

Case Affirms Test For Untenantability

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A recent High Court decision sheds light on the question of untenantability. Paul Calder, of Duncan Cotterill, discusses what it means for landlords and tenants in Christchurch.

A High Court judgment has clarified the issue around untenantability of damaged premises and will no doubt be of interest to landlords and tenants of Christchurch buildings.

The case, *Russell v Robinson*, involved an appeal from an earlier District Court finding that a lease of commercial premises in Auckland had been validly terminated by the landlord because of damage caused by fire. The lease was on the standard ADLS form (4th edition 2002). The High Court upheld the earlier decision, affirming the meaning of the word “untenantable”. The tenant in this case had entered into a four year lease of first floor premises in a three storey commercial building. On the first day of the lease there was a serious fire as a result of work being undertaken by the tenant in preparation for taking over the premises. It extensively damaged the building. The roof and ceiling of the premises needed to be demolished, the debris taken away and these structures then rebuilt. The electrical and air conditioning systems were destroyed and needed to be replaced; as did the flooring; and water and electricity had to be reconnected. The remedial work, which included design, consents, and building work, took 10 months during which the premises were unable to be occupied.

The landlord purported to terminate the lease on the grounds that the premises were untenantable and that, in its opinion, the damage was such that the premises would need to be demolished or rebuilt. The landlord effectively invoked both limbs of the total destruction clause in the lease. But the tenant disputed termination and argued that if a tenant wanted to continue leasing damaged premises, then how could they properly be described as untenantable.

This argument was rejected in both the District and High Courts. While there are no fundamentally new concepts identified in the High Court judgment, it does confirm the general principles to be applied when considering tenantability issues. In particular:

- The question of whether premises are untenantable is a factual matter that will need to be objectively determined in each case.
- While the focus of the enquiry must be whether the premises are capable of being used by the tenant who went into the premises for a specific purpose and term, this does not permit the objective assessment being watered down by the landlord or the tenant’s subjective preferences. The question is, has there been a substantial interference to the tenant’s ability to enjoy, use and operate the premises? If the premises are not fit for such occupation, they are untenantable.
- Importantly, some degree of permanence is required to render the premises untenantable. In this case the fact that the premises could not be occupied or used for the tenant’s purposes for 10 months out of a four year lease term was central to the finding of untenantability.

Each case will be different. Landlords and tenants should seek legal advice early, and before taking action.

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