



Commercial Tenancies

Landlord Remedies for Tenant Default: Terminate or Distraint?

In the Ontario Court of Appeal decision *Cassandro v. Glass*, 2019 ONCA 654, Mr. Cassandro had leased his property to Mr. Glass, who operated a commercial contracting business. Following a breakdown in the landlord and tenant relationship, Mr. Cassandro chose to terminate the lease, seize the premises and distraint the tenant's equipment. Mr. Cassandro then sued his tenant, claiming damages for unpaid rent and damage to the property and Mr. Glass counterclaimed, seeking damages for the value of the chattels seized and lost income. At trial, damages were awarded to both parties which were set off against each other. The parties appealed.

On appeal, it was held that the trial judge's reasoning demonstrated a misunderstanding of the law of distraint and the principle that a party may either take distress or terminate the lease, but not both. The trial judge found that Mr. Cassandro had terminated his tenant's lease, effective January 31, 2014, while still finding Mr. Cassandro entitled to take distraint from the tenant for rent, merely characterizing the distraint taken as "excessive."

A party may seek **either** distraint **or** termination of a lease, but not both. In *Malka & Circle Inc. v. Vasiliadis*, it was held that:

"The law is clear when a tenant defaults in the obligation to pay rent, the landlord has two mutually exclusive legal remedies, and must elect which remedy to pursue. The landlord can elect to enter the premises and distraint the goods owned by the tenant for purposes of satisfying the debt owed by way of rent, but with a view to continuing the lease. Alternatively, the landlord can elect to re-take possession of the premises and terminate the lease, and potentially pursue other additional remedies."

In point of fact, the distraint in this instance was not merely excessive, but wholly unlawful. It is settled law that distraint is deemed unlawful when the landlord terminates the lease, while at the same time attempting to take distress. Should the landlord terminate the lease, they lose the entitlement to take distress, including the ability to take distress for rent arrears.

Furthermore, it should be emphasized that, as outlined in section 41 of the *Commercial Tenancies Act*:

"A person having any rent due and in arrear, upon any lease for life or lives or for years, or at will, ended or determined, may distraint for such arrears, after the determination of the lease,



in the same manner as the person might have done if the lease had not been ended or determined, if the distress is made within six months after the determination of the lease, and during the continuance of the landlord's title or interest, and during the possession of the tenant from whom the arrears became due.”

Distrain only applies in cases where obligations are classified as rent. As stated in *Baragar & Russell Ltd. v. 1553464 Ontario Ltd.*, “distress is available only for non-payment of rent and not for breaches by the tenant of non-rent covenants.” Moreover, a landlord may only distrain chattels on the commercial property; this excludes items on residential property and common areas such as parking lots.

The Ontario *Commercial Tenancies Act*, at section 43 also clarifies that “distress shall be reasonable.” Section 55 of the Act provides that a landlord who takes an excessive distress, or takes a distress wrongfully, shall be liable in damages to the owner of the goods distrained. Furthermore, a landlord cannot seize and sell more goods than are reasonably necessary to satisfy the arrears of rent. In cases where there is excessive distress, the damages are typically recognized as special damages, although general damages may be considered appropriate. As was stated in *1526183 Ontario Ltd. v. Grant Equipment Corp.*:

“...where the wrongful distress is very excessive and the landlord's conduct has been oppressive, the distress may be found to be illegal and subject to a claim for general and special damages. Punitive or exemplary damages have also been awarded against a landlord where its exercise of distress was oppressive and there have been aggravating circumstances.”

At De Francesca Law, we may assist you in determining whether either distraint or the termination of the lease is the best remedy to apply when dealing with a tenant who is in default under their lease. In circumstances where the landlord improperly terminates a lease, or improperly distrains tenant property, the landlord may be liable for significant financial damages.

