

Earthquake Canterbury

A guide for Landlords and Tenants

This is a brief guide to some of the considerations relevant to landlords and tenants using a standard form Auckland District Law Society (ADLS) lease (5th edition 2008).

It is clear that dealing with destruction will require the cooperation of the landlord, tenant and local authorities where remediation is undertaken.

TOTAL DESTRUCTION

If the premises or any portion of the building is destroyed or so damaged:

- (a) as to render the premises untenable, then the lease term shall at once terminate; or
- (b) in the reasonable opinion of the landlord as to require demolition or reconstruction, then – within three months of the damage - the landlord can give 20 working days notice to terminate and a fair proportion of the rent and outgoings shall cease to be payable as from the date of damage.

Sub-paragraph (a) provides that where the premises are untenable termination is deemed to occur. Whether the premises are untenable is a factual matter. Is it likely to be an area of contention between the landlord and tenant and is discussed in greater detail below.

Sub-paragraph (b) gives the landlord the ability to terminate the lease where the destruction or damage is going to require demolition or reconstruction. In this scenario:

- (a) The landlord must undertake this assessment (acting reasonably), and notify the tenant within 3 months (which would be 3 December 2010 based on the damage occurring from the main earthquake).
- (b) The notice to the tenant must give 20 working days notice to the tenant.
- (c) Rent and outgoings will reduce to a fair proportion from the date of damage. It is unclear whether the tenant can demand from the date of

destruction a reduced rent or whether a tenant is obliged to pay full rent until termination (which could be 4 months after the damage).

Removal of a tenant's fit-out is not necessarily contemplated in the circumstances of destruction, however, we suggest a practical approach but with public safety paramount.

PARTIAL DESTRUCTION

If the premises or any portion of the building is destroyed or so damaged but not as to render the premises untenable and:

- (a) the insurances have not been invalidated by actions of the tenant; and
- (b) all the necessary permits and consents are obtainable,

then the landlord shall with all reasonable speed expend the insurance monies toward repair and reinstating the premises – but only to the extent of the insurance proceeds. This process will require constant contact and cooperation between the landlord and tenant, with the tenant also likely to want to lodge its building consent application for any fit-out work required.

Any repair or reinstatement may be carried out by the landlord using such material and form of construction and according to such plan as the landlord thinks fit, and is satisfactory so long as it is reasonably adequate for the tenant's occupation and use of the premises.

Until completion of the repair or reinstatement a fair proportion of the rent shall cease to be payable as from the date of damage.

If a permit or consent cannot be obtained or the insurance money is inadequate, then the lease shall at once terminate. While this provision is drafted as a deeming provision, it requires information from the landlord to assess whether the termination conditions have been triggered.

Practically, we see that this area will need careful consideration from the landlord as they may be required to bring other aspects of the building up to the current Building Code standard as a result undertaking repair and reinstatement. This may increase the costs of repair and reinstatement beyond what is contemplated by their insurance policy.

UNTENANTABILITY

The key concept around determining the landlord and tenant rights with regard to damage or destruction is “untenantability”. This is an objective test.

The test is essentially whether the premises have been rendered unfit for the occupation and use of someone assumed to want the premises for the same use as the tenant, or put another way, has there been a substantial interference to the tenant’s ability to enjoy, use and operate the premises?

There is little case law around untenantability, and even those that are available typically relate to damage or destruction relating to fire damage.

TENANT LIABILITY

The above is predicated on the assumption that none of the damage or destruction was caused by the tenant. This may not be as obvious as it seems – where say, the tenant’s fit-out contributed to the damage or destruction then the tenant may be liable. An example of this might be a shelving unit was not properly fastened and collapsed causing damage to the landlord’s property.

Also, if the lease is a net lease and item 5 of outgoings is not crossed out, the landlord is entitled to claim an insurance excess up to \$500 as an outgoing from the tenant.

NOTIFICATION AND INSPECTION

The tenant must notify the landlord of any accident or defect in the premises promptly. Ideally photos should be taken to ensure evidence of damage, including so the date of damage is recorded.

Tenants should remember that the landlord has a right of inspection at all reasonable times to view the condition of the premises.

LANDLORD WORK AND THE BUILDING ACT 2004

The landlord has right of access for repairs to the premises or adjacent premises but with the least possible inconvenience to the tenant.

During the term, the landlord must not give any consent to work or undertake work which would put the tenant in breach of section 363 of the Building Act 2004.

Section 363 of the Building Act 2004 provides that it is an offence for owners, occupiers and people who control premises to permit people to use those parts of premises intended for public use that are affected by building work. It applies where a code compliance certificate or certificate for public use has not yet been issued, or where building work has been undertaken without a building consent.

Public use may extend to areas open to the public and which are typically not secured by card, key or other means of restricted access. Open foyer areas, retail areas or pedestrian areas in shopping malls are likely to be areas of public use.

FINAL COMMENTS

In this time of great uncertainty for landlords and tenants alike, good communication is the key. In many instances, this communication will need to be ongoing to navigate the contractual and statutory obligations.

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