

## DEALING WITH COMMERCIAL TENANTS' ABANDONED PROPERTY

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### 1. INTRODUCTION

- a. Where a tenant leaves the premises, either before or after the termination of their lease agreement, without taking all of their property with them
- b. Landlords should proceed with caution in order to avoid potential liability
- c. There is no legislation dealing with abandoned property in the commercial leasing context but landlords do have options including distress, storage, sale or retention pursuant to the *Repair and Storage Liens Act*; or dealing with the property in whatever manner the landlord sees fit

### 2. PRELIMINARY INQUIRIES

The landlord should make proper inquiries into:

- a. The status of the lease: determines which option for dealing with the abandoned property is most appropriate. Confirm whether: (i) the lease has been terminated; and (ii) the lease contains an abandonment provision
- b. The status of the abandoned property and tenant: reveals any secured creditors who may have an interest in the abandoned property and determines if the landlord will need to be in contact with a trustee in bankruptcy. Conduct corporate searches, bankruptcy searches, and searches under the *Personal Property Security Act*

### 3. LEASE HAS NOT BEEN TERMINATED

- a. If the lease has not been terminated and the lease contains an abandonment provision, comply with the terms of the lease
  - i. A well-drafted provision should detail what constitutes abandoned property, the landlord's rights and obligations owing to a tenant where property has been deemed abandoned, and limit the landlord's liability
- b. If the lease has not been terminated and the tenant is in arrears for rents unpaid, the landlord can exercise its right to distraint against the abandoned property for the value of the rents unpaid
  - i. If a landlord exercises this right and the lease has actually been terminated, then the landlord may become liable for the tort of conversion or wrongful withholding
  - ii. Only chattels are subject to distraint (not leasehold improvements or trade fixtures)

### 4. LEASE HAS BEEN TERMINATED AND THERE IS NO ABANDONMENT PROVISION

- a. Landlord must not sell, dispose of, or claim title to the property prematurely
- b. The landlord needs to determine if the property has been legally abandoned. According to Ziff's *Principles of Property Law*, there must be an intention to relinquish title (i.e. an indifference as to the fate of a chattel) coupled with sufficient acts of divestment
  - i. If a tenant has not legally abandoned its property, and a landlord attempts to claim title to it under the mistaken assumption that it was abandoned, the landlord could be found liable for the tort of conversion wrongful withholding
  - ii. *Stewart v. Gustafson* provides guidance on what the courts will and will not consider abandoned property and why
    - A. Abandonment is a question of fact to be proven by the party relying on the principle of abandonment. Considerations in determining whether property has been abandoned: (1) the passage of time; (2) the nature of the transaction; (3) the property owner's conduct; and (4) the nature and value of the property
    - B. The burden of proof is onerous where the property owner's actions do not clearly manifest an intention to surrender ownership of the item in question
    - C. The intention of the property owner is paramount in determining whether or not an item has been abandoned

- iii. The landlord's actions in dealing with the abandoned property must be reasonable
- c. Options available to the landlord
  - i. If a new tenant for the same space wishes to use such property and the landlord is comfortable that the property has been legally abandoned
    - A. The landlord should seek to include the following acknowledgements of the new tenant in the new lease: (1) the property is being provided in "as is" condition; and (2) the landlord provides no warranties or representations as to the quality of title, fitness for proposed use, state of repair, quality or functionality of the property
  - ii. When a tenant has not legally abandoned its property but the property remains on the premises and the landlord wants it removed in order to re-let the premises to a new tenant
    - A. The *Repair and Storage Liens Act* (Ontario) ("RSLA") governs the landlord's ability to sell, store or retain such property
    - B. The RSLA allows the "repairer" or "storer" (which likely includes a landlord) to impose a lien on property for the cost of repairing or storing that property (s. 1)
    - C. The landlord must strictly comply with the requirements of the RSLA
    - D. The landlord should retain the services of a bailiff (preferably one registered under the *Bailiff's Act*) to remove the property and put it into storage
      - I. Storage: Section 4 of the RSLA
        - a. The storer has a lien against an article that the storer has stored for an amount equal to either the amount agreed upon (if any) for storage of those goods or the fair value of the storage as determined in accordance with any applicable regulations under the RSLA (s. 4(1)) and the storer may retain possession of the property until this amount is paid
        - b. The storer must provide written notice of the storage within 60 days of storing the property to those parties listed in ss. 4(4) of the RSLA
        - c. Subsection 4(5) of the RSLA lists the required contents of such notice
      - II. Sale or Disposition: Part III of the RSLA
        - a. If no one redeems the property within the above-noted 60 day notice period, then the lien claimant can sell the property
        - b. Before the lien claimant may sell the property it must provide written notice of its intention to sell, at least fifteen days before the sale, to the parties listed in ss. 15(2) of the RSLA
        - c. Subsection 15(3) of the RSLA lists the required contents of such notice
        - d. Any receiving party may redeem the property by paying the lien claimant its incurred storage costs and expenses (s. 22), failing which the lien claimant can sell the property
        - e. Government "super priority liens" survive any sale of the property by the landlord or bailiff under the RSLA. Accordingly, landlords should ensure that they include in any contract for the sale of goods with a third party a clause limiting the landlord's liability owing to government creditors, by way of indemnity or otherwise
      - III. Retention: Section 17 of the RSLA
        - a. If the lien claimant wishes to retain the property in satisfaction of the amount of the lien claimed, the lien claimant must give written notice of its intention to retain to the parties listed in ss. 15(2) of the RSLA (s. 17(1))
        - b. The notified parties have 30 days to object to such retention (s. 17(2)), failing which the lien claimant is deemed to have elected to retain the article and will be entitled to keep or dispose of the article as it sees fit (s. 17(4))