

COVID-19 RESOURCE CENTER

Landlord/Tenant Issues in the Time of COVID

March 27, 2020

The COVID 19 pandemic has had a significant (and adverse) impact on many business's cash flow, and the uncertain forecast presents a series of challenges for both landlords and tenants.

If a landlord has a tenant that cannot pay its rent, the landlord may seek to exercise its remedies and (i) distrain the tenant's assets; or (ii) terminate the lease. Distress is a remedy whereby a landlord seizes and sells assets from the premises; however, this remedy must be executed carefully as the rules of distraint are technical and must be complied with. Distraint also imposes certain limitations on a landlord; for instance, it cannot terminate the lease while a distraint is outstanding. Alternatively, a landlord may decide that it wants to terminate the lease; however, if it does, landlords should be aware that tenants may seek "relief from forfeiture" which is a remedy that might relieve a tenant from the consequences of its failure to pay rent (amongst other things) and prevent the landlord from terminating the lease. This is a remedy that many tenants may seek in the wake of COVID-19 and the courts might be willing to grant relief to sympathetic tenants who are simply trying to navigate through this difficult time.

Landlords' and tenants' should both be aware of their rights and remedies in the case of insolvency. For instance, if a tenant has filed for bankruptcy, a landlord's claims are limited to three months of rental arrears and up to a maximum of three months of accelerated rent (regardless of any provisions in the lease that say otherwise). A landlord's claim will be treated as a "preferred claim" ranking behind the secured lenders but ahead of unsecured claims. Typically, a landlord risks increased losses with the passage of time and will want to consider its position as early as possible if it looks like a tenant is heading into bankruptcy.

Even if an insolvent tenant does not file for bankruptcy, it may look to restructure its business by filing a proposal under the Bankruptcy and Insolvency Act or the Companies' Creditors Arrangement Act. If a tenant proceeds with a proposal under the BIA, there is a specific formula that is used to calculate the quantum of a landlord's claim (and is different than what a landlord is entitled to in the bankruptcy context). If a tenant files for relief under the CCAA, an automatic stay will prevent a landlord from terminating the lease on the basis of insolvency and the lease will likely remain in effect in accordance with their terms, unless and until they are dealt with in the restructuring. Please note that the CCAA regime contemplates circumstances where leases can be (i) disclaimed by the debtor, with the consent of its court-appointed monitor; (ii) assigned without the landlord's consent but with court approval (regardless of the terms of the lease); and (iii) repurchased by the landlord, who can then control the sale and marketing of the lease.

FARRIS

The COVID-19 crisis will almost certainly commence a cascade of business insolvency. Landlords should consider their rights (and limitations of such rights) as early as possible and ideally before their tenant files for insolvency protection as it is important to understand how to mitigate their risks.



Rebecca Morse
Partner
604 661 1712
rmorse@farris.com
Bio



Tim Louman-Gardiner
Partner
604 661 1729
tlouman-gardiner@farris.com
Bio

Farris communications are intended for informational purposes only and do not constitute legal advice or an opinion on any issue. We would be pleased to provide additional details or advice about specific situations if desired. For permission to republish this content, please contact the Marketing Department at ssangha@farris.com. © 2020 FARRIS LLP