

Tenant Defaults – What to Do and What Not to Do: A Short Checklist

By Krista Chaytor, Partner, and Angela Mockford, Partner, WeirFoulds LLP

DOs

- **DO abide by notice and default provisions in the lease**

The most common mistakes are:

- a. *Counting Days Incorrectly.*
 - i. Are “days” defined as calendar days or business days?
 - ii. Is there a reference to “clear days”?
 - iii. Be sure to count both the length of notice required and the number of days before service is effective.

- b. *Delivering by Courier.* Although courier is a popular method of delivery, not all leases specifically refer to it as a proper method of delivery of notice. “Personal delivery” may not necessarily mean delivery in person by courier. Other leases prohibit electronic delivery (therefore, fax may not be acceptable).

- c. *Non-rent Defaults.* If the lease does not contain a default provision, the Ontario *Commercial Tenancies Act* fills in the gap and allows for a termination for a rent default. It does not provide the same right for a non-rent default. Not all provinces have the same type of legislation.

- **DO check for construction liens before terminating a lease for a rent default**

A lien properly registered against a leasehold improvement is not discharged on termination of a lease unless the landlord has given the lien holder notice of the termination in accordance with the Ontario *Construction Lien Act* and the right to pay the arrears of rent in order to preserve the lease.

- **DO notify the indemnifier or guarantor**

Some indemnity/guarantee agreements do not require that notice be given to the indemnifier or guarantor. Nevertheless, such notice can be given with little effort and may assist in any future action by or against the indemnifier/guarantor.

- **DO accelerate rent**

If a landlord wants to make it more difficult for a tenant to seek relief from forfeiture, it should accelerate the rent before the termination. It can then argue that a tenant seeking relief from forfeiture is required to pay all of the rent in arrears (including the accelerated rent) before obtaining such relief.

- **DO enforce interest provisions in the lease**

Charging interest encourages tenants to pay on time. In addition, if a landlord does not enforce interest provisions during the term of the tenancy and/or at the time of termination, a tenant may argue that the landlord has waived its right to interest.

- **DO have a clear statement of account ready**

In certain situations, a termination may be improper if the landlord has misstated the amount of the arrears of rent. Take the time to ensure, as landlord, that you have properly calculated the amount owing.

DON'Ts

- **DON'T accept a surrender or keys**

If a landlord accepts the keys when a tenant is in default, the tenant may argue that the landlord has accepted a surrender of the lease (rather than terminated the lease). The consequence of a surrender is that the lease comes to an end by agreement, leaving the landlord unable to sue for the rent owing over the balance of the term of the lease. Some counsel attempt to circumvent this risk by way of letter; it is not always clear that a letter is enough to prevent the finding by a court of an acceptance of surrender.

- **DON'T dispose of abandoned property**

- a. Does the *Repair and Storage Liens Act* apply?
- b. Is any of the property subject to PPSA registration? There may be a registered lender waiting in the wings (or unaware of the default) who has rights to the personal property of the tenant. You may be able to negotiate with this lender.

- c. Is there a lien on the property for unpaid taxes? The truth is, you may not know. Tax information is private, and ministries and government agencies are unlikely to provide you with the information you need in time to make the right decision.
- d. Is it really “abandoned”? Many commercial leasing lawyers have written on the subject, and there is no general consensus on how long you must wait before you remove items. There is case law, however, indicating that even tenants who have appeared to have abandoned their goods have not done so – leaving the landlord liable for conversion and damages.

- **DON'T ignore a breach of a law or by-law by the tenant**

In many instances, a landlord can become directly responsible for a tenant’s breach of a law or a by-law such as a building code violation, a breach of the fire code or permitting the operation of a gaming house. A landlord whose tenant is “behaving badly” should speak to counsel quickly about the appropriate course of action; as waiting it out or otherwise delaying could be more costly than you would imagine.

More recently a landlord’s liability for knowingly allowing a tenant to breach copyright has been considered by the courts. Does a failure to enforce a right of termination for a breach of a law amount to “authorizing” the breach of copyright? Remember, there is a difference between an established “breach” of law (that is, a conviction), and having been “charged” with a criminal offence.

- **DON'T do anything if there is a trustee or receiver unless you speak to a lawyer first**

A landlord’s rights when a tenant is insolvent are different depending on whether there is a receiver in place, a bankruptcy or a reorganization. In most cases, a “stay” applies that prevents the landlord, by federal law, from terminating the lease.

- **DON'T terminate in the middle of a distress**

If a distress has been commenced, complete the distress or abandon it entirely before terminating the lease. Before distraining in the first place, be sure the potential reward outweighs the risks (and the real cost of the distress).

- **DON'T re-lease the space too quickly (that is, before you know what is likely to happen with the defaulting tenant)**

Remember that, even if the law is on your side,

- a. there is relief from forfeiture available to tenants in some cases,
- b. there are appeal periods after court victories, and
- c. some tenants just will not leave right away.

- **DON'T change the locks if there is someone in the premises**

Believe it or not, this could amount to forcible confinement, which is an offence under the *Criminal Code of Canada*.

- **DON'T expect the police to intervene**

They are interested in enforcing criminal law, but not in enforcing civil contracts.

AUTHOR

Krista Chaytor



Krista is an experienced litigator. She has extensive experience with leasing disputes and other real estate litigation. Krista has appeared at all levels of Ontario courts, numerous tribunals and the Federal Court. She is also experienced in alternative dispute resolution and effectively provides advice and opinions that result in practical business solutions for her clients.

Contact Krista at 416.947.5074 or kchaytor@weirfoulds.com.

AUTHOR

Angela Mockford



Angela has been a leasing lawyer for just over 13 years. After practising in-house with both a large national financial institution and a large national developer, she joined the firm in 2000 and became a partner in 2007. For Angela, leasing is all about “getting the deal done” on time and on budget – without sacrificing quality, the relationship, or the client’s best interests. Her strengths include negotiating and drafting all manner of lease documentation (including offers, leases and lenders’ agreements), developing or improving standard forms for clients, and advising in cases of lease interpretation disputes.

Contact Angela at 416.947.5096 or amockford@weirfoulds.com.

ABOUT THIS PUBLICATION

For over 150 years, the lawyers of WeirFoulds have been proud to serve our clients in their most difficult and complex matters. We are the firm of choice for discerning clients within our core areas of practice: (1) Litigation; (2) Corporate; (3) Property; and (4) Government Law. Within these core areas, as well as key sub-specialties, we address highly sophisticated legal challenges. We have acted in some of Canada’s most significant mandates and have represented clients in many landmark cases. Reflecting the firm’s focus, our lawyers are consistently recognized as leaders in their chosen areas of practice and in the profession at large. To learn more about our firm, visit www.weirfoulds.com.

Information contained in this publication is strictly of a general nature and readers should not act on the information without seeking specific advice on the particular matters which are of concern to them. WeirFoulds LLP will be pleased to provide additional information on request and to discuss any specific matters.

If you are interested in receiving this publication or any other WeirFoulds publication by e-mail, please let us know by sending a message to publications@weirfoulds.com.

© WeirFoulds LLP 2011