

PropertySpeaking

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Enjoy reading this spring edition of *Property Speaking*. We hope you find all these articles both interesting and useful.

To talk further about any of the topics covered in this e-newsletter, please don't hesitate to contact us – our details are above.



Making the Most of Your Agreement to Lease

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Cross lease issues: 'warts and all' clauses

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Property Speaking
will be published
in Summer.

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Making the Most of Your Agreement to Lease

An agreement to lease is an agreement between a landlord and tenant of commercial property. It gives the parties an opportunity to record their leasing arrangements before they are formalised in a deed of lease.

There are many details to be worked through between parties to a lease. The agreement to lease should set out most of the details between the parties so when it comes to signing the deed of lease there is no confusion or discrepancy.

What should be included?

The agreement to lease needs to clearly identify the parties to the agreement and the premises to be leased.

In addition, it should record the annual rent, any reviews of the annual rent, the term of the lease, any renewals of the lease as well as a commencement date and the details of any guarantors required.

Many agreements contain much more detail than just the above basics. The agreement to lease provides an opportunity

to address matters arising prior to lease commencement, such as due diligence or consent conditions, the specification for works to be completed by the landlord and/or the tenant, and the period allowed for fit out (rent free or otherwise).

ADLS agreement to lease form

Many agreements to lease are in a standard form (Auckland District Law Society – ADLS). This has a clause in the fine print which requires a formal deed of lease to be prepared, and, until that deed of lease is prepared and signed, the terms of the ADLS lease will apply to the parties.

This is a critical clause as it binds the parties to a document (being the latest edition of the ADLS lease) which the parties may not have reviewed. They may not be familiar with the terms of an ADLS lease and many people do not understand, nor have they taken advice on, the rights and obligations in the ADLS deed of lease.

Important points

It's common in business leasing situations for a commercial real estate agent

to negotiate all of the terms of the agreement to lease between the parties, prepare the document, have both parties sign and then deliver a copy to their respective lawyers with the intention of having them draw up the formal lease.

This approach has advantages and disadvantages.

On the positive side, most commercial landlords and tenants have a good understanding of their own businesses. They know what they need for premises and are usually comfortable with negotiating terms and conditions around annual rent, rights of renewal, fit outs and any further additional special terms or conditions.

However, the parties are often so keen to ensure that their commercial arrangements are recorded quickly before the deal cools off, that there are often some omissions. These can include:

- » Whether or not a guarantor is available; this can have serious consequences from the perspective of enforcement or security for the landlord
- » An understanding or explanation (for first-time landlords or tenants from their lawyers) about the obligations

and rights of the standard ADLS lease to which the parties are bound, and

- » An understanding as to when rent starts being paid; usually this is the 'commencement date' as defined in the agreement. However, particularly in the case of fit outs or construction of new premises, the premises may not be fully available for the use of the tenant on the actual commencement date, yet the obligation exists to pay rent.

These are just a few of the items that can be missed in the negotiations surrounding signing an agreement to lease.

This is a critically important document that landlords and tenants should have their lawyers review and advise on before the document is executed. Early advice in the process can prevent problems and disputes around easily preventable issues. As lawyers, we can also have valuable input into issues that the parties may not yet have considered.

If you are involved in negotiations around an agreement to lease be sure to contact us early in the piece so we can assist you with the negotiations. ■



What Are Your Rights When Your Tenants Don't Pay Up?



Renting out residential property is a great way to make some extra money, pay your mortgage off faster and build an investment nest egg. It can cause real frustration, however, when your tenant fails to pay rent on time.

To avoid costly delays, you should know the steps to take that will allow early intervention to either get the rent payments back on track or to bring the tenancy to an end.

Early intervention is key when it comes to dealing with rent payment problems. Your tenancy agreement should clearly state how rent is to be paid and when. You should also keep and monitor rent records so you will know straight away if your tenant falls behind in payments. If your tenant does miss a payment the first step is to contact them to find out the reason for that missed

payment and to make a payment plan. If your tenant doesn't pay the overdue rent, below is a guide to help fix the problem.

First steps

You can send a letter via email (if the email address is listed on the tenancy agreement) notifying your tenant that they have 14 days to pay the overdue rent (this is known as a 14-day notice to remedy).¹ If you have the read receipt setting on, you will receive confirmation that the email has been opened.

Further steps you can take

If your tenant doesn't pay after receiving a 14-day notice to remedy, or if they are more than 21 days behind in rent, you can apply to the Tenancy Tribunal for a mediation between you and your tenant.

If an agreement is reached to repay the overdue rent, a mediator's order documenting the discussions will be issued. You can request for the order to be 'sealed', which means you can enforce it through the Ministry of Justice enforcement process if your tenant doesn't follow the terms of the order.

If an agreement cannot be reached at mediation, the matter may be referred to a hearing. An adjudicator will hear the case and consider factors including the reasons for the missed payments, your

tenant's financial position and whether your tenant will repay their overdue rent before making an order. The order will either set out the terms of your tenant's repayment obligations and/or be for a possession order for your tenant's eviction.

FastTrack Resolution

The FastTrack Resolution is a slightly different process which suits situations where you and your tenant make your own agreement about repaying the overdue rent, without the assistance of a mediator.

You can apply [online](#) to have your agreement formalised through the FastTrack Resolution provided the agreement records the amount of rent that is outstanding, details of how the outstanding rent will be repaid, the date repayments will begin and the consequences if any payments are missed. You will also need to notify your tenant that you are applying to have the agreement formalised through FastTrack.

On receiving your application, a mediator will contact your tenant to ensure they understand and agree to all conditions of the agreement. The mediator will then record the agreement in a mediator's order and notify the parties that it has been formalised.

The advantage of the FastTrack Resolution process is that it allows landlords and tenants to make their own agreement and have it formally recorded as a

binding and enforceable agreement without having to attend mediation.

What if my tenant breaches an order?

If your tenant doesn't follow an order made by a mediator or the Tenancy Tribunal, you can get your order enforced through the Collections Unit of the Ministry of Justice. Where your tenant doesn't follow an order to repay their overdue rent, you can apply for an attachment order. Attachment orders require your tenant's employer to deduct a specified amount from their wages and pay that amount directly to you.

Failing to vacate your property?

Ultimately you can apply for a possession order that requires your tenant to vacate the property. If your tenant won't vacate your property after being ordered to do so, you can apply for an eviction warrant. If successful, this will enable a court bailiff to return possession of the property to you.

Don't let the stress get to you!

It can be incredibly frustrating to chase up overdue rent. However it doesn't need to cause you endless stress and worry. If you have to deal with tenants who won't pay their rent, it's easy to follow this relatively straightforward procedure. Essentially it all comes down to 'pay up or leave the property'. ■

¹ A template can be found [here](#).

Property Briefs

Buying a house – are you covered?

If you're buying a house, you will of course need insurance cover for your new property, and your lender will require it.

Here we pinpoint some specific items that some purchasers overlook and, if checked, could avoid later expense:

- » Look at the condition of the roof and whether or not there is any evidence of water leaking in around existing vents or skylights
- » Check the type of water pipe used in the construction. Some pipe products used in the 1970–90 period only had a 30 year lifespan!
- » Inspect retaining walls. Have they been well maintained and does your insurance cover them?
- » Check the state of the boundary fences. If they have been poorly maintained your insurance may not cover them when they fall down
- » Ensure any renovations have been properly permitted and completed, and
- » Check the drainage pipes. You don't want to find out they're blocked when your house or garage suddenly floods during a rainstorm!

We recommend you get a qualified building inspector to do a thorough pre-purchase inspection of the property before you commit to purchasing it. Think of it as a form of insurance; whilst it costs money you may be reluctant to spend, it will cost you far more if you have to replace the pipes, a retaining wall or the roof.

And having just mentioned plumbing, you may also want to check whether or not your home has any flexible/braided hoses in the kitchen or bathroom. Research from Australia has shown that these hoses only last for about 10 years and they are likely to cause significant water damage if they fail. ■

Hidden titles

If you or a member of your family have been granted a protection order under the Domestic Violence Act 1995 you can apply to the Registrar-General of Land under s108 of the Act to hide the information held about you on the Land Register which may otherwise disclose your whereabouts.

In practice this means that no-one can then search for your title information without your consent. The hidden title direction lasts

for five years unless the protection order is discharged earlier; and it can be revoked at any time if your circumstances change.

Co-owners of the property must consent to your application as their details will also be concealed.

It's important to note that the hidden title direction does not extend to other public registers such as your local rating authority; you would need to make separate applications for those.

The hidden title procedure is not used very often but it is available if you have personal safety concerns. ■

Cross lease issues: 'warts and all' clauses

The basic outline (or 'footprint') of a flat on a cross lease title is shown on a flat plan deposited with Land Information New Zealand and attached to your title.

If you make additions that alter the footprint of your flat, the only way to correct the title is to deposit a new flat plan, and this can easily cost thousands of dollars.

If you're selling your cross lease property, talk with us first to check that the flat plan is correct. If there have been footprint changes that are not recorded



on the title, a purchaser can requisition the title. This might force you to amend the flat plan, or to drop the asking price or you could simply lose the sale.

However, if you're prepared in advance, you can make sure your real estate agent includes a 'warts and all' clause in your agreement alerting purchasers to the footprint changes but requiring them to accept the title 'as is.' While this may put off some purchasers or cause them to offer less, its purpose is to prevent the purchaser from requiring you to alter the flat plan at your expense. ■