

Commercial Leasing Bulletin:

Notices of Default: Court Confirms that Content, Not Quantity, Matters

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April 2023

Most commercial leases will provide that, if the tenant fails to pay rent, the landlord may exercise its self-help right of termination only after giving the tenant a stipulated number of days' notice. However, the lease will usually be entirely silent on what information or details must be set out in this notice. This leaves unanswered questions like:

- Does the notice have to stipulate the amount owing?
- Does it have to state by when payment must be made?
- Does it have to spell out the consequence of non-compliance with it?

Perhaps because common sense and common practice will often dictate what a default notice is to contain, there has been a lack of judicial commentary on the legal requirements of a default notice. However, in the case of [Art for Everyday Inc. v. Canarctic J.F.K. Inc.](#), the court seized the opportunity to provide some guidance on the subject in its assessment of whether a “do-it-yourself” landlord’s communications to their tenant constituted a valid default notice entitling the landlord to terminate the lease.

The Decision

The events in issue occurred during the first few months of the COVID pandemic in 2020. At that time, the tenant had leased its premises for some 16 years and, with its option to renew, could extend its term to 2036.

As a result of the pandemic’s effects on their business, the tenant was only able to pay partial rent for the months of April, May and June. The landlord did not remain silent in the face of these partial rental arrears. Rather, from May 6 to June 20, 2020, they sent a total of eight emails to the tenant in which the landlord noted the arrears, advised that interest was accruing on it, and generally maintained that they were relying on their rights under the lease. In the landlord’s last email, sent on June 20, 2020, they stated:

“...I confirm Art for Everyday is in DEFAULT and for now interest is running. We will rely on the Lease we signed as well as any other legal remedies available to us for Art for Everyday to be compliant with the Lease.”

On July 2, 2020, the tenant paid the July 2020 rent but the April to June partial rental arrears remained unpaid.

On July 14, 2020, without any further notice, the landlord served the tenant with a notice of termination letter purporting to terminate the lease for the April to June rental arrears—and interest—effective as of that date. However, given the landlord’s understanding of the COVID eviction moratorium at the time, the letter advised that the tenant did not have to vacate the premises until September 2, 2020.

In response, the tenant brought an application to the court for an order that the landlord’s termination was invalid, or in the alternative, relief from forfeiture. The tenant argued that the termination was invalid because:

1. The landlord had failed to serve a proper notice of default as required by the lease,
2. In accepting rent on July 2, 2020, the landlord had waived its right to terminate the lease for the pre-existing arrears, and
3. The landlord’s notice contemplated continued occupancy of the premises and, as such, was not effective in terminating the lease.

The court decided the case on the basis of the default notice issue alone.

The lease provided that the landlord could terminate if “any Rent due is not paid within five (5) days after notice in writing from the Landlord to the Tenant.” The landlord argued that the cumulative effect of their eight pre-termination communications about the arrears—including expressly maintaining its reliance on the lease—constituted compliance with the lease notice requirement.

Both the application Judge and the Court of Appeal disagreed.

The application Judge found that a default notice “is to serve as a warning to the tenant so as to prevent him from being taken by surprise.” In granting the tenant’s application, she determined that the landlord’s eight emails did not properly warn the tenant as they failed to clearly set out the date by which payment was to be made and the consequence of termination in the event of non-payment.

The Court of Appeal upheld the decision of the application judge that the landlord’s purported July 14, 2020 termination was invalid because of the absence of proper notice. In particular, the Court of Appeal held that the landlord’s eight emails did not, cumulatively, constitute a valid default notice under the lease because:

- The last “notice” email to the tenant on June 20, 2020 “did not stipulate the precise amount it claimed was then owing for arrears and interest;”
- The last “notice” email to the tenant on June 20, 2020 did not stipulate the date by which the payment had to be made;
- Although a landlord might not be generally required to do so, given the landlord’s numerous emails identifying accruing interest as the consequence of non-payment, the landlord was obligated but failed to warn the tenant that, failing compliance, it would be terminating the lease.

The practical end result of these proceedings was that the purported lease termination was held invalid and the lease remained subsisting in good force and effect. The landlord, in addition to its own legal costs, paid the tenant’s determined legal costs.

Takeaways

This decision provides important guidance on the minimum requirements of default notices in the common absence of such requirements in the lease. Both the amount owing and the date for payment should be expressly stated. Further, if the landlord has previously only threatened other consequences, they should advise of their intentions to terminate if the tenant does not comply with the default notice.

This decision also serves as a cautionary tale to landlords who wish to pursue their perceived lease remedies without legal advice. In this case, the landlord incorrectly maintained that the number of general rental arrears communications that they sent to their tenant was more important than the content of the communications. Additionally, although the court did not need to make a determination on these points, there is a significant chance that the landlord’s purported termination would have also been deemed invalid because of their acceptance of rent on July 2, 2020 because of their failure to take possession of the leased premises at the same time as the termination.

We provide regular updates on commercial leasing issues in Canada. If you have any questions or would like to obtain legal advice on any leasing issues or commercial leasing litigation, please contact any lawyer in our [Commercial Leasing Group](#).

Ian Cantor acted on behalf of the tenant on this case.

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