

Negotiating a Waiver of Distraint: A Landlord's Primer

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*(*This release is based on an article published in The Shopping Newsletter.)*

It is not unusual for a tenant to seek financing from time to time throughout the term of a lease, and, particularly in the current economic climate, tenants may require financing to stay afloat. Prior to advancing any funds, lenders will often require that the landlord execute what is commonly called a "waiver of distraint," whereby the landlord foregoes its distress rights – the ability to seize tenant property in order to pay arrears of rent.

Although onerous at first glance, this request is actually quite tolerable if the result is a rent-paying, continuously operating tenant. However, a landlord need not execute the "standard" form of waiver provided by the lender. The landlord in this situation has a fair amount of bargaining power, and should use it to reach an agreement that accommodates the lender while still preserving some of the landlord's basic rights. Landlords should try to achieve the following during negotiations:

- **Don't Waive, Postpone.** The first priority for a landlord should be to amend the form such that the landlord does not actually waive its distress rights, but rather postpones its right to distraint in favour of the lender. In doing so, the landlord has preserved its right to distraint against any of the tenant's chattels and fixtures that may remain on the premises after the lender has realized on its security, while still maintaining its priority above other potential creditors.
- **Occupation and Occupation Rent.** The standard form will generally provide the lender with the right to occupy the leased premises for the purposes of realizing on its security, sometimes for up to several months in the case of a lease termination. Although the lender may reasonably require such a long occupation period due to the nature of the security, this can tie up the landlord's space and impact its ability to run a revenue generating property. Therefore, particularly if the lender requires more than a few days to remove the tenant's goods, the landlord should insist that the lender pay occupation rent at the rate provided for in the lease. Depending on the nature of the occupation and the premises, the landlord may also insist that the lender comply with some or all of the provisions of the lease (e.g. insurance, liability for its acts). Finally, although it may be a long shot, the landlord should also request that the lender pay the arrears of rent owing under the lease prior to entering the premises, and prepay the occupation rent, or at least the first month's worth, if the lender will be occupying the premises for a substantial length of time.
- **Repairs.** The agreement should provide that the lender is responsible for any damage caused by the removal of any chattels or fixtures from the premises, as well as any damage caused to the premises or the project during the lender's occupation, so that the landlord is not left to foot the bill.
- **Notice.** The standard form will require that the landlord notify the lender of every default by the tenant under the lease. This is a somewhat impractical provision, and should be amended to provide that the landlord will give notice to the lender of any default for which the landlord intends to enforce remedies, or any termination of the lease. Reciprocally, the agreement should provide that the lender will notify the landlord of any default by the tenant under the loan.
- **Costs.** Include a provision providing that the tenant will be responsible for all costs, legal or otherwise, incurred by the landlord in preparing and negotiation the agreement, regardless of whether the loan contemplated is actually advanced.
- **Tripartite Agreement.** Once the above provisions have been negotiated, the lender and tenant should be included as signatories to the agreement.

Landlords can and should actively negotiate the "standard form". The caveat, however, is to keep in mind that the end goal is to facilitate tenant financing. There is a fine line between protecting the landlord's interests and killing the deal - tread carefully!