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Distressing News for Landlords:

**The BC Court of Appeal decision in Delane v. PCI
Properties**

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The BC Court of Appeal has recently clarified the law as it pertains to the exercise of a landlord's right to distrain against the assets of a tenant and the implications of such exercise on other remedies that the landlord might have available with respect to a tenant who has defaulted under its lease. In *Delane Industry Co. Ltd. v. PCI Properties Corp.* [2014 BCCA 285](#) (“Delane”) the court held that the exercise of a landlord's distress remedy obviates reliance by the landlord on any default of the tenant that occurred prior to completion of the distraint process. Effectively, the tenant is given a clean slate from that point forward.

First, a backgrounder.

Remedies of a Landlord for Unpaid Rent

Provided a tenant is not bankrupt, or the subject of a proposal to creditors, the principal remedies available to an unpaid landlord, are to:

- a) Leave the lease in place and to sue for damages as they arise.

A landlord may commence an action to recover damages it suffers due to the tenant's default, as those damages accrue. While rarely exercised, this remedy can be useful where the landlord wishes to ensure that the lease is not terminated (e.g. a continuous use clause in a lease, requiring the tenant to continually operate from the demised premises during the term of the lease, would give reason to the landlord to keep the lease in place, bring its action for damages as they accrue);

- b) Terminate the lease and bring an action for damages.

A lease typically provides for various events of default on the tenant's part, the occurrence of which give the landlord the right to terminate the lease and bring an action against the tenant for damages.

The lease will often impose notice requirements and may give the tenant a grace period to cure the default. The landlord will need to comply with these requirements it can properly terminate the lease.

Upon termination the landlord may then bring an action for the damages or loss suffered as a result of the tenant's breach. In the action the landlord may seek to recover the arrears owing and damages for loss of the benefit of the lease over the remainder of the term. The landlord will be expected to have taken measures to mitigate its losses (principal among them, attempting to find a new tenant to rent the premises). Termination of the lease, however, obviates the landlord's option to pursue another key remedy, the right of distress.

- c) Notify the tenant that the landlord will take possession of the premises and re-rent them on the tenant's behalf and account, thereafter claiming from the original tenant the difference between the obligations of the original tenant and the rent received from the new tenant.
- d) Exercise the right to distrain against the assets of the tenant.

The exercise of the right of distress is a remedy at common law that has since been partially codified in what is now known as the Commercial Tenancies Act (the "CTA"). It is a self-help remedy, pursuant to which the landlord may take possession of and thereafter sell the personal property (goods and chattels) of the tenant located at the leased premises, to satisfy the rent arrears.

There are some strict rules limiting the landlord's actions in effecting distress. For example, notices must be given at the time distress is taken (sections 34 and 36 of the CTA). The common law requires that distress be levied during daylight hours. The value of the assets distrained against must not greatly exceed the amount of arrears, being the object of the distress

(see *Highway Properties Ltd. v. Kelly, Douglas and Co.*, [\[1971\] S.C.R. 562](#)).

The Supreme Court, in the *Highway Properties* case recognized that a lease was a contractual document, as well as one which conveyed an estate (leasehold) in land. The remedies available for breach of a lease, it follows, encompass contractual remedies as well as those available under traditional real property law, a departure from previous case law which had considered only the latter.

Pre-Delane Situation

Leases often contain provisions permitting the landlord to exercise its rights in the cumulative, meaning that the exercise of rights under one of the remedies available to a landlord does not preclude the exercise of one or more additional remedy. Such a clause was present in the lease under consideration in Delane (sub-section 13.7 of the lease, found at paragraph 5 of the judgment).

No remedy conferred upon or reserved to the Landlord herein, or by statute or otherwise, will be considered exclusive of any other remedy, but the same will be cumulative and will be in addition to every other remedy available to the Landlord and all such remedies and powers of the Landlord may be exercised concurrently and from time to time and as often as may be deemed expedient by the Landlord.

A landlord enforcing under its lease could, by the language of the contract, exercise its right to terminate, following completion of the distress. Such was argued by counsel for

the landlord in Delane. While distress can only be levied under a valid lease then in operation, once the distress was completed, a landlord could rely on the tenant's ongoing default (assuming that the arrears were not wholly satisfied through the distress) to allow for, inter alia, the termination of the lease for continued default.

Delane – It's Time for a Change

The tenant, Delane Industry Co. Ltd. leased retail space from the landlord, PCI. PCI distrained upon the assets of Delane for unpaid rent. PCI seized and sold Delane's assets, and then gave notice of termination of the lease. Delane sought a declaration of the BC Supreme Court reinstating the tenancy. Counsel for Delane argued that distress and termination were alternate, mutually exclusive remedies. PCI, having exercised the remedy of distraint for unpaid rent, could not thereafter terminate the tenancy for the breach that gave rise to distress having been levied.

The BC Supreme Court, in a decision cited as [2013 BCSC 1397](#), declared that a notice of default given by PCI during an ongoing distress was ineffective to terminate the lease immediately following completion of the distress. The "cumulative remedies" clause in the lease did not vary the result. The judge at first instance found that it would have been open to PCI, in a "fresh" notice of default, to claim rental arrears for the period preceding the distress proceedings and, if the arrears remained unpaid following the required notice period, to terminate the lease accordingly.

The BC Court of Appeal, in dismissing the appeal, affirmed the trial judge's conclusion on the first point. The Court disagreed with the lower court's suggestion that if and when PCI issued a new notice of default, it might rely on the pre-distress rental arrears as the basis for terminating the lease. Rather, the higher court found that any new notice of default would have to be based on a default or breach by Delane that would have followed the exercise of distress.

The Court of Appeal, in its review of relevant authorities, observed that other courts have held that once a landlord elects to waive a breach of a lease, so as to permit exercise of the distress remedy, the landlord's right to rely on the prior breaches prior to that election is forfeited, in so far as the breach may have allowed the landlord to treat the tenant as having terminated the lease. Among the authorities cited was *Malva Enterprises Inc. v. Rosgate Holdings Ltd.*, [1993 CanLII 8675](#) (ON CA).

The Court did find that a breach giving rise to the exercise of distress obviates the landlord's ability to treat the lease as terminated by the terminate, but expressly held that (at paragraph 44) all other remedies available to a landlord during the currency of a lease remain available for the earlier breach (i.e. those remedies identified above in commentary respecting *Highway Properties* – other than termination of the lease).

Conclusion

A landlord's flexibility in enforcing a lease in the event of a tenant's default is unquestionably restricted as a result of the decision in *Delane*. With the benefit of 20/20 hindsight, however, it is relatively clear that such a finding was inevitable. The trend since *Highway Properties* has been to emphasise the contractual nature of a commercial lease. Some twenty years after *Highway Properties*, in *Malva Enterprises*, the Ontario Court of Appeal had held that "[o]nce a right to forfeit for a breach has been waived it cannot be revived". Now, twenty years further on, a court has found that a remedy to a landlord that requires that the lease be in force during its exercise necessarily obviates the availability of a future remedy for an earlier breach, if the landlord's intent is to treat that earlier breach as one resulting in termination.

In fact, in retrospect, the outcome in *Delane* appears to be the logical outcome of the facts in that case.