

August 20, 2007

How to Deal with Vacant Premises Containing a Former Tenant's Property

A common scenario – the tenant abandons its property in the premises and the landlord must decide what to do with it. Often, the tenant's property is of little value and the landlord must incur the costs of disposing of it. (By "property", we are referring to the tenant's furniture, equipment and trade fixtures.)

On the other hand, where the property is of some value, the landlord may want to sell the abandoned property to an incoming tenant, or to a third party who will absorb the removal costs. The big question is how does the landlord sell the abandoned property to a new tenant or third party free of any claims by the former tenant and its secured creditors?

The *Repair and Storage Lien Act* (the "Act") offers landlords a way to sell property to an incoming tenant or other third party. The Act provides that anyone who repairs *or stores* another's property may sell the property in order to pay the repair *or storage costs*. If the landlord has been storing the tenant's abandoned property, it has become a "storer" under the Act. A storer has a lien against any property that is being stored.

As a storer, the landlord has a lien on the tenant's abandoned property equal to the "storage rent". Since the lease will not usually deal with storage rent, the landlord is entitled to charge a reasonable amount of storage rent. The landlord may also add the cost of removing the property and any commercially reasonable expenses incurred in the custody, preservation and preparation for sale of the property.

In order to recover such costs and its reasonable storage rent, the landlord may exercise its lien rights and sell the stored property at any time, by public or private sale, as long as the sale is commercially reasonable. The landlord must give notice of its intention to sell the property to the former tenant, all secured creditors (identified by conducting a PPSA search) and anyone else who the landlord believes may have an interest in the property. Those who receive notice of the sale may redeem the property by paying to the landlord the storage rent and the costs and expenses incurred by the landlord. Where no one redeems the property, the landlord may proceed with the sale free and clear of claims by those who received notice.

In situations where the former tenant has not remitted sales or other taxes (e.g. source deductions), such government claims have priority over the landlord's claim to the proceeds of the sale. Governments are not always diligent in pursuing their "super priority" claims for source deductions, G.S.T. and P.S.T.

After receiving notice of the landlord's notice of sale, government creditors do not always respond and there is uncertainty about what happens if the government asserts a claim after the sale is completed. The sale agreement between the parties (or the bill of sale) can apportion the risk. Whether the landlord or the buyer bears the risk is a matter to be negotiated.

Even where these governmental claims have taken a bite out of the sale proceeds, some landlords have nevertheless found the process advantageous, as it allows for either the transfer of property to a new tenant or the avoidance of removal costs if there is a willing buyer who will take on that responsibility.

A practical example of this process involved a billiard parlour operated by a tenant in space that it leased on the second floor of a building. The tenant defaulted and left numerous pool tables in the premises. The tenant's creditors found the property of little value because the tables had to be disassembled in order to be taken downstairs and removed from the building.

The cost of removal was approximately equal to the value of the property. The property would only be of any real value if it were left in place for a new tenant to use. By following the requirements of the Act, the landlord was able to sell the pool tables to a new tenant.

It is easy to think of other scenarios in which the use of this process might be effective and worthwhile. Restaurants, grocery stores, fitness facilities and even office space come to mind. In one instance, the landlord of a fully equipped grocery store was able to transfer all of the former tenant's abandoned property to a new tenant.

Considering that some trade fixtures, such as a built-in freezer, quite often cost more to remove than their value, this legislative vehicle gives landlords a practical and economical solution to the problem of dealing with a tenant's abandoned property.

A note of caution: the amount of the landlord's lien is only that which corresponds to a reasonable storage rent and the cost of removing, preserving and preparing the property for sale. This suggests that the process described above may not lead to any profit in the hands of the landlord. Nevertheless, in the common scenario we have described, the mechanism offered by the *Repair and Storage Lien Act* provides a valuable tool to enable landlords, who are left with tenants' abandoned property, to move on with life.



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