

COMMERCIAL PROPERTY ISSUES ARISING FROM THE CANTERBURY EARTHQUAKES

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INTRODUCTION (MARK ABBOT)

- Agreements for Sale and Purchase
- Lease Issues
- Insurance Issues

Agreements for Sale and Purchase

- **Insurance**
- **Due Diligence**
- **LIM Reports**
- **Earthquake strengthening**

Lease Issues

- **Untenantability and Termination**
- **Frustration**
- **Rent abatement**
- **Rent reviews**
- **Rights of renewal**
- **ADLS Lease amendments**

Insurance considerations:

- Insurability
- Cost of insurance
- Assignment of vendor's policy
- Reduction in purchase price
- Further pre-settlement earthquake damage
 - termination; diminution
- Amendments to Agreements

Due Diligence:

- Structural reports
- Geotechnical reports
- Insurance
- Finance
- Title and LIM
- Building/RMA/CERA regulations
- Issues on leases and insurance

- **LIM reports:**

- Only current to 3 September 2010

Earthquake strengthening

- Building Code amended as from 19 May 2011
 - Seismic hazard “Z” factor increased for all buildings by 35% to 0.3
 - Foundations for Housing
 - Additional costs

Lease Issues

- **Untenantability and Termination**
- **Frustration**
- **Rent abatement**
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- **Rights of renewal**
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- **Untenantability and Termination:**
 - Definition
 - Total Destruction
 - Clause 26.1
 - Partial Destruction
 - Clause 27

TOTAL DESTRUCTION - Clause 26.1

If the premises or any portion of the building of which the premises may form part shall be destroyed or so damaged

- (a) as to render the premises untenable then the term shall at once terminate; or
- (b) in the reasonable opinion of the Landlord as to require demolition or reconstruction, then the Landlord may **within 3 months of the date of damage** give the Tenant 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.

Any termination pursuant to this clause shall be without prejudice to the rights of either party against the other.

- **PARTIAL DESTRUCTION – Clause 27**

- 27.1 If the premises or any portion of the building of which the premises may form part shall be damaged but not so as to render the premises untenable and:
- (a) the Landlord's policy or policies of insurance shall not have been invalidated or payment of the policy moneys refused in consequence of some act or default of the Tenant; and
 - (b) all the necessary permits and consents shall be obtainable:
- Then the Landlord shall with all reasonable speed expend all the insurance moneys received by the Landlord in respect of such damage towards repairing such damage or reinstating the premises and/or the building but the Landlord shall not be liable to expend any sum of money greater than the amount of the insurance money received.
- 27.2 ...
- 27.3 Until the completion of the repairs or reinstatement a fair proportion of the rent and outgoings shall ceased to be payable as from the date of damage.
- 27.4 If any necessary permit or consent shall not be obtainable or the insurance moneys received by the Landlord shall be inadequate for the repair or reinstatement then the term shall at once terminate but without prejudice to the rights of either party against the other.

- **COST OF REGULATORY COMPLIANCE – Clause 21.2**

If the Landlord is obliged by any such legislation or requirement to expend moneys on any improvement addition or alteration to the property then the Landlord shall be entitled to charge up to the next rent review date in addition to the rent an annual sum equal to the Improvements Rent Percentage of the amount so expended by the Landlord and the monthly payments of rent shall increase accordingly from the first day of the month in which such improvement addition or alteration is completed. **If the Landlord would be obliged to expend an unreasonable amount then the Landlord may determine this lease and any dispute as to whether or not the amount is unreasonable shall be determined by arbitration.** In the case of a multi tenancy building, the annual sum payable shall be assessed in respect of a fair proportion of the amount so expended.

KEY THEMES:

- Totally destroyed
- Untenantable
- If 3 months expired two further options to terminate:
 - Insurance insufficient
 - Compliance costs unreasonably high

- **Frustration:**
 - Frustrated Contracts Act 1944
 - High threshold test

- **Rent abatement:**
 - When do tenants resume rental payments?
 - How much rental and outgoings should the tenant pay?

- **Rent reviews:**

- What happens at the next rent review?

- **Rights of renewal:**
 - Right of renewal is the grant of a new lease
 - Implications for reinstatement of premises to rebuilt condition, or conditional commencement of original term?

- **ADLS Lease Amendments:**
 - Disputes
 - Termination
 - Total destruction
 - New tenants
 - Force majeure

Insurance Issues

- **Status of tenancies**
- **Don't prejudice yourself**
- **Level of cover for rebuild**
- **Unreasonable delays by insurer**

- **Status of Tenancies:**
 - Establish in writing if possible
 - New tenancies
 - Renewals
 - Rent reviews
 - Be clear on policy wording

- **Level of Cover for Rebuild:**
 - Height or size of new premises
 - Location of new premises
 - Costs of Building Code compliance
 - Earthquake strengthening
 - Time limitation for rebuild
 - Indemnity or Replacement

Check out further information on earthquake related issues on our website:

<http://mdslaw.co.nz/Expertise>

Click on the Commercial, Property or Tax Update Links

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