

Canterbury Earthquake – Some Advice for Landlords and Tenants

Leases: Possible Cancellation Due to Earthquake Damage

Under the Auckland District Law Society Lease (“ADLS Lease”) which is widely used for commercial premises in New Zealand, if the building or premises subject to the lease is destroyed or so damaged as to make the premises untenable, the lease terminates from the date of the damage. No notice is required for termination although it is prudent to record the situation in writing with the other party. The landlord may also terminate the lease if in their reasonable opinion the building requires demolition or reconstruction. In those circumstances the landlord must give 20 working days notice to terminate, and this notice may be given at any time within three months of the damage occurring.

Whether premises are “untenable” is a matter of fact and degree, requiring a common sense approach by landlords and tenants. The parties will need to consider whether there is substantial interference with the tenant’s ability to enjoy, use and operate from the premises, with some degree of permanence. Of particular importance is the likely length of time the premises will remain unavailable for use compared with the remaining term of the lease. For example, a three month closure to carry out repairs during a five year lease may not be sufficient.

Under the ADLS Lease, if the building is not untenable, the landlord is required to spend any insurance money it receives to repair any damage, provided the necessary building permits or consents can be obtained. The government is putting in place legislation to speed up the building consent process and make it easier to obtain building consents to rebuild following the Christchurch earthquake. If however the landlord is unable to obtain building consent to carry out the required repairs, the lease will terminate.

Each case of damage will need to be assessed on its own facts, with careful consideration given to the nature and extent of the damage in light of the particular surrounding circumstances.

Leases: Rent

If a tenant is not able to occupy premises due to damage caused by an earthquake, the Property Law Act 2007 provides that any rent or outgoings under the lease abate (i.e. are suspended) in a fair proportion to the destruction or damage until the premises are repaired and reinstated, and are again fit for your occupation. The ADLS Lease contains similar provisions.

There is scope for argument between landlords and tenants as to when a building becomes fit for occupation, particularly given that many buildings will need to be reassessed by structural engineers following aftershocks. While some buildings may receive a “green sticker” after inspection by Council, there may still be reasons why a tenant may consider the premises (or part of the premises) unfit for occupation, and specific legal advice should be taken as to whether rent should abate. A tenant who considers that their premises are unfit for occupation, and that rent should cease to be payable, should set this out in writing to the landlord as quickly as possible.

Leases: Effect of the Police Cordon

Some premises may be inaccessible, not because of damage, but due to the police cordon or unsafe neighbouring buildings. The terms of the ADLS Lease do not directly address the situation where premises are inaccessible, but undamaged. In such a situation, there is a possibility that the fundamental nature and purposes of the lease have been frustrated, bringing the lease to an end.

However, the doctrine of frustration has historically had limited application to leases. Whether or not the lease has in fact been frustrated is likely to turn upon the duration of the disruption relative to the remaining term of the lease. It is likely that something close to total loss of the remaining term will be required. It is presently unclear how long the Christchurch cordon will be in place, and again, each case of will need to be assessed on its own facts.

Disclaimer

This fact sheet contains general advice which is intended to be used only as a guide. There is no substitute for legal advice, as each situation will turn upon its own unique facts. Please contact us for legal advice specific to your situation.