

Flood legal help

Produced by the Queensland Legal Assistance Forum



Commercial and retail leases

This factsheet provides information on the impact of flooding on leased premises. Every commercial or retail lease will be different so it is critical to read the lease prior to giving specific advice, especially the repair, insurance, abatement and termination provisions. Answers to specific problems depend on a construction of the lease, the wording of an insurance policy and the nature and cause of the loss or damage.

Who is responsible for cleaning up flooded premises or paying for the clean up?

This will depend on the lease's terms, the type of premises and how they are insured.

In the case of a lease of a stand-alone building (ie not a retail shop), the tenant will usually have the obligation to keep the premises in good repair as well as express obligations in relation to cleaning. These obligations will extend to cleaning out the premises, repairing or replacing fixtures and fittings and ensuring repair of infrastructure for services and utilities (ie pipes, wiring), unless the lease makes this the landlord's obligation. The tenant's obligations under the lease will apply irrespective of whether the damage is covered by insurance. Essentially, the tenant will be responsible for returning the premises to the same condition it was in prior to the flooding.

In a multi-tenanted property, such as a shopping centre, normally the tenant is responsible for repair, maintenance and cleaning the leased premises only (fixtures, fittings and stock) and the landlord is responsible for the common areas of the building and land. This position may be altered by the lease where the premises are not a retail shop. If the leased premises are a retail shop, the landlord will be liable for any loss suffered by the tenant if the landlord does not take reasonable steps to rectify

defects or clean the building and common areas as soon as possible (s. 43 of the *Retail Shop Leases Act 1994*).

The landlord will usually have insurance for damage to the building but this is unlikely to cover the cost of damage to the fixtures, fittings, or stock of the leased premises. The tenant will need to consult their own insurer with respect to claiming for that cost.

Who is responsible for repairing structural damage to the building?

In a multi-tenanted property, including retail lease, the landlord will usually be responsible for repairing structural damage to the building, including the leased premises. This will not include internal fit-out, fixtures or stock belonging to the tenant. Section 43 of the *Retail Shop Leases Act 1994* provides a right to compensation for the tenant if the landlord fails to repair the defect as soon as is reasonably practical.

In the case of a stand-alone building (ie not a retail shop), the position will be governed by the repair covenant in the lease and the extent of the damage. If the lease provides for the tenant to repair, including structural repairs, the tenant's responsibility will depend on the extent of the damage compared to the building value as a whole. For example, if the building remained intact but the inside of the building is destroyed, the tenant may be responsible for repair. If however,

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the building has significant structural damage or part of the building was swept away, this may be outside of the repair covenant in the lease. The repair covenant does not usually entitle the landlord to a brand new building. Ultimately, whether the tenant is obliged to reinstate the property depends mainly on the extent of the repair required.

The lease should be read carefully to ensure there are no exceptions, such as flooding or other acts of God from the repair covenant. If this is the case, there may have been an expectation that the insurance for the building would cover the damage.

In some leases of stand-alone buildings, structural repairs are exempt from the tenant's repair obligation or the lease is silent in relation to the repair of structural defects. If there is no positive obligation placed on the landlord to repair structural defects, the law does not imply an obligation on the landlord to repair. This may create a stand off between the landlord and tenant with neither having the responsibility to repair. In the first instance, the lease's insurance provisions should be checked to see if flood insurance is carried and by whom (and whether it is current and adequate). This might determine the approach taken by the parties to this issue.

What if leased premises are destroyed by flooding?

Leases normally contain a 'damage and destruction' provision, pursuant to which a tenant is granted the right to an abatement of rent where the premises are damaged or a right to terminate where the premises are substantially destroyed. These matters are a question of fact. The clauses are not usually confined to any type of damage or destruction, so damage or destruction by flood should be covered. It is important to check any time limits imposed for the tenant to give notice to the landlord.

Some 'damage and destruction' clauses also provide for reinstatement of the building at the landlord's option and this would have to be taken into account. This may allow the landlord to elect to not rebuild and terminate the lease. A properly drafted lease should link this clause to the insurance obligation and both clauses should be read together. Again, there will be time limits for the landlord to give notice under such a clause.

If the building is destroyed or damaged and there is no 'damage or destruction' provision allowing termination, consideration should be given to whether the lease is frustrated. This will depend on the extent of the damage and whether the building's destruction was foreseeable as a serious possibility.

What if access to the building is prohibited or the building is unusable because of safety concerns?

In the case of a multi-tenanted building, the leased premises may not be damaged or destroyed (such as in the case of an office building), but access may not be possible or the premises not useable for a period of time, mainly due to safety concerns (eg damaged fire safety systems or damaged services).

If there is no damage to the building, the damage and destruction clause, discussed above, will not apply. Therefore, an abatement of rent will only be possible if the lease expressly provides for abatement in the case of access or essential services to the building being interrupted by natural disaster or by agreement with the landlord.

Likewise, the tenant will not be entitled to terminate the lease unless:

- › the lease contains an express right to terminate in this type of circumstance or

- › the landlord guarantees access to the building (unlikely) and the landlord has failed to take reasonable steps to ensure access is restored within a reasonable time or

- › the landlord's conduct has negligently increased the loss or damage to the tenant so that there is a breach of the covenant for quiet enjoyment (failing to reconnect airconditioning within a reasonable time of gaining access to the building; failing to properly maintain the property prior to flooding which increased the damage or loss); this will require clear evidence of the landlord's negligence or

- › the inability to access the property is for such an extended and unreasonable period, having regard to the remaining period of the lease, that there is a frustration of the lease. This is an unlikely result and would require a significant and extended period of delay in access.

Trading losses occurring because of the building's closure will fall on the tenant. For this, the tenant should contact their insurer. If the leased premises are a retail shop, the tenant will only have a right to claim compensation from the landlord if the delay in resuming occupation is caused by the landlord failing to take reasonable steps to rectify defects or reconnect services.

Who is responsible for ensuring the utilities (gas, water, electricity) are reconnected?

The responsibility for repairing utilities infrastructure is considered above. Once any repairs are carried out it will usually be the tenant in a stand-alone building or the landlord in a multi-tenanted building who should take steps to ensure services are reconnected by the appropriate authorities. The parties should cooperate in making this happen.

What if the executed lease has been lost or destroyed?

If the lease is registered, a copy can be obtained from the Land Titles Office.

If the lease is unregistered, first approach the other party to the lease for a copy. If both copies of the lease are destroyed approach the lawyer who prepared the lease for a copy.

Who is responsible for insurance?

The obligation to insure will be governed by the lease. If an insurance policy is in place, the parties should carefully consider the policy's terms and what damage or loss is covered. For more information about making

an insurance claim, see the *Need help getting an insurance claim paid?* factsheet at www.floodlegalhelp.qld.gov.au

Leases often contain an obligation on the tenant to insure or pay the premium or part of the premium on the leased premises and not the landlord and mortgagee on the insurance policy. If this occurs, the landlord and mortgagee will have a right to claim on the tenant's insurance.

If the tenant was supposed to insure against flood risk but did not, the tenant may have to pay the landlord for damage done to the property by the flooding. If the tenant has insurance, but it does not cover the

costs of repairing or rebuilding the property, the tenant may have to bear the cost of repair (as discussed above) in line with their obligations under the lease.

If the landlord was supposed to insure but did not or failed to insure against a flood risk, and the tenant has suffered loss which may have otherwise have been claimable, there may be a cause of action against the landlord.

In certain cases, where the tenant has insured in a composite policy with the landlord or contributed to the premium of the landlord's insurance, then subject to the policy the tenant may have a right to demand reinstatement of the premises.

Notes: