



Commercial leases and outgoings

MICHELLE HILL

WHEN NEGOTIATING A NET LEASE FOR A landlord or tenant, attention to detail on the outgoings can have a positive impact on the overall value of the lease to your client. Given the ever-increasing compliance costs in commercial property ownership, such as asbestos management and seismic performance, this seems more so today than ever before. This article looks at matters to consider when advising either landlord or tenant.

Proportion of outgoings

Where the tenant is leasing only part of the landlord's land, the parties should turn their minds to the proportion of outgoings the tenant should pay in relation to outgoings that are not directly assessed or levied in relation to the premises. There are a variety of ways the proportion can be calculated. The most common is the proportion which the net lettable area of the premises bears to the net lettable area of the property as a whole. However, a proportion reflecting the utility interest in a body corporate development may also be appropriate. If there are changes to the development over the course of the lease (for example, if additional premises are built), there should be the ability to have the proportion changed so that it remains a fair proportion. The current version of the Auckland District Law Society Incorporated Deed of Lease ('ADLSi Lease') makes it mandatory for the landlord to vary the proportion to ensure that the tenant pays a fair proportion (clause 3.2). However, previous versions of the ADLSi Lease did not (they only gave the landlord a discretion to do so) and other forms of leases may not either. This is something to watch for when acting for a tenant.

Estimate of outgoings

The ADLSi Lease (Item 16 First Schedule) provides for an estimate of annual

outgoings to be stated. In my view, this is problematic for two main reasons:

1. **Directly or separately assessed outgoings**

The estimate is confusing as the parties tend to insert what they understand to be the estimate of all outgoings which are payable by the tenant under the lease. However, Item 16 only relates to outgoings which are not separately assessed or levied in respect of the premises.

2. **Effect of estimate**

The effect of the estimate is unclear. There are no operative provisions in the deed of lease which refer back to the estimate. What remedies, for example, would a tenant have if the estimate was well short of the actual outgoings the landlord on-charges? Arguably the tenant could have a claim for misrepresentation. However, it is worth advising your tenant client that there are no clear remedies in the event that the estimate does not turn out to be an accurate reflection of the actual outgoings payable.

What outgoings are included?

When acting for a landlord, ascertain what they expect to pay for this investment. If they expect the leasing arrangement to be a true net lease, with the tenant paying all costs in relation to the ownership, maintenance, and management of the property, the standard outgoings are likely to require amendment. The ADLSi Lease most certainly will. Other more landlord-friendly forms (such as the Property Council Lease) may not. If acting for a tenant, and the bargaining position of the parties allows it, there are a number of ways to limit the tenant's liability for outgoings and to provide them with some certainty for their financial forecasting

purposes. It might be reasonable to exclude any costs of a capital nature, or to place a cap on the total sum of outgoings that the landlord can pass on per annum. In this age of increased building compliance costs (such as seismic upgrading and asbestos removal) tenants may want to ensure that the lease does not allow the landlord to pass such costs on to them (whether by improvements rent or otherwise). The latest form of ADLSi Lease makes it clear that the tenant is not liable for repairs due to defects in design or construction, inherent defects in the building and renewal or replacement of building services. Also excluded are costs of upgrading and other work to make the building comply with the Building Act 2004. Other forms of lease may not contain such exclusions. Additional consideration may need to be given to the cost of obtaining and maintaining an asbestos management plan, if relevant to the property in question.

If acting for a tenant entering into an ADLSi Lease, and they are leasing all of the property, consideration should also be given to the fact that the landlord may require the tenant to carry out works, maintenance and repairs to the property in respect of which outgoings are payable by the tenant (refer clause 8.2(c)).

Body corporate levies

If acting for a landlord granting a lease of body corporate premises, additional care may be required to ensure they can recover all their body corporate levies from the tenant as outgoings. This is because the listed outgoings may not mirror the costs that might be included in the body corporate levies which are payable by the landlord. In the ADLSi Lease, for example, certain costs which would

Continued on next page...

Living in an anti-money laundering world

MONEY LAUNDERING IS BIG BUSINESS. It is estimated that over \$1 billion a year is laundered through New Zealand businesses, with much higher amounts being reported as suspicious transactions. With our country's booming housing market making international headlines, money launderers may look at property purchase transactions as an easy way to clean their ill-gotten gains. Property lawyers need to be increasingly vigilant. Do you know how to spot a money laundering operation taking advantage of your firm?

Money laundering is the process criminals use to hide the money they make from crimes like dealing in illegal drugs, fraud and human trafficking.

They do this by exploiting legitimate businesses to buy, sell and channel their funds through things such as property, expensive goods and financial services. People who finance terrorism also use these methods to send money to violent causes and to disguise who's providing and receiving the money.

On 1 July, the New Zealand's anti-money laundering regime expanded to lawyers and conveyancers to provide much-needed protection against money launderers, financiers of terrorism and other criminals.

If you conduct activities which are captured by the Anti-Money Laundering and Countering of Financing of Terrorism (AML/CFT) Act then you should have completed a risk assessment, established your compliance programme and be mitigating the risks you face. These measures are to help us stop crime and protect New Zealand's reputation as a safe and corruption free place to do business.

The Department of Internal Affairs is



responsible for ensuring the businesses they supervise are complying and it uses a suite of interventions to encourage 'doing the right thing'. Internal Affairs is here to help, and as the Act beds in, the focus is primarily on education and providing support.

We are working closely with the legal sector and the New Zealand Law Society/Property Law Section to ensure that lawyers have the information and support throughout the implementation of the AML/CFT Act.

The AML Group has fielded over 850 individual queries from lawyers since the go live date, many of these relate to "doing the right thing". Internal Affairs would like to remind and reassure the legal sector that this is a risk-based regime, when making decisions that are not black and white. If you're uncertain, then make sure you record your decision making process and seek advice.

New Zealand has a strong reputation for upholding international best practice. While money laundering may be more prevalent in other jurisdictions, New Zealand cannot be seen to be a soft touch when it comes to cracking down on the

proceeds of crime.

Our AML Group is continuing to grow both in experience and personnel as we work with the legal sector, and others, to help people become compliant with the AML/CFT legislation.

If you notice potential signs of money laundering or financing terrorism then file suspicious activity reports using the goAML system.

For help:

- Read the guidance at https://www.dia.govt.nz/diawebsite.nsf/wpg_URL/Services-Anti-Money-Laundering-Codes-of-Practice-and-Guidelines
- Contact the Department of Internal Affairs at amlcft@dia.govt.nz
- Find out more about money laundering at keepourmoneyclean.govt.nz

Reminder: If you undertake captured activities under the AML/CFT legislation and haven't registered with the Department of Internal Affairs, please fill out the registration form at www.dia.govt.nz/Anti-money-laundering-and-countering-financing-of-terrorism.

COMMERCIAL LEASES AND OUTGOINGS *Continued...*

usually form part of the body corporate levies are included (such as rates, insurance excess, cleaning and maintenance charges and body corporate charges for insurance premiums) but other levies may not be included. These may include payment into the body corporate's long

term maintenance fund.

Conclusion

There is much opportunity for property lawyers to add value to their clients' leasing transactions by asking some probing questions regarding expectations for liability for

outgoings, whichever side of the landlord/tenant divide, and ensuring the detail of the deed of lease accurately reflects those expectations.

Michelle Hill is Special Counsel at Kensington Swan in Auckland.