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TEN DEFAULT REMEDIES EVERY LANDLORD NEEDS IN A COMMERCIAL LEASE

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When a Tenant defaults under a commercial Lease, the Landlord looks to one of the most important tools in its tool box, the Lease document, to help deal with the problem. If the Landlord hasn't included sufficiently detailed default remedies in the Lease, then the Landlord will often not have the ammunition it needs to protect its position.

Ten common default remedy clauses which a commercial Landlord should include in the Lease document, are set out below.

1. Re-Entry On Default

The events giving rise to the Landlord's right of re-entry should be specifically set out (e.g. non-payment of rent, breach or non-performance of any Tenant covenant, failing to occupy, vacating or abandoning the premises, or using the premises for an unauthorized purpose) together with any specific period of time the Tenant has to cure a particular default. Often the requirement for written notice of default, and time to cure the default, is limited to defaults other than the failure to pay rent. Many Landlords also include a right to accelerate rent which is automatically triggered when the right of re-entry is exercised. It is important to keep the Landlord's right to re-enter the premises separate from the right to terminate the Lease because there may be circumstances in which the Landlord wishes to re-enter without terminating the Lease (for example, when exercising the right to relet the premises as the Tenant's agent).

2. Re-Entry On Bankruptcy or An Act of Insolvency

If one of the Tenant's other creditors takes action against the Tenant's goods, the Tenant becomes insolvent, a Court Order is made to wind up the Tenant company, a receiver is appointed in respect of the Tenant's assets, or the premises are abandoned, then the Landlord wants the option to re-enter and take possession of the premises immediately, without prior notice. It is important to include in this clause, an



accelerated rent provision for up to three months' rent which is triggered by the Landlord's re-entry, in order to claim priority over unsecured creditors in a Tenant bankruptcy situation. There is no point in stipulating a higher amount of accelerated rent than three months because the Landlord's priority claim is limited under the *Bankruptcy and Insolvency Act* to three months' rent following the date of bankruptcy.

3. Re-Letting and Sale as Tenant's Agent

If the Tenant default gives rise to a Landlord's right of re-entry, then a specific clause allowing the Landlord to re-enter and relet the premises as the Tenant's agent, allows the Landlord to keep the Lease in existence, rather than having to terminate the Lease. The clause should also include a right for the Landlord to sell goods of the Tenant which are found in the premises, as the Tenant's agent, and to apply the net proceeds of sale against the rent owing.

4. Termination of Lease

Whenever the Landlord becomes entitled to re-enter and take possession of the premises, then the Landlord also wants the right to terminate the Lease, if necessary. This right of termination needs to be expressly set out and should only be exercised on written notice to the Tenant. Stipulate that the termination does not relieve the Tenant from the Landlord's claim to rent arrears and damages, including damages for loss of future rent.

5. Waiver of Rights of Redemption

When the Landlord re-enters the premises and terminates the Lease, the Tenant forfeits the balance of the Lease term and may want to seek relief from forfeiture by Court Order. For that reason, many Landlords include a clause waiving the Tenant's right to seek that relief in court. Since relief from forfeiture is a discretionary power of the court, however, this type of clause may not be enforceable unless the Tenant's waiver has been given in response to a prior default of the same type.

6. Landlord's Right to Perform Tenant's Obligations

If the Tenant fails to perform any of its obligations under the Lease (e.g. its duty to repair), then the Landlord wants the right, but not the duty, to perform the Tenant's obligation and to charge the cost of that work to the Tenant, as rent. Many Landlords include an administrative fee on top of the out-of-pocket expense, either based on a percentage of the cost incurred or a lump sum charge. It is important to stipulate that any expenses incurred by the Landlord to perform the Tenant's obligations are deemed to be rent, so the Landlord can exercise rights of rent distress to enforce payment and collection.



7. Expanded Rights of Distress

A commercial Landlord doesn't need a clause in the Lease to give it the right to seize and sell a Tenant's goods for payment of rent arrears because the right of seizure arises from the mere Landlord/Tenant relationship, and the right of sale is granted by the B.C. *Rent Distress Act*. The Landlord may be able to expand its rent distress rights, however, by including a clause which gives it the ability to seize goods of the Tenant which are not located on the premises, to use force to access the premises or to extend the period of time during which the Landlord can follow goods which had been fraudulently removed from the premises by the Tenant.

8. Recovery of Landlord's Expenses Incurred to Enforce Its Rights

If the Landlord wants to recover its actual out-of-pocket expenses incurred to enforce its rights against the Tenant (including actual legal fees incurred), then the Landlord must include a clause in the Lease which gives it that right. The clause can also ensure that the Landlord can recover the actual cost of bailiff's fees, leasing commissions, repair expenses, etc., as if the expenses were rent. In that manner, the Landlord can distrain to collect that "rent".

9. Interest

If the Landlord wants the right to charge and collect interest on money payable by the Tenant under the Lease, then the Landlord must include a clause in the Lease setting out that right to charge interest. The clause must describe the contract rate of interest as an annual rate (not simply a monthly rate) to be enforceable under the *Canada Interest Act*. The clause should stipulate that the interest charges shall be recoverable as rent.

10. Rights Cumulative

It is important to stipulate that the Landlord can exercise more than one remedy arising out of a single default by the Tenant. Without that wording, the choice of one remedy may prevent the Landlord from exercising a second remedy for the same default.

For advice on these default remedy clauses and other Lease drafting tips, please contact a member of the Commercial Leasing Practice Group at Richards Buell Sutton LLP.