

Early Access Letters

By Glenn Browne

It's hard to imagine financing construction on a premises in which you have no legal interest. However, in order to meet construction schedules, opening date projections and cash flow targets, a tenant must sometimes consider whether it is willing to commence construction without having an executed lease or agreement in place. While this decision may expose the tenant to considerable risk, under certain circumstances both the landlord and the tenant may be willing to proceed with construction, absent the existence of an executed lease or agreement. In order to allow a tenant to construct its space prior to executing a lease for the space, a landlord and a tenant would be wise to enter into an Early Access Agreement providing for certain understandings between the parties, prior to the time that the lease or agreement is executed. The Early Access Letter need not be a long or complicated document, but should provide for certain crucial understandings to establish the rights and protect against the liabilities of each party, as well as to create an understanding of the relationship between the parties. At a minimum, the Early Access Letter should cover the following topics: i) plans; ii) insurance; iii) indemnification; and iv) what happens if a lease is not executed by the parties; and v) construction rules and regulations.

PLANS

Before a tenant is allowed access to the premises to begin

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Strategies For No-Grief Rent Relief

By Jeanne Banka

Recent downturns in the economy have increasingly found retail and office tenants in the position of having to seek rent relief in varying degrees from their landlords in an effort to overcome short-term financial difficulties. While the landlord finds unpalatable the prospect of reducing a rental income stream to which it has become accustomed, the prospect of having a vacancy in a shopping center, with its attendant adverse effect on neighboring tenants, as well as the additional costs involved in replacing the tenant through the payment of brokerage fees and lease inducements, may be even more unpalatable.

The landlord will face added pressure to come to some agreement with a financially strapped tenant in situations where vacancies already exist in the shopping center, where the tenant is key to the center, where the tenant's departure will trigger further departures from the center by tenants possessing co-tenancy clauses in their leases, or where the tenant's departure may have a domino effect on other tenants in the center.

The following are some protections that the landlord may wish to secure prior to agreeing to rent relief.

Abatement vs. Deferral. Although the tenant would prefer that some or all of the rent payable abate fully during the relief period, the landlord's preference is that a portion of the rent which would otherwise be payable to the landlord be deferred and subsequent rent payments increased. This type of rent restructuring has the added advantage of appearing not to diminish the landlord's net return on a lease. The landlord may agree to defer the payment of minimum/basic rent and percentage rent for a certain number of months, but require the tenant to continue paying additional rent items such as its share of realty taxes, common area costs and utilities consumed in the premises. The deferred rent is added to the minimum/basic rent payable during later years of the term. Of course, the landlord always has the option of "forgiving" the deferred rent in exchange for "good behavior" by the tenant (*ie*, no default during the relief period).

Forbearance by Landlord. The landlord may wish to characterize the rent relief period as the period during which the landlord will *forbear* from exercising its remedies under the lease. The difference between the amount that the tenant should

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No-Grief Rent Relief

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have been paying under the lease and the reduced amount which it is actually paying constitutes the "Relief Arrears." The landlord's "forbearance" will end if the tenant commits certain acts of default, as discussed below.

Termination of Relief Period. The landlord should be entitled to terminate the rent relief immediately upon notice if: i) the tenant commits a default under the lease or any rent relief agreement signed by it; ii) the tenant discloses the terms of the rent relief agreement to any other tenant in the center; iii) the tenant effects a transfer of the lease; iv) the tenant or any entity affiliated with the corporate tenant directly or indirectly lends financial assistance to or guarantees the debts or obligations of another entity; v) the corporate tenant makes any distributions (such as by way of dividends, bonuses, or repayments of loans) to any of its shareholders, directors, officers or anyone not dealing at arm's length with the tenant; or vi) the tenant increases the salaries or other remuneration of any of its shareholders, officers, directors or any other person not at arm's length to the tenant. The rent relief period should be deemed automatically terminated one (1) day prior to the tenant's becoming bankrupt or filing for creditor protection, so as to avoid any bankruptcy trustee obtaining the benefit of the reduced rent. Sample wording for the provisions outlined in items (4), (5) and (6) above is as follows:

Prohibition: Throughout the Relief Period: a) neither the Tenant nor any Person associated with or affiliated or related to the Tenant will i) either directly or indirectly, lend money to, guarantee the debts or obligations of, invest money in or offer financial assistance to any Person nor ii) engage in, or carry on business in, any retail business operation or store if it is not in existence on the

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Effective Date or if the Tenant was not engaged in or carrying on business in the retail business operation or store on the Effective Date; and b) the Tenant, if a corporation, will not make any distributions or payments whatsoever (whether by way of dividends, bonuses, repayments or loans or otherwise) to and will not (except for reasonable increases given in the usual course of business) increase the salaries or other remuneration of any of its shareholders, directors or officers or any other Persons not dealing at arm's length with the Tenant.

Acceleration of Payment of Deferred Rent. If the rent relief is terminated due to default by the tenant or for the reasons stated above, the landlord should be entitled to accelerate payment of the deferred or abated rent so that it is payable immediately to the landlord by way of a lump sum. This situation is analogous to mortgage acceleration upon default.

Promissory Note. If the Relief Arrears are substantial, the landlord may wish to consider having the tenant execute a promissory note in a principal sum equal to the amount of the deferred or abated rent plus interest. The promissory note will be cancelled if the tenant repays the deferred rent and otherwise performs its obligations under the rent relief agreement and the lease without default. The promissory note also backstops the landlord's claim for acceleration of payment of the deferred or abated rent if the tenant defaults under the rent relief agreement or the lease during the rent relief period.

Personal Property Security Interest. Where the landlord has agreed to defer or abate a substantial amount of rent, the landlord may seek to elevate itself to the status of a secured creditor by requiring the tenant to grant to the landlord a security interest (equal in value to the amount of deferred or abated rent) in the tenant's equipment, fixtures, inventory, personal property, accounts and other assets. By registering its interest, the landlord will enhance its position in any tenant bankruptcy or insolvency

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No-Grief Rent Relief

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proceedings. Any requests for postponement of the landlord's security interest will also alert the landlord to the claims of other secured creditors, who may be lending money to the tenant. As a condition of any postponement by the landlord of its security interest, the landlord may require satisfaction as to the manner in which such new funds will be expended by the tenant and require repayment of some or all of the deferred rent.

Adjustments. In consideration of the landlord's agreeing to grant rent relief, the tenant should acknowledge that any credits owing by the landlord to the tenant on account of year-end adjustments for additional rent items such as common area operating costs, any realty tax refunds and any other similar refunds owing to the tenant shall belong to the landlord and may be applied by the landlord to reduce the Relief Arrears. Sample wording for this provision is as follows:

Adjustments: In consideration of the Landlord entering into this Agreement, the Tenant acknowledges that any amounts that would otherwise be payable or repayable by the Landlord to the Tenant under Sections of the Lease that provide for adjustments in respect of, instalments, pre-payments or estimates of Additional Rent, or that might otherwise be payable or repayable by the Landlord to the Tenant may, at the Landlord's option, be applied to reduce the Relief Arrears from time to time instead of being paid or repaid to the Tenant or being credited against Rent that is not Relief Arrears.

Clawback of Tenant's Favorable Rights. The granting of rent relief to a tenant provides the landlord with the opportunity to take back (either permanently or temporarily during the duration of the rent relief period) rights that the landlord may have had to give up in its initial lease negotiations with the tenant. The tenant should be required to forfeit its renewal rights, rights of first refusal and expansion rights, lease termination rights, co-ten-

ancy provisions and any exclusivity rights granted to it. This is also the landlord's opportunity to impose radius restrictions on the tenant, re-visit any exclusions from operating costs that may have been negotiated earlier, impose relocation obligations on the tenant, and require payment of a security deposit.

Financial Statements. While the rent relief is in effect, the tenant should be required to provide the landlord with monthly gross revenue reports, quarterly financial statements, audited year-end statements, and any other reports and information reasonably requested by the landlord.

If the Relief Arrears are substantial, the landlord may wish to consider having the tenant execute a promissory note in a principal sum equal to the amount of the deferred or abated rent plus interest.

Indemnifier or Guarantor. The landlord may wish to insist upon the addition of an indemnifier or guarantor (or the addition of additional indemnifiers or guarantors) who will remain jointly and severally liable with the tenant for the fulfillment of the tenant's obligations under the rent relief agreement and the lease during the rent relief period.

Landlord's Termination Rights. The landlord should provide itself with the right to terminate the rent relief at any time upon thirty (30) days' prior written notice, as well as the right to terminate the lease at any time upon at least sixty (60) days' prior written notice to the tenant. The landlord should resist the imposition of criteria under which these termination rights may be exercised, as the landlord needs the flexibility to market the premises and to terminate the lease if it finds a replacement tenant who is prepared to pay the rent sought by the landlord.

Right to Show the Premises. If the lease does not already contain this right, the landlord should give itself the

right to enter the premises upon 24 hours' prior notice to the tenant for the purpose of showing the premises to prospective tenants.

There is no guarantee that a financially challenged tenant will regain its former financial strength and resume the payment of rent in a manner favoured by the landlord. However, if the landlord follows the suggestions outlined above, it may survive rent relief without grief.

"Use Restrictions"

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determine is appropriate, from time to time during the life of the center.

This is not to suggest that no other tenants will have input in this decision. For example, some large department stores may protect some portions of the center from uses that are included on the Reserved Use List. The primary advantage to this approach is that the landlord can make these decisions on a case-by-case basis with assurance that it has reserved the right to protect each new tenant's rights, while also having the flexibility to make those decisions as the tenant mix develops, as all of the facts become known, and the center becomes fully occupied.

The use of a Reserved Use Clause does not mean that there is no need for a declaration of restrictions, because a well-designed declaration of restrictions will address many issues far beyond the use clause. However, these two approaches, used in conjunction, often can lead to shorter and simpler lease negotiations, give comfort to landlords, tenants, lenders, and future owners that the shopping center is being operated as a cohesive use unit, and help ensure that the center will retain its value in the marketplace over an extended length of time.