

KEY ISSUES FOR LANDLORDS AND TENANTS



The impact of the recent earthquake has left landlords and tenants anxious about their obligations and rights under their leasing arrangements. In this update the MDS Law property team addresses some of the key issues facing people on both sides of the property fence. Our Commercial team has prepared a separate update on earthquake related commercial issues.

Commercial Leases

Every situation will differ depending on the specific terms of an individual lease and the nature and extent of the damage sustained to a building. The ADLS lease is the most commonly used commercial lease and we therefore focus solely on the latest version of those provisions.

Termination - Total Destruction

If the premises are destroyed or damaged so as to render the premises untenable, the lease will be immediately terminated.

The essential question is whether the premises are untenable, and what "untenable" means.

Is a building tenable?

- The definition of "tenable" is the most fundamental concept to determining the rights of the landlord and tenants.
- A property is "tenable" if the tenant can enjoy, use and operate from the premises. It is not a determination that is made by looking simply at a moment in time. Just because you can't occupy, enjoy and use the premises for one or two weeks you cannot assume that it is untenable.
- Clearly for many buildings tenants are currently unable to enjoy, use and operate from their premises. In comparable situations the courts have decided the key question is whether this is a temporary position or something more permanent, effectively "are the premises permanently untenable".
- There is surprisingly little judicial guidance on applying the definition of "untenable". Ultimately the definition will be applied differently dependent on the individual facts of each particular case.

We believe that some of the key considerations will be:

- The length of the lease overall and the time remaining;
- The nature and extent of the damage;
- The costs and ability to repair;
- The time frame for repairs;
- The ability to properly utilise the premises.
- The commercial viability of the business conducted from the premises as a result of the damage to the building.
- The advice supplied by an engineer

If you have a concern about your lease and your on-going obligations please let us have a look at your lease as soon as possible so we can provide you with specific advice.

It is clearcut that where the building has been destroyed completely premises will be untenable.

In other situations however, a tenant cannot assume that because they cannot use the premises at this moment, or for a period of weeks, or because they or their staff do not want to work in the premises because of the perceived danger, that they can terminate the lease.

In *DFC v Samson* (1993) the Court of Appeal suggested that a substantial interference with the tenant's ability to enjoy, use and operate, would be "untenable". The case does not go further in defining what "substantial interference" is.

We consider that "substantial interference" will ultimately be a question of fact based on what is reasonable in those particular circumstances. It is something landlords and tenants may form differing views on.

Landlord's option to terminate

Where the premises have not been demolished then, if in the reasonable opinion of the landlord the building requires demolition or reconstruction, the landlord has the option within three (3) months of the damage occurring, to terminate the lease on twenty (20) working days' notice.

Partial damage to building

If the actual premises covered by the lease are damaged, or the premises form part of a building which is damaged, but the building is not rendered untenable, then the lease is not automatically terminated. The obligations of the landlord and of the tenant continue in existence, although the amount of rent payable will be reduced to reflect the loss of use of the premises by the tenant.

Where insurances have not been invalidated by the actions of the tenant, and all necessary permits and consents are obtainable, the landlord is obliged to expend all insurance monies to repair and reinstate the premises. The landlord is not required to spend more money than received from the insurer but is required to act with all reasonable speed.

The ADLS lease generally imposes an obligation on the landlord to take out and to maintain insurance cover. If the insurance has expired the landlord is at risk of being sued by the tenant, for instance, for the loss of the benefit of the location, where the location is crucial to the goodwill of the tenant's business.

Rent - Abatement

Both landlords and tenants will be very anxious as to their respective rights regarding the payment of rent.

If the lease is terminated, the rent and outgoings cease to be payable from the date of termination.

If the lease is not terminated but the premises do require repair and reinstatement work then the tenant may be entitled to a reduction/abatement of the rent to reflect the loss of use of the premises by the tenant.

The level of rent abatement will depend on the facts of each case and the requirements of the tenant.

It may be fairly straight forward to calculate where the whole premises cannot be occupied. It will be more problematic where some parts of the premises are able to be occupied or where there are varying levels of damage, or where a number of services such as air-conditioning or lifts are unavailable. It is not simply a calculation of pro rating the usable versus the unusable area on a square metre basis.

The appropriate way to deal with this is for the landlord and tenant to communicate with each other. If a fair and sensible outcome cannot be agreed, then the parties may wish to obtain a valuation from a registered valuer.

If a dispute arises, then both parties have rights under the lease to go to arbitration.

Please note that the tenant's inability to access the premises because they are in a cordoned area is not technically an issue between the landlord and the tenant. It follows therefore that the rent abatement provisions in the lease will not apply.

Residential Leases

A large number of people have been displaced from their homes and a number of those homes will be residential rentals.

Rent

If a home has been damaged in the earthquakes then the rent should be reduced in proportion to the damage. Once the repairs have been completed then the rental can resume at the ordinary rate.

If the property is uninhabitable, then the rent is not payable from the date the damage was sustained.

Termination

If the property is uninhabitable then the landlord may terminate the lease on seven (7) days' notice. The tenant may also terminate on two (2) days' notice.

We are aware a number of tenants have relocated away from Christchurch and will therefore be wishing to terminate their leases.

Where a property is inhabitable then the lease remains in effect. The ability to terminate the lease will therefore depend on the type of lease.

Where a tenancy is a fixed term lease then generally the tenant cannot terminate the lease until the fixed term period has expired. The tenant is still required to give notice of at least twenty one (21) days prior to the expiry date of the intention to terminate. The landlord must give between ninety (90) days' and twenty one (21) days' notice.

Where a tenancy agreement has no fixed term or the fixed term has expired then the tenant may terminate the tenancy on twenty one (21) days' notice in writing. The landlord may also terminate the lease but only on ninety (90) days' notice.

In the event the property is partially destroyed or partially uninhabitable then either the landlord or the tenant may apply to the Tenancy Tribunal to terminate the lease.

MDS Law is fully operational from new offices at Level 1, 334 Lincoln Road. Please let us know if we can be of any assistance by contacting one of our Property team below:

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