Goodyear – 10 Years Later

Max Maréchaux1

INTRODUCTION

The Ontario Court of Appeal’s decision in *Re: Goodyear Canada Inc. v. Burnhamthorpe Square Inc.*2 is now ten years old. Much has been written about *Goodyear*. *Goodyear* caused a sensation not only because it created new law but also because it applied and adopted existing law to benefit a party, namely a tenant, who does not normally benefit from a default under a prior mortgage.

This paper tries to summarize the existing law with respect to tenants and mortgagees in the event of a mortgage default, to review most (hopefully all) of the recent decisions that affect tenants and mortgagees in mortgage transactions and to provide some practical suggestions for solicitors representing mortgagees and tenants in mortgage transactions.

1. *Goodyear* Summarized

For the purposes of this paper, the facts in *Goodyear* can be simply stated. The prior mortgagee obtained a final order of foreclosure against the landlord. A notice to

1 Miller Thomson LLP, Toronto – This is an updated version of a paper by the same author entitled *Goodyear Revisited*, at a conference of the Ontario Bar Association entitled *Leasing Lawyers: Avoiding Hot Water in a Cold Economy* on June 6, 2002. The writer gratefully acknowledges the assistance of David C. Holmes, Miller Thomson LLP, in the research for and preparation of this paper.

2 41 O.R. (3d) 321. Leave to appeal to the Supreme Court of Canada was denied. This decision as well as the lower court’s decision (32 O.R. (3d) 657) are referred to throughout this paper as *Goodyear*. 
attorn was served on the subsequent tenant (Goodyear Canada Inc.). The prior mortgagee sold the property to a new owner (Burnhamthorpe Square Inc.). The subsequent tenant gave six months’ notice to the new owner that it was terminating the lease. Both the Ontario Court (General Division) and Court of Appeal for Ontario held that the lease had been converted to a year-to-year lease and that the tenant was entitled to terminate on six months’ notice. The Court of Appeal held that the subsequent lease was not “terminated” but was somehow “suspended”. In addition, the Court of Appeal provided some flexibility regarding the commencement of the notice period for the tenant’s six months’ notice to terminate the lease. Both courts held that there was no privity of contract between the tenant and the mortgagee or the tenant and the subsequent owner (Burnhamthorpe Square Inc.) as a result of the estoppel certificate, the collateral assignment of rents and/or leases and the registrations on title. It is interesting to note that the tenant and mortgagee had entered into a non-disturbance agreement with respect to a prior lease. However, the mortgagee and tenant did not enter into a non-disturbance agreement with respect to the then existing lease. The term of the existing lease would have ended July 31, 2002. As a result of the decision by the Court of Appeal in Goodyear, the tenancy was terminated as of December 31, 1996.

2. Prior Mortgage/Subsequent Lease

At common law, when the owner of real property granted a mortgage, the mortgagee obtained the owner’s entire estate in the real property subject only to the
owner’s right to redeem or equity of redemption. This was altered by Section 6 of the 

*Land Registration Reform Act*\(^3\) which provides as follows:

Sec. 6. – (1) A charge does not operate as a transfer of the legal estate in the land to the chargee.

(3) – Despite subsection (1), a chargor and chargee are entitled to all the legal and equitable rights and remedies that would be available to them if the chargor had transferred the land to the chargee by way of mortgage, subject to a proviso for redemption.

Despite this change in the common law, the result, from a practical perspective, is the same. Once the mortgage has been granted, the only real property interest the owner can grant to any subsequent encumbrancer, such as a tenant, is a partial interest in the owner’s equity of redemption.\(^4\) The mortgagee’s prior interest is paramount to the interest of all subsequent encumbrancers. In the event of default under the prior mortgage and absent any agreement between the tenant and mortgagee, the mortgagee may evict the tenant and obtain possession of the property. The only issue when the mortgagee is taking possession is whether such possession is immediate or is subject to a notice period. In *Goodyear*, a year-to-year tenancy was established and, as a result, a six month notice period was required.\(^5\)

\(^3\) R.S.O. 1990, c. L.4 as amended.


In Goodyear there was really no dispute concerning the establishment of a year-to-year tenancy. There appeared to be ample evidence that the mortgagee had accepted the tenant and its rental payments. There are decisions prior to Goodyear where the issue of a year-to-year tenancy is considered. In Federal Business Development Bank v. 674739 Ontario Ltd. the mortgagee brought an action for possession after giving a notice to attorn to the tenant. The court held that “the mere fact that the mortgagee sends a notice to attorn for rent does not, in itself, create the relationship of landlord and tenant”. In this case there was evidence of rental disputes and other correspondence that led to the decision that the mortgagee did not intend to create a landlord and tenant relationship. For that reason, the writ of possession was issued against the tenant. A different result is found in Guscon Enterprises Ltd. v. Andsam Masonry Co. In that case, an unqualified notice to attorn was delivered to the tenant and there was a subsequent sale under power of sale by the mortgagee. The new owner sought to terminate the lease immediately. The court held that the acts of the parties were of a nature sufficient enough so that it could be implied that a year-to-year tenancy had been established. Both decisions in Federal Business Development Bank and Guscon Enterprises were referred to in the decision of Domus Architects v. Bank of China (Canada). Although the facts are somewhat unusual, the court upheld the mortgagee’s right to possession and determined that a year-to-year tenancy had not been established.

---

6 [1993] CarswellOnt 3656  
7 Ibid. at para. 12  
8 (1995), 48 R.P.R. (2d) 255  
In Select Restaurant Plaza Corp. v. Pavilion Royale Inc.\textsuperscript{10} the decision in Goodyear was followed but there was an added twist. In the Select Restaurant case the prior mortgage went into default and the mortgagee, instead of going into possession, appointed a receiver. The receiver terminated an existing lease between the tenant and the owner and replaced it with a new lease between the receiver and the same tenant. The owner subsequently brought its mortgage into good standing and the receiver’s appointment was terminated. The owner sought to set aside the lease entered into between the receiver and the tenant. In this case, the court found that the mortgagee did not go into possession: “A mortgagee does not become a mortgagee in possession merely by appointing a receiver of the mortgaged property pursuant to a provision in the mortgage which provides that the receiver is the mortgagor’s agent.”\textsuperscript{11} The lease therefore was not terminated and was binding on the owner.

In the more recent case of Gestion Rodaki Inv. v. Laurier Optical Ltd.\textsuperscript{12} there was a prior mortgage and a subsequent lease. The mortgagee took possession and sometime thereafter, the tenant, Laurier Optical Ltd., gave notice that it would be “vacating the premises.”\textsuperscript{13} Although it would appear that the lease would have become a year-to-year lease terminable on six months’ notice, there are several factors from which the court was able to conclude that both the tenant and the mortgagee intended to be bound by the lease. There was correspondence from the tenant indicating that it was terminating the lease pursuant to its provisions and offering three months’ rent as

\textsuperscript{10} [2004] CarswellOnt 6130
\textsuperscript{11} Ibid. at para. 76
\textsuperscript{12} (2006), 57 R.P.R. (4\textsuperscript{th}) 178
\textsuperscript{13} Ibid. at para. 5
final payment to settle in order to be released from all terms and conditions for the balance of the existing lease, and other language to that effect. The court found that there was an implied agreement between the mortgagee and the tenant that indicated “a mutual intent to continue to be bound by the terms of the lease.” The court goes on to say that “[t]his can be distinguished from Goodyear where McKinlay J. A. found there were no facts to suggest there was anything beyond a year-to-year lease and that there was no evidence that the mortgagee intended to be bound.” Although the decision in Gestion Rodaki followed Goodyear by holding that no privity of estate is created merely by a collateral assignment of leases and rents, the conduct of the parties is important. In Goodyear the court had no evidence before it that suggested in any way that the tenant intended to be bound by the lease. This was not the case in Gestion Rodaki.

These cases reinforce the principle that, absent an agreement, there is, at law, no direct relationship between the tenant and the mortgagee. In order to collect rent, the mortgagee must serve a notice of attornment on the tenant. The tenant may either pay rent in accordance with such notice or refuse to pay and leave.

The limited effect of collateral assignment documentation in a mortgage transaction was one of the highlights of the decision in Goodyear. The usual form of assignment of rents and leases that are given as collateral security to a mortgage were held by the court not to create any privity of contract or privity of estate between the

14 Ibid. at para. 27
15 Ibid.
16 Falconbridge on Mortgages, Supra note 4 at 326
17 See footnote 1
tenant and the mortgagee. All that the assignment documentation accomplishes is the transfer to the mortgagee of the right to collect rent. That may be sufficient for the mortgagee to service the debt but may not be sufficient if the mortgagee wants to sell the mortgaged property under its power of sale or foreclose the mortgagor’s equity of redemption in order to generate sufficient funds to repay the mortgage loan, the accrued interest and all costs associated with the enforcement. In these circumstances, a purchaser will likely question the ability of the mortgagee to transfer to the purchaser the rights of the landlord under the lease. One commentator has suggested that the mortgagee should obtain an absolute assignment of rents and leases as well as the usual collateral assignments at the time of the initial advance.\textsuperscript{18} The mortgagee would use such absolute assignment to transfer the landlord’s rights to a purchaser. In the event of a sale of the property and assumption by a purchaser of the mortgage, the mortgagee should, as a precaution, obtain new absolute assignments from the purchaser.

The matter of absolute assignments was also considered in \textit{Gestion Rodaki}.\textsuperscript{19} The plaintiff in \textit{Gestion Rodaki} was the new owner who purchased the property under a power of sale. The court held that when the mortgagee exercised the power of sale and the mortgagor was no longer able to redeem, “the benefits under the lease became absolutely assigned.”\textsuperscript{20} Even though there was only a collateral assignment of rents and leases and only for the purposes of security, such assignment became absolute

\begin{footnotes}
\item[19] \textit{Supra} note 12
\item[20] \textit{Ibid.} at para. 22
\end{footnotes}
and “there remained privity of estate between the plaintiffs and [the tenant] because of the common interest in the property”.  

If the tenant and mortgagee have entered into a non-disturbance or similar agreement, the rights of the mortgagee and the tenant in the event of default are determined in accordance with the provisions of such agreement. Basically, the non-disturbance agreement establishes privity of contract between the tenant and mortgagee – a critical factor that was not established in Goodyear (despite the creative arguments raised by the mortgagee) - as well as the right of the tenant to remain in possession for the remainder of the term so long as it performs its obligations under the lease.

3. Prior Lease/Subsequent Mortgage

At common law, when an owner leases real property not subject to any mortgage, a tenant receives a leasehold estate in the same property. Any subsequent mortgagee receives the owner’s entire estate in the real property subject to the tenant’s leasehold estate. In the event of a default under the mortgage by the owner, the subsequent mortgagee has no right to possession against or to evict the prior tenant and correspondingly, the tenant has no right to surrender the lease. The prior lease remains unaffected by the subsequent mortgage. In addition, no notice to attorn is required. Section 62(1) of the Commercial Tenancies Act\(^\text{22}\) provides as follows:

\(^{21}\) Ibid.
\(^{22}\) R.S.O. 1990, c. L.7 as amended
Attornment of tenant, in what cases not necessary

62. (1) Every grant or conveyance of any rent or of the reversion or remainder of any land is good and effectual without any attornment of the tenant of the land out of which such rent issues, or of the particular tenant upon whose particular estate any such reversion or remainder is expectant or depending.

Tenant not to be prejudiced

(2) A tenant shall not be prejudiced or damaged by the payment of rent to any grantor or by breach of any condition for non-payment of rent before notice to the tenant of such grant by the grantee.

Although there is no specific reference to mortgagees, the section does refer to “[e]very grant…of the reversion or remainder of any land…” At common law, the owner would grant such reversion to the mortgagee. Although the actual grant no longer takes place because of section 6 of the Land Registration Reform Act23, the rights of mortgagees remain the same.

While in Goodyear it was clear that the tenant’s interest was subject to that of the mortgagee, other cases show that the distinction is less clear. In 1420111 Ontario Ltd. v. Paramount Pictures (Canada) Inc.24 the tenant (Paramount Pictures (Canada) Inc., formerly Famous Players Limited) tried to argue that its leasehold interest was subsequent to the interest of the mortgagee. The tenant tried to use the decision in Goodyear to its advantage in order to terminate a commercially unfavourable tenancy. The tenant and the former owner entered into a comprehensive offer to lease in 1986. No lease was ever entered into and no notice of the tenant’s interest was ever

23 Supra note 3
24 (2001), 56 O.R. (3d) 447
registered. In 1988 the then owner mortgaged the property in favour of Imperial Life. When the mortgage went into default, Imperial Life collected rents from Famous Players for 5 years and thereafter sold the property to 1420111 Ontario Ltd. under power of sale. After negotiations to reduce rent with the new owner failed, the tenant tried to argue its lease was a year-to-year tenancy and was therefore entitled to terminate upon six months’ notice. The court held that failure to register a tenant’s notice of lease did not result in the mortgagee having a prior interest. There was ample evidence that all parties had actual notice of the tenant’s prior lease. The lease therefore continued unaffected by the power of sale and was binding on the tenant. In an unusual set of facts, the court in Toronto-Dominion Bank v. Ottlantis Inc.25 held that the lease was not “extinguished” when the mortgagee went into possession and sold under power of sale even though registration of the mortgage occurred prior to the registration of the lease. However, in this case the mortgagee and owner became one and the same and it is doubtful whether this decision will have any further application in light of its unique facts.

A non-disturbance or similar agreement in the case of a prior tenant would be redundant. The subsequent mortgagee cannot disturb the possession of the prior tenant, unless the tenant defaults under the lease, in which case a non-disturbance or similar agreement would be of no assistance either.

25 (1997), 36 O.R. (3d) 119
4. Estoppel Certificates

Goodyear confirmed that the execution and delivery of an estoppel certificate by a tenant to a mortgagee does not, in itself, create any privity of contract between the tenant and mortgagee. In the case of an estoppel certificate, the tenant is basically confirming certain information for the benefit of the mortgagee but not entering into any agreement with the mortgagee. If a mortgagee wants to establish privity of contract with a tenant, then a non-disturbance and attornment agreement would be the normal way to proceed. In addition to the privity issue that was thoroughly canvassed in Goodyear, the Court of Appeal upheld the principle that a party must establish that it relied on the estoppel certificate. In Goodyear, the purchaser was required to complete the transaction whether or not an estoppel certificate was obtained.

Other cases have been similarly decided. In Confed Trust Co. v. Gasland Oil Ltd. the tenant delivered a “clean” estoppel certificate to the mortgagee. After the landlord defaulted under the mortgage, the tenant tried to terminate the lease. The Alberta Court of Queen’s Bench held that the tenant was estopped from taking such actions because of its clean estoppel certificate and because the mortgagee was able to establish that it relied on such certificate in order to finance the loan to the mortgagor. An interesting but not a determining fact in Confed Trust is that the tenant had entered into a non-disturbance agreement with the mortgagee. In Devon Estates Ltd. v. Royal

--------------------

26 (1993), 11 Alta. L.R. (3d) 5 [Confed Trust]
Trust Company the same Alberta Court of Queen’s Bench held that the mortgagee can rely on the estoppel certificate. But this case considered an additional issue. Was the mortgagee liable to the tenant for landlord defaults expressly set out in the estoppel certificate? In its estoppel certificate, the tenant stated that it had overpaid on account of operating costs and that such dispute was ongoing. After the mortgagee took possession, the tenant tried to collect the amount of the overpayment from the mortgagee. The court held that the mortgagee was only responsible to account for overpayment and other landlord’s obligations from the date the mortgagee took possession and not before. On the estoppel certificate issue, this case is the “flipside” of Goodyear where the landlord was trying to use the estoppel certificate to establish privity of contract with the tenant. In Devon Estates the tenant tries to do the same and in both cases, neither succeeded.

A rather basic point is that the estoppel certificate can only be relied upon by the party to whom it is issued. This matter was reviewed in R. Denninger Ltd. v. Metro International General Partner Canada Inc. where the tenant gave a “clean” estoppel certificate to the landlord’s mortgagee. Thereafter, the landlord tried to rely on the same estoppel certificate to settle certain disputes with the tenant regarding charges under the lease. The Ontario Court General Division held that the landlord could not rely on the estoppel certificate nor claim that the tenant was estopped because the landlord knew of the dispute. To meet the reliance test as set out in Goodyear, a mortgagee

\[27\text{ (1994), 24 Alta. L.R. (3d) 401 [Devon Estates]}\]
\[28\text{ (1992), 8 O.R. (3d) 720}\]
must clearly show that it relied upon an estoppel certificate before proceeding with a loan advance. Simply stating such reliance in the estoppel certificate may not be sufficient. The mortgagee must be able to demonstrate that such estoppel certificate was an essential part in arriving at its decision to advance funds and at the time such decision was made and such estoppel certificates were received, the mortgagee had the right not to advance funds.

5. Collateral Agreements

If the landlord/mortgagor has entered into side agreements and assigns these to the mortgagee, it is by no means certain that the mortgagee will be bound by such side agreements. Depending on the circumstances, the rationale appears to be what was expressed in Goodyear. The act of assigning rights or obligations (or both) by one party to a contract to a third party mortgagee does not create privity of contract, let alone privity of estate with the other party to the contract unless such other party is a party to the assignment. While this concept worked to the disadvantage of the mortgagee in Goodyear, in many cases, it is to the mortgagee’s advantage. In 2774880 Manitoba Ltd. v. Superior Management Ltd., Manufacturers Life Insurance Company (“Manulife”) was a mortgagee in possession. The mortgagor/landlord had entered into an agreement with a neighbouring owner with respect to parking. This parking agreement was assigned to Manulife as collateral security for its loan. The Manitoba

29 (2000), 150 Man. R. (2d) 136
Court of Appeal adopted the reasoning in *Goodyear* and held that the assignment of the parking agreement did not create any obligation on Manulife.

In addition to collateral contracts, there may be certain provisions within the lease itself that are not binding on assignees/mortgagees. For example, in *Sadie Moranis Real Estate Limited v. Hongkong Bank of Canada*\(^{30}\), a right of first refusal in an offer to lease was held not to be binding on the mortgagee in possession. In this case the mortgagee had given notice of attornment and initiated power of sale proceedings. Thereafter, the mortgagee in possession gave notice to the tenant pursuant to the terms of a right of first refusal in the lease and the tenant did not respond within the prescribed period. Afterwards, the tenant tried to enforce the right of first refusal on the basis that certain extension rights negotiated between the mortgagee in possession and purchaser created a new agreement thereby entitling the tenant to a new right of first refusal. Despite the mortgagee’s earlier actions, the court held that there was no obligation on the part of the mortgagee to give effect to the tenant’s right of first refusal.

There are also a number of cases where tenants have paid monies to the landlord in advance, such as deposits and estimates for operating costs and taxes. In these situations, the Courts have held consistently that a mortgagee is not responsible for any monies received by the mortgagor/landlord before the mortgagee takes possession. In *Re: Dollar Land Corporation Ltd. and Solomon*\(^{31}\), a deposit paid by a tenant to a landlord was not enforceable against the landlord’s assignee. Although this

\(^{30}\) (1998), 39 O.R. (3d) 691

\(^{31}\) (1963), 39 D.L.R. (2d) 221 [*Dollar Land*]
case did not involve a mortgagee, it did involve an assignee of the landlord’s interests under a certain lease. The payment of a deposit was held to be “merely collateral to the land” and it did not touch or concern the land and therefore did not run with the land. The Court also indicated that the ultimate assignee (Dollar Land) received no part of the $165.00 paid by the tenant. That would lead one to the conclusion that if a tenant is able to show that the assignee received the benefit of a deposit, then it would be enforceable against the assignee. This is normally the situation in a purchase transaction where the purchaser is credited with the amount of a deposit as part of the adjustments on closing. However, in the case of a mortgagee, it is unlikely that any of the deposits will ever end up in the hands of the mortgagee prior to the mortgagee taking possession. Equally troubling to tenants is the matter of the payment of operating cost estimates. This is a normal practice in any commercial or industrial lease where a landlord estimates the operating costs and taxes for the coming year with a readjustment within a certain period after the year has ended and the actual amounts are known. In Devon Estates 32, the tenant's overpayment on account of operating costs, although clearly set out in the estoppel certificate delivered to the mortgagee, did not bind the mortgagee to account for such overpayment. Both the decision in Dollar Land 33 and Devon Estates 34 were adopted and followed in Canada Trustco Mortgage Co. v. Mundet Industries Ltd. 35 In his decision, Justice MacFarland of the Ontario Court of Justice noted that the cases upon which these decisions are based do not

\[32\] Supra note 27  
\[33\] Supra note 31  
\[34\] Supra note 27  
\[35\] [1996] O.J. No. 3746 [Canada Trustco]
necessarily involve only mortgagees in possession but also assignees. In Canada Trustco, the tenant sought to obtain a return of goods and services tax paid over the first five (5) years of the term. Unfortunately (for the tenant), the tenant delivered what appeared to be a “clean” estoppel certificate to the purchaser. The purchaser agreed to assume all obligations from and after the closing date and the vendor agreed to indemnify the purchaser from all prior liabilities. The estoppel certificate and the purchaser’s acts clearly indicated that the purchaser was relying on the certificate. From a mortgagee’s perspective, the case law appears to favour the mortgagee in that claims or liabilities arising before the mortgagee takes possession are not enforceable against it.  

6. **Non Disturbance Agreements**

Although non disturbance agreements were discussed at great length in Goodyear, there was no non disturbance agreement in place between the tenant and the mortgagee with respect to the existing lease. There was a non disturbance agreement with respect to a prior lease but not with respect to the existing lease. Had there been a non disturbance agreement between the tenant and the mortgagee in Goodyear, the new owner would have succeeded in establishing privity of contract and binding the tenant to the existing lease. Generally, non disturbance agreements are for the benefit of tenants to prevent mortgagees in possession from terminating their

---

36 However, in 789247 Ontario Inc. v. 215 Piccadilly Properties Inc. (1991), 20 R.P.R. (2d) 294, a subsequent landlord was bound by a prior landlord’s side letter to the tenant resolving an ambiguity in the lease. Mr. Justice Granger of the Ontario Court of Justice held that the side letter really formed part of the lease.
tenancies. However, the effect of a non disturbance agreement can go beyond protecting the leasehold estate and establishing privity of estate. In the case of *473807 Ontario Ltd. v. TDL Group Ltd.*\(^{37}\) the mortgagee and the tenant entered into a comprehensive postponement and non disturbance agreement. The tenant sued its landlord for breach of the lease. The tenant was successful and obtained a court order entitling the tenant to set-off its damages and costs award (in excess of $700,000) from the rent. The landlord subsequently defaulted on its mortgage and the mortgagee issued a notice of sale. Subsequently, the mortgagee became mortgagee in possession of the premises. The tenant contended that it continued to have the right to set-off its damages as against the rent and, obviously, the mortgagee argued otherwise. At trial, the mortgagee was successful. On appeal, the court spent considerable time reviewing and interpreting the postponement and non disturbance agreement. After considering numerous creative arguments, the court held in the end “that the [postponement and non disturbance agreement] alone determines the Mortgagee’s obligations. And under the [postponement and non disturbance agreement] the Mortgagee must assume the burden of [the tenant’s] court-ordered right of set-off.”\(^{38}\) Most if not all the text of the postponement agreement was featured in this decision. Accordingly to Laskin J.A., “the Mortgagee agreed to be “bound as the landlord under the Lease . . . In other words, the Mortgagee agreed to accept the Landlord’s obligations under the Lease. One binding obligation of the Landlord was to recognize


\(^{38}\) *Ibid.* at para. 73
[the tenant’s] court ordered set-off."39 In addition, the postponement and non disturbance agreement contained specific references to certain exclusions. The specific exclusion of prepayment of rent gave rise to the principle of interpretation “to express one thing is to exclude another.”40 What was also curious is that the mortgagee had received notice from the tenant of the litigation between the tenant and the landlord and the mortgagee chose to do nothing about it. It is not clear what the mortgagee could have done at this stage but there was considerable discussion on this point. In any event, this decision has resulted in mortgagees looking more closely at their forms of non disturbance agreements. Attached to this paper are precedent non disturbance agreements that include specific language to counter the affects in the TDL case.

7. Renewals and Amendments

Where a lease has been renewed or materially amended, deemed novation may become a factor. Although not expressly referred to as “deemed novation” in the current case law, the principle is that in certain cases a new lease will be deemed to be established rather than an extension of an existing lease. In many cases, this may not be an important consideration. However, if a lease has been assigned and, as is normally the case, the assignor continues to remain liable under the lease, it may become very relevant if the landlord or the mortgagee is looking to the covenant of the original tenant/assignor.

39 Ibid. at para. 37
40 Ibid.
In the case *Avlor Investments Ltd. v. J. K. Children’s Wear Inc. et al* 41 the renewal clause provided that at the tenant’s option, the landlord would grant to the tenant “a renewal lease” of the premises. Prior to the exercise of such option for a renewal lease, the lease was assigned. The assignee exercised the right to obtain a renewal lease and subsequently went into default. The original tenant/assignor was held not to be liable. The court held that exercising the option to renew had the effect of creating a new contractual relationship between the landlord and the assignee which put an end to the original privity of contract between the landlord and the original tenant. As a result, there was no liability on the part of the original tenant to pay any damages. The court went on to state that if it was the tenant’s right simply to extend the term (rather than have the right to enter into a renewal lease), the original tenant would continue to remain liable.

A similar result was reached in *Comcorp Life Insurance Co. v. G. Muia Investments Ltd.* 42 In this case, there was a prior lease and a subsequent mortgage. However, the prior lease was terminated and a new lease was entered into after the mortgage without any renewal right being exercised. The lease expired and the original tenant entered into a new lease under a different company name. In these circumstances, the mortgagee was successful in obtaining possession against the tenant. In one respect, the facts in this case bear some similarity to one aspect of the facts in *Goodyear*. In *Goodyear* there was a prior lease with respect to which a non-

---

42 (1997), 10 R.P.R. (3d) 309
disturbance agreement had been entered into between the mortgagee and the tenant. That prior lease expired and a new lease was entered into without a new non-disturbance agreement. In both cases, the court held that only the existing lease counts. The old expired lease is of no assistance.

Less obvious and certainly less clear is the effect of a material amendment to a lease. In *Pye v. Bank of Montreal* 43 the landlord tried to argue that a reduction in rent in exchange for the release of the landlord’s duty to supply certain services constituted a new lease. As a result, the new lease would then be subsequent to the mortgage that went into default and foreclosed. In other words, the current owner tried to reorder the priorities in order to terminate the lease. 44 It should also be noted that there were other factors in this case that probably worked against the landlord. The landlord tried to terminate the lease (which lease had very favourable financial terms for the tenant) by means that were considered to be precipitous. Whether or not the landlord’s conduct had any effect on the decision, it is clear from this decision that minor adjustments to rent do not have the effect of creating a new lease.

43 (1986), 41 R.P.R. 1
44 A similar result was also reached in *Friends’ Provident Life Office v. British Railways Board* [1996] 1 All ER 336. In this case the significant rental increase did not operate to create a new lease and the original tenant was held liable but only with respect to the original rent.
8. Residential Tenancies

Part V of the *Mortgages Act*\(^{45}\) basically removes the distinction between prior and subsequent mortgagees of residential tenancies. Section 47 of the *Mortgages Act* provides as follows:

**Person deemed to be landlord**

\(^{47}\) (1) A person who becomes the mortgagee in possession of a mortgaged residential complex which is the subject of a tenancy agreement between the mortgagor and a tenant or who obtains title to the residential complex by foreclosure or power of sale shall be deemed to be the landlord under the tenancy agreement.

What is noteworthy is that Part V of the *Mortgages Act* only refers to the obligations of the landlord and is silent with respect to the tenant’s obligations. Would a subsequent residential tenant have the right to refuse a notice to attorn and vacate in the event of a mortgage default and possession by the mortgagee? In *Royal Trust Corp. of Canada v. Mahoney*\(^{46}\), the court held that even though the mortgagee in possession shall be deemed to be landlord under the tenancy agreement, the option to purchase clause in the tenancy agreement did not bind the mortgagee in possession. The term “tenancy agreement” was not explicit enough to have intended to bind the mortgagee in possession to provisions “which are not integral to, or normally incidental to, a tenancy agreement.”\(^{47}\) In light of this reasoning, it is difficult to imply anything binding a residential tenant where there is no explicit provision in the legislation.

---

\(^{45}\) R.S.O. 1990, c. M.40 as amended

\(^{46}\) (1993), 34 R.R.P. (2d) 65

\(^{47}\) *Ibid.*
The mortgagee in possession has rights and obligations that are essentially the same as those of a residential landlord. The rights to terminate the tenancy are set out in the *Residential Tenancies Act, 2006.* In addition, the mortgagee in possession has special rights to terminate where there is a sale to a purchaser who requires possession for personal or family use.

9. **Checklist for Mortgagees**

Before any funds or additional funds are advanced by a mortgagee, what steps should be taken, what concerns should be addressed and what documents prepared in order to protect the mortgagee who relies on the income derived from leases to ensure that its loan payments are met? The following list is not intended to be exhaustive but only an indication of the various areas that should be considered.

A. **Searches**

   (i) **Title:** A review of the registered title is a basic requirement on any mortgage transaction. Where there are leases involved, in addition to disclosing the registered owner, the registered title will also disclose whether any notices of lease, non disturbance agreements, rights of first refusal, options to purchase and similar documents have been registered. All of these registrations should

---

48 S.O. 2006, c. 17, section 37, section 43ff
49 See section 53, *Mortgages Act*
be reviewed to ascertain their impact on any subsequent mortgagee.

(ii) **Off Title:** Of equal importance with the search of title are the searches with respect to off-title or title related matters. These include searches with respect to realty taxes, utilities, work orders (building, fire, environmental) and other similar searches and they provide valuable information to the solicitor regarding the current state of the property. It may be the tenant’s responsibility to pay realty taxes. If these taxes are not paid, that may be valuable credit related information for the mortgagee concerning the viability of a particular tenant. Alternatively, it could also be an indication that the management of the property is not what it should be. In other words, in addition to providing the solicitor with the means to give an opinion to the mortgagee concerning title and title related matters, priority and perhaps enforceability, there are also the practical benefits of obtaining invaluable information to assist the mortgagee in assessing the credit risk involved in a particular loan transaction.

B. **LEASE REVIEWS**

Reviewing the leases involved in a particular transaction is a similarly basic requirement. In a multi-residential context, this may not be practical because of the volumes involved. In the residential situation most mortgagees take comfort in the fact
that most, if not all, residential leases are substantially the same with only the names of the tenants, the leased premises, the term and the rent being the usual variable factors. However, in a commercial or industrial context, this is usually not the case. In each case, it will be up to the solicitor to obtain (and confirm in writing) instructions concerning lease reviews.

Assuming that instructions are received to carry out lease reviews, what are the main points that should be checked from a mortgagee’s perspective? Obviously the mortgagee will have concerns similar to any purchaser and would want to know who the tenants are, any guarantors or indemnifiers, the term, the term expiry dates, the base rental rates, the extent of recovery for operating expenses under additional rent payments, renewal rights, parking rights as well as other specialty rights and obligations. In addition to these, there are certain aspects that may be of particular interest to a mortgagee.

(i) **Proper Execution:** Normally a mortgagee or its solicitor will only receive a photocopy of each lease. The first obvious matter to check is that the photocopy is complete, no pages or schedules are missing and that each lease appears to have been executed by the landlord, tenant and, if applicable, any guarantor or indemnifier. Mortgagees generally require confirmation, usually by way of an estoppel certificate or tenant’s acknowledgement, from each tenant confirming that the lease attached to the estoppel certificate is a valid and binding obligation on the tenant, that there are no other agreements between the landlord and tenant except as noted on
the acknowledgement or certificate. This provides the mortgagee and its solicitor with the necessary comfort to ensure that the lease documentation is complete and accurate.

(ii) **Subordination Clause:** Most commercial and industrial leases contain a provision setting out the tenant’s obligation with respect to any subsequent mortgagee. Leases to major or anchor tenants often include provisions requiring landlords to obtain certain assurances, such as non disturbance agreements, from prior mortgagees. In light of the decision in *Goodyear*, mortgagees will no doubt be paying special attention to the subordination rights and obligations.

(iii) **Cost Recovery:** To what extent does the landlord recover its cost under the lease? In other words, is this a net lease, a gross lease or something in between? This is extremely important in the event the mortgagee decides to enforce its mortgage and go into possession. Once in possession, the mortgagee will have landlord’s obligations and the extent to which the cost of these obligations can be recovered from tenants is extremely important to the mortgagee.

(iv) **Termination Rights:** The right of any tenant to terminate before the end of the term is highly relevant from a mortgagee’s perspective, especially if the tenant with such rights occupies a
large amount of space. Such termination rights have to be viewed in context with all the lease expiry dates. If a number of leases are expiring at the same time (as in the case of many of the Skybox licences at the Skydome), the landlord, and therefore the mortgagee, will be in a vulnerable position at renewal time especially if there is a downturn in the market. Commercial landlords generally try to stagger their expiry dates to avoid over exposure in any particular market.

(v) **Guarantees and Indemnities:** The pitfalls with respect to guarantees and indemnities have been discussed as part of another topic in this programme. From a mortgagee’s perspective, these guarantees and indemnities have to be examined closely not only for enforceability but also for their creditworthiness. By carrying out searches with respect to a guarantor or indemnifier such as executions and searches under the *Personal Property Security Act*\(^{50}\) one might be able to ascertain whether or not the guarantor or indemnifier has substantial outstanding liabilities which again may impact on the mortgagee’s credit decision.

(vi) **Lease Renewals and Amendments:** In addition to having complete information and documentation regarding renewals and

\(^{50}\) R.S.O. 1990, c. P.10
amendments as discussed earlier, the precise wording of any renewal clause and the effect of any amendments should be carefully reviewed. From the mortgagee’s perspective, this is particularly important when there has been an assignment of the tenant’s obligations and the mortgagee is relying on the covenant of the original tenant/assignor.

(vii) **Lump Sum Payments:** Obviously, any payment of large sums by the tenant to the landlord need to be assessed by the mortgagee. In order to control any lump sum pre-payments of rent or other material amendments to the lease, the mortgagee will try to get the agreement of the tenant not to do so without the mortgagee’s consent. This may be a possible trade off for a non disturbance agreement.

10. **Tenant Issues**

As many cases have indicated, a default under a prior mortgage can have a significant impact on the tenant’s rights under its subsequent lease. Not only can the tenant be evicted (unless the tenancy is with respect to residential premises) but the tenant may also lose any prepaid rent or credits on account of operating costs as well as the use of any leasehold improvements paid for by the tenant. While the tenant may have recourse against the landlord, that may be of no assistance if that landlord is in financial difficulty or insolvent. Qualifying an estoppel certificate preserved the tenant’s rights in *Goodyear*. However, as other cases have indicated, even an express
statement will be of no assistance to collect those monies from the mortgagee unless they were in fact paid to the mortgagee. The tenant’s recourse in these situations is not against the mortgagee (unless the mortgagee is in possession and the monies have been paid to that mortgagee) but against the landlord at the time the offer to lease is entered into or the lease itself is negotiated and finalized. The lease (or if no lease, then the offer to lease or agreement to lease) is the means whereby the tenant and landlord establish their rights and obligations with respect to each other and also, to the extent possible, with any third parties, mainly mortgagees. Issues such as non-disturbance agreements, pre-payment of rent, unreasonable estimates with respect to operating costs and realty taxes should be dealt with at this stage. As the cases have indicated, once a default occurs, recourse against the mortgagee may at best be unpredictable and more likely be unsuccessful.

**Conclusion**

The foregoing is intended as a summary of the case law surrounding some of the issues raised in *Goodyear*. As solicitors representing mortgagees, landlords and tenants, we cannot afford to underestimate or be unaware of their significant impact. As in *Goodyear*, the ultimate result, although beneficial to the tenant in *Goodyear*, was not an expected result. No one, particularly the mortgagee, landlord or tenant, initially expected the lease to become a year-to-year lease. In order to bring more certainty into the process, solicitors must first of all identify the potential issues, address them, review them with their clients, provide advice based on the current case law and commercial practice, confirm the instructions in writing and proceed accordingly. This paper will hopefully provide some assistance in that process.
NON-DISTURBANCE AND ATTORNMENT AGREEMENT – TENANT’S FORM51

AGREEMENT

THIS AGREEMENT, made as of the ● day of ●.

B E T W E E N:

●, a corporation having its principal place of business at ●, in the City of ●, Province of Ontario,

(hereinafter called Mortgagee),

- and -

●, a corporation having its principal place of business at ●, in the City of ●, Province of Ontario,

(hereinafter called Tenant),

WITNESSETH:

WHEREAS, Mortgagee is about to make a loan to ● (hereinafter called Landlord) secured by a mortgage (hereinafter called the Mortgage) covering a parcel of land owned by Landlord and described on Exhibit A annexed hereto and made a part hereof, together with the improvements now or hereafter erected thereon (said parcel of land and improvements thereon being hereinafter called the Mortgaged Property); and

WHEREAS, by a certain lease heretofore entered into between Landlord and Tenant dated as of ● and amended, as follows:

● (hereinafter (collectively) called the Lease), Landlord leased to Tenant certain premises in the Mortgaged Property together with the building now or hereafter erected on all or a portion of said premises (said premises and the improvements on or to be erected thereon being hereinafter called the Demised Premises); and

WHEREAS, a Notice of Lease is intended to be, or has been registered in the ●; and

WHEREAS, a copy of the Lease has been delivered to Mortgagee, the receipt of which is hereby acknowledged; and

51 The Non-Disturbance and Attornment Agreements and related precedents are reproduced from James. D. M. Fraser & Lawrence H. Iron, Commercial Tenancies, (LexisNexis Canada Inc. 2007) at 8-107ff and 9-107ff.
WHEREAS, Mortgagee is unwilling to make said loan to Landlord unless the Lease is and continues to be subordinate to the lien of the Mortgage; and

WHEREAS, Article  of the Lease provides that the Lease shall become subject and subordinate to a first mortgage of the entire fee interest of the Mortgaged Property made to certain institutional lenders if and when a non-disturbance agreement is entered into with respect to such mortgage; and

WHEREAS, the parties hereto desire to effect the subordination of the Lease to the lien of the Mortgage and to provide for the non-disturbance of Tenant by Mortgagee.

NOW THEREFORE, in consideration of the premises and of the mutual covenants and agreements herein contained, the parties hereto intending to be legally bound hereby agree as follows:

1. Mortgagee hereby consents to and approves the Lease.

2. The Tenant hereby acknowledges and agrees that its interest in the Lease, including, without limitation, its interest in the Mortgaged Property, is subject and subordinate to the Mortgage and to all amendments, extensions or substitutions thereof and all advances thereunder and the Mortgage and all such amendments, extensions and substitutions to the Mortgage shall be deemed for all purposes to have been executed and registered against the Mortgaged Property prior to the execution of the Lease, and the rights of the Mortgagee under the Mortgage, as the Mortgage may be amended or supplemented from time to time, shall have priority accordingly.

3. Tenant certifies that the Lease is presently in full force and effect.

4. Mortgagee agrees that so long as the Lease shall be in full force and effect, and the Tenant is not in default beyond any period given in the Lease to cure such default:

   (a) Tenant shall not be named or joined as a party defendant or otherwise in any suit, action or proceeding for the foreclosure of the Mortgage or to enforce any rights under the Mortgage or other obligation secured thereby;

   (b) The possession by Tenant of the Demised Premises and the Tenant’s rights thereto shall not be disturbed, affected or impaired by, nor will the Lease or the term thereof be terminated or otherwise affected by (i) any suit, action or proceeding upon the Mortgage or other obligation secured thereby, or for the foreclosure of the Mortgage or the enforcement of any rights under the Mortgage or any other documents held by the Mortgagee, or by any judicial sale or execution or other sale of the Demised Premises, or by the exercise of any other rights given to the Mortgagee by any other documents or as a matter of law, or (ii) any default under the Mortgage or other obligation secured thereby.

   (c) All insurance proceeds paid or payable with respect to the Demised Premises or any other part of the Mortgaged Property and received by the Mortgagee shall be applied and paid in the manner set forth in the Lease.
(d) Neither the Mortgage nor any other security instrument executed in connection
therewith shall cover or be construed as subjecting in any manner to the lien thereof,
any trade fixtures, signs or other personal property at any time furnished or installed by
Tenant or its subtenants or licensees on the aforementioned property regardless of the
manner or mode of attachment thereof.

5. The Tenant agrees that the Tenant shall attorn and shall be deemed to have
attorned to the Mortgagee for the then remaining term of the Lease and any extensions
or renewals thereof which may be effected in accordance with any option therefor in the
Lease, on all the terms and conditions of the Lease, which shall remain in full force and
effect, forthwith upon the Mortgagee giving notice thereof to the Tenant, whereupon the
Tenant covenants and shall be deemed to have covenanted with the Mortgagee to
perform all of its obligations under the Lease (including, without limitation, its obligations
to pay rent), as if the Mortgagee was the original lessor under the Lease, and the
Mortgagee shall be deemed to have covenanted with the Tenant to perform all of the
Landlord’s obligations under the Lease, as if the Mortgagee was the original lessor
under the Lease.

6. If the Mortgagee shall become the owner of the Mortgaged Property by reason of
foreclosure of the Mortgage or otherwise, or if the Mortgaged Property shall be sold as a
result of any action or proceeding to foreclose the Mortgage, the Lease shall continue in
full force and effect, without necessity for executing any new lease, as a direct lease
between Tenant and the then owner of the Mortgaged Property, as landlord thereunder,
upon all of the same terms, covenants and provisions contained in the Lease, and in
such event:

(a) Tenant shall be bound to such new owner under all of the terms, covenants and
provisions of the Lease for the remainder of the term thereof (including the renewal
periods, if Tenant elects or has elected to exercise its options to extend the term) and
Tenant hereby agrees to attorn to such new owner and to recognize such new owner as
landlord under the Lease; and

(b) Such new owner shall be bound to Tenant under all of the terms, covenants and
provisions of the Lease for the remainder of the term thereof, including the renewal
periods, if Tenant elects or has elected to exercise its options to extend the term.

7. Notwithstanding anything contained in this Agreement, the Mortgagee is not
obligated to assume any obligations under, nor is it responsible for the performance of
any of the provisions of, the Lease, except as provided herein or unless and until (and
then only for so long as) the Mortgagee is enforcing its security under the Mortgage and
is in possession of the Mortgaged Property as a mortgagee in possession.

8. Any notices or communications given under this Agreement shall be in writing
and shall be given by registered or certified mail, return receipt requested, postage
prepaid, (a) if to Mortgagee, at the address of Mortgagee as hereinabove set forth or at
such other address as Mortgagee may designate by notice, or (b) if to Tenant, at the
address of Tenant as hereinabove set forth, or at such other address as Tenant may
designate by notice. During the period of any postal strike or other interference with the
mail, personal delivery shall be substituted for registered or certified mail.
9. This Agreement shall be binding upon and enure to the benefit of the parties hereto and their respective successors and assigns including, but not limited to, any purchaser of the interest of the Landlord upon a foreclosure or sale of the Mortgaged Property by the Mortgagee.

10. This Agreement contains the entire agreement between the parties and cannot be changed, modified, waived or cancelled except by an agreement in writing executed by the party against whom enforcement of such modification, change, waiver or cancellation is sought.

11. This Agreement and the covenants herein contained are intended to run with and bind all lands affected thereby.

IN WITNESS WHEREOF, the parties hereto have duly executed this Agreement the day and year first above written.

Per: ____________________________
I have authority to bind the Corporation.

Per: ____________________________
I have authority to bind the Corporation.
NON-DISTURBANCE AND ATTORNMENT AGREEMENT – MORTGAGEE’S FORM

AGREEMENT dated as of ●
BETWEEN

●
(the “Bank”)
- and -
●
(the “Tenant”)
- and -
●
(the “Guarantor”)

1. Definitions

“Assignment” means:
(1) a general assignment of book debts and a general security agreement now held by the Bank from the Landlord;
(2) any other existing or future assignment of rents or leases relating to the Property held by or for the benefit of the Bank; and
(3) any amendment of any of the above.

“Landlord” means ●

“Lease” means a lease by the Landlord to the Tenant dated ●, a copy of which is attached to this agreement.

“Leased Premises” means the premises described in the Lease.

“Bank” includes any person who becomes the owner of any part of the Property as the result of the Bank enforcing the Mortgage and that person’s heirs, executors, administrators, successors and assigns.

“Property” means the property described in Schedule A to this agreement.

“Mortgage” means:
(1) a charge of the Property by the Landlord to the Bank registered in the land registry office for the ● Division of ● on ● as instrument;
(2) any other existing or future mortgage or charge of the Property held by or for the benefit of the Bank; and
(3) any amendment of any of the above (including renewals, modifications, consolidations, replacements and extensions).
2. **Postponement**

The Tenant postpones the Lease and all of its rights in the Property to the Mortgage, and to the Bank’s rights under the Mortgage in respect of any advances that may be made in the future.

3. **Non-Disturbance**

The Bank agrees that, as long as the Tenant is not in default in complying with the Tenant’s obligations under the Lease and this agreement, the Bank will not during the term of the Lease enforce its rights under the Mortgage to disturb the Tenant’s quiet possession of the Leased Premises under the Lease. The Bank is not however bound by any right of the Tenant to purchase under any option, right of first refusal or other agreement.

If the Tenant is in default, the Tenant’s rights under this section end and the Bank may take possession of the Leased Premises or enforce any other rights of the Landlord.

4. **Attornment**

The Bank may at any time give the Tenant written notice requiring the Tenant to attorn to the Bank. On receiving the notice the Tenant will become a tenant of the Leased Premises as regards the Bank on the following terms. The tenancy will be for the balance of the term of the Lease and the Tenant will have the benefit of any options to renew in the Lease. The Tenant will be liable to the Bank to comply with all the Tenant’s obligations under the Lease and the tenancy will be subject to all of the Landlord’s rights under the Lease. The Bank will become subject to the same obligations under the tenancy as a chargee over whose charge the Lease had priority. The Bank will be subject only to obligations that have reference to the subject matter of the Lease. The Bank will not be affected by any breach of the obligations before the Bank became subject to the obligation. The Bank will not be affected by any such breach that continues after it becomes subject to the obligation until the Tenant has given the Bank written notice of the breach and the Bank has had a reasonable time after the notice to remedy the breach. The Bank will not be subject to any obligation of the Landlord to construct or reconstruct the Property or any improvements, to pay any inducements to the Tenant, to take over or otherwise assist the Tenant with respect to other premises of the Tenant, to lease additional premises to the Tenant, to permit the Tenant to have any exclusive right to conduct a business in any area, or to sell to the Tenant under any option, right of first refusal or other agreement. No one who falls within the definition of “Bank” shall be subject to an obligation after ceasing to have an interest in the Property.

5. **Tenant’s Agreements**

The Tenant agrees with the Bank as follows:

(a) The Tenant will not in the future pay any rent or other payment in advance except as required by the existing terms of the Lease. The Bank will not be bound by any such payment.

(b) The Bank will not be bound by any amendment of the Lease, any surrender of the Lease, any merger affecting the Lease, any termination of the Lease, any waiver of
the Landlord’s obligations under the Lease or any consent given under the Lease unless the Bank gives its written consent to the amendment, surrender, merger, termination, waiver or consent.

(c) The Tenant will not exercise any right under the Lease that detracts from the Bank’s rights as to insurance.

6. Assignment

The Tenant agrees with the Bank to observe the Bank’s rights under the Assignment to enforce any of the Tenant’s obligations under the Lease. The Tenant agrees that neither the Assignment nor any exercise or intended exercise by the Bank of the Bank’s rights under the Assignment detracts from the Bank’s rights under this agreement.

7. Tenant’s Certificate

The Tenant certifies to the Bank as follows:

(a) The Lease is in full force, unamended, and contains all the terms agreed between the Tenant and the Landlord as to the Leased Premises. The Tenant is entitled to full benefit of the Lease free from any encumbrances.

(b) The Tenant is itself occupying and using the Leased Premises and the Tenant accepts that the Property and the Leased Premises have been substantially completed in accordance with the Landlord’s obligations.

(c) The Tenant has started to pay basic rent at the maximum rate required under the Lease for any month in the first year of the term.

(d) The Tenant has no right to set-off any claim against, or make any deduction from, the rent and other payments to be made by the Tenant under the Lease or to terminate or extend the Lease because of a default by the Landlord.

(e) The Tenant named in the Lease is liable under the Tenant’s obligations for the term of the Lease despite any assignment.

The Bank will not be bound by anything that does not conform to this certificate. If anything does not conform to this certificate, the Bank may give the Tenant written notice cancelling this agreement.

8. Transfer

The Tenant agrees that the Tenant will, before assigning the Lease (if assignment is permitted under the Lease), obtain from the assignee an agreement in favour of the Bank to be subject to and comply with this agreement.

9. Statements

The Tenant agrees, within 10 days after being requested in writing by the Bank to do so, to give the Bank a certificate in a form supplied by the Bank as to the status of the Lease and of the parties’ rights under it. The form may require the Tenant to state whether the Lease is in force, in what ways it may have been amended, what is the state of accounts between the Landlord and the Tenant, in what ways the Landlord and Tenant may have failed to comply with their obligations under the Lease and what
claims the Tenant may have against the Landlord. The Tenant may make the statement to the best of the Tenant’s knowledge and belief. The Tenant agrees that the Bank, including any person acquiring an interest in the Property or the Mortgage, may rely on the certificate.

10. Further Acts and Documents

The Tenant agrees at the Tenant’s expense to do any further act and execute any further document to carry out the intent of this agreement that the Bank may request in writing. The Tenant irrevocably appoints the Bank as the Tenant’s attorney, in the name and on behalf of the Tenant, to do any act and execute any document required to perform the Tenant’s obligations under this section.

11. Renewal

If the Tenant renews the Lease under any option to renew in the Lease, this agreement shall apply each new lease as if all references to the Lease were to the new lease.

12. Notices

Either party may give the other a notice by sending it by prepaid registered mail to the address set out below. A party may change the address by giving the other written notice of the new address. A notice so sent will be deemed to have been given on the fourth day after it was mailed. The address is as follows:

(a) For a notice to the Bank: ●
(b) For a notice to the Tenant: ●

13. Guarantee

The Guarantor consents to this agreement and agrees that every guarantee and indemnity given by the Guarantor to the Landlord shall be for the benefit of the Bank as well. This provision does not detract from any rights of the Landlord under the guarantee or indemnity or from the rights of the Bank under the Assignment.

14. Successors

A reference to a party to this agreement or the Landlord includes the party’s or the Landlord’s heirs, executors, administrators, successors and assigns. This agreement binds and enures for the benefit of the parties, heirs, executors, administrators, successors and assigns.

IN WITNESS OF WHICH, the parties have executed this agreement.

By: _____________________________________
   Name: ●
   Title: ●

By: ________________________________
   Name: ●
   Title: ●

   c/s

   (seal)
ACKNOWLEDGEMENT AND CONSENT

The Landlord hereby acknowledges and consents to the foregoing agreement, and agrees with the Bank to be bound by its terms.

By: _____________________________________

Name: ●
Title: ●

SCHEDULE A

DESCRIPTION OF THE PROPERTY
MORTGAGEE INSERT TO NON-DISTURBANCE AGREEMENT

If the Mortgagee shall succeed to the interest of the Landlord under the Lease, or should any person or entity or any successor or assigns who shall acquire the interest of the Landlord under the Lease through a foreclosure of the Mortgage, the exercise of the power of sale under the Mortgage, a deed in lieu of foreclosure or otherwise (the “New Owner”), the Mortgagee or New Owner, as the case may be, shall be bound to the Tenant under all of the terms, covenants and conditions of the Lease, and the Tenant shall from and after the Mortgagee’s or New Owner’s succession to the interest of the Landlord under the Lease, have the same remedies against the Mortgagee or the New Owner, as the case may be, for the breach of an agreement contained in the Lease that it might have had under the Lease against the Landlord or New Owner, as the case may be, provided however, the Mortgagee and New Owner shall not be:

(a) liable for any act or omission of a prior landlord (including the Landlord); or

(b) subject to any set-offs or defences that the Tenant might have against a prior landlord (including the Landlord); or

(c) bound by any rent or additional rent that the Tenant might have paid in advance to any prior landlord (including the Landlord) for a period in excess of One (1) month or by any security deposit, cleaning deposit or other prepaid charge which the Tenant might have paid in advance to any prior landlord (including the Landlord), except to the extent that the Mortgagee or New Owner actually comes into exclusive possession of the same; or

(d) bound by any assignment, surrender, release, waiver, cancellation, amendment or modification to the Lease made without its written consent.
ESTOPPEL CERTIFICATE

TO: ●

The undersigned (“Tenant”) hereby certifies to ● (“Purchaser”) and ● (“Landlord”), Purchaser’s lenders and the respective successors and assigns of the foregoing as follows:

1. Parties

Tenant is the tenant of the Premises, pursuant to the lease between Tenant, as tenant, and ●, as landlord (“Lease”) more particularly described as follows:

Lease dated ● by and between Landlord and Tenant

2. Lease Is in Force

The Lease has been duly executed and delivered by Tenant and is presently in full force and effect. The Lease has not been otherwise amended, supplemented, or changed, by letter agreement or otherwise, except as set forth in Paragraph 1 above.

3. Completion of Premises

Except as noted below, all improvements, tenant-finish work and construction obligations required to be completed as of the date of this Certificate under the terms of the Lease by Landlord have been completed in accordance with the terms of the Lease:

4. Premises Accepted

The Premises consists of ● square feet. Tenant has accepted and is currently in possession of the Premises.

5. Lease

The term of the Lease is scheduled to expire on ●, subject to any extension options or renewals set forth in the Lease.

6. Rent

Current base rent is calculated according to the following: — See attached Schedule “A”. Tenant has fully paid rent, charges and other payments due Landlord to and including the month of ●. No rental or other charges have been paid by Tenant more than thirty (30) days in advance, except as follows:

7. Security Deposit

The amount of security deposit currently held by Landlord under the terms of the Lease is $●.
8. **No Landlord Default**
Landlord has satisfied all commitments made to induce Tenant to enter into the Lease. Tenant has not sent Landlord any written notice of default which has not been cured by Landlord, and, Landlord is not in default in the performance of any of its obligations under the Lease, nor has any event occurred which with the passage of time (after notice, if any, required by the Lease), would become an event of default.

9. **No Tenant Default**
Tenant is in material compliance with all laws, regulations and ordinances with respect to Tenant’s use and occupancy of the Premises. Tenant is not in default under any of the terms of the Lease, nor has any event occurred which with the passage of time (after notice, if any, required by the Lease) would become an event of default.

10. **No Offsets or Claims**
As of the date of this certificate, there exist no outstanding offsets, claims, counterclaims or defences of Tenant against Landlord arising from the Lease or otherwise, except as follows:

11. **No Concessions**
Tenant is not entitled to any improvement funds, concessions, bonuses, free or reduced rental, rebates, cash contributions, or other matters for any period after the date hereof, except as follows: ●

12. **No Right or Option to Renew, Expand, Purchase or Cancel**
Tenant has no right or option to purchase all or any portion of the Premises or any improvements or fixtures located therein. Except as set forth in the Lease, Tenant has no right or option to renew or extend the terms of the Lease, right or option to lease other space, or right or option to cancel or terminate the Lease.

13. **No Sublease/Assignment**
Tenant has not entered into any sublease, assignment or any other agreement transferring all or any part of its interest in the Lease or the Premises, except as follows: ●

14. **Authority**
The person or persons signing this Certificate for Tenant has full power and authority to do so.

15. **Bankruptcy**
Tenant is not insolvent and has not filed and is not the subject of any proceeding for bankruptcy, reorganization, receivership or similar proceeding.

16. **Reliance/Attornment**
Tenant recognizes and acknowledges it is making the representations contained in this Certificate to Landlord in connection with a sale of its interest in certain real property (including the Premises) to Purchaser, and Landlord and Purchaser and its successors and assigns will fully rely on Tenant’s representations. This Certificate may also be
relied upon by any lender making a loan secured by the Premises or Purchaser's interest therein, and such lender's successors and assigns, and upon request of Landlord or Purchaser, Tenant will reconfirm the statements set forth herein directly to any such lender together with such other information reasonably requested by such lender. The provisions of this Certificate shall be binding upon and inure to the benefit of the successors, assigns, personal representatives and heirs of Tenant, Landlord, Purchaser and the lenders and shareholders of Landlord and Purchaser.

Date

TENANT

By: _____
Name: _____
Title: _____