

LANDLORD AND TENANT ISSUES IN THE WAKE OF THE CANTERBURY EARTHQUAKE

Our thoughts are with everyone in the Canterbury region following the latest earthquake. The impact of such an earthquake can be debilitating for businesses and their tenancy arrangements. Many business owners have to manage issues with their existing lease while at the same time secure alternative premises.

Following the September 2010 earthquake, we released an update on landlord and tenant issues. That update is even more applicable now, as the severity of the damage caused by the February 2011 earthquake is much greater.

After client feedback, we are re-releasing that update to assist people in considering their options.

Good faith communication

The first focus for most people will not be their legal entitlements, but how best to work through what is a very difficult situation. The maintenance of good and open communication between landlords and tenants is vital and will greatly assist the parties in achieving the best possible outcomes in what is undoubtedly a stressful situation for all concerned.

ADLS Lease

When considering your legal entitlements, the starting place is of course your lease. As the ADLS Lease is the most commonly used commercial lease, this update focuses on the provisions of that lease. The wording of the damage and destruction clauses in the Third, Fourth and Fifth editions of the ADLS Lease are largely consistent. If you are a party to other forms of lease or have negotiated amendments to the standard damage and destruction provisions of the ADLS Lease, the comments in this update may not apply and specific legal advice will need to be obtained.

Total destruction

Clause 26.1(a) of the ADLS Lease provides that if the premises or any portion of the building of which the premises form part of, is destroyed or damaged so as to render the premises untenable the lease will immediately terminate.

Where premises have been clearly destroyed by an earthquake, the lease will be deemed to have terminated from the date of destruction. For premises that have sustained extensive damage the question is whether or not the damage has rendered the premises "untenable." To be considered untenable, the premises must be unfit for occupation and use by the tenant. In addition there needs to be a degree of permanence. Something of a transitory or temporary nature will not make a building untenable.

Whether or not premises have been rendered untenable will be a matter of fact and degree in each case. Relevant factors will include the length of time that the premises remain unavailable for the use of the tenant and the term of the lease remaining. The temporary closure of a building while structural checks are undertaken or as a result of the imposition of cordons will not, in our view, necessarily entitle a party to terminate a lease under clause 26.1(a) on the basis that the premises are untenable.

Clause 26.1(b) gives the landlord the right to terminate the lease if the landlord decides that the premises are so damaged or destroyed as to require demolition or reconstruction. This covers situations where the premises may not have been rendered untenable but are so damaged that a complete rebuild is more practical than the repair and reinstatement of the premises. The landlord has 3 months from the date of damage to exercise this right of termination. If the landlord elects to terminate the lease under this clause, a fair proportion of rent and outgoings ceases to be payable from the date of damage.

Partial destruction

Clause 27 deals with the situation where premises are damaged but not to the extent that they are rendered untenable. In such circumstances the landlord is required to repair any damage with all reasonable speed provided that all necessary permits and consents can be obtained and the insurance monies received are adequate for the repairs or reinstatement works required. If either of these provisos cannot be satisfied then the lease will terminate.

In such circumstances:

- The repair obligations of the landlord are limited to the amount of the insurance money received
- Any repair or reinstatement may be carried out by the landlord using materials, form of construction and according to such plan as the landlord thinks fit provided it is reasonably adequate for the tenant's occupation and use of the premises. This may give rise to situations where the repairs and reinstatement works result in something different to what was there before the earthquake. In such circumstances we recommend that where possible tenants are involved in the planning process in an attempt to minimise the potential for disputes to arise
- The landlord is required to undertake any repairs or reinstatement with all reasonable speed. Given the number of buildings that might require repair works, the speed with which repairs can be completed will largely be controlled by the availability of tradesmen and the consent process
- Until the completion of the repairs or reinstatement a fair proportion of rent and outgoings will cease to be payable as from the date of damage.

Rent abatement

As stated above, if the premises are fit for the occupation and use of the tenant but require repair and reinstatement works, the tenant may be entitled to a rent abatement. The calculation of any rent abatement will be relatively straightforward where part of the premises cannot be occupied whilst the required repairs are undertaken. Determining what, if any, abatement should be provided in the following circumstances will be more problematic:

- Where the premises can be occupied but have suffered damage which necessitates repairs that by their nature require the temporary closure of parts of the premises
- The unavailability of services, such as lifts, air conditioning and sanitary facilities

The level of rent abatement provided will depend on the particular circumstances and requirements of the tenant.

Disputes

While the ADLS Lease provides for any disputes that arise in connection with the above issues to be determined by arbitration, it will likely be in the interests of both parties to adopt a faster and more cost effective disputes resolution process. There are several options available which can be canvassed in more detail should the need arise.

Conclusion

Each situation will need to be assessed on a case by case basis. Whether you are a landlord or a tenant, we recommend that you are proactive in your approach. We would be pleased to assist you.

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