

Documenting SMSF COVID-19 rent relief

When an SMSF and its tenant have agreed to reduce the rent, how should the SMSF properly implement and document the rent relief?

Take a look at the following scenario:

Ed, Rose and Ted are the members of the 90 Day Finance Superannuation Fund ("Fund"). TLC Pty Ltd ("Trustee") is the trustee of the Fund with Ed, Rose and Ted as directors.

The Fund owns a commercial shop space which it leases out to Ted who runs a small clothing store. Ted pays a weekly rent of \$1,000.00 to the Fund.

Due to the COVID-19, Ted has had to close the shop until further notice by the government.

To assist parties to a lease in these situations, the NSW government issued the Retail and Other Commercial Leases (COVID-19) Regulation 2020 [NSW] ("Regulations") which required parties to a commercial lease agreement to renegotiate the lease provided the parties do so in good faith and meet the requirements.

Unable to meet his rent obligations, Ted requested a rent reduction by 80% a week or pay a weekly rent of \$200.00 for 6 months or until such time as the COVID-19 is over and repay the rent arrears after the rent relief is over. In support of his request, he presented the following:

- a) tax returns and Business Activity Statements ("BAS") to show that his business had a turnover of \$1 million for the financial year 2018/2019; and
- b) documents and calculations to show that his business is suffering an 80% decline in turnover.

The Trustee (of which of course Ted is a director) reviewed the request and supporting documents and upon being satisfied, it accepted the request.

Now that the Trustee and Ted had agreed to the rent relief, what are the steps to take to give effect to the rent relief?

As Ted is a related party tenant, the Trustee and Ted must see to it that they deal with each other at arm's length. To determine if they are dealing with each other at arm's length, the question to ask is: would the Fund as the landlord provide the same terms to

Ted if he was not a related party? If the answer is yes, the parties are dealing at arm's length. Otherwise, the Fund will have compliance issues,

Next, the Trustee should review the fund's trust deed to ensure that there is nothing in the deed that could prevent the rent relief being agreed to by the Trustee. Although it is very unlikely, because the deed is the fund's rule book the Trustee must be able to say that they've checked the deed and confirmed that it contains no impediment or condition in relation to such a rent relief agreement.

Next, the Trustee should review the lease to see that the proposed rent reduction provisions don't breach the lease. The lease agreement governs the lease relations between the landlord and tenant so any decision made in respect to the lease must be made pursuant to it.

If there are no rent relief provisions, the parties are advised to vary the agreement to include such provisions allowing the rent relief. Although the Regulations do not state that parties vary the lease, similar regulations in Victoria require the parties to either vary the existing lease or enter into a separate agreement. Nevertheless, varying the lease is important as it provides:

- opportunity for parties to agree on the terms of the rent relief so long as it is in line with the Regulations;
- clarity of the terms of the rent relief actually agreed upon between the parties;
- stability and control of the parties' respective situations; and
- prevention of ambiguity or any misunderstanding that in an arms-length situation could lead to potential disputes.

The rent relief provisions should contain the matters agreed by the parties such as documents to support a request for temporary rent reduction including proof of loss of income, manner of calculating the temporary rent amount, period when the temporary rent amount applies, treatment of accrued rent arrears as a result of rent relief, resumption of the original terms of the lease once COVID-19 is over, and other matters considered necessary to give effect to the rent relief.

Once the commercial lease agreement allows for the rent relief, the Trustee can implement the agreed rent relief. As SMSF trustees have a basic obligation to keep a record of all its transactions, the Trustee must ensure that it properly documents the rent relief as follows:

- a) Ensure that it keeps Ted's written request for rent relief containing the following:
 - Temporary rent amount
 - Period on which the temporary rent amount applies
 - Request to repay accrued rent arrears as a result of rent reduction
 - Amount of income loss and its percentage to the income prior to COVID-19
 - Reasons for the income loss
 - Documents provided in support of the request
- b) Issue a resolution accepting the request for rent reduction.

Though not mandatory, registration of the variation of lease is recommended. Registration gives the lease a legal status and recognises the rights of a tenant. If somewhere down the track the Fund decides to sell the commercial property during the lease period, the new owner will be bound to respect the lease and its variation especially the rent relief.

Despite the close connection between the tenant and the SMSF landlord, arms-length dealings and documents are fundamental to the proper administration and compliance of the fund and should not be ignored.

For more information on any aspect covered in this article, please call SUPERCentral on 02 8296 6266 or email info@supercentral.com.au.