

RECOVERY OF UNPAID RENT: THE RENT DISTRESS OPTION

BY JUDY ROST AND MICHAEL NADEAU

In these difficult economic times landlords are increasingly likely to encounter the problem of tenants defaulting on their leases. In response, landlords may attempt to terminate the lease or sue for rent in arrears, but another option is to secure payment of arrears by seizing a tenant's goods; this is also known as distraint for rent. While distraining for unpaid rent may be an effective course of action in some circumstances, landlords should be aware that this method of collecting rent is rife with pitfalls and problems.

In British Columbia, when payment of rent is in arrears, landlords have the right to seize their tenant's goods as security for the unpaid rent and sell the goods if the rent remains unpaid after a prescribed period of time. This remedy is only available in the context of commercial leases. The remedy of distraint is governed by judge-made law and a statute called the Rent Distress Act (the "RDA"). Landlords must only initiate a rental distress during daylight hours and can generally only hold goods located on the leased premises. Distraint must only occur against property that is reasonably necessary to satisfy the amount in arrears and not more.

Distraint can be effected by various methods, such as the removal of the tenant's belongings from the premises or by obtaining an undertaking from the tenant not to remove any of the goods from the premises. Prior to carrying out a distraint, landlords must consider a number of issues, of which the following are only a select few.

First, landlords often hire a bailiff to carry out the distraint. The bailiff may seize and remove goods from the tenant's premises or perform an inventory of the goods, which are then left on the premises along with a signed distress warrant. The bailiff will act as the landlord's agent and the landlord will be responsible for illegal actions committed by the bailiff if they are authorized by the landlord. Forced entry by the landlord or the bailiff will typically render a distraint illegal and the landlord may be liable in trespass.

Second, landlords should be aware that they cannot distraint and terminate a lease simultaneously. The lease remains intact even while a distraint is carried out. The right to distraint ends once a lease is terminated. Accordingly, unless authorized to do so by the tenant, a landlord should not change the locks on the premises prior to or during a distraint as it may be viewed as a termination of the lease. If the lease is terminated while distraint is ongoing the distraint will be against the law.

Third, landlords should consider the status of other security interests over the tenant's goods. Many of the items in the possession of their tenant may be leased. The tenant's goods may be subject to security interests that take priority over the landlord's interest. It is always advisable to perform a search using the Personal Property Security Registry in order to determine the priority of

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security interests over a tenant's property prior to distraining. In situations where the tenant's property is subject to the security interest of others, it makes little sense to proceed with a distraint.

Finally, while distraint may force a tenant to repay its overdue rent, the landlord may need to sell the goods to obtain money to pay down the arrears. The right to sell a tenant's goods as payment for unpaid rent is set out in the RDA. There are a number of legal requirements in the RDA that must be met prior to selling a tenant's goods. For example, the goods must be held for at least five days after distraint is taken and notice is given before the landlord may sell the goods. Even then, the landlord must obtain two appraisals sworn in an affidavit prior to sale. If these requirements are not met, the landlord may be liable to the tenant for damages.

Rent distress can be a very thorny area of the law; landlords attempting to use this legal remedy must exercise extreme caution. A number of specific penalties are set out in the RDA for wrongfully or excessively distraining for rent in arrears. It is easy to get into trouble when attempting to use this remedy. To avoid problems, it is advisable that landlords consult with a lawyer if they are considering distraining for unpaid rent. Having said that it can be an effective method of recovering unpaid rent. ❖

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