

UPDATE ON CASE LAW DEVELOPMENTS IN REAL ESTATE LAW

March 2007

➤ Clarification on the implementation of a termination clause

Lease agreements governed by the rules on commercial leases systematically provide for automatic termination of the lease in case of non-performance by the lessee of any one of its obligations, such as non-payment of the rent or incidentals.

The mechanism of this termination clause is governed by Article L 145-41 of the Commercial Code, which specifies that *"no clause inserted in a lease providing for automatic termination shall be effective until one month after an enjoinder to pay shall have remained ineffective."*

The *Cour de cassation* had already stated that this clause is to be strictly interpreted and can only be applied in case of breaches of the contractual obligations expressly covered by it (Cass. 3^e civ., 19 May 2004).

The Court of Appeals of Bourges (ruling of 2 May 2005) had found that the termination clause was automatically enforceable after having noted that the tenant, while having paid the rents covered by the official enjoinder to pay, had not paid the interest thereon that had also been claimed in the official enjoinder.

In its ruling of 13 December 2006 (Cass. 3^e civ., 13 December 2006), the highest court of the land struck down this ruling by considering that, failing an express stipulation in the lease, the non-payment of the interest attached to the rent pursuant to the enjoinder could not serve to justify application of the termination clause.

This strict interpretation of the termination clause had already led the *Cour de cassation* to exclude from the scope of such clauses, unless expressly stipulated in the lease: past due rent owed following judicial review of the price of the renewed lease (Cass. 3^e civ. 11 July 1990), occupancy indemnities replacing rent upon expiry of the bail (Cass. 3^e civ., 24 February 1999) and collection costs (Cass. 3^e civ., 24 May 2000).

In view of this strict interpretation, lessors should be especially careful to clearly draft the termination clause so as to make it as broad as possible.

➤ Recipient of the lessee's notice of termination upon expiry of the lessee's three-year period

Pursuant to the provisions of Articles L 145-4 and L 145-9 of the Commercial Code, the lessee has the possibility of giving notice of termination upon the expiry of every 3-year period, by extrajudicial act, following the local customs and at least six months in advance.

The lessee must notify its termination to the lessor, who may be the sole recipient of the document.

On this point, the judges on the merits had already invalidated the notice of termination served to the representative of the lessor who was not an authorized recipient, on the grounds that it was substantively flawed (CA Paris, 16^e Division, Sect. B, 13 November 1998).

Similarly, the *Cour de cassation* had already found to be invalid the notice of termination delivered to the former owner of the leased premises, even if the new owner had retained the same manager as its predecessor (Cass. 3^e civ., 4 July 2001).

In line with this well-established body of case law, the *Cour de cassation* had announced the invalidity of a notice of termination upon the expiry of a 3-year period delivered to the former owner of the leased premises who, at the date of delivery of the notice of termination, was no longer the lessor since an assignment had been made to the benefit of a third party having its registered office at the same address (Cass. 3^e civ., 11 July 2006).

In the case at hand, what is involved is strict application of the rule cited above inasmuch as the mistake regarding the identity of the lessor could stem from simple confusion by the lessee in view of the similar company name of the successive owners, who also had the same registered office, especially since the new owner of the premises had accepted service of the notice of termination by the lessee without demur.

The lessee should thus imperatively verify that its initial lessor has not lost this status following the sale of the leased premises and should avoid serving the notice of termination to the manager of the building instead of the lessor.

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