

COMMERCIAL LEASES—FIRST SEMESTER 2024 CASE LAWS DIGEST

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France Real Estate Alert

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Commercial lease law is constantly evolving, with court rulings providing particularly interesting insights into the negotiation and management of commercial leases.

Our selection of some of the High Court's major decisions relating to commercial leases for the first half of 2024 provides an opportunity to take stock of the latest developments in commercial leases.

The decisions handed down on the classic themes of commercial lease formation, amendments, and termination are full of useful information for updating the knowledge of our investor, manager, owner, and user clients' teams.

First semester focuses on eminently practical subjects such as:

- A notice of termination with an offer to renew on different terms from the expired lease (excluding rent) is equivalent to a notice to quit with refusal to renew, entitling the lessee to eviction compensation ([Cass. 3rd civ., 11 January 2024, no. 22-20.872](#));
- In the case of a commercial lease with a binary rent, even in the absence of an express clause providing for recourse to the commercial rents judge, the judge must search the contract or the extrinsic elements for the common will to have recourse to the rents judge ([Cass. 3rd civ., 30 May 2024, no. 22-16.447](#)).

TERMINATION NOTICE

A Notice of Termination With an Offer to Renew on Different Terms and Conditions is Deemed to be a Refusal to Renew

A notice of termination with an offer to renew the lease on terms and conditions different from those of the expired lease, except for the price, must be construed as a notice of termination with refusal to renew, giving rise to a right to eviction indemnity.

In [Cass. 3rd civ., 11 January 2024, no. 22-20.872](#), the appeal decision was reversed in favor of the lessee.

PRECARIOUS OCCUPATION AGREEMENT

A Precarious Occupation Agreement is not a Lease

As a precarious occupancy agreement is not a lease, the precarious occupant cannot rely on the provisions of article 1719 of the Civil Code, which require the lessor to deliver the leased premises, but must establish that the other party has failed to meet its contractual obligations.

The owner cannot be ordered to compensate the occupant for damage caused by a loss on premises covered by a precarious occupancy agreement on the grounds of a breach of an obligation to deliver.

In [Cass. 3rd civ., 11 January 2024, no. 22-16.974](#), the appeal decision was reversed in favor of the lessor.

RENTAL VALUE, CAPPED AND UNCAPPED RENTS

Favorable Impact and Significant Change in Local Marketing Factors

The rental value is determined, in particular, with regard to local commercial factors, the significant evolution of which during the lease to be renewed and up to the effective date of the new lease makes it possible to set aside the rule of capping the rent of the renewed lease and to fix it according to the rental value if it has a favorable impact on the activity carried out on the leased premises.

In [Cass. 3rd civ., 25 January 2024, no. °22-21.006](#), the appeal decision was reversed in favor of the lessee.

LEASE TERMINATION

Prior Notice is not Always Required for Termination

The inappropriate gestures made by the lessor's manager towards the lessee's employees, which were such as to interfere with the peaceful enjoyment of the leased premises, constituted behavior of such gravity that a formal notice prior to notification of the termination of the lease, which would have been in vain, was not necessary.

In [Cass. 3rd civ., 25 January 2024, no. 22-16.583](#), the appeal decision was reversed in favor of the lessee.

Lease Termination is not a Fault of the Lessee

Neither the termination of the leases, which took place on their expiry dates and in accordance with legal provisions and contractual stipulations, nor the lessee's decision to transfer its business to another establishment, are at fault.

In [Cass. 3rd civ., 29 February 2024, no. °21-16.755](#), the appeal decision was reversed in favor of the lessor.

PROCEDURE

Validity of the Formal Notice Included in the Notice to Quit

The formal notice provided for in article L145-17 C. com. (refusal to renew for serious and legitimate reasons) may be included in the same deed as the refusal to renew (Cass. 3rd civ., December 16, 1987, 86-16.189).

The result of [Cass. 3rd civ., 25 January 2024, no. °17-31.538](#) was rejection in favor of the lessee.

Memorandum Procedure and Referral to the Rent Judge

Failure to serve a brief prior to referral to the commercial rents judge gives rise to a *ground for dismissal* (i.e., causing a lawsuit to be ineligible in court) (Cass. 3rd civ., July 3, 2013, no. 12-13.780), and this situation cannot be remedied by serving a brief after a copy of the summons has been delivered to the clerk's office.

The result of [Cass. 3rd civ., 8 February 2024, no. 22-22.301](#) was rejection in favor of the lessee.

COVID-19

Effect of Health Crisis Control Measures on Rent Suspension Clause

The clause suspending the rent, whose clarity precludes any interpretation, clearly implies that the premises themselves are affected. Thus, since the measures taken to combat the health crisis did not affect the leased property itself, but only its operating conditions, the obligation to pay rent is not seriously questionable.

In [Cass. 3rd civ., 8 February 2024, no. 22-17.620](#), the appeal decision was sustained in favor of the lessor.

PROPERTY TAX

Impact of Property Tax on Rental Value

Obligations normally incumbent on the lessor, such as the payment of property tax, which the lessor has discharged from the lessee, are a factor in reducing the rental value.

In [Cass. 3rd civ., 8 February 2024, no. 22-24.268](#), the appeal decision was reversed in favor of the lessor.

COMMON REGULATION OF COMMERCIAL LEASES

Validity of Lease of Another's Property

A lease of another person's property is effective between the lessor and the lessee as long as the lessee has the peaceful enjoyment of the property on the part of the owner, to whom it cannot be enforced.

In [Cass. 3rd civ., 8 February 2024, no. 22-21.219](#), the appeal decision was reversed in favor of the lessee.

LESSEE'S PREFERENTIAL RIGHT

Erroneous Notification by the Notary Does Not Give the Lessee a Legal Right of Preference

At the date of the synallagmatic promise to sell, prior to 18 December 2014, when article L145-46-1 C. com. was not applicable, the lessee did not hold any legal preferential right, and the notary's error in notifying him to purge the said right could not have given him such a right.

In [Cass. 3rd civ., 29 February 2024, no. 22-24.381](#), the appeal decision was sustained in favor of the lessor.

The Lessee's Preferential Right Does Not Apply to Out-of-Court Sales Authorized by the Court

As the provisions of article L145-46-1 C. com. apply when the owner of a commercial or craft premises is planning to sell it, it has been ruled that they do not apply to sales made by judicial authority (3rd Civ., 30 November 2023, no. 22-17.505).

An out-of-court sale authorized by the court, in accordance with article R322-15 of the French Code of Civil Enforcement Procedures, which takes place as part of a property seizure procedure, is a sale carried out under the authority of the court, which does not have the character of a voluntary sale, and the lessee may not avail himself of the preferential right provided for in article L145-46-1 C. com. on the premises sold.

In [Cass. 3rd civ., 13 June 2024, no. 23-13.728](#), the appeal decision was sustained in favor of the lessor.

JURISDICTION

Jurisdiction of the Administrative Judge Over an Action for Compensation for Damage Caused by Public Works

The administrative courts alone have jurisdiction to hear actions for compensation for damage caused by public works, even where there is a commercial lease between the public entity, on whose behalf the works are carried out, and the victim of the damage.

The judge must therefore determine, independently of the legal basis invoked, whether the compensation claims relate to damage caused by public works.

In [Cass. 3rd civ., 14 March 2024, no. 22-24.222 \(same 22-24.223, 22-24.224, 22-24.225, 22-24.226\)](#), the appeal decision was reversed in favor of the lessor.

TERMINATION CLAUSE

Criterion of the Lessor's Good Faith in Enforcing the Termination Clause

Even when the lessee continues to engage in activities other than those authorized by the lease, after the one-month period referred to in the summons containing the termination clause, the judge must determine whether the termination clause has been implemented in good faith by the lessor.

In [Cass. 3rd civ., 25 April 2024, no. 23-10.384](#), the appeal decision was reversed in favor of the lessee.

Failure to Pay on the Date of the Official Receiver's Decision

When the official receiver receives a request from the lessor to terminate the lease for nonpayment of rent and charges relating to an occupation subsequent to the opening judgment, he must ensure, on the day of his decision, that rent and charges relating to an occupation subsequent to the opening judgment remain unpaid.

The result of [Cass. com., 12 June 2024, no. 22-24.177](#) was rejection in favor of the lessee.

SUBLETTING

Irregular Subletting and Standing of the Lessor Acting in Payment of Sublets

While an irregularly granted sublease cannot be enforced against the lessor, it has full effect on relations between the main lessee and the sublessee for as long as the latter has peaceful enjoyment of the premises (Cass. 3rd civ., 7 December 2011, no. 10-30.695, Bull. 2011, III, no. 207).

A lessor who has granted a commercial lease on the premises when he was the lessee and not the owner has standing to sue for payment of subrentals.

In [Cass. 3rd civ., 25 April 2024, no. 22-23.291](#), the appeal decision was reversed in favor of the lessor.

Criteria for Qualifying Subleases

Under article L145-31 of the French Commercial Code, subletting does not apply when the lessee makes the leased premises available to third parties for a fixed overall price, which covers both the provision of the premises and the specific services required by customers.

In [Cass. 3rd civ., 27 June 2024, no. 22-22.823](#), the appeal decision was reversed in favor of the lessee.

HOUSEHOLD WASTE TAX

Lessee Responsible for Payment of Household Waste Collection Tax

The lessee of a commercial lease can only be required to pay household waste collection tax under a clear and precise clause.

It cannot therefore be inferred from the lease, which does not expressly mention this tax among the charges recoverable by the lessor, but which stipulates that the lessee will reimburse the lessor for all charges relating directly or indirectly to the leased premises and the building for its share, so that the rent is received net of all charges, that the lessee has undertaken to reimburse all charges, including the household waste collection tax.

In [Cass. 3rd civ., 16 May 2024, no. 22-19.830](#), the appeal decision was reversed in favor of the lessee.

PREMISES MAINTENANCE

A Lessee Who Remains on the Premises Pending Payment of the Eviction Indemnity is not an Occupier Without Right or Title

According to article L145-28 al. 1er C. com., a lessee entitled to an eviction indemnity cannot be obliged to leave the premises before receiving it. Until such compensation is paid, the lessee is entitled to remain in the premises under the conditions and clauses of the expired lease and cannot therefore be considered as occupying the premises without right or title.

In [Cass. 3rd civ., 16 May 2024, no. 22-22.906](#), the appeal decision was reversed in favor of the lessee.

TRANSFER OF LEASED PREMISES

Relative Effect of the Sale of the Leased Premises

According to articles 1165 and 1376, in their wording prior to that resulting from ordinance no. 2016-131 of 10 February 2016, and 1743, paragraph 1 of the Civil Code, agreements have effect only between the contracting parties and do not prejudice third parties; the lease is enforceable against a purchaser who has knowledge of it before the sale of the leased property; and anyone who receives by error or knowingly what is not due to him is obliged to return it to the person from whom he received it unduly.

Thus, the lessee may take action against the original lessor for restitution of undue payments made in respect of rents and charges due prior to the sale, without the lessor, who remains liable to the lessee for his personal obligations prior to the sale, being able to invoke a clause in the deed of sale subrogating the purchaser to the rights and obligations of the seller.

In [Cass. 3rd civ., 16 May 2024, no. 22-19.922](#), the appeal decision was reversed in favor of the lessee.

SHOPPING MALL

The Lessee is not Bound by the Shopping Center's Opening Hours, Which Contravene Night Work Regulations

Since the use of night work must be exceptional and justified by the need to ensure the continuity of economic activity or services of social utility, and insofar as the lessee's clothing sales activity does not fall within the scope of a service of social utility and the extension of this activity beyond 9:00 PM, the lessee is not required to comply with the decisions of the GIE's general meeting (GIE standing for *Groupement d'Intérêt Economique*, i.e., economic interest grouping), which are of lesser value in the hierarchy of standards.

Thus, the use of night work during the winter period in dispute is not essential to the lessee's operations, with the result that a period of night work different from the legal period can neither be set by a collective agreement organizing the use of night work nor be authorized by the labor inspector.

The result of [Cass. com., 29 May 2024, no. 22-17.107](#) was rejection in favor of the lessee.

BINARY RENT

Binary Rent and Application to Fix Rental Value

While parties who stipulate a variable rent clause are, in principle, expressing a desire to exclude judicial fixing of the price of the renewed lease at the rental value, the situation is different when they have expressed a common desire to the contrary.

Consequently, even in the absence of an express clause providing for recourse to the commercial rents judge, it is up to the latter, when seized of the defense on the merits - consisting in opposing a request to set the price of the renewed lease at the rental value - to seek out this common will to the contrary, either in the contract or in extrinsic elements.

In [Cass. 3rd civ., 30 May 2024, no. 22-16.447](#), the appeal decision was reversed in favor of the lessor.

STATUTE OF LIMITATIONS

Effect of Fraud on the Biennial Limitation Period

Fraud suspends the two-year limitation period applicable to actions under a commercial lease.

In Cass. [3rd civ., 30 May 2024, no. 23-10.184](#), the appeal decision was reversed in favor of the lessee.

RENTAL CHARGES AND COSTS

Expenses Chargeable to the Lessee and the Need for an Express Stipulation in the Lease

The judge must ascertain whether the sums contested by the lessee (the costs of pest control, disinfection, wiring, elevator maintenance, and road tax) have been charged to him by an express stipulation in the lease.

In [Cass. 3rd civ., 30 May 2024, no. 22-22.981](#), the appeal decision was reversed in favor of the lessee.

TERMINATION NOTICE AND REFUSAL TO RENEW

Retroactive Effect of an Appeal Ruling on the Validity of a Notice to Quit With Refusal to Renew

In the absence of any clarification, the ruling of an appeal supersedes the ruling of the court of first instance, which is provisionally enforceable with effect from the date of the overturned ruling.

A notice of termination with refusal to renew without eviction indemnity cannot be considered to be unfounded on serious and legitimate grounds when a first judgment, enforceable by provision, having made the lessor responsible for carrying out work, is subsequently overturned.

In [Cass. 3rd civ., 30 May 2024, no. 23-13.044 and 23-14.903](#), the appeal decision was reversed in favor of the lessor.

RENTAL VALUE

Impact of Reduced Sales Area on Rental Value Assessment

When the lessee's renovation work has not altered the structure of the building, and the configuration of the premises is fully in line with the business activity, and even though the lease contract does not specifically define a sales area, the judge may base his decision on the specific characteristics of the premises at the date of renewal, and take into consideration the size of the areas allocated respectively to receiving the public and to operations following the renovation work, in order to set the rental value.

The result of [Cass. 3rd civ., 13 June 2024, no. 23-13.613](#) was rejection in favor of the lessee.

HANDING OVER OF PREMISES

Failure to Restore and Need for Prejudice

The mere fact that the lessee has failed to carry out repairs cannot be used as grounds for condemnation unless it is established that the lessor has suffered loss as a result of the lessee's contractual fault.

In [Cass. 3rd civ., 27 June 2024, no. 22-24.502](#), the appeal decision was reversed in favor of the lessee (same [Cass. 3rd civ., 27 June 2024, no. 22-21.272](#)). The result of [Cass. 3rd civ., 27 June 2024, no. 22-10.298](#) was rejection in favor of the lessee.

OBLIGATION TO DELIVER

Scope of the Breach of the Obligation to Deliver as a Basis for the Plea of Nonperformance

In order to consider that the lessor has failed in his obligation to deliver and that, in the case of the lessor's principal obligation, the lessee has validly raised the exception of nonperformance, by refusing to pay the rent and the council tax in full, the judge must determine whether the alleged infiltrations have rendered the premises unfit for the use for which they were intended.

A judge may only rely on an expert report produced unilaterally at the request of a party if the report has been submitted to the free discussion of the parties and is corroborated by other evidence. This is not the case with the analysis carried out by the lessee's chartered accountant.

In [Cass. 3rd civ., 27 June 2024, no. 23-10.340](#), the appeal decision was reversed in favor of the lessor.

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