Helen Nathan

NEW "STANDARD FORM" COMMERCIAL LEASE RELEASED

The majority of Leases for commercial premises are based on the Auckland District Law Society standard form Deed of Lease current at the time the Lease was entered into.

The Auckland District Law Society has now released the Deed of Lease Sixth Edition 2012 which is likely to be adopted in relation to most new tenancies entered into after November 2012. The new form addresses several issues arising after the Christchurch earthquake.

Under the old form Lease, a Landlord could gain access to inspect the premises and/or to carry out repairs. However, the Landlord had no right to other access. The Lease contemplated that if the Landlord was required to carry out improvements or alterations as a result of legislation or requisition, the Landlord could charge a percentage of the cost of those improvements or alterations to the Tenant through to the next rent review date. The Landlord's ability to gain access to carry out those improvements or alterations, and the Tenant's rights to any abatement or remedy, were not expressly provided for.

Problems also arose under the old Lease when buildings remained habitable but Tenants in Christchurch could not gain access to them.

The new form of Lease addresses these issues but both Landlords and Tenants will need to think carefully about the implications of the new form and in particular the implications of any timeframes which should apply.

Clause 15 of the Sixth Edition requires the Tenant to permit the Landlord on "reasonable written notice" to enter the premises for a "reasonable period" to inspect and carry out works to the premises or adjacent premises where the works are required to comply with the requirements of any statutes, bylaw or local authority. There is no longer a right for the Landlord to pass on any part of the costs of carrying out those required works to the Tenant. The works are to be carried out at the least possible inconvenience to the Tenant. Obviously, what is "reasonable" in regards to notice and the timeframe for the works may be quite different from the Landlord and the Tenant's perspective.

Where a building is likely to require remedial work for earthquake strengthening, it will be important for both Landlord and Tenant to have an understanding of what is anticipated and what level of disruption to the Tenant's business will be likely.

Clause 15 provides that if the Tenant's business is materially disrupted because of the Landlord's work, then during the period that the works are being carried out, a fair proportion of rental and outgoings will cease to be payable. There is also provision for the Landlord to give the Tenant "reasonable" written notice requiring the Tenant to vacate the whole of the premises if that is required in the "reasonable" opinion of the Landlord. Again, there is provision for rental and outgoings abatement but it is clear that the Landlord has the right to re-take possession to carry out required works.

The Landlord has an obligation to act in good faith when exercising the Landlord's rights under clause 15. However, in the absence of bad faith, the Tenant's rights are quite restricted.

Landlords and Tenants may want to think about specifying actual minimum timeframes for notice to be given under the applicable clauses so that there is time for the Tenant to take the necessary steps to protect the Tenant's business. The more extensive and open the communication between the Landlord and the Tenant in advance of any works being undertaken, the less likely it is that there will be problems.

Tenants should not wait to be given notice but should proactively make enquiries of their Landlord as to works that may be anticipated and the timeframes within which the Landlord will either be carrying out the works, or be in a position to know what type of work is required.

The other significant area of change in the Lease where timeframes will be relevant is where there is an emergency which results in the Tenant being unable to gain access to the premises to conduct the Tenant's business for reasons of public safety. If a Tenant is prevented from gaining access to the premises, then rental and outgoings abate from the date the access is prevented and either party may terminate the Lease if access has not been regained, or is not reasonably likely to be regained, within the time period to be specified in the Lease (a default period of nine months has been provided). When deciding on appropriate timeframes for both access for works and termination as a result of access being prevented, the Landlord and the Tenant will need to consider the insurance cover that they are able to obtain/maintain in respect of losses they may each suffer in the relevant scenarios.

It is important that Landlords and Tenants are not taken unawares by the effect of their Lease should the events provided for occur. These events should be planned for with each party fully understanding the way in which the Lease will operate during the relevant period(s).