

CASE AFFIRMS TEST FOR UNTENANTABILITY



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The High Court's recent judgment in *Russell v Robinson* (delivered 1 April 2011) will be of interest to landlords and tenants in earthquake hit Christchurch, where the issue of whether damaged premises have been rendered untenable is the subject of much discussion. The case involved an appeal from an earlier District Court finding that a lease of commercial premises in Auckland had been validly terminated by the landlord as a result of damage caused to the premises by fire. The lease was on the standard ADLS form (4th edition 2002). The High Court upheld the District Court Judge's decision and in so doing affirmed the already understood principles regarding the meaning of the word "untenantable".

By way of brief factual background, the tenant in this case had entered into a lease of first floor premises in a three storey commercial building for a term of 4 years. On the first day of the lease a serious fire ensued as a result of work being undertaken by the tenant in preparation for taking over the premises. Extensive damage was caused to 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; flooring had to be replaced; water and electricity had to be reconnected to the premises. The remedial work which included design, obtaining building consent, and building work, was estimated by the landlord to take 9-10 months and in fact 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 untenable and that in its opinion the damage was such as to require demolition or reconstruction of the premises. The landlord effectively invoked both limbs of the total destruction clause in the lease (clause 26.1). The tenant disputed termination and argued that if a tenant wanted to continue leasing damaged premises then the premises could not properly be described as untenable.

In both the District Court and High Court this argument was rejected, and while there are no fundamentally new concepts identified in the High Court judgment, it does provide a useful summary and confirmation of the general principles to be applied when considering tenability issues. In particular:

- The question of whether premises are untenable is a factual matter that will need to be determined in light of the specific circumstances of each case on an objective basis.
- While the focus of the enquiry must be whether the premises are capable of being tenanted 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 parties must look at the physical state of the premises and ask whether the premises have been rendered unfit for the occupation and use of someone assumed to want the premises for the same use as the tenant - or put another way, has 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 untenable.
- Importantly, some degree of permanence is required to render the premises untenable. 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 4 year lease term was central to the finding of untenability.

Each case will turn on its own facts. Landlords and tenants should seek legal advice early, and before taking action.