

What is "Notice of Default"?

Notices Required

We are often asked what forms sufficient notice of default by a tenant under a lease.

Section 27(2) of the *Retail Leases Act 2003* confirms that a lease which contains an option exercisable by the tenant to renew the lease for a further term is not exercisable if the tenant has not remedied any default about which the tenant has been given written notice. Alternatively the option will not be exercisable if the tenant has persistently defaulted under the lease throughout its term and the landlord has given the tenant written notice of the defaults.

These provisions raises a number of questions:

- What does a notice need to say to be a "Notice of Default"?
- How many defaults must there be for the defaults to be "persistent"?
- When in the term of the lease do they need to occur to be defaults "throughout the term"?

VCAT Decision

In the recent case of Leonard Joel Pty Ltd -v- Australian Technological Approvals Pty Ltd [2017] VCAT 1781 the Victoria Civil & Administrative Tribunal (**VCAT**) had to consider what does a notice need to say to be a "Notice of Default".

In that case the tenant had failed to give the landlord "as built" plans following alterations made to the leased premises and whether the purported notices of default constituted "notice" of the default.

In the case in question the landlord's letters requesting "as built" plans made no mention of a "default" under the lease or a "breach" of the lease.

In the Tribunal's decision the landlord's letters were held not to be "notices" of a default. It held that:

"...the potential consequences to the tenant of the landlord not being required to grant the option to renew are significant and serious and as such I find that a more narrow interpretation has to be applied to under the lease "about" which

the sufficiency of the notice any default the landlord has given. It is necessary therefore that the landlord applies some rigor in its giving of notice which should make it expressly clear that a breach by the tenant is alleged and should be clear and consistent in its description of the nature of the breach, all of which is alleged to constitute the default."

Practical Implications

It is not necessary that the "Notice of Default" states that a possible consequence of the breach of lease being that an option may not be exercisable. The notice must communicate with "obvious clarity and sufficiency" that there is a default or a breach which must be rectified. The default or breach should be identified clearly. The relevant lease provision should be referred to and a request made to rectify the default. The notice should be given as soon as possible after the landlord becomes aware of the default.

It is also important to ensure that the notice is served on the tenant in accord with the requirements of the Lease and/or *Retail Leases Act 2003*.

Invoices Insufficient

The practical application of this decision is that a landlord or agent cannot rely on invoices or monthly statements to satisfy the requirements of Section 23 of the *Retail Leases Act 2003* for the giving of a notice of default.

Tenant Perspective

From a tenant's perspective the decision of VCAT gives a tenant cause for hope if a landlord refuses the exercise of option to renew a lease where it is alleged that the tenant has been in default under the lease. In those circumstances the tenant may be able to establish that proper notice of default was not given by the landlord and that the tenant is entitled to exercise its option to renew the lease.

Message for Agents

Landlord agents should be careful to ensure that any notice of default is properly drawn and served on the

tenant as required by the lease. Failure to do so may have serious consequences for an unwitting landlord.

Effective notices of default will be just as important were a landlord seeks to refuse the exercise of an option to renew a lease and as a precursor to exercising a right of re-entry to evict a tenant.

Contact Us

If any further information concerning leasing practice is required, please contact **Mark Flynn**.

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