

Claiming for costs from a broken lease

Under a fixed term agreement the term of the agreement is binding. The tenant cannot terminate the agreement before the end of the fixed term without being held responsible for costs related to the landlord/agent reletting the property, unless the landlord/agent agrees to the early termination of the lease and waives liability.

Where the agreement is for a fixed term and the tenant leaves before the expiry date, the landlord may claim for loss of rent until the premises are relet, pro-rata advertising costs and other compensation which may arise under the agreement, such as a proportion of reletting fees charged to the landlord by an agent. If the tenant vacates a rental property as a result of a breach notice (Form 2) being served for rent arrears, the landlord may also claim compensation for any loss caused by the early termination of the lease. Under these circumstances, the landlord has an obligation to relet the premises as soon as possible.

This is covered by section 94(3), (4), & (5) of the *Residential Tenancies Act 1995*, which covers 'abandoned premises'. When a tenant breaks the lease they are considered to have abandoned the premises.

“94 (3) If a tenant has abandoned premises, the landlord is entitled to compensation for any loss (including loss of rent) caused by the abandonment.

(4) However, the landlord must take reasonable steps to mitigate any loss and is not entitled to compensation for loss that could have been avoided by those steps.

(5) The Tribunal may, on application by the landlord, order the tenant to pay to the landlord compensation to which the landlord is entitled under this section.”

When claiming costs associated with a tenant breaking the lease there are a number of factors that need to be considered.

The lease is not actually broken until the tenant has given back vacant possession of the premises so the landlord is not obligated to advertise prior to the tenant vacating. Obviously, to do so would be in the best interests of both parties so most will do this, however, if there is any doubt about what date the tenant will give up vacant possession then advertising should not be commenced as there is still a binding agreement in place.

Advertising

Although the landlord is not obligated to commence advertising before the tenant vacates, if the landlord chooses to do this then the formula used by the South Australian Civil and Administrative Tenancies Tribunal (SACAT) must be applied to all advertising costs.

All advertising that is done should be claimed in accordance with this formula. As a guide, twice a week in the Advertiser may be considered a reasonable effort in advertising. Tenants cannot however be expected to pay for corporate headers etc and claims should be made using standard charges. Not all landlords or agents utilise the Advertiser (particularly in rural areas) so other forms of advertising e.g. advertising on the internet, may be considered reasonable and will need to be substantiated on a case-by-case basis.

Formula for advertising fee

$$\frac{\text{Total advertising costs} \times \text{weeks remaining from abandonment to the end of the agreed term}}{\frac{3}{4} \text{ of weeks of total agreed term(s)}}$$

example: based on total advertising costs of \$87, property abandoned 12 weeks before the end of a 2 year tenancy (two 12 month terms).

$$\frac{\$87 \times 12 \text{ (weeks from abandonment to the end of the term)}}{78 \text{ (3/4 of 104 week tenancy)}} = \frac{87 \times 12}{78} = \$13.38$$

Letting fee (agents only)

The letting fee charged by an agent can also be claimed in accordance with the formula applied by SACAT. When calculating the letting fee claim, the total term of the tenancy should be used. GST charged by the agent can also be claimed from the tenant in accordance with the formula.

Formula for reletting fee

Reletting fee (maximum of 2 weeks rent + GST) x weeks remaining from letting to end of agreed term
 $\frac{3}{4}$ of weeks of total agreed term(s)

example: based on rent of \$100 per week (+ GST), relet 12 weeks prior to the end of a 52 week term:

$$\frac{\$200 (2 \times \$100) + \text{GST} \times 12 \text{ (weeks from relet to end of term)}}{39 \text{ (3/4 of 52 week tenancy)}} = \frac{200 + \text{GST} \times 12}{39} = \$67.69$$

- The advertising and reletting fee formulas are not to be applied if the tenant has been in the tenancy for less than a quarter of the total lease term, in this case the whole cost is applicable.
- The advertising and reletting fee formulas are not to be applied if the tenant pays rent to the end of the fixed term tenancy as their lease obligations have been met.

Loss of rent

After vacating, the tenant is still liable for rent - (this is called 'compensation for loss of rent'), until the premises are relet, or until the end of the fixed term, whichever is the earlier, unless the landlord consents to the tenant vacating and waives liability. If the tenant does not continue paying 'compensation for loss of rent', once the premises have been relet, the landlord may make a claim against the bond, or directly against the tenant.

All break lease claims apply only if the landlord mitigates. This means that the landlord/agent must make reasonable effort to relet the property as soon as possible. Several things need to be considered when assessing mitigation:

- If the property has been advertised unsuccessfully for several weeks, has demand in this area dropped and should the rent have been reduced? Is the property being advertised appropriately?
- Is the landlord/agent actively showing the property to prospective tenants?
- If the property has been advertised at a higher rent, has this delayed the time taken to rent the property?

The landlord is entitled to claim any loss arising from the abandonment of the property so if the rent needs to be reduced in order to relet the property quickly then the landlord can claim the difference from the tenant to the end of the tenancy. Conversely, if the property is relet at a higher rate, then the landlord is profiting from the lease break and the tenant can expect this profit to be offset against the landlord's losses, i.e. loss of rent (from date tenant vacates), advertising fee and reletting fee.

For further information contact Consumer and Business services on 131 882, or visit www.sa.gov.au/tenancy/renters