Don't Stress with Distress: A Landlord's Distress Remedy in Delane Industry Co. Ltd. v. PCI Properties Corp.

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Introduction

Determining the most appropriate remedy in response to a tenant's failure to pay rent can be a difficult decision for a commercial landlord. Exercising distress is one such available remedy. The British Columbia Court of Appeal's decision in *Delane Industry Co. Ltd. v. PCI Properties Corp.,* 2014 BCCA 285 highlights the need to proceed with good legal advice and caution. The decision also clarifies the legal demarcation between a landlord's distress remedy and its right to terminate.

Facts and Decision

The landlord, PCI Properties Corp., leased retail space in the Vancouver Convention Centre to the tenant, Delane Industry Co. Ltd. A dispute arose between the parties and the tenant withheld rent for over a year. After months of unpaid rent accrued and informal demands by the landlord went unrectified, the landlord wrote a formal demand letter on April 18, 2013 demanding payment of the outstanding rent in excess of $100,000. The landlord threatened to exercise its rights and remedies under the lease, including its right to terminate. On May 13, 2013, the landlord issued a distress warrant, seizing the goods of the tenant. Shortly thereafter, on May 14, 2013, while the distress was underway, the landlord issued a notice of default to the tenant, demanding full payment of the arrears within five days.

The landlord's bailiff sold the tenant's chattels for the small sum of $9,500 plus tax, leaving the landlord with a significant deficiency. After the landlord's bailiff had sold the tenant's goods, by way of a letter on May 29, 2013 the landlord purported to terminate the lease for non-payment of rent. On that same day, the landlord also changed the locks to the premises. There were no new intervening defaults between the initiation of the distraint and the purported termination and the landlord had failed to issue any new notice of default after completion of the distraint.

The tenant argued that rent distress and termination are two mutually exclusive remedies, and that by having exercised its right to distress, the landlord was not entitled to terminate the lease for that same breach. The landlord did not dispute that distress is inconsistent with termination, but argued it was entitled to terminate the lease after distress had been completed on the basis of the May 29 letter.

The British Columbia Court of Appeal, upheld the trial level decision, and ruled in favour of the tenant. Relying on established case law on the intersection between the distress remedy and termination, the Court stressed that for any given breach a landlord may elect to terminate or affirm the lease. In this instance, once the landlord elected to exercise its right of distress, it made an irrevocable election to affirm the lease. It therefore could not then terminate on the basis of the same breach on which the distress was grounded. Importantly, the Court upheld its decision despite the existence of a clause in the lease which stated that the landlord could exercise multiple remedies.

Significance

The decision in *Delane* raises serious considerations for landlords and their counsel.

The act of distraining represents an irrevocable election to affirm the lease. Once a landlord elects to distrain for arrears, the landlord may not then seek to terminate the lease for default based on those same arrears even if the arrears have not been fully paid as a result of the distress. The reality of exercising a distress remedy is that it rarely provides a landlord with full recovery of arrears. A landlord and its counsel must be mindful that exercising the remedy of distress may prevent, or at least delay, any subsequent termination of the lease. The Court's reasoning in *Delane* also emphasizes that the initial steps taken by a landlord in response to a defaulting commercial tenant are of critical importance. Distraint can be a useful remedy to assist in achieving recovery of rent or if done strategically, as a means towards obtaining vacant possession. However, a landlord faced with a tenant's default must be disciplined and seek strategic guidance to avoid pursuing remedies that preclude the landlord's intended goals.

By

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