Posted on: October 26, 2017

THE IMPORTANCE OF PROVIDING PROPER NOTICE

By: Ryan A. Shaw

A recent decision of the Supreme Court of British Columbia serves as a reminder to all landlords and tenants to carefully consider the nature and content of the notices being provided under a commercial lease. In *Rami and Nina Holdings Ltd. v. Xu*, 2017 BCSC 4, the landlord learned the hard way that the form and content of a notice can be critical, particularly when terminating a tenancy.

Background

In *Rami*, the subject lease had an initial term of 5 years commencing January 15, 2005, with an option to renew the lease for an additional five years. The tenant exercised the first renewal option, which renewed the lease for a new term commencing January 16, 2010 and ending January 15, 2015 (the "First Lease Renewal"). The First Lease Renewal agreement contained a right of renewal for an additional five years on the same terms and conditions in the lease, except the tenant had to provide six months' written notice to the landlord before exercising the right to renew. Also, rent for the additional renewal term would be mutually agreed or determined by arbitration.

In July 2014, the tenant gave written notice of her intention to renew the lease for an additional five years. It was unclear on the evidence whether that notice was provided pursuant to the First Lease Renewal agreement or if the tenant wished to have a new agreement altogether, independent of that right of renewal. However, it was clear that the tenant sought to have an additional five-year option to renew the lease in the form of the second lease renewal (the "Second Lease Renewal"). Between January and November 2015, the parties did not reach an agreement on the terms of a Second Lease Renewal. The parties did agree on a new rental rate, which the tenant paid from February to October 2015, but could not agree on the additional right to renew proposed by the tenant. In November 2015, the tenant stopped paying rent at the new agreed upon rate and reverted to paying rent at the old rate payable under the First Renewal Lease agreement, on the stated basis that she would do so until the Second Lease Renewal agreement was signed. The landlord continued to demand payment at the new rate and eventually sought to terminate the tenancy, but the tenant refused to deliver up possession.

The Landlord's Application to Court for Possession

700 - 401 W GEORGIA ST.
VANCOUVER, BC V6B 5A1
CANADA
TELEPHONE 604 682 3664
FAX 604 688 3830
RBS.CA

The landlord brought an application for an order for possession under sections 18 – 21 of the *Commercial Tenancy Act*, R.S.B.C. 1996, c. 57 (the "Act"). However, at the first stage of what is usually a two stage process, the Court dismissed the application, finding a number of defects in the landlord's materials prevented it from proceeding. The most significant flaws were with respect to the manner of purported termination, mainly the timing and content of various notices provided by the landlord through its property management agent.

In order to obtain an order for possession under ss.18 – 21 of the Act, a landlord must establish by way of affidavit evidence, amongst other things, the terms of the lease and that the lease has expired or been determined by a notice to quit or otherwise. In *Rami*, the landlord had declared the tenant a month-to-month tenant, so it was required to give the tenant one month's notice to terminate the lease. The landlord's agent provided notices of default to the tenant in January and February 2016. On January 13, 2016, the agent wrote to the tenant advising that the locks on the premises would be changed if all current and outstanding rent was not paid in full. The term of the tenancy was not clarified in that notice, nor was there any mention of termination. On February 3, 2016, the landlord notified the tenant of her continued failure to pay rent and that if she did not remedy her defaults by paying the amounts due, then the balance of the lease term would be "fortifed [sic]" and the landlord would re-enter and take possession. In that notice, the landlord informed the tenant that the lease had been renewed on January 15, 2015, notwithstanding its repeated assertions that no renewal was granted and the tenancy had become month-to-month. That confusion was never clarified in the landlord's supporting affidavit. Thus, the Court found the landlord had failed to establish the terms of the lease or right of occupation, as required in s.18(1)(a) of the Act.

Perhaps even more troubling for Court however, was the form of notice of termination and demand for possession which the landlord subsequently provided to the tenant. On March 1, 2016, the landlord's agent delivered a "Notice to Quit" to the tenant, which provided in part:

> *You are hereby notified that the Lease is therefore terminated immediately and you are formally notified that you are required to vacate and quit the property no later than the 15th day of March, 2016 at 5:00 p.m.* (emphasis added)

The landlord's agent then delivered a demand for possession to the tenant on March 16, 2016, which demanded possession of the premises, but delayed the time for delivery of possession to March 25, 2016. The Court found that both of the above notices were fundamentally flawed, as they contemplated and permitted continued occupancy of the premises by the tenant. The jurisprudence clearly provides that

700 - 401 W GEORGIA ST.
VANCOUVER, BC V6B 5A1
CANADA
TELEPHONE 604 682 3664
FAX 604 688 3830
RBS.CA

notices which contemplate continued occupancy are not effective to end a tenancy. As a result, the landlord could not establish that the tenancy had been determined, as required under s.19 of the Act, and its application for an order for possession could not proceed.

Best Practice

This decision in *Rami* should serve as a warning to landlords to be very careful when issuing notices to tenants, especially when purporting to end a tenancy. Firstly, ensure that you are aware of your legal position (i.e. is it a fixed-term tenancy or month-to-month?) and that that position is expressed clearly in all notices provided to the tenant thereafter. Secondly, the notice to quit or notice of termination must clearly call for immediate termination of the tenancy; a termination notice which contemplates continued occupation by the tenant will not be effective. Similarly, to be effective, a demand for possession must not delay the time for delivery of possession. If you do not follow these guidelines in issuing notices, then you risk not being able to rely on those notices in subsequent legal proceedings brought against, or initiated by, a knowledgeable tenant.

700 - 401 W GEORGIA ST.
VANCOUVER, BC V6B 5A1
CANADA

TELEPHONE
604 682 3664

FAX
604 688 3830

RBS.CA