Ending Commercial Tenancies

by Daniel S. Parlow

I. Introduction

Counsel are approached by landlords, tenants and related parties in a number of contexts relating to commercial leases. This paper addresses varying circumstances in which termination is contemplated; considerations which ought to be taken into account in advance of any decision to terminate; notice requirements underlying termination or the preservation of rights following termination; options regarding the methods of termination; and ways in which termination may be avoided.

II. Motivation to End Tenancy

The first step, is for counsel to obtain a clear understanding of the parties' motivations, ie the real back story. In this way, the lawyer will be able to best guide her client in considering different options which may be available.

Landlords may wish to terminate an existing tenancy for different reasons. They may simply want to be rid of a tenant with a poor payment history.

There may be conflict between the parties with regard to use or occupation. The landlord may be unhappy with a sublessee or licensee, or with renovations which the tenant has made or proposes to make. The tenant may consider that activities of the landlord or of neighbouring tenants are so disruptive as to deprive it of substantially the whole benefit of the lease.

In other circumstances, the parties may be motivated purely by financial circumstances unrelated to performance under the lease. The tenant's business may have changed such that the lease no longer conforms to its needs, for example it may need less or more space or have new operating needs which cannot be met at its current location. In a long-term lease with pre-established pricing adjustments, a landlord may be desirous of replacing the tenant with another who will pay market rents.

A landlord may wish to sell the leased premises, or the property in which they are contained, unimpeded by an existing lease. The landlord's motivation may alternatively relate to a proposed new tenant, for example a new lucrative tenant who intends to carry on a business competitive with that of the existing tenant and where either the new tenancy may be in breach of an existing restrictive covenant or the new tenant requires exclusivity.

In some cases, extensive renovations are required to be made, either specifically to satisfy the needs of another existing or proposed tenant, or to bring a building up-to-date, in circumstances where this cannot be done without substantial interference with an existing tenant's use and enjoyment.

Other market circumstances may be the true underlying motivator. For instance, having inherited a lease from a prior owner, a landlord may be anxious to rid itself of a related option to renew or of an option to purchase the leased premises either at a specified price or under a right of first refusal which acts as a disincentive for other prospective buyers to put their best foot forward.

Not only are the parties' true motivations critical in guiding counsel to advise on available options, they may be important factors in a court's ultimate determination whether to grant

possession under the *Commercial Tenancy Act* and/or relief from forfeiture under the *Law and Equity Act*. Clients focused solely on termination should be guided at the outset on other potential outcomes.

III. Considerations before Deciding to Terminate

Having examined the parties' motivations one then turns to a myriad of factors before a final decision is made to terminate.

a. Provisions governing the consequences of the alleged breach

The first consideration is of course whether the alleged breach gives rise to the right to terminate. Most commercial leases will contain express terms governing when the landlord may move toward termination and any contractual preconditions to doing so. It is critical therefore to begin with a careful examination of all such terms: the covenant(s) alleged to have been breached, any notice requirements and the default provisions.

It is not uncommon, owing to lease precedents having been cobbled together, to find inconsistencies in such provisions, for example in determining which breaches give rise to a contractual right to terminate and under what conditions. Any such inconsistencies should be identified before any decision is made to terminate. To avoid unhappy surprises, the party wishing to enforce termination rights should normally follow the path of the most conservative possible interpretation. The *contra proferentem* rule will often be applicable to landlords who have used their own form.

b. Fundamental breach

Having reviewed the lease it may be unclear – particularly to tenants - whether the breach complained of gives rise to a right to terminate. In the absence of an express right to terminate the party wishing to terminate will be required to demonstrate fundamental breach. Our Court of Appeal summarized the law in *Firth, Stouwer and Westerra Investments Ltd. v. B.D. Management Ltd., M.P.N. Holdings Ltd. and Daniel* (1990), 73 D.L.R. (4th) 375 (B.C.C.A.):

> To constitute fundamental breach the landlord's conduct must be such as to go to the very root of the contract – not merely to part of it – so that it makes further performance impossible or it deprives the tenant of substantially the whole benefit which it was the intention of the parties to the lease that the tenant should obtain as consideration for the rentals it was obliged to pay. Unless the alleged breach is of this character the tenants' remedy lies in damages for breach of its contract - not in rescission of the lease agreement. See Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd. (1962), 2 Q.B. 26 (C.A.)."

The determination of whether fundamental breach has occurred will depend both upon the terms of the lease and the subject circumstances of the innocent party. Due to the subjective nature of the test, the courts have accepted fundamental breach arguments by tenants in a myriad of circumstances.

For example, in *Wesbild Enterprises Ltd. v. Pacific Stationers Ltd. and Hauck* (1990), 52 B.C.L.R. (2d) 317 (C.A.), the landlord had reserved under its lease the rights to:

> "make alterations or additions to the buildings and facilities of the Centre"; and to
>
> …
>
> "build adjoining the Premises";

> while the tenant was required to "receive, ship, take delivery of, and allow and require suppliers and others to deliver or take delivery of, merchandise, supplies, fixtures, equipment, furnishings and materials only through the appropriate service and delivery facilities designated by the Landlord, at such times as the Landlord may reasonably specify and in accordance with the reasonable directives and further rules and regulations of the Landlord."
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> In a majority judgment, Lambert J.A. held that alterations performed by the landlord mall owner without seeking the tenant's consent and which impeded the tenant's egress and access for delivery purposes was a fundamental breach permitting the tenant to walk away from the lease. His Lordship held that "[t]he question of whether the breach was fundamental to the nature of this lease and lease arrangement turns, in my opinion, on the particular circumstances of this particular tenant as they must have been known to the landlord at the time the breach or breaches occurred."

Mr. Justice Lambert went on to specifically note:

> I would add only this, that I think that it is possible that one landlord can make identical leases with two tenants and then breach the lease agreement with the two tenants in the identical clause and that could be a fundamental breach in relation to one tenant and not a fundamental breach in relation to the other. It is the particular business that has to be looked at to decide whether the breach is a fundamental one in relation to that tenancy and not just the clause that was breached.

Hutcheon J.A., in dissent, would have applied the same test more narrowly:

> It seems to me that this exceptional remedy should be available only in circumstances where the foundation of the contract has been undermined, where the very thing bargained for has not been provided.

In *Shun Cheong Holdings B.C. Ltd. v. Gold Ocean City Supermarket Ltd*., 2000 BCSC 574 for a four month period and, from the tenant's point of view with no end in sight, frequent leaks of smelly, greasy fluid seeped into the premises, primarily from a restaurant tenant above. These leaks created a health and safety hazard as well as likely a negative effect on the attractiveness of the premises as a place to shop for food. Koenigsberg J. held that "there must be a focus on the obligation and acts of a landlord and the effect of those acts on the lessee, rather than on what the landlord intended by such acts." Her Ladyship adopted Ontario authority concluding that a landlord has an obligation to ensure that one tenant does not breach another tenant's covenant of quiet enjoyment. In this case the breach was so serious as to amount to fundamental breach.

In *Lehndorff Canadian Pension Properties Ltd. v. Davis Management Ltd.* (1989), 59 D.L.R. (4th) 1, [1989] 5 W.W.R. 481, 37 B.C.L.R. (2d) 306, 5 R.P.R. (2d) 1 (C.A.) There, a landlord refused, without reasonable excuse and against the terms of a lease, to permit the tenant to assign it. The result was that the landlord was held to have repudiated the lease and ended the tenant's obligations under it. Carrothers J.A., speaking for the majority on this point, held at paras 47-48:

> When the law firm's move became a reality halfway through the term of the Burrard leases, this alerted the parties to the necessity of a careful management of the situation. The effective frustration by Lehndorff of D.M.L.'s right to mitigate its loss arising from its continuing covenant to pay rent for the substantial balance of the term of the Burrard leases and involving a large sum of money was of such magnitude and importance to the

> parties as to amount to breach of a fundamental term of the Burrard lease contracts or to fundamental breach thereof.
>
> I have no hesitation in concluding that Lehndorff's conduct, characterized at the time D.M.L. acted upon it on 7th August 1984, effectively depriving D.M.L. of the economic benefit and enjoyment of the balance of D.M.L.'s estate in the Burrard leases, indeed constituted a fundamental breach or a breach of a fundamental term of those leases amounting to anticipatory repudiation on the part of Lehndorff which, when accepted by D.M.L.'s letter of 7th August 1984, terminated the Burrard leases, without further liability on its part. Accordingly, D.M.L. would not be limited to a remedy in damages and would not be liable to Lehndorff for further rent.

c. Uniqueness and "Efficient Breach"

A landlord wishing to terminate due to purely financial reasons may apprehend that a tenant will be able to frustrate plans by obtaining an injunction restraining termination or reinstating the lease. In *Evergreen Building Ltd. v. IBI Leaseholds Ltd.,* 2005 BCCA 583 (leave to appeal to S.C.C. granted but appeal subsequently abandoned) the landlord owned a 10-storey office building which, for economic reasons, it wished to demolish and replace with a 21-storey residential tower. It had made application to the City of Vancouver in that regard and at the time of the appeal the building was largely vacant.

The 7th floor tenant, having a subsisting lease with right of renewal, resisted the landlord's efforts to terminate its lease, noting the absence of a demolition clause allowing the landlord to terminate early under prescribed circumstances. At summary trial, the tenant was granted an interlocutory and permanent injunction restraining the landlord from breaching the lease on the ground that its breach could not be remedied by damages in lieu of specific performance. The summary trial judge decided that he lacked the discretion to consider the landlord's argument that the availability of other available and comparable office space dictated that damages, rather than specific performance or an injunction, would be the only just remedy arising from the landlord's admittedly intended breach of its covenant of quiet enjoyment.

On appeal, Prowse J.A. held that, given the courts' acceptance in *Highway Properties (infra)* and *Lehndorff (supra)* of a lease as both a demise of land and a contract, it was inappropriate for the summary trial judge to have considered himself lacking in discretion to weigh the evidence:

> [32] In my view, before determining the appropriate remedy, the chambers judge should have considered the equities between the parties, including any factors relating to the "uniqueness" of the property demised and the relative hardship, if any, of holding the landlord to the strict terms of the lease. There was an abundance of evidence before him in that regard. What he did instead was to reject damages out of hand and to impose injunctive relief tantamount to an award of specific performance. In adopting that approach, he erred.
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> [33] Both injunctive relief and specific performance are equitable remedies. They are sufficiently linked in this case that the equities to be weighed would be similar for both. A consideration of the equities may, or may not, favour injunctive relief. After considering the equities, the Supreme Court judge who ultimately hears this matter will be in a better position to determine whether the nature of this lease in the particular circumstances of this case is such that the demise aspects of the lease should be given more, or less, significance than the contractual aspects.

The ratio in *Evergreen* was applied by D. Smith J. in 472448 B.C. Ltd. v. 343554 B.C. Ltd., 2006 BCSC 1075. The plaintiff sought an interlocutory injunction to restrain the defendant from continuing with its renovations to the mall's interior configuration and common inside corridor in order to accommodate a proposed new tenant, the Bargain Shop. The plaintiff also sought a mandatory injunction directing the defendant to restore the inside corridor to a state comparable to its original configuration. The application was brought because the defendant's changes have eliminated the plaintiff's access to the mall's interior corridor and left only its exterior entrance from the outside parking lot.

After agreeing that the plaintiff had made out a "serious question to be tried", her Ladyship, in her assessment of the balance of convenience, proceeded to weigh the tenant's prospective loss against the merits of allowing the new tenant in. She concluded at para. 30:

> I am not persuaded that it would be just and convenient to restrain the defendant from completing its reconfiguration plan in order to secure the Bargain Shop as a tenant. I am supported in that determination by the financial benefits the new tenant is expected to bring to the Mall, the support of the project by all of the existing tenants, except for the plaintiff, and the speculative nature of the plaintiff's claim that it will suffer considerable losses if the project proceeds. The most determinative factor that weighs in favour or the n award of damages.

d. Tenant's Insolvency

Many leases provide that an insolvency or act of bankruptcy by the tenant amounts to a breach of the lease entitling the landlord to terminate. A landlord wishing to terminate may be subject to s. 29 of the *Commercial Tenancy Act* which, by virtue of s. 146 of the *Bankruptcy & Insolvency Act*, is applicable in British Columbia. S. 29(2) of the *Commercial Tenancy Act* gives the tenant's trustee an unconditional right to occupy the premises for three months from the date of the bankruptcy order or assignment where the lease does not create a monthly tenancy or has not yet been terminated at the date of bankruptcy.

S. 65.1(1) of the *Bankruptcy & Insolvency Act* provides that "[i]f a notice of intention or a proposal has been filed in respect of an insolvent person, no person may terminate or amend any agreement … with the insolvent person, or claim an accelerated payment, or a forfeiture of the term, under any agreement … with the insolvent person, by reason only that

(a) the insolvent person is insolvent; or

(b) a notice of intention or a proposal has been filed in respect of the insolvent person."

S. 65.1(2) then provides that "[w]here the agreement referred to in subsection (1) is a lease or a licensing agreement, subsection (1) shall be read as including the following paragraph:

(c) the insolvent person has not paid rent or royalties, as the case may be, or other payments of a similar nature, in respect of a period preceding the filing of

(i) the notice of intention, if one was filed, or

(ii) the proposal, if no notice of intention was filed."

In *Canadian Petcetera Limited Partnership v. 2876 R Holdings Ltd.*, 2010 BCCA 469 it was held at para. 20:

> …that the purpose of s. 65.1, as it relates to leases, is to prevent landlords from terminating leases on the basis of rent arrears at the time of the filing of a notice of

> intention to make a proposal, so that the lease will continue to subsist while the tenant formulates and negotiates a proposal with its creditors. Its purpose is similar to the provision in s. 69(1), which stays creditors from attempting to recover claims provable in bankruptcy while the debtor is endeavouring to reorganize its financial affairs with its creditors. Both sections have the purpose of maintaining the status quo among creditors and preserving the debtor's assets during the reorganization process.

In that case, the purported termination by the landlord was not caught by s. 65.1 because the ability to terminate the lease depended in part on the non-payment of rent in respect of the period *after* the filing of its notice of intention. Notwithstanding this conclusion, relief from forfeiture was granted and the lease reinstated.

A landlord faced with repeated instances of non-payment suggesting a possible future bankruptcy should therefore consider termination as early as possible prior to the tenant being petitioned or assigning itself into bankruptcy or filing a notice of intention or a proposal in bankruptcy.

The landlord must however also consider the effect of termination on indemnitors and guarantors under the lease. Whether they will continue to be liable after termination (or after a disclaimer of the lease by the trustee in bankruptcy which flows from ss. 30.(1)(k) and 146 of the *Bankruptcy and Insolvency Act*) will depend upon the wording of the lease. As for the trustee's disclaimer, see *KKBL No. 297 Ventures v. Ikon Office Solutions et al*, 2003 BCSC 1598.

e. Highway Properties Options

Once established that termination is available, it is standard practice for counsel to advise the landlord on the options set out in *Highway Properties Ltd. v. Kelly, Douglas and Co. Ltd*., [1971] S.C.R. 562 . At p. 570, Laskin J. (as he then was) set out the three traditional options:

> The developed case law has recognized three mutually exclusive courses that a landlord may take where a tenant is in fundamental breach of the lease or has repudiated it entirely, as was the case here. He may do nothing to alter the relationship of landlord and tenant, but simply insist on performance of the terms and sue for rent or damages on the footing that the lease remains in force. Second, he may elect to terminate the lease, retaining of course the right to sue for rent accrued due, or for damages to the date of termination for previous breaches of covenant. Third, he may advise the tenant that he proposes to re-let the property on the tenant's account and enter into possession on that basis.

The court then accepted a fourth option in accordance with principles of contract law, namely, that the landlord may elect to terminate the lease but with notice to the defaulting tenant that damages will be claimed on the footing of a present recovery of damages for losing the benefit of the lease over its unexpired term. One element of such damages would be the present value of the unpaid future rent for the unexpired period of the lease less the actual rental value of the premises for that period.

It is common practice for the landlord to send a notice in this form (preferably) at the time of termination, or as soon as possible thereafter. Of course, this presupposes that termination is the desired course of action. In rare cases, the landlord may wish to preserve the existing lease, where the tenant and/or the co-covenantors/indemnitors/guarantors have the financial wherewithal to meet the continuing obligations under the lease, and:

- where the landlord cannot expect to receive comparable rent in the market;

- where the premises are not in high demand and the landlord would prefer to place any new tenant in other vacant premises;.

It is important to note that while the landlord's obligations after termination include the duty to mitigate, with potential damages being reduced accordingly, there is no such duty in the case of the first traditional option, ie merely allowing the lease to subsist. That was made clear by our Court of Appeal in Transco Mills Ltd. v. Percan Enterprises Ltd., 100 DLR (4th) 359; 76 BCLR (2d) 129.

f. Effect of Termination on Indemnitors and Guarantors

As landlords rely heavily on guarantees or (more commonly) indemnity agreements when dealing with corporate lessees, before proceeding with the termination option it is essential to consider what effect that will have on the landlord's ability to recover from the guarantors/indemnitors.

To avoid facing the argument that an indemnity or guarantee of obligations under a terminated lease is of no further effect, it is common for landlords to include in indemnity agreements, executed contemporaneously with the lease, or as a condition of approving any lease assignment, a covenant that, in the event of termination, disclaimer or surrender of the lease the indemnitors will enter into a new lease with the landlord of the leased premises on comparable terms and for the balance of the existing term of the terminated lease.

In *365175 B.C. Ltd. v. Malamute Recreations Ltd.* et al 200 BCCA 293, Rowles J.A. considered whether the personal defendants were given reasonable notice of the landlord's intention to enforce the provision in issue in the indemnity agreement and whether, by seeking to enforce the provision in issue, the landlord was pursuing inconsistent remedies. The relevant clause provided as follows:

> In the event of termination, disclaimer or surrender of the Lease, other than surrender voluntarily accepted by the Landlord, then at the option of the Landlord the Indemnifier agrees to lease the Leased Premises from the Landlord on the terms and conditions of the Lease except as to renewal thereof for a term equal in duration to the residue of the Term of the Lease remaining unexpired at the date of such termination, disclaimer or surrender. It shall not be necessary for a further lease document to be executed by the Indemnifier (though the Landlord may require such a lease document to be executed), and the execution of this Agreement shall be treated as execution by the Indemnifier as Tenant of a lease of the Leased Premises on the conditions of the Lease for a term equal in duration to the residue of the Term of the Lease as aforesaid. The Indemnifier covenants that he shall accept such lease and shall pay rent and observe and perform the terms and conditions of such Lease. The Indemnifier shall do all such acts and execute all such deeds and assurances as the Landlord may reasonably require to give effect to the intent of this provision.

Upon terminating the lease for non-payment the landlord gave notice jointly to the lessee and indemnitors of its claim for arrears plus three months' accelerated rent as provided in the lease. It did not, however, give the usual *Highway Properties* notice at that time that it would hold the lessee and/or indemnitors liable for damages in respect of the entire unexpired portion of the lease or that it would require the indemnitors to execute a new lease. The court held that the wording of the novation language, in which the new lease would be based on the remaining unexpired portion of the term, required that notice be given contemporaneously with termination

of the lease. It was further held that notice given three months after the lease had been terminated could not be regarded as reasonable notice.

This case is a lesson not only in ensuring proper notice is given in accordance with the terms of the indemnity agreement but also in the potential pitfalls of pursuing inconsistent remedies. It was further held in this case that the specific contractual remedy of three months' accelerated rent was inconsistent with the remedy subsequently sought. The court commented that if the landlord had exercised its option to require the indemnitors to enter into a new lease, it had no right to take immediate possession of the leased premises or to attempt to re-lease the premises.

It is instructive that in this case following both the contractual and *Highway Properties* remedies, had they been done together, would not have been inconsistent for a claim against the original tenant. The issue of a new lease was not relevant to the original tenant so the inconsistency applied only to the claim against the indemnitors.

Extreme caution should thus be exercised when enforcing rights under indemnity agreements or guarantees to assess the various enforcement options at the outset and to ensure that any required notices are given not only at the correct time but also in respect of remedies which are mutually consistent..

g. Relief from forfeiture

Section 24 of the *Law and Equity Act* provides:

> The court may relieve against all penalties and forfeitures, and in granting the relief may impose any terms as to costs, expenses, damages, compensations and all other matters that the court thinks fit.

However, section 28 limits such relief:

> The court or judge does not have power under this Act to relieve the same person more than once in respect of the same covenant or condition, nor does it have power to grant any relief under this Act if a forfeiture under the covenant in respect of which relief is sought has been already waived out of court in favour of the person seeking the relief.

Prior to a landlord proceeding with termination, it is important to consider whether the tenant will be entitled to relief from forfeiture. Relief from forfeiture is a purely discretionary remedy. No party is entitled to this relief as of right: *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490 at 504 (S.C.C.)

In *Sechelt Golf & Country Club Ltd v. District of Sechelt*, 2012 BCSC 1105, Abrioux J. reviewed the authorities, and at para. 139, he summarized factors to be considered in the exercise of that discretion:

(a) whether the sum forfeited is out of all proportion to the loss suffered;

(b) whether it would be unconscionable in the traditional equitable sense for relief not to be granted;

(c) the applicant's conduct, the gravity of the breaches and the disparity between the value of the property forfeited and the damage caused by the breach;

(d) whether there are any collateral equitable grounds which exist including the party coming to court with "unclean hands";

(e) whether the applicant is "prepared now to do what is right and fair, but must also show his past record in the transaction is clean".

In this author's experience, the most critical factors considered by the courts are the history of breaches and whether the landlord can be compensated in damages for what has occurred.

In many cases, a landlord will be fed up with a tenant's history of non-payment or late payment of rent. In such cases, even if relief from forfeiture appears likely it is worth considering whether to force the issue so as to trigger the prospective operation of s. 28 in respect of potential future breaches. A tenant who knows it cannot seek relief from forfeiture again in respect of the same covenant, will be much more likely to pay its rent on time. The same applies for non-financial breaches.

Another reason to invoke termination is to foreclose renewal rights under a renewal option. This will depend on whether conditions precedent to the exercise of the option will be affected by a termination. It is important to note that relief from forfeiture may not be available in respect of a renewal option as it may be in respect of the lease. In *Clark Auto Body Ltd. v. Integra Custom Collision Ltd.*, 2007 BCCA 24, Kirkpatrick J.A. summarized the distinction:

> In my opinion, it is essential to distinguish between the court's equitable jurisdiction to grant relief from forfeiture for the non-observance of covenants in an existing lease and from the failure to comply with conditions precedent to the exercise of an option to renew a lease. In the former, equity recognizes that a tenant may be permitted to cure its default and be relieved from forfeiture to allow it to retain the balance of the term of the lease. In the latter, there is no compulsion on the tenant to exercise the renewal option, but if it does so, the tenant must comply with the conditions precedent. If the tenant fails to comply, it does not suffer a penalty or forfeiture of an existing tenancy. Equity will not intervene.

IV. Notice Requirements

It is important to review carefully the notice provisions contained in the lease and, if applicable, in the *Commercial Tenancy Act*. Notice requirements can be a minefield to the unsuspecting.

a. Notice of breach

There may be a series of notice requirements prior to termination, and it is essential that they be strictly complied with.

Often the right to the terminate will depend upon prior notice having been given and a prescribed period having elapsed without the breaches alleged having been remedied. It is essential to consider these at the outset rather than to give notice of a breach, allow time to elapse, and then find out later that the conditions for termination have not been met.

Notice provisions include timing, method of delivery, location and the addressees. The parties may have been conversing by email but if that is not an accepted method of delivering notice of a breach under the lease, then any subsequent termination will be ineffective. It is important to consider that the stipulated requirements for notice of a breach or for notice of termination may not be the same as the general notice requirements under the lease.

Counsel should consider at the outset what other notice requirements ought to be given simultaneously with notice of a breach. For example, the failure to give notice under a guarantee or indemnity agreement could prejudice rights to later pursue claims under those agreements. If there is any doubt, it is best to err on the side of providing guarantors and indemnitors with notice of breach to foreclose later arguments that such an obligation had been implied to give them an opportunity to remedy the breach.

In the case of continuing breaches, it is important to assess what must be done and within what time period to remedy the breach. As with most notice periods, in the absence of a stipulated period the courts will require reasonable notice. This, of course, presents uncertainty as to whether any remedial action taken has met the test.

b. Land Transfer Form Act, Schedule 4

You should also consider whether the lease is subject to this statute. If so, it may provide for termination without advance notice. S. 14 of Schedule 4 provides:

> Provided always, and it is expressly agreed, that if the rent hereby reserved, or any part thereof, shall be unpaid for 15 days after any of the days on which the same ought to have been paid (although no formal demand shall have been made thereof), or in case of the breach or nonperformance of any of the covenants and agreements herein contained on the part of the said lessee, his executors, administrators, or assigns, then and in either of such cases it shall be lawful for the said lessor, his heirs, executors, administrators, or assigns, at any time thereafter, into and upon the said demised premises, or any part thereof, in the name of the whole, to re-enter, and the same to have again, repossess, and enjoy as of his or their former estate, anything herein contained to the contrary notwithstanding.

c. Notices on termination

Tysoe J.A. noted in Petcetera, at para. 3:

> Leases typically have default clauses. Some leases allow for monetary defaults to be cured by the tenant after notice of default is given by the landlord, while other leases permit their termination after a default without giving the tenant an opportunity to cure the default. In this case, the Lease contained a hybrid provision, which gave the tenant the opportunity to cure a default unless there was a history of tardy payments.

Although the lease may not contain a notice requirement to terminate, notice may be required for other purposes, for example, to preserve the *Highway Properties'* right to claim in respect of the unexpired portion of the lease, and the right to pursue indemnitors. Particularly where the tenant has abandoned the leased premises, notice of termination may provide evidence of the date on which the termination occurred although it is not strictly required under the lease. As noted *supra*, the precise date of termination will determine a trustee in bankruptcy's ability to disclaim the lease.

If the lease does not require a form of notice upon termination, and there are no other parties to serve contemporaneously, the landlord may decide to terminate by retaking possession either personally or through a bailiff.

While other actions inconsistent with the maintenance of a lease may be relied upon as evidence that the lease is at an end, such as reletting the premises or substantially interfering with the tenant's right of access, for clarity's sake any such actions should be accompanied by a formal notice of termination.

It would also be unusual to terminate without providing a *Highway Properties* notice of intent to sue in respect of the unexpired term, as noted above.

d. Notice of Possession and Commercial Tenancy Act

Should the landlord opt to seek a court order for termination, a common pitfall is to fail to give notice in the matter set out in s. 18 of the *Commercial Tenancy Act*. The language of this section is rather archaic:

> (1) In case a tenant, after the lease or right of occupation, whether created in writing or verbally, has expired, or been determined, either by the landlord or by the tenant, by a notice to quit or notice under the lease or agreement, or has been determined by any other act whereby a tenancy or right of occupancy may be determined or put an end to, wrongfully refuses, on written demand, to go out of possession of the leased land, or the land that the tenant has been permitted to occupy, the landlord may apply to the Supreme Court
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> (a) setting out in an affidavit the terms of the lease or right of occupation, if verbal;
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> (b) annexing a copy of the instrument creating or containing the lease or right of occupation, if in writing;
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> (c) if a copy cannot be annexed by reason of it being mislaid, lost or destroyed, or of being in possession of the tenant, or from any other cause, then annexing a statement setting forth the terms of the lease or occupation, and the reason why a copy cannot be annexed;
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> (d) annexing a copy of the demand made for delivering possession, stating the refusal of the tenant to go out of possession, and the reasons given for the refusal, if any; and
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> (e) any explanation in regard to the refusal.

This section has been interpreted to require the tenant to be given notice in writing of termination *before* demand is made for possession: *Mount Seymour Park Housing Cooperative v. Williamson*, 2003 BCSC 1261, paras. 28-29; *Keneck Ventures Ltd. v. Green Acres Realty (1992) Ltd.*, 2006 BCSC 1795, paras. 11-12. As the requirements of these provisions of the *Commercial Tenancy Act* must be strictly complied with, the result of failing to deliver two notices in this order will be fatal to a later application under the Act.

V. Re-taking Possession

There are at least three ways to retake possession: by self-help (either personally or through a bailiff); under the procedure set out in ss. 18-21 of the *Commercial Tenancy Act*; or under the alternative procedure set out in ss. 25-26 of the *Act*.

Self-help is the preferred method in the majority of circumstances. Unless the premises have been abandoned or the tenant moves out voluntarily, most landlords prefer to use a bailiff to retake possession although there is no obligation to do so unless set out in the lease. In practice, despite the cost involved there are usually fewer downside risks and much less potential for violence, abuse and damage.

The main advantages to self-help are that it provides instant access and does not require judicial intervention.

In a number of different circumstances it may be appropriate to seek an order of possession under the *Commercial Tenancy Act*. First, if the lease terms and the breach do not clearly demonstrate to the bailiff that there is a right of re-entry, the bailiff may refuse to act.

On occasion, the tenant will have residential premises adjacent to or included in the commercial premises. If the residential premises are not included in the commercial lease, the landlord will be normally obliged, in respect of the residential component, to follow the procedures set out in the *Residential Tenancy Act*. These include a Notice to End Tenancy and an application for an order of possession. This requirement may affect the landlord's decision whether to exercise self-help on the commercial portion.

The most common reason for a commercial landlord to seek an order of possession is the risk of liability for damages, including punitive damages, in the event the right of termination is not clear. This most likely occurs in respect of disputes over the amounts alleged to be owing on account of additional rent, property taxes or expenses incurred by the landlord for which indemnity is sought; and in respect of non-financial covenants alleged to have been breached, for example, where the tenant sublets or assigns to a party for which the landlord has purported to withhold consent. In such cases, the tenant may seek an interlocutory injunction to restrain the landlord from terminating pending final determination, or may simply sue for damages for lost business, moving costs, etc. which in some cases can prove very substantial. The courts will also award punitive damages in appropriate circumstances.

Landlords will almost always invoke the procedure under ss. 18-21 of the Commercial Tenancy Act rather than the alternative procedure set out in ss. 25-26. Under the former sections, a writ of possession will be granted where:

- the lease has been terminated and demand for possession has *subsequently* been refused (s. 18);
- the court, having determined that the tenant appears to remain improperly in possession, has appointed and conducted a subsequent hearing on five further days' notice (ss. 19-20); and
- the court has summarily confirmed at the subsequent hearing that the right of possession is established (s. 21).

It is a somewhat unwieldy process and, given the practice of requiring notice before the hearing under s. 18, counsel are constantly confused as to the reasons for holding two hearings. Presumably the second hearing is necessitated by the rare case in which the landlord cannot give notice due to emergency or tenant's absence. The concept of summary determination on 5 days' notice seems inconsistent with the time delay often experienced in waiting for a complex s. 18 application to get before the court.

It is hoped that this procedure will be simplified to allow for one order on proper notice, with the possibility of an *ex parte* interlocutory injunction where the usual circumstances warrant.

A final reason to invoke ss. 18-21 rather than self-help is to trigger any motion for relief from forfeiture sooner rather than later. Often – and particularly where the sole dispute is monetary – a compromise can be worked out whereby rent is agreed and paid and the tenant is relieved from forfeiture. This can be of particular importance to landlords due to s. 28 of the *Law and Equity Act*, above, which precludes relief being granted more than once in respect of the same covenant.

Where the landlord opts for self-help, there can be great uncertainty on any new potential re-letting of the premises while the tenant waits to raise the arrears, which will often drive away potential lessees. On the other hand, if an order of possession is sought under ss. 18-21 and the tenant does not seek relief from forfeiture, it may be much easier for the landlord to instill confidence in a new lessee. While not legally impossible, it is certainly unheard of for a tenant

seeking relief not to bring that application at the same time as the application for possession is heard.

The other option to terminate, under ss. 25-26 of the *Commercial Tenancy Act*, is almost never used. That is likely because it requires the motion to be made before termination, and expressly allows the tenant to reinstate the lease by paying arrears and costs at any time before the final order is granted. In this way, the tenant is not obliged to seek relief from forfeiture and the landlord cannot subsequently avail itself of s. 28 of the *Law and Equity Act*. Due to the language of s. 26(3), "the proceedings shall be stayed", there is no limit on the number of times the tenant could obtain reinstatement notwithstanding the terms of the lease.