

3.11 The Duty To Mitigate Loss

What is the duty to mitigate loss?

The “duty to mitigate loss” is a contract law principle. The principle states if one person breaches the contract, the other person has to take reasonable steps to ensure that any costs that are incurred as a result of the breach are kept to a minimum.

Section 58 of the *Residential Tenancies Act (1987)(WA)* states that the duty to mitigate loss applies when tenancy agreements are breached. The law behind the duty to mitigate loss is based on cases which have been heard by courts over many years. How the rules apply to you depends on the particular facts of your case.

Example:

An owner failed to keep the premises properly maintained and the ceiling started to come down. The owner was therefore in breach of the tenancy agreement. The tenant sent a letter telling the owner and asking them to fix it quickly. The owner wanted to get quotes and the tenant realised that this would take time and that their furniture and TV might get wrecked while this was going on. The tenant moved all their belongings into another room and then the ceiling collapsed. The tenant may not have been able to claim the cost of all of their losses if the belongings had been left there: the tenant had a duty to minimise any possible loss from the owner’s breach of agreement. In this case the tenant met their duty by moving their belongings.

Ending a fixed term tenancy and the duty to mitigate loss

To end a fixed term agreement early the tenant has to get the owner/agent to agree. The owner has a duty to mitigate any loss they may suffer because the tenant has ended the agreement early. (See chapter [4.02 Ending a Fixed Term Agreement](#) for more information.) Even if the owner/agent does not agree to an early termination, the duty to mitigate loss applies, and the owner/agent must take all reasonable steps to keep their loss to a minimum.

When a tenant ends a fixed term tenancy early, the tenant pays to the owner/agent any costs associated with the tenant breaking their tenancy agreement. For example, advertising costs and rent until new tenants move in. At the same time the owner has a duty to ensure that these costs are kept to a minimum. However, the owner is only obliged to take all “reasonable” steps, not anything extravagant or unusual.

Example:

In a case before the court, an owner was claiming loss of rent because the tenants broke their tenancy agreement by ending it early. The parties had agreed that the owner would find new tenants and rent would be paid until the new tenants moved in. The tenants gave evidence that they had given one months notice that they had to leave and the owner had accepted this. However, the owner did not start advertising until the tenants moved out of the property. The court decided that the tenants didn’t have to pay all the rent claimed because the owner had failed to mitigate his losses by advertising earlier.

OWNER OR AGENT?

It is important to know that whilst you may be dealing directly with the real estate agent about your tenancy, it is the owner who takes on all the landlord responsibilities under the *Residential Tenancies Act*. If the agent or owner does something wrong and you have to fill out a breach notice or go to court, it is the owner you will list on the forms and notices.

Does the owner have a duty to mitigate their loss when a tenant abandons the property?

When an owner and tenant do not reach an agreement about ending a fixed term tenancy, and the tenant leaves anyway and stops paying rent, the tenant has “abandoned” the property.

Section 78 of the Residential Tenancies Act says that when a tenant abandons the property, the owner is entitled to compensation from the tenant for any losses, such as loss of rent, the owner has suffered as a result of the tenant’s action. However the owner still needs to take all reasonable steps to mitigate their loss. The owner will not be entitled to compensation for any loss that could have been avoided if they had taken those reasonable steps.

Example:

In one case, the tenant abandoned the premises after giving notice that he was leaving. The owner knew the tenant had moved out and also knew his forwarding address, but did nothing until the end of the tenancy agreement months later. The owner then applied to the court claiming thousands of dollars in rent. The owner’s application failed because she failed to minimize her own losses.

PLEASE NOTE: Even though the court made the decisions mentioned in the above cases, it does not mean that you will get the same decision if your case is similar. In other words, there is no such thing as a precedent in the Magistrates Court where tenancy disputes are heard. The court is not bound by earlier decisions made in the Magistrates Court. Cases are decided by a Magistrate or Registrar using their own understanding of the law in each particular case.

For more information, see chapter [6.03 Preparing for Court](#) and [6.04 Going to Court](#).

How can I make sure the owner takes all reasonable steps to mitigate loss?

Make sure all the terms of the agreement about what you and the owner agree to do are in writing. For example, who will pay for what and when.

Here are some tips if you are ending your agreement early:

- Keep copies of newspaper advertisements to re-let the property – not just your ad but also other ads to compare it to if you feel it's not a reasonable ad. For example, is it too long or too short to attract potential tenants; are you being asked to pay for a Real Estate Agent's logo?
- Ask to be provided with receipts for the ads (sometimes agents/owners get a special bulk price).
- Try to get a contact number for potential tenants. That way if the owner refuses them without good reason you can find out about it and may even be able to call on them as witnesses.

You can't always make sure the owner/agent minimises their losses, but you can try to make sure you know what they should have done. That way, if the owner's claim for compensation is unreasonable you are able to prove it.

If you are in a situation where you think the owner has failed in their duty to mitigate loss, call Tenants Advice Service to get more information and discuss your particular circumstances. See chapter [1.12 Community Contacts](#) for details.

List of Tenants' Rights Manual chapters referred to in this info sheet:

- [1.12 Community Contacts](#)
- [4.02 Ending a Fixed Term Agreement](#)
- [6.03 Preparing for Court](#)
- [6.04 Going to Court](#)