# LANDLORD WAIVER AGREEMENTS – THE QUINTESSENTIAL PANDORA'S BOX

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Tenants often obtain business loans which are secured, in whole or in part, by collateral situated within premises leased by the tenant. In such cases, it is quite common for the tenant's lender to seek a waiver agreement from the landlord with whom the tenant/borrower has entered into a lease. These waiver agreements are typically referred to as "landlord waivers". In a nutshell, a landlord waiver allows the lender to enter the premises in order to retrieve the collateral pledged by the tenant/borrower should there be a default under the loan agreement. It also serves to confirm that the lender may do so in priority to any rights which the landlord itself may have over the collateral (typically, such rights being the landlord's right to distrain against the chattels for unpaid rent).

Generally speaking, a landlord derives little benefit from granting a landlord waiver. However, a landlord will often agree to provide a waiver as part of the initial lease negotiation in order to secure a desirable tenant. In other cases, where a lease does not contemplate the delivery of a waiver, a landlord may nevertheless agree to grant one in an effort to assist its tenant in securing a credit facility in order to operate its business (thereby indirectly helping to ensure that the tenant remains viable and/or grows and prospers).

Waiver agreements are often short documents that may lull an unsuspecting landlord into believing they are harmless. However, they are the quintessential Pandora's box and, as such, should be thoroughly reviewed and negotiated. Failure to do so may open the landlord to a

myriad of unforeseen problems. This paper serves to describe some of the more common issues that should be clearly and expressly addressed in a waiver.

## 1. DESCRIPTION OF COLLATERAL

Landlords should be cautious in relation to the description of the collateral used in the landlord waiver agreement. Broad definitions of collateral should be avoided. In a perfect scenario, the collateral over which the landlord is asked to waive its rights would be limited to a few specifically described items (such as a few pieces of equipment included in a schedule using serial numbers). *At a minimum*, the description of collateral should expressly exclude the lease itself as this would bring the lender's security into the realm of a leasehold mortgage and open up a different set out issues (all of which are outside the scope of this paper). The collateral should also expressly exclude any leasehold improvements within the premises (e.g. HVAC equipment) as such improvements belong to the landlord and the landlord may wish to retain them for future tenancies. For the same reasons, statements in the waiver agreement to the effect that the collateral remains "personal property" even if affixed to the premises, should carve out an exception for leasehold improvements.

The description of the collateral over which the landlord is asked to waive its rights should also be limited to items physically located on the premises. It should not extend to all property of the tenant such as funds in bank accounts, goodwill or other assets not physically on the premises. By way of one example, where a landlord obtains a monetary judgement against a tenant, it would not want to lose its right to enforce this judgement against funds in the tenant's bank accounts. This could occur where the landlord has agreed to waive all of its rights as

against all of the tenant's collateral (the problem with granting a blanket waiver of all rights, as opposed to merely its right of distress, is elaborated upon below below).

## 2. WAIVER VERSUS SUBORDINATION/POSTPONEMENT

Although this article refers to "waiver" agreements, landlords should be careful insofar as they only agree to *postpone or subordinate* their rights, in favour of the lender, over the collateral. There is no real need for the landlord to completely give up or waive its rights to the collateral, including as against unrelated third parties. Merely subordinating/postponing its rights (in lieu of completely waiving them) ensures that the landlord retains the ability to avail itself of its rights (except as against the lender) should it become useful or strategic to do so at a later date (for example, as part of an insolvency proceeding or as against third parties). The lender's only real interest should be to ensure that its rights trump those of the landlord so that the lender has comfort in knowing it can enter the premises and retrieve pledged collateral without having to worry about the landlord leaving the lender empty handed.

Consideration should also be given as to what specific rights the landlord should subordinate/postpone. From the landlord's perspective, the landlord should try to limit the subordination/postponement to the right of distress and any *Personal Property Security Act* (PPSA) security interest which the landlord may hold. The landlord should avoid a broad waiver of all of its rights, such as those rights which would arise if the landlord were to obtain a court judgment against the tenant as well as the landlord's preferred creditor rights under *the Bankruptcy and Insolvency Act*.

## 3. ACCESS ISSUES

As noted above, granting a lender a right of access to the tenant/borrower's premises is one of the key features of a landlord waiver agreement. However, it would be prudent for a landlord to impose certain rules and limitations on lender access. For example, a lender's right of access should be time limited. The duration of such access period is dependent on a number of factors, including the nature of the collateral found in the premises. For example, for office premises where the collateral simply consists of office furniture, a maximum of 3 to 10 days to remove the collateral may be appropriate. On the other hand, if the collateral consists of heavy industrial equipment that is not easily transportable, a longer period of access may be appropriate. Also, the waiver agreement should stipulate that the lender must exercise its right of access within a set number of days after notice from the landlord, failing which the lender will forego its right. This will help ensure that the landlord is able to deal with the premises (and perhaps re-lease them to another party), as opposed to waiting around for an inordinate period of time while the lender decides what to do.

In addition, the lender's right of access should be limited to simply removing the collateral over which it holds security. Specifically, the lender should not be able to use the premises to hold auctions or "going out of business" sales. This is particularly relevant in a shopping centre context where such any such auction or sale would look unfavourably on the centre.

The lender's right of access should also be made to be non-exclusive with the landlord. The landlord can use its own right of access in order to ready the premises for another user and/or to supervise or oversee the lender's removal work.

Finally, during the period while the lender does access the premises, the lender should be made to pay rent on a *per diem* basis. Ideally, the landlord should try to go one step further and require that the lender pay any arrears of rent prior to accessing the premises, after all the landlord typically gets little in return from granting the waiver. Insisting that the lender first pay any arrears of rent provides some consolation to the landlord.

## 4. LENDER REPAIR/INDEMNITY OBLIGATIONS

The form of waiver presented by a lender is often completely silent on the issues of repair and indemnity. Since the form is prepared by the lender, it is understandable that the lender will want to avoid imposing additional burdens on itself. However, if a landlord grants a lender access and allows it to remove collateral (with little or no reciprocal benefit to the landlord), then it is reasonable for the landlord insist upon the lender repairing any damage which it may cause during the course of its removal. It is also reasonable for the landlord secure an indemnity from the lender so that the landlord is protected in the event that it suffers expense, harm, damages or a claim from the acts or omissions of the lender. Of course, where an indemnity is sought, the landlord should satisfy itself that the lender is sufficiently creditworthy to fulfil its indemnity obligation should the need arise. Consideration should also be given as to whether the lender should be made to have insurance in order to back-stop its repair and indemnity obligations (proof of which should be delivered prior to the landlord's grant of access).

## 5. NOTICE

So that it is better able to monitor the tenant/borrower, lenders will often insist upon receiving any notice of default and/or termination which the landlord may deliver under the lease. This represents a potential source of liability for the landlord as it will be exposed to the lender's claim for damages should the landlord fail to deliver any required notices. As a result, as part of the negotiation of the waiver, the landlord should attempt to limit its obligation to simply use "reasonable efforts" to deliver notices. Where possible, the waiver should also include an express acknowledgement confirming that any failure to deliver notice does not represent a default on the part of the landlord or otherwise open it up to liability vis-à-vis the lender.

Similarly, the landlord should limit the types of notices which it must provide. Ideally, from the landlord's perspective, notices to the lender should be limited to notices of lease termination which the landlord has delivered to the tenant. Alternatively, the landlord may be amenable to extending its obligation to notices of default as well. However, the landlord should strenuously resist agreeing to anything beyond these two types of notices (such as notices related to construction approvals, assignment/sublet approvals or the upcoming natural expiry of the lease).

## 6. UNCLAIMED COLLATERAL

One issue that is almost always overlooked is what happens to unclaimed collateral? Specifically, what happens if the tenant has left some collateral behind following the expiry or

termination of its lease? Similarly, what happens if the lender has come into the premises and removed some, but not all of the collateral?

In order to avoid uncertainty and a possible claim for damages from a lender, a landlord should ensure that the waiver expressly stipulates that so long as the lender has received notice, the landlord is entitled to treat the collateral as abandoned and the landlord may dispose, sell or otherwise deal with it as it sees fit without fear of retribution from the lender. Consideration should also be given to employing an "all or nothing" approach with the lender. That is, the lender cannot gain access and cherry pick the assets which it would like to remove. It must either remove all of the assets, or they must all remain behind.

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As described above, landlord waivers pose many potential pitfalls for landlords. While Pandora's box is an artifact of Greek mythology, there is no myth or fiction in relation to the problems that waiver agreements can create for landlords. Careful consideration should be taken prior to entering into one.