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Fungal Contamination and Commercial Leases

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Fungal contamination: a complex problem

The detection of a fungal contamination problem in a building can be a complex operation. For example, recurring water infiltration due to leaks in a building's outer envelope can create an environment that is conducive to the growth of mould in spaces not visible to the occupant, such as behind walls, in ventilation conduits, and in the plenums of the ventilation system.

Many companies offer a wide array of services for detecting fungal contamination, ranging from ambient air quality tests to sniffer dogs. Nevertheless, if the source of the fungal contamination is not adequately identified and all the necessary corrections are not made, the problem can recur. In such cases, the multiplication of decontamination operations can become very costly and result in a significant reduction in the peaceful enjoyment of the leased premises.

In some cases, the health of employees can be affected, which can lead to significant operational difficulties for the occupying lessee.

In November 2002, the Institut national de santé publique du Québec (the "Institute") published a scientific report[1] on health risks associated with the presence of interior moulds. The purpose of this report, which is still current, was to provide support for public health responses to mould problems occurring in both residential settings and in public buildings. The fungal contamination considered in this report "(…) *refers to the uncontrolled growth of moulds on structures, furniture or other materials usually free of humidity, and in ventilation systems*,"[2] in non-industrial and non-agricultural indoor environments.[3]

With respect to the origin of fungal contamination in indoor environments, the Institute indicates that: "*The main factor contributing to fungal growth therefore remains the presence of available water, which can be due to problems of chronic infiltration, excessive humidity, surface condensation or a broken pipe or a flood.*"[4] The Institute further notes that, at present, no reliable data exists to establish a threshold below which there is no effect on health, and there is no reference list to evaluate the health risk for a given mould species.[5]

The Institute concludes as follows:[6]

"The reviewed studies complement each other, confirm the scientific consensus described in the preceding paragraph and make it possible to state that indoor mould exposure is a health risk varying according to the species encountered, the exposure dose and the subjects' individual susceptibility, and that the symptoms encountered affect several systems, especially the respiratory system. The main problems recognized as being associated with moulds are irritation, asthma

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exacerbation, and allergic and hypersensitivity reactions. Toxic reactions following a strong or repeated exposure as well as infections in severely immunodepressed subjects are also documented."

Deficient air quality in a building can result in the intervention of an inspector from the Commission de la santé et sécurité au travail ("CSST") and the issuance of a remedial order to the employer.[7] The employer must then ensure that the corrective measures identified in the remedial order are carried out.

Finally, when a physician suspects that there is a threat to the health of the population, as fungal contamination in a building can be, he must notify the public health director ("directeur de santé publique") in his territory[8]. The public health director may then conduct an epidemiological investigation where he believes on reasonable grounds that the health of the occupants is or could be threatened[9].

Peaceful enjoyment and abandonment of the premises

Unless the lease provides otherwise, the lessor has various obligations, including the obligation to provide peaceful enjoyment of the leased premises to the lessee during the term of the lease.[10]

The lessor's failure to fulfill its obligation to provide peaceful enjoyment can, in some cases, provide justification for the lessee to abandon the leased premises and treat the lease as terminated as of right.[11] The lessee's right to abandon the leased premises is based, in particular, on articles 1590, 1591, 1605 and 1863 C.C.Q., which enshrine the right to termination as of right, without judicial intervention, when a party to a contract of successive performance repeatedly neglects or refuses to perform its obligation.

While termination as of right in commercial leases is not a possible remedy in all cases,[12] the courts have recognized it when there is a substantial reduction in the enjoyment, causing the lessee serious prejudice.[13] Two conditions must be met to justify the lessee's abandonment of the leased premises and termination of the lease as of right:

1. the substantial non-performance of the lessor's obligations; and
2. notification by the lessee of the disturbance to the lessor.[14]

The courts have previously held that a danger to the health or safety of the occupants could be considered as causing serious prejudice and constitute a substantial reduction in the enjoyment of the leased premises.[15] As for whether the lessor is liable, this depends on the source or sources of the fungal contamination and the commercial lease that was entered into. It may be difficult to prove the sources of the contamination and identify the necessary corrective measures that have to be made. The assistance of experts will often be useful and necessary. Once the sources of contamination have been identified, the relevant clauses of the commercial lease, including those dealing with the parties' respective obligations relating to repair work and maintenance, will contribute to determining whether the lessor is truly the debtor of the unfulfilled obligation to provide this peaceful enjoyment.

The lessee must notify the lessor of the disturbance before abandoning the leased premises. The purpose of notifying the lessor of the disturbance is to give it the opportunity to remedy the problem, and the notice must give it a reasonable time period for doing so. Where the occupants' health is at risk, the lessor is well-advised to act swiftly to identify the source or sources of contamination and take the necessary corrective measures. The obligation to provide peaceful enjoyment is an obligation to achieve a result, and the lessor cannot relieve itself of this obligation by showing that it took reasonable measures to correct the disturbance.

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When the health of the occupants and the operations in the leased premises are compromised due to a fungal contamination, the lessee may be justified in abandoning the leased premises on an urgent basis and claiming damages from the lessor equal to the costs incurred for the relocation of its operations.16

In conclusion, the termination of the lease as of right is a remedy that can be considered when the lessor's failure to perform its obligations is substantial and causes serious prejudice. The fact that the occupants' health and the operation of their business in the leased premises are compromised is an example of a prejudice that is sufficiently serious to warrant such termination.

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1. *Rapport scientifique - Les risques à la santé associés à la présence de moisissures en milieu intérieur* (available in French only), Direction des risques biologiques, environnementaux et occupationnels et Laboratoire de santé publique – November 2002, http: www.Insqp.qc.ca. See also "Health risks associated with the indoor presence of moulds: summary document".

2. See note 1, summary document, page 2.

3. See note 1, summary document, page 2.

4. See note 1, summary document, page 2.

5. See note 1, summary document, page 5.

6. See note 1, summary document, page 8.

7. Christian BEAUDRY, "*Qualité de l'air intérieur et enjeux pour le droit de la santé et de la sécurité au travail*" in Santé et sécurité au travail, vol. 2, Montréal, LexisNexis, updated July 4, 2012, p. 28/6. Denis JOBIN, "*Qualité de l'air intérieur - Responsabilités du propriétaire et de l'employeur à l'égard de la L.S.S.T. et de la L.A.T.M.P.*", in *Développements récents en droit de la santé et sécurité au travail*, Cowansville, Éditions Yvon Blais, 1997, pages 14 and 15. *An Act respecting occupational health and safety*, R.S.Q. c. S-2.1, see, in particular, sections 2, 4, 51, 56 and 182.

8. Public Health Act, R.S.Q. c. S-2.2, Sections 2 and 93.

9. Public Health Act, cited note 8, Section 96.

10. See the text published by Nicole Messier entitled "The Landlord's Obligation to Provide Peaceful Enjoyment," in *Lavery Real Estate*, July 2013, Bulletin Number 7. See also *Société de gestion Complan (1980) inc.* v. *Bell Distribution inc.*, 2011 QCCA 320 (CanLII).

11. While the present article deals with the abandonment of the leased premises, the lessee also has other rights, such as the right to apply for a reduction in rent (article 1863 C.C.Q.).

12. See, in particular, the article by Marie-Josée HOGUE, *Recours en cas d'inexécution des obligations prévues à un bail commercial, in Louage commercial : un monde en évolution*, Carswell, 2000.

13. See, in particular, Bernard LAROCHELLE, *Le louage immobilier non résidentiel, in Répertoire de droit, nouvelle série : doctrine*, 2006, Chambre des notaires du Québec, pages 44 and 45.

14. See, in particular, Pierre-Gabriel JOBIN, *Le louage*, 2nd edition, Éditions Yvon Blais, Cowansville, 1996, pages 470 to 476.

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15. See, in particular, *Société de gestion Complan (1980) inc.* v. *Bell Distribution inc.*, cited note 10; *9087-7135 Québec inc. et al*. v. *Centre de santé et de services sociaux Lucille-Teasdale*, 2013 QCCS 3856 (CanLII) (under appeal).

16. See, in particular, *9087-7135 Québec inc. et al.* v. *Centre de santé et de services sociaux Lucille-Teasdale*, cited note 15 (under appeal).

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