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Leasing Update – February 2014

Beware the Pitfalls of the Notice of Default

by Rachel Goldenberg

It is well established law that distress and termination are mutually exclusive remedies. Distress proceedings are fundamentally inconsistent with a termination of the lease, as the former contemplates the continuation of the leasing relationship while the latter contemplates the end of the leasing relationship. If the landlord intends to terminate the tenancy, a separate and distinct notice of termination must be delivered and must comply with the lease.

The British Columbia Supreme Court has recently affirmed this principle in its decision in *Delane Industry Co. v PCI Properties Corp.*[1] The landlord elected to exercise its right of distress and delivered a notice of seizure, citing unpaid rent in the amount of $101,663.09. The amount recovered in the distress proceeding was insufficient to cover the rent arrears. The landlord then delivered a notice terminating the lease for default in payment of rent effective immediately. The court held that the landlord's notice of termination was unlawful because the landlord did not give the tenant sufficient notice of termination as required by the lease and did not specify the precise amount of rent due after crediting the sales proceeds.

The court held that once the distress proceeding was concluded, leaving an unpaid balance, the landlord was entitled to terminate the lease. However, that right was subject to the terms of the lease, which in this case required a demand notice and a five-day cure period prior to the termination. Further, the amount of rent cited in the notice was not accurate. Consequently, the notice that the landlord delivered was invalid. Had the landlord delivered a fresh demand letter with a five-day cure period, the termination would have been valid.

There is nothing really new about this case, in this author's view. But what it does highlight are the challenges associated with notices of default which are so often required by the terms of a tenant's lease. In Ontario, after fifteen days have elapsed from the date rent was due, absent anything to the contrary in a lease, a lease can be terminated without a notice of default. But more often than not, tenants insist that the lease require the landlord to deliver to the tenant a notice of default, giving the tenant an opportunity to cure a rent default, before terminating the lease by changing the locks. Tenants frequently dispute the terms of such notices, whether it is the amount cited in the notice, the length of the cure period, the failure to offset any deposit, whether interest is properly calculated and payable, or the manner of delivery of the notice, and so on. In any of these circumstances, the notice may be invalidated and any subsequent

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termination in reliance on the notice may be found to be invalid, or worse, result in damages for wrongful termination against the landlord.

For example, suppose a landlord wants to deliver a notice of default for rent arrears in the amount of $30,000. How does a landlord satisfy itself that its notice is correct and that any subsequent termination in reliance on the notice will not be challenged? One option may be to deliver a notice claiming arrears in rent generally and attach to the notice a schedule with a detailed calculation of the arrears. However, this will not necessarily avoid the problem – the schedule is tied to and consequently limits the notice to the exact amount specified in the schedule, which, if not properly calculated, may nullify the notice.

Another potential solution is to deliver two separate notices to the tenant: the first is a notice claiming arrears of rent that does not specify the amount in arrears and the second is a letter citing the specific amount allegedly owing. In these circumstances, even if the amount is disputed, the notice itself may still be valid so long as some amount is owed, even if the amount specified in the second letter turns out to be incorrect.

Alternatively, the landlord might elect to send separate notices for a basic rent default and an additional rent default, on the basis that the basic rent default is easily calculable and unlikely to be the subject of any dispute, while the additional rent default might be less exact.

A final suggestion is to deliver a notice which claims "arrears currently calculated to be $30,000". This language specifies the amount owing but it also allows room for errors in calculation without invalidating the notice.

At the end of the day, the easiest thing is to provide that no notice is required whatsoever. But with most tenants, with any modicum of bargaining power, this is an unlikely result. So – beware the pitfalls of the notice of default. The *Delane Industry Co. v PCI Properties Corp.* case reminds us of the requirement to deliver it and suggests that once delivered, the amount of arrears specified must be accurate. It does not resolve the question as to how to solve the practical issues surrounding notices of default.

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