

Number 7

## Rent Concessions

In a competitive property market landlords may have to be pragmatic about how to deal with tenants in financial difficulties struggling to pay their rents. A landlord could consider offering temporary support to a tenant by abating the rent. This may make commercial sense for a landlord; a failure to support the tenant may lead to the tenant's insolvency and the lease being disclaimed. In a difficult economic climate, or where there is a high level of vacancies, a landlord will need to budget for a rental void period, tenant's inducements and/or lower rents. It is a difficult equation for the landlord because rent concessions may also adversely affect the investment value of the building, but so will an insolvent or non performing tenant.

Rent concessions offered by landlords can be dealt with by way of a side letter which would set out the reduced rent and the period of the abatement. There are a number of factors that need to be considered and dealt with in a rent concession letter:

- The letter should specify the reason for the rent abatement. If the tenant is encountering adverse trading conditions or financial difficulties then the letter should refer to the information provided by the tenant in support of those reported difficulties. A landlord should examine the tenant's management accounts and should try to see the audited accounts in order to verify the tenant's position. If the tenant has obtained a rent abatement by misrepresenting its financial position the rent abatement could be set aside.
- The concession should be expressed to be personal to the tenant and not to be dealt with in any way, ceasing upon assignment or underletting of the premises.
- The operation of the concessionary rent needs to be considered. One method is to provide for the concession to be given on an ex gratia basis. An alternative is to provide for a specific period. A specified period of months may be considered better from the point of view of providing more certainty for both parties. It would also allow the concession arrangement to be reviewed periodically and the tenant's trading position or financial situation re-examined.
- When considering a specified period for the concession, particularly when dealing with tenants in the retail business, seasonal effects on the tenant's trade should be considered. For many tenants Christmas may have the principal seasonal effect. The rent adjustment should be looked at again following any seasonal variations.
- The letter should deal with confidentiality. It should provide for the non-disclosure of the arrangement to any third party for use as a comparable rent in any negotiations for rent review or lease renewal relating to any premises. Such a blanket non-disclosure provision may fall foul of a rule of public policy requiring the exchange of information as to rental values between surveyors so that there is correct and accurate information available as to the state of the commercial letting market readily available. To deal with that concern, the letter could specify that the tenant is not prohibited from disclosing the abated rent to any party

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# BRIEFING

lawfully authorised to ascertain the rent payable under the lease provided that the full circumstances of the concession and its terms and conditions are also disclosed.

- Conversely, a landlord should consider providing that it will be entitled to use the full and unabated rent as a comparable rent in any negotiations. Also, the letter should specify that the concession is not to have any effect on any future rent reviews pursuant to the lease. In using the full unabated rent as a comparable a landlord must itself be careful not to misrepresent the position.
- A landlord may wish to consider including a provision for any difference between the rent under the lease and the abated rent to become due and payable for the concession period in the event of a tenant breach of covenant.
- The letter should specify that it will not bind the landlord's successors in title. In practice, there may be some difficulties with this; if the property was sold, the landlord may have to bear any shortfall in rent on a sale for the specified period.
- If there is a guarantor as a party to the lease or under an authorised guarantee agreement, the guarantor will need to be asked to consent to the rent concession because any material variation of the terms of a lease may release a guarantor from his guarantee obligations unless the guarantor consents to the variation.

Using a rent concession is something to be considered by a landlord where its tenant reports that it is in financial difficulty. The use of a rent abatement period can, in some circumstances, be in a landlord's best interest having considered the rental void, sundry costs of re-letting and the possible difficulties of a lower final rent and rent inducements that would be likely to arise following forfeiture.

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Readers are advised to take specific advice before acting in reliance on the matters set out in this briefing.

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