CHANGES TO COMMERCIAL LEASE AGREEMENTS

By Sarah Fields, MDS Law Associate

Introduction

The Auckland District Law Society's commercial Deed of Lease and documents (Agreement to Lease and Deed of Sublease) have undergone further changes (particularly as a result of the Canterbury earthquakes). In this article, MDS Law property Associate, Sarah Fields examines some of those changes and the key points to consider before entering into a new agreement with a tenant using the ADLS form.

Landlord's Insurance

It is important to check the terms of your current insurance policy with your broker to ensure you have full replacement and reinstatement insurance (including loss, damage or destruction of windows and other glass) for the 7 risks detailed in the Agreement. If not, appropriate amendments need to be made.

Whilst the 7 risks have not changed, there is now a specific reference to "additional risks". The additional risks listed in the Agreement are indemnity for loss of rent and outgoings, loss and damage to Landlord's fixtures and fittings and public liability.

If you do not include all of the "additional risks" that you are covered for in the Agreement a Tenant may try to raise an argument that they are not responsible for paying that part of the premium which relates to any risks that are not listed.

Tenants are now responsible for insurance excesses up to a maximum of $2,000 (previously $500). Whilst the excess amount has increased in the current climate excesses, particularly building excesses, can be much higher than this so you may wish to amend the cap. Any increase that you may be able to negotiate with a Tenant will depend upon the terms of your particular Lease, but it is important to ensure that you are aware of the cap and are comfortable with it.

No access period (Red Zone clause)

The "no access" clause is detailed in clauses 27.5 and 27.6 of the Lease. It has been inserted to try and prevent the difficulties that arose when properties in the CBD red zone could not be accessed for long periods of time, even though they were not actually damaged.

If the premises become inaccessible for one of the listed reasons then a fair proportion of the rental and outgoings ceases to be payable from the date that access is denied until the date that the Tenant can fully conduct their business from the premises again.

In addition, if the premises cannot be accessed for one of the listed reasons but are not partially or totally damaged, either party can terminate by giving the other party 10 working days' notice if the period for which the premises cannot be accessed is more than a specified period of time to be inserted in the Agreement. The length of the specified period will depend on the length of the lease.

A party does not necessarily have to wait until the end of the specified period before terminating the Lease, the terminating party just has to be able to establish with "reasonable certainty" that the Tenant will be unable to gain access to the premises for the whole of the specified period.

Costs

There has been a change in the way that costs are dealt with. Although the Landlord has always been responsible for paying its own costs in relation to the negotiations for the Agreement, the Agreement now provides that each party shall pay their own costs in relation to the drafting of the Deed of Lease and any renewal or rent review. Previously all of these drafting costs were payable by the Tenant.

You may wish to instruct your leasing agent to include a clause that provides that the Tenant pays all of, or at least makes a contribution towards, the costs of drafting the Lease and any renewal and rent review of the Lease. The success of this will depend on the state of the rental market at the time of negotiating the Agreement.

The Tenant still has to pay the Landlord's solicitors' costs in relation to any request for consent under the Lease (e.g. to an assignment, or alterations to the premises) and the Landlord's legal costs in the event that it has to take any enforcement action against the Tenant for breach of any of its obligations under the Lease. The Lease is silent as to which party has to pay for the costs of any variation but often these costs form part of the negotiations relating to the variation in any event.

Dispute resolution

The Agreement and the Lease now provide that any disputes should be resolved by agreement where possible and, if not, by mediation prior to having to go to arbitration. Previously arbitration was the only option. Mediation can be quicker and more cost effective than arbitration.

Landlord's Fixtures and Fittings

You should always check that all of the Landlord's fixtures and fitting have been listed in the Fourth Schedule.

Premises Condition Report

Under clause 8 of the Deed there is an ability to prepare a "premises condition report" which can be attached to the Lease. We have always advised that Landlords record the condition of the premises at the commencement of a new tenancy as this can assist later if there are any arguments about the Tenant's "make-good" obligations at the end of a lease term. A report is particularly useful where there have been one or more changes of Tenant during the term of the Lease.

We have only summarised some of the main changes in this article rather than going through each and every difference in the new documents. As always you should take legal advice prior to entering into any new Agreement with a Tenant so that the Agreement can be tailored to suit your particular requirements.

Sarah Fields is a property law specialist with Canterbury based law firm, MDS Law. She has extensive property experience acting for commercial and residential landlords on a range of leasing issues. Sarah can be contacted at MDS Law by phone: +64 3 371-0485 or email: sarahfields@mdslaw.co.nz