



Posted on: December 2, 2013

NEW BEST PRACTICE FOR DISTRESSING LANDLORDS

By RBS Articled Student

It is well-settled law that a landlord cannot exercise its right of distress for unpaid rent while simultaneously terminating the tenancy for the same breach. This is because distress presupposes the continued existence of the landlord-tenant relationship. Landlords cannot issue a notice to terminate, even where it is apparent that distress will result in a short-fall, until distress is complete. A recent decision of the Supreme Court of British Columbia also serves as a reminder that caution must be exercised by landlords when trying to collect and terminate in an efficient way.

Rent Distress and Termination of the Lease

In *Delane Industry Co. Ltd. v. PCI Properties Corp.*, 2013 BCSC 1397, the Court concluded that the landlord was required to wait until distress was complete before issuing and relying on a notice of default to terminate the lease.

The critical facts of this case can briefly be summarized as follows:

- The plaintiff tenant leased retail space at the Vancouver Convention Centre where it operated a gift shop.
- The defendant landlord was allegedly owed over \$100,000 in unpaid rent and on May 3, 2013 commenced distress proceedings in accordance with the *Rent Distress Act*, RSBC 1996, c 403.
- On May 14, 2013, the landlord provided notice of default to the tenant and demanded payment in full within 5 days. Upon the expiration of this notice period, another provision in the lease allowed the landlord to re-enter and terminate.
- Fifteen days later, on May 29, 2013, the distress procedures were completed and the landlord recovered a mere \$9,500. That same day, the landlord provided notice to terminate the lease, effective immediately.

The Court concluded that the May 29th notice was not given in accordance with the lease and was not effective. The Court explained that after the landlord issued its notice of default on May 14th, the remedy it chose was distress, not termination. Therefore, the landlord was not permitted to terminate the lease on the basis of the previous notice. Instead, the landlord should have issued (or re-issued) notice of default upon





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completion of distress and waited the required 5 day notice period before terminating. The Court was not swayed by the fact the landlord did not actually terminate until distress was complete and had only pre-emptively issued the notice.

Best Practice

This case warns landlords to avoid certain inefficiencies while attempting to collect what is owed to them. Even when it is clear that there will be a short-fall following distress, landlords must ensure distress is complete before issuing a notice to terminate. If notice of default is required under the lease, landlords must also wait for distress to be complete before issuing this notice and cannot terminate until the notice period, as outlined in the lease, has elapsed.



VANCOUVER OFFICE:
700 - 401 W GEORGIA STREET
VANCOUVER, BC CANADA V6B 5A1
TEL: 604.682.3664 FAX: 604.688.3830

SURREY OFFICE:
200 - 10233 153 STREET
SURREY, BC CANADA V3R 0Z7
TEL: 604.582.7743 FAX: 604.582.7753

RBS.CA