribunal have jurisdiction to hear the claim?
 - b. Does clause 27.5 of the ADLS lease mean no rent is payable during the period of no access? If rent is payable, what is a reasonable reduction?
 - c. Can the Trust recover the legal costs and penalty interest?

Does the Tribunal have jurisdiction to hear the claim?

6. Mr Kevin Hague representing GCQ Incorporated says the Disputes Tribunal has no jurisdiction to hear the claim because the ADLS lease contains an arbitration clause.
7. However, s16(1) of the Disputes Tribunal Act 1988 provides that any provision in an agreement to exclude or limit the right of a person to invoke the Tribunal's jurisdiction. More specifically s 16 (2)(a) says that without limiting the generality of s 16(1) "...the Tribunal shall have jurisdiction in respect of a claim notwithstanding any agreement relating to that claim the provides for ...the submission to arbitration of any dispute or difference..."
8. Therefore, the Tribunal has jurisdiction to hear this claim.

Does clause 27.5 of the ADLS lease mean no rent is payable during the period of no access? If rent is payable, what is a reasonable reduction?

9. The "no access in emergency clause" (clause 27.5) was introduced in the Sixth edition of the ADLS Lease released in November 2012 as part of a significant revision of the lease. It was inserted as a result of the Canterbury earthquakes and it was decided to extend it to other emergencies.
10. Mr Hague says clause 27.5 says "no access" means a 100% reduction in rent at Level 4.
11. Clause 27.5 says in part:

If there is an emergency and the Tenant is unable to gain access to the premises to fully conduct the Tenant's business from the premises

...

then a fair proportion of the rent ...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.

12. The key components of clause 27.5 are:

If there is an emergency and the tenant is unable to gain access to the premises to fully conduct the tenant's business ...

13. The result of clause 27.5 is that:

a fair proportion of the rent and outgoings shall cease to be payable...

14. At level 4 there was a "national state of emergency" and no one could gain access. At Level 3 would be still an emergency for the purposes of clause 27.5 and some can gain access.
15. At level 4 the majority of business would not be able to fully conduct its business. However, this would depend on the type of business. For example, some business could fully operate by having people working from home.
16. For the reasons above Level 4 does not mean a 100% reduction in rent.
17. The question then becomes (in this case) what is a fair proportion of rent that should be reduced (assuming key components are met). ADLS intentionally drafted clause 27.5 like so. ADLS say in an April 2020 release:

It was recognised that each situation would be different, and it was not workable for a precedent to have a universal solution. The intention was to maintain fairness for the parties.

18. Where there is very little disruption to the tenant's income, the level of deduction will be small. Where the tenant loses its all income, the deduction will be high (not necessarily 100%).

19. I asked Mr Hague about GCQ's tenancy. He said:

- a. Four people worked at the premises at the relevant time.
- b. The premises are 110m² comprising a large office, a small office, bathroom facilities and a kitchenette in the area where the large office is.
- c. The equipment at the premises includes office furniture, IT equipment, posters, leaflets, magazines, binoculars and monitoring equipment.
- d. Various items of equipment (mainly laptops) were removed so people could work from home.
- e. One staff member in the Auckland office works 100% on the website and social media.
- f. Two other members are out and about often doing regional advocacy work, one being out of the office 60% to 70% of the time and the other is more office based say 70% of the time.
- g. Staff continued to work during lockdown to the extent they could. The fourth person worked more on the administrative aspects. However, that person found it difficult to do a lot during lockdown because of his living circumstances.

20. Given the above (in particular that some work (and bearing in mind the type of work)) could be done from homes the 20% reduction in rent appears, on balance, to a fair proportion of rent that should be reduced in this case.

Can the Trust recover the legal costs and penalty interest?

Legal costs

21. Under section 43(1) of the Disputes Tribunal Act 1988 (Act) costs cannot be awarded by the Tribunal.

22. However, if a contract provides for costs then reasonable costs can be awarded despite section 43(1) of the Act (as that is agreed in contract).

23. Clause 6.1 of the ADLS lease says:

Each party will pay their own costs of the negotiation and preparation of this lease and any deed recording a rent review or renewal. The Tenant shall pay the Landlord's reasonable costs in considering any request by the Tenant for the Landlord's consent to any matter contemplated by this lease, and the Landlord's legal costs (as between lawyer and client) of and incidental to the enforcement of the Landlord's rights remedies and powers under this lease. *[emphasis added]*

24. There are three parts of the "costs" clause (clause 6.1):

- a. *That the parties will pay their own costs for negotiating and preparing the lease and any rent review or renewal of lease.* Any costs relating to the negotiations in relation to the reduction of rent during Covid 19 is not captured here.
- b. *That the tenant pays the landlord reasonable costs for considering a request by the tenant for the landlord's consent to any matter contemplated by the lease.* What is contemplated in this part are requests by tenant for the landlord's consent for the usual things like assignments and subleases. This landlord in considering whether or not to give consent might require information about the assignee or subtenant but that would be at the cost (usually) of the assignee or subtenant. Negotiating a reduction in rent is not envisaged here – it's not something that requires the landlord's consent rather it requires agreement between the landlord and tenant. Any legal costs relating to the negotiations do not fall under this part.
- c. *That the tenant pays the landlord's costs relating to enforcement under the lease.* The reduction of rent during Covid 19 is not an enforcement matter and therefore costs relating to this issue does not apply here.

25. For the reasons above the Trust cannot recover the legal costs.

Penalty Interest

26. As there is a dispute between the parties as to the rent reduction during lockdown I cannot say the rent was due for the purposes of clause 5.1 of the ADLS lease, until such time I made a determination. Accordingly, I am not awarding any penalty interest.

Conclusion

27. For the reasons above GCQ must pay the Trust \$2,129.43.

Referee: Ms G Jaduram
Date: 20 November 2020