LANDLORD AND TENANT RELATIONSHIPS ON SHAKY GROUND AFTER THE CANTERBURY EARTHQUAKES

Toni Collins *

Abstract

The Canterbury earthquakes in 2010 and 2011 not only shook what was supposed to be firm ground beneath us but tested what we thought were firm relationships. Commercial tenants who had enjoyed good relationships with their landlords prior to the earthquakes found these relationships changed afterwards and, in many cases, deteriorated. For many parties, their inability to access buildings owing to the cordon set up around the central business district, the loss of essential services, the damage to their buildings and the prospect of long-term repairs and strengthening were significant issues they had to deal with. To make matters worse, the leases did not cover these problems and the law was unclear, which meant the parties were left in the unenviable position of not knowing their legal rights.

This paper reveals the results of empirical research undertaken soon after the earthquakes. It highlights the problems faced by commercial landlords and tenants, how they dealt with each other to resolve them and the lessons to be learned from these experiences to promote change for the future.

I Introduction

The Canterbury earthquakes in 2010 and 2011 caused significant and widespread damage to the central business district (CBD) of Christchurch. Two multi-storey buildings collapsed; many others suffered substantial damage. Over 1,000 commercial buildings had to be demolished.[1] In order to safeguard the public from dangerous buildings and demolition work, a cordon was set up around the CBD, making a 3.9 square kilometre red zone to which only authorised people had access. The cordon remained in place for nearly two-and-a-half years, although it was reduced over that time as areas were made safe. This was an unprecedented response to a natural disaster in New Zealand.

Although many buildings were seriously damaged, there were a large number that came through the earthquakes with only minor issues. These buildings could have been occupied and used, but the cordon prevented access to them. This caused a major problem for commercial tenants[2] as they could not access their buildings and therefore operate their businesses. Tenants turned to their leases to clarify their legal rights but discovered this issue and many others — such as the loss of essential services and long-term repairs and strengthening of buildings — were not covered. The legislation did not provide clarity and it was unclear whether the common law provided a remedy.

Landlords and tenants were left in the unenviable position of not knowing their legal rights. Were tenants required to pay rent for a building they could not access or use? Could they terminate their leases on this basis? Owing to the uncertainty of the situation, parties had

* Lecturer in Law, School of Law, University of Canterbury, New Zealand.

1 The demolitions list on the Canterbury Earthquake Recovery Authority (CERA) website reported that 1,086 had been demolished as of April 2015 <www.cera.govt.nz>.

2 All tenants and landlords referred to are commercial tenants and commercial landlords with leases of commercial buildings. Residential tenancies were not part of this research. Furthermore, the tenant and landlord participants were not connected in any way with each other.

to make their own decisions about what to do. Some tenants stopped paying rent and found alternative premises; some tried to terminate their leases. Landlords were torn two ways. From a legal perspective, they believed they had the right to demand rent because there was nothing in the lease that provided otherwise. However, they also understood their tenants' reasons for not paying rent and some felt that, from a moral point of view, it was not right to demand rent in a post-disaster situation. The problem was that landlords also had financial obligations, which were supposed to be met by the rent they received. In their defence, they were not the ones preventing tenants from accessing or using the buildings. This was a difficult situation for all involved.

Leaving landlords and tenants to resolve these problems themselves was not ideal. First, the obvious power imbalance between landlords and tenants created a tension between their respective positions. Second, the difference in resources available to each created a problem in terms of access to justice. Third, the length of time the courts were taking to deal with cases in a post-disaster environment did not provide for the needs of these parties.

This paper examines how the relationships between landlords and tenants were affected as a consequence of the earthquakes. It describes the results of empirical research obtained from those who had direct experience of earthquake-related lease issues, and from lawyers who acted for clients facing these problems. It looks at how the parties dealt with each other in light of the challenges they faced and how they resolved their issues. To conclude, there is a reflection on lessons learned from the research and suggestions for change in the hope that there will be an improved outcome for landlords and tenants in possible future events.

II Relationships Put to the Test

A The Research

Empirical research was undertaken by questionnaires and interviews to obtain qualitative data. In total, information from 33 participants was collected: 14 tenants, 10 landlords (including one property manager acting for landlords) and 11 lawyers who had advised tenants and/or landlords who experienced issues with their commercial leases. The landlord and tenant participants came from a broad cross section of business. The lawyers were from a range of law firms of various sizes, including a lawyer in sole practice.

The questionnaires used a mixture of multi-choice and open-ended questions. For both types, participants were given an opportunity to enlarge on their answers. The interviews sought to capture any information that may have been missed in the questionnaires by asking participants to tell their story, talk through responses given and expand where necessary or desired. The majority of the interviews took place in 2013 and 2014, at a time when those who had lived through the events had taken time to reflect on their experiences, having dealt with many insurance, employment and personal issues that also arose as a consequence of the earthquakes.

1 TENANTS

New Zealand is made up of predominately small to medium-sized businesses.[3] To ensure the participants were representative of a broad range of businesses, there was also a sole trader, a trading trust and a non-governmental organisation (NGO). Most of the tenants had businesses in Canterbury, although two conducted business at a national level and one internationally. At the

3 It states on the Ministry of Business, Innovation and Employment website that small enterprises of up to 20 employees account for 97 per cent of all enterprises in New Zealand: 'Small enterprise' (29 August 2018) *Ministry of Business, Innovation and Employment* < www.mbie.govt.nz/info-services/business/business-growth-and-internationalisation/small-enterprise> .

time of the earthquakes,[4] 12 of the 14 tenants leased only one building; one had leases of between two and five buildings; and one had leases of more than 10 buildings. Most tenants shared their buildings with other tenants.[5] The majority of tenants had landlords with Canterbury-based businesses; only a few had landlords with national or international businesses. These landlords comprised partnerships, companies and trusts.

II LANDLORDS

The landlord participants were mainly companies with Canterbury-based businesses,[6] although one operated in New Zealand and internationally. Four leased between one and four buildings, four leased between five and 20 buildings, and one leased over 100 buildings. The majority of landlord participants had tenants with Canterbury-based businesses, three had tenants with national businesses and two had tenants with international businesses.

III LAWYERS

The lawyer participants were a cross section of the legal profession in Christchurch who practised commercial and/or property law. They were all senior lawyers having been in practice for eight years or more, and eight of them had been in practice for more than 20 years. One was a sole practitioner. The majority of the lawyers acted for both landlords and tenants, with only two acting solely for tenants.

Nine of the 11 lawyers had been tenants themselves at the time of the earthquakes, and two had also been landlords. Their ability to give advice about earthquake-related lease issues was affected by their own experiences as tenants and landlords. They were able to understand their clients' problems and 'had a real appreciation for the practical implications of situations'.[7]

B Research Results

The research results point strongly to the fact that the problems that arose as a consequence of the earthquakes tested landlord and tenant relationships. It is clear that prior to the earthquakes these relationships were strong and in good shape. Tenants described their relationships with their landlords prior to the earthquakes as being 'very good' or 'good', with only one saying it was 'poor'.[8] Landlords too described their relationships with their tenants prior to the earthquakes as 'extremely good' and 'very good'.

The research revealed, however, that for many tenants the positive views held of their relationships prior to the earthquakes changed afterwards. Half said their relationships had deteriorated. By comparison, only one landlord participant reported their relationship with the tenant had worsened. There were many reasons for this, including the particular issues that arose for the parties, how the parties dealt with each other and how the issues were resolved.

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4 When the term 'earthquakes' is used, it refers to the period starting with the first earthquake on 4 September 2010 and continuing for the sequence of large earthquakes until December 2011, including the most damaging aftershock on 22 February 2011.

5 Eleven of the 14 tenants had between two and 12 other tenants in their buildings, while three were the sole tenant.

6 Eight of the 10 landlords had Canterbury-based businesses.

7 FQ008. The codes beginning with FQ were given to participants in the research to ensure anonymity.

8 The scale was between 1 and 5 with 1 being 'poor'; 2 being 'not very good'; 3 being 'good'; 4 being 'very good'; and 5 being 'extremely good'.

I THE ISSUES ARISING FROM THE EARTHQUAKES

a. The cordon, lack of essential services, damage and long-term repairs and strengthening

A multitude of issues arose for landlords and tenants as a consequence of the earthquakes. A major issue was the cordon. It was difficult and slow to get information about the buildings situated within the cordon in order to determine whether the leases could be terminated and to obtain business equipment, stock, records and other business necessities from them. Furthermore, the local authority was unable to provide a time frame for the required work in the CBD and was therefore unable to say how long the cordon would remain in place. Landlords and tenants did not know what to do in this situation.

One lawyer said:

> [The disputes we had were] more the ones where the building itself was actually okay but nothing around it was okay or they were stuck in a cordon and the landlord was saying, 'well it's tenantable and simply because you can't get access to it because of the cordon is not my problem and you will continue to pay rent'. [9]

There were also other issues. Essential services were disrupted owing to damaged infrastructure in the central city. Power, water and waste facilities were unavailable for many months. Furthermore, over 2,000 buildings in the CBD required assessment for damage and either demolition or repair. Owing to a shortage of suitably skilled personnel to carry out both assessment and repair work, there were significant delays despite many coming from other parts of New Zealand and overseas. Delays were also caused by insurance disputes and the complicated nature of the repair work to be undertaken.

b. The lease did not provide for the issues that arose

A major problem for landlords and tenants was the uncertainty about their legal rights. Most participants had an Auckland District Law Society lease 2008, 5th edition or earlier (ADLS lease), being one of two standard form leases commonly used in New Zealand.[10] The ADLS lease, the focus of this research,[11] did not cover the situation of a building that could not be accessed, nor did it cover a number of the other earthquake-related issues. As a consequence, the parties were unclear about what to do. Did tenants have to pay rent for an inaccessible building, for a building without essential services, for a building requiring long-term repairs or strengthening? Could the lease be terminated for these reasons? The lease simply did not provide the answers. One lawyer explained:[12]

> For the vast majority of people, and I suspect 95 per cent of practitioners, they would never have to deal with [these issues] in the entire lifetime of [their] career. All of a sudden, in the space of two years, every single practitioner had to try and figure out what these [clauses in the ADLS lease] actually mean and try to work through them … I think the earthquake created a lot of other issues that were simply not anticipated and I think … the [leases] simply did not cover the number of issues that needed to be dealt with and I think that all of the uncertainty came out.

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9 FQ006.

10 The other commonly used lease is the Property Council of New Zealand Standard Office lease.

11 Most participants had the ADLS lease; it was therefore the focus of this research. Thirteen out of 14 tenants and six of the nine landlords used this lease, and the property manager reported that the majority of his landlords had this lease. Of the lawyer participants, seven said all clients who sought advice on earthquake-related lease issues had an ADLS lease; the other three lawyers reported 90 per cent of their clients used this lease too. Any other forms of lease mentioned by participants were very much in the minority.

12 FQ010.

Furthermore, the legislation[13] did not assist and it was unclear whether the common law would apply.[14]

c. Hardship suffered

Tenants did not know if they could terminate their leases in the aftermath of the earthquakes. Many realised early on the situation was dire and worked as quickly as possible to obtain new premises to keep their businesses going. As a consequence, they became liable for two leases: the one for their inaccessible building and the one for their alternative premises. However, a number of tenants stopped paying rent for their inaccessible building so, at that time, they were only paying rent for one. Most landlords were able to claim on their insurance for loss of rent.

With the CBD out of bounds, tenants had the expense of moving and setting up business elsewhere. The suburbs and the outskirts of the city were popular places, but, owing to the demand for premises, rents in these areas increased. Furthermore, landlords of buildings in these areas who had struggled to fill them in the past now had a strong demand from tenants desperate for premises. Therefore, leases were obtained for terms longer than had been the norm in the CBD. This meant that tenants who were still contractually bound by their leases in the CBD ran the risk their building in the CBD would become available before the second longer term lease had finished. As a consequence, tenants who had stopped paying rent because their buildings were inaccessible could become liable for rent for two buildings in the future.

Many tenants could not afford to pay rent for two buildings. Nor did they have the means to test the legal position, particularly as the law was unclear and they could not afford to risk being unsuccessful.

Some tenants did not want to return to the CBD even if their buildings became accessible. It was clear the CBD had suffered significant damage and this meant a loss of inner-city workers, pedestrians and therefore foot-traffic, which was the main source of business for those working in the city. All of these uncertainties created worry and stress for tenants. Landlords may also have been concerned if their tenants could not conduct business because they might have been unable to pay their rent.

d. Access to information

One of the main criticisms tenants had after the earthquakes was their inability to obtain information. First, they did not have authority to access their buildings. Landlords were able to apply for access rights to the cordoned area, the CBD's red zone, through the Canterbury Earthquake Recovery Authority (CERA), which was in control of the area. Tenants were not. They were reliant on their landlord for access to retrieve items from their buildings or to assess their buildings for damage, which was difficult where relations were strained.

Second, tenants had problems obtaining information about their building, which they needed in order to decide whether it was likely to be repaired or demolished. This information would have given tenants more insight into whether their lease would remain on foot or be terminated and they could have planned accordingly. Landlords, as owners, received information from engineers, the authorities and their insurance companies. However, they had no obligation to

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13 The legislation that covers commercial leases is the *Property Law Act 2007* (NZ). The *Property Law Act 1952* (NZ) (repealed) may still have applied to leases dated prior to 1 January 2007 when the latest Act came into force.

14 One possible solution might be to apply the common law doctrine of frustration to bring the leases to an end, but, at the time of the earthquakes, it was unclear whether it applied. This research is outside the scope of this paper and is addressed in the author's thesis, see TL Collins, *The doctrine of frustration, commercial leases and the Canterbury earthquakes* (PhD Thesis, University of Canterbury, 2016).

pass any information on to tenants. Most landlords obtained building and engineering reports for insurance purposes, but few tenants were shown or had access to these reports. In some cases, tenants asked the landlord directly for the report, but they were not forthcoming. In other cases, the reports were obtained indirectly through a property manager or insurance assessor, which tenants perceived to be a most unsatisfactory way of getting information.

The lack of information-sharing left tenants feeling very frustrated and disempowered. One expressed his views:

> We were only able to get copies of the engineering reports and CERA information through our landlord, so we felt we did not have direct access to official information that would have helped our decision-making. We felt powerless and unable to get the information and advice we needed.[15]

Furthermore, insurance companies had control of important information on the buildings. One landlord reported that the insurance company told them to keep building reports confidential, which meant they did not have the authority to share the information with the tenant.

Lawyers also reported a problem with the disclosure of information to tenants. Half of the lawyers thought there should be a legal requirement that landlords disclose information on their buildings to tenants, because in their experience this was not done.

e. Access to justice

Landlords and tenants had problems with access to justice. After the earthquakes, there was very little litigation between landlords and tenants over their earthquake-related lease issues. Few tenants sought legal advice or considered litigation for the simple reason that the court system is expensive and slow. One tenant even said it was prepared to pay two rents rather than challenge the landlord's demand through the court. There is a clear problem here.

II HOW THE PARTIES DEALT WITH EACH OTHER

The earthquake-related lease issues created a lot of difficulties for landlords and tenants. The research reveals that the way the parties dealt with each other after the earthquakes explains why tenants reported their relationships with their landlords had deteriorated. Tenants reported that one of their main frustrations was the lack of communication. Many comments evidenced a general feeling of being kept in the dark or out of the loop in relation to matters concerning the building. This may not have been the landlords' intention, but was certainly the perception of a large number of tenants. For example, one tenant said:[16]

> The landlord would not respond to our communications, did not give us any information about the building or its status. He referred us to his lawyer rather than speaking to us directly. It was only after he had resolved his own insurance situation with the building that he was prepared to speak with us.

Another said:[17]

> I rang the company [landlord] every month looking for an update. They did give us a release [from the lease] eventually, but there was a lot of time where they obviously were in a position to do so and chose not to reveal that to us.

Another frustration for tenants was the lack of certainty about their legal rights. They did not understand why they were being asked to pay rent for their buildings when they were inaccessible and unable to be used or occupied. A common reaction was summed up by one tenant:[18]

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15 FQ200.
16 FQ200.
17 FQ204.
18 FQ207.

> I don't see why the tenant should have to pay rent for a building that cannot be accessed or used. It is up to the landlord to provide the necessary environment we pay our monthly rent for. The landlord has got more money than the tenant.

Tenants also believed the law would reflect the morality of the situation. They were clear that, if the building was not available for them to use, they should not have to pay rent unless they had done something to make it untenantable. One tenant said, 'I did not find out my legal rights. I just assumed I didn't have to pay for a building I couldn't access'.[19] For others, it was a matter of not being released from the lease. A good example was one tenant who had to live with the uncertainty of not knowing whether she would have to go back to the building in the city after the February 2011 earthquake. She was out of the building for eight weeks and then returned only to be told seven months later the building needed earthquake strengthening and she would have to move out again. Three-and-a-half years passed before she was told she had been released from her lease.[20]

Landlords were also unclear about their legal rights. They too had financial obligations that needed to be met by rent payments. Some landlords were able to claim insurance to cover loss of rent; however, some policies did not cover the total length of time the building was inaccessible and the rent remained unpaid.

Most landlord participants took a pragmatic approach to dealing with the situation. It was clear they were concerned about their relationships with their tenants. One lawyer said:[21]

> There was a very strong view that [rent] was payable; that the cordon is not [the landlord's] problem, it's [the tenant's] problem. But in most cases the commercial decision that was made was that these guys aren't going to pay so you have to go and enforce it. Do you want to spend money enforcing [payment of rent] and damage your relationship and lose the tenant? I think the view was that reading the strict interpretation of the lease, tenants were liable to pay but we just came to a commercial decision [that] it's actually unfair to require them to pay and it's just not a good look if you want to get them back.

III RESOLUTION OF ISSUES

Only half of the tenant participants sought legal advice about their earthquake-related lease issues, the main reason being the expense. Landlords sought help from their lawyers, but the legal advice obtained was that the law was unclear, which did not help them. Therefore, most participants chose a pragmatic solution. The majority of tenants stopped paying rent for their building in the CBD and their landlords claimed on their insurance for loss of rent. Some tenants, however, continued to pay rent for two buildings, usually where the landlord did not accept the tenant's decision not to pay. This is likely to have been in situations where the landlord's insurance did not pay out. One tenant told of her experience:

> I contacted the landlord and said, 'I have signed up a lease for another building … I understand we are not going to be able to get back into the building for some time so we [will] no longer be paying rent'. He said, 'Read your contract; your contract states that if you don't pay you will have penalties to pay as well'. I made a decision to continue paying the lease because the penalty was 25 per cent … so it was a lot of money to be penalised if we didn't pay.[22]

A number of tenants who had no communication with their landlords immediately after the earthquakes not only stopped paying rent, but also walked away from their leases and were

19 FQ214.
20 FQ205.
21 FQ005.
22 FQ208.

never contacted again. There was no official end to the lease by the parties agreeing to terminate it; silence, it seems, was louder than words. However, that approach does not provide certainty for either party, particularly tenants, because at any time during the remaining term of the lease the landlord might say the building is now available for use and expect the tenant to meet his or her contractual obligations. This problem is illustrated by one tenant whose building had minimal damage but was inaccessible for years owing to the cordon. Her landlord never contacted her, so she was unsure about his intentions. However, she was adamant she did not want to return to her building in the CBD:[23]

> I had signed up [to a new lease] in the winter after the earthquakes but I was still legally liable for the other lease. But I thought I don't care, they can take me to court if they made me go back … I wasn't willing to go back.

In other cases, solutions were worked out between the parties. A property manager (acting for landlords) gave one example. His problem was tenants not wanting to return to their buildings when they were available for use. As there was nothing in the lease that applied to this situation, he took what he thought was a fair approach to the problem and developed his own rule of thumb: if the tenants were unable to return to their buildings for more than a year, they were given the choice to return or terminate the lease; if the time was under a year then the property manager held the tenants to the lease. The property manager said he did not have any tenants complain about this approach, but he did admit that he may not have been as accommodating to tenants had the insurance companies not covered the loss of rent.

III Reflection on Lessons Learned

In times of disaster, it is essential that business relationships stay strong to work through the inevitable issues that will arise. One way to do this is to provide clear, robust law to which parties can turn, to determine their legal rights at a time of uncertainty. In addition, an affordable and efficient dispute resolution process should also be available to the parties for those problems that are not foreseen and therefore not provided for.[24] Both were lacking at the time of the Canterbury earthquakes.

A suggested solution to this problem is to enact legislation that is specific to commercial tenancies: a Commercial Tenancies Act.[25] It could serve two purposes: one to provide separate legislation that would not only acknowledge the unique and ongoing relationship that exists between landlords and tenants, but also cover aspects of law that are not provided for in the leases; second, it could set up a dispute resolution service for commercial landlords and tenants that they do not currently have.

A new Commercial Tenancies Act could contain provisions to deal with the earthquake-related lease issues that might once again arise — in particular, inaccessible buildings, lack of essential services and long-term repairs. It could also provide a solution to the problem of communication and information-sharing highlighted by a number of tenants. This could be dealt with by the imposition of a new obligation on the parties to deal with each other in good faith, similar to the good faith requirements for employer/employee relationships in the *Employment Relations Act 2000*.[26] The obligation could include a duty to disclose information to each other,

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23 FQ210.

24 It must allow parties to represent themselves. As noted earlier, half of the tenants did not seek legal advice or representation because they could not afford the cost of a lawyer.

25 In Canada, British Columbia has a *Commercial Tenancy Act* [RSBC 1996] c 57, but it is outside the scope of this paper to examine this and the proposals for a new Act.

26 *Employment Relations Act 2000*, s 4.

and this duty could be implied into every lease. The parties should not be able to contract out of it.

Tenants were clear that they did not want to go to court to deal with their earthquake-related lease issues because it was too expensive and too slow (they needed answers quickly).[27] Therefore, the other purpose of a new Act could be to establish a Commercial Tenancies Tribunal as an affordable and speedy dispute resolution service with judges who have a specialist knowledge of the law in this area. It would not be difficult to establish such a tribunal as it could be based on the Residential Tenancies Tribunal, which is already well established in New Zealand. Alternatively, to reduce costs, there could be one Tenancy Tribunal with two arms to cover both residential and commercial tenancies.

Another option is to set up a specialist tribunal specifically to deal with the unique issues arising from a disaster, which would operate in times of emergencies. The government has shown it is willing to provide such services by the introduction of the new Canterbury Earthquakes Insurance Tribunal Bill on 1 August 2018. Its purpose is to establish a tribunal to provide 'speedy, flexible and cost-effective services to help resolve insurance claims between policyholders and insurers' that have arisen as a result of the earthquakes.[28] This type of tribunal might have been a great help to landlords and tenants in their time of need immediately after the Canterbury earthquakes.

IV Conclusion

The Canterbury earthquakes were a significant natural disaster that created problems landlords, tenants and lawyers had not turned their minds to previously. The erection of a cordon around the CBD was an unprecedented response to the devastation. The loss of essential services and the substantial damage to buildings necessitating extensive repair work and strengthening were also issues that affected landlords and tenants. The leases did not provide for these problems and the law was unclear. The parties did not know their legal rights and, consequently, communication decreased and suspicion increased. Tenants, in particular, believed their relationships with their landlords had deteriorated after the earthquakes. This is not a satisfactory outcome because landlords and tenants have a special relationship that requires them to interact on an ongoing basis over many years.

It is simply not feasible nor cost effective for commercial leases to cover every possible eventuality that might befall a building following a natural disaster. However, there are things that can be done in preparation. First, lessons can be learned from the Canterbury earthquakes and the law expanded to provide clarity around the issues that arose. Second, where the law does not cover an issue, there should be a strong, quick and affordable dispute resolution process for the parties to turn to, rather than having to negotiate the court system. This can be achieved by the creation of a Commercial Tenancy Tribunal through the introduction of a Commercial Tenancies Act. This Act could also impose an obligation on the parties to act in good faith and share information with each other.

Parties are more likely to resolve their issues and maintain good relationships through difficult times if they know their legal rights. Certainty in the law is essential to achieve this objective, which in turn is important for the long-term recovery of the affected community, city and nation.

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27 The High Court set up the High Court Earthquake List in 2012 to manage litigation resulting from the Canterbury earthquakes, and this is ongoing.

28 Canterbury Earthquakes Insurance Tribunal Bill, cl 3.