

Attornment and Non-Disturbance Agreements

Prepared By: Natalie Vukovich and Brian Parker
Daoust Vukovich LLP
for The Law Society of Upper Canada

- 6-Minute Commercial Leasing Lawyer
- Commercial Mortgage Transactions 2013
September 10, 2013

Introduction

As a commercial leasing lawyer, dealing exclusively with commercial landlord and tenant matters, my work only occasionally intersects with commercial mortgages. When it does, more often than not, the opposing party is similarly not highly skilled in commercial mortgage transactions. Typically, the scenario involves two leasing lawyers who are wrestling with the “Subordination and Attornment” provisions of a lease, at least one of whom is primarily focused on the “Non-Disturbance” aspect of the discussion.

When asked to address the topic of “Attornment and Non-Disturbance Agreements” for this seminar, my first thought was that the title was wrong. I thought the topic should be simply, “non-disturbance agreements” (known generally as “NDA”-s in my line of work). As a landlord or a tenant, attornment is never the main event when negotiating these terms of a lease. Upon reviewing the literature to prepare for this presentation, however, I came to realize that to a lender, attornment can actually be of greater concern than subordination, and since often its quid pro quo is the promise of non-disturbance, lawyers who represent commercial mortgage lenders should appreciate the significance of attornment when considering whether to give assurances of non-disturbance to a tenant (or to tenants generally).

The purpose of this paper is to focus on a few specific issues within this topic, which are:

1. Is it sufficient for a mortgagee to rely on a lease term requiring the tenant to attorn to the mortgagee, or must the mortgagee have a separate attornment agreement directly with the tenant?

2. Are there any traps that a lender should be mindful of when entering into a non-disturbance agreement?

This paper assumes that the basic aspects of the relationship between a mortgagee and a tenant of a commercial lease have been previously digested by the reader. However, it might help to begin with a few short paragraphs intended to serve as background for the specific issues.

What is Attornment?

Attornment is a legal device “akin to assignment”¹. If A owes a sum of money to B and B requests that A pay the money to C and A assents, A is said to have “attorned” to C; C may sue A for the debt.² So much has been written since *Goodyear Canada Inc. v Burnhamthorpe Square Inc.*³ (“Goodyear”), by so many thoughtful and articulate analysts⁴, that there is really nothing left to say about the basic premise of this now well-known area of law: when the mortgagor/landlord defaults on its mortgage, a mortgagee who enforces its remedies by realizing on the mortgaged property may seek to enjoy the benefit of tenancies created after the mortgage (“subsequent tenancies”, or “subordinate tenancies”). In some cases it may be necessary to ask those tenants to attorn to it as landlord (that is to say, to accept the mortgagee as the new landlord, by paying rent to the mortgagee and performing the obligations of the tenant in favour of the mortgagee *qua*

¹ SM Waddams, *The Law of Contract*, 6th ed (Toronto: Canada Law Book Inc, 2010) at 201.

² *Ibid* at p 201.

³ *Goodyear Canada Inc v Burnhamthorpe Square Inc*, (1998) 166 DLR (4th) 625, 41 OR (3d) 321 (ONCA).

⁴ See generally Kenneth A. Beallor, “Subordination and Attornment” in *Shopping Centre Leases* (2nd ed, Canada Law Book) 2008; Brian Bucknall, “*Goodyear Canada Inc. v Burnhamthorpe Square Inc*: New Life in Old Law”(1999) 22 *Advoc Q* 117 1999-2000; Marilyn G. Lee, “Case Comment on *Goodyear Canada Inc v Burnhamthorpe Square Inc*” (1999) *Real Property Reports* (3rd series), 21 RPR-ART 28; David B Light, “The *Goodyear* Problem and Possible Solutions for Mortgagees” (2001) *Canadian Bankruptcy Reports* (4th series) 21 CBR-ART 148.

landlord). But, as Goodyear highlighted and the subsequent literature has well-explained, (1) a mortgagee may encounter difficulty when trying to enforce a promise to attorn that is given to the prior landlord under the lease; (2) a tenant may not be willing to attorn without assurances that its lease will be preserved exactly as written; and (3) in the absence of a separate NDA (Non-Disturbance Agreement), the tenant and mortgagee may find themselves in a different landlord-tenant relationship than they expected, when the tenant does pay rent to the mortgagee *qua* landlord. As so much has been written on this subject that there is really nothing to add, the reader who still requires a proper and thorough explanation of what I have just glossed over should refer to the numerous articles cited in this paper under footnote 4.

What is Subordination?

A lease may be entered into after a mortgage has been granted (in which case it is subordinate to the mortgage). Alternatively, the lease may be established, and later a mortgage granted (in which case the mortgage is subordinate to the lease).

If the lease or the mortgage or both are registered on title, the ranking of one over the other will be determined by the date of registration.⁵

In a lease, a tenant may agree “to subordinate” its lease to any mortgage. If there is already a mortgage in place, this clause in the lease should be academic, as the mere fact that the mortgage was entered into before the lease should result in the lease being subordinate to the mortgage (barring a re-ordering of priority via title registration).

⁵ *Land Titles Act*, RSO 1990, c L5, s 78(5).

However, if the landlord arranges new financing after the lease is in place, it may actually call on its tenant to take steps to confirm the subordination of the lease to the mortgage.

What is Non-Disturbance?

Upon default under the mortgage, the mortgagee may realize on its security by foreclosing the equity of redemption held by the mortgagor. In the event that the land is encumbered by a lease which is subordinate to the mortgage, the mortgagee may foreclose this subordinate interest as well; the mortgagee may realize on the entirety of the security that was pledged to it by mortgagor. A non-disturbance agreement is an agreement between the mortgagee and tenant to ensure this won't happen. An NDA will state that in the event of foreclosure, the mortgagee will not foreclose the lease held by the tenant. NDAs may also include specific provisions ensuring that terms of the lease which are important to the tenant will withstand any subsequent foreclosure (a common example is the right to renew the lease). The main purpose of the NDA is to ensure that if the mortgaged property changes hands through the enforcement of the mortgage, the tenant will not be deprived of the lease that it bargained for. (Typically, a non-disturbance agreement will say a little more than that, but we'll get to that topic later.)

Can a mortgagee enforce a lease clause requiring a tenant to attorn to the mortgagee?

Most of the literature seems to recognize the value of carefully drafted lease clauses regarding a tenant's obligation to subordinate and attorn, but fails to question whether the lease is the appropriate forum in which to make these commitments. It seems to be common industry practice to consider appropriately drafted subordination and attornment

clauses as sufficient security to lenders, but there is case law that should cause commercial mortgage lenders to think again.

In *Goodyear*, as part of a letter agreement amending a lease, the landlord and the tenant covenanted to obtain “consents and non-disturbance agreements”⁶. After negotiation, leases were signed, but consents and non-disturbance agreements were never obtained. When the mortgagee foreclosed on the property, the tenant argued that there was no privity of contract between it and the mortgagee and therefore the mortgagee did not have the right to enforce the provisions of the lease. The Ontario Court of Appeal agreed, holding that, absent an attornment agreement, a mortgagee has no grounds to compel a tenant to fulfill obligations under a subordinate lease. The mortgagee argued all angles, submitting that the lease was preserved through privity of estate, an implied contract evidenced by conduct, and/or assignment of rents, but none of these arguments was able to save the lease. After foreclosure, but before the matter reached the court, when the tenant was paying rent to the mortgagee, a new tenancy was created. The court held that the new tenancy had a yearly period term, terminable on each anniversary of its commencement, with at least 6 months’ notice. The tenant lawfully terminated, and the mortgagee could not insist on the tenant fulfilling the balance of the lease obligations following the termination date.

It is well-established law that that the only parties who may enforce a contract are those persons who exchange mutual promises therein.⁷ Since the 19th century, “consideration was thought of as the price of the promise and ...only one who paid the price could

⁶ *Supra* note 3 at para 9.

⁷ *Supra* note 1 at 197.

enforce the promise”.⁸ Those who derived benefit from a contract, but offered no consideration in exchange, were seen as “stranger[s]”⁹ to the contract who lacked the requisite privity and were therefore unable to sue for the performance of contractual obligations. But the doctrine of privity is not without exception. Agency and trust law have adapted to permit third party beneficiaries to enforce contracts which were intended for their benefit.¹⁰ Similarly, progressive interpretation of the law regarding assignment has been applied to arrive at desirable results where the rule against third party beneficiaries would do injustice.¹¹ In *London Drugs v Kuehne*,¹² the Supreme Court of Canada canvassed the history of the doctrine of privity and the calls by law commissions and academics for its abolition. Short of overruling the doctrine, the court recognized an exception in the circumstances in order to conform to “commercial reality and justice”¹³. In 1999, the Supreme Court of Canada recognized another exception in *Frasier River Pile & Dredge v Can-Dive*.¹⁴ While the doctrine of privity is still good law in Canada, these cases may suggest a trend away from privity of contract as a strict prerequisite to enforcement of contractual obligations.

Nevertheless, in *Lavalin Services Inc. v National Life Assurance Co. of Canada*¹⁵ (“Lavalin”) the Alberta Court of Appeal held that the mortgagee could not enforce the clause in the lease whereby the tenant promised to attorn. The lease provided that the

⁸ *Supra* note 1 at 197.

⁹ *Tweddle v Atkinson* (1861), 1 B & S 393, 121 ER 762, rejecting *Dutton v Poole* (1678), 2 Lev 210, 83 ER 523.

¹⁰ *Supra* note 1 at 200-02.

¹¹ *Supra* note 1 at 198.

¹² (1992), 97 DLR (4th) 261 (SCC).

¹³ *Ibid* at 301.

¹⁴ (1999) 176 DLR (4th) 257, [1999] 3 SCR 108.

¹⁵ (1984), 42 Alta LR (2d) 28, 70 AR 358 (ABCA).

tenant would “attorn to a mortgagee on demand by the mortgagee”¹⁶. When the mortgagee requested the tenant to attorn, the tenant refused. The mortgagee then brought an application to declare the existence of the lease; presenting many of the same arguments raised in *Goodyear*. On the matter of enforceability of the attornment clause, the Court of Appeal held that it was not enforceable by the mortgagee because there was no privity of contract between the parties. One wonders if this judgment was given today, whether the modern trend of permitting enforcement of contracts by third party beneficiaries would have changed the outcome.

In the case of *DeGasperis Muzzo Corp. v 951865 Ontario Inc.*¹⁷ (“*Degasperis*”), the Ontario Court of Appeal treated the subordination clause in the lease as a binding obligation on the tenant in favour of the mortgagee. However, this holding should be approached with caution. Not only does it concern a covenant to subordinate (rather than to attorn), but the subordination was effected through registration on title. The central issue of the case was whether the mortgagee’s actual notice of the lease determined the priorities as between these parties, despite the registry. So while the subordination clause in the lease seemed to bind the tenant, the enforcement of such a clause wasn’t an issue; the tenant had already registered as subordinate. Although some have commented that the case provides support for the proposition that a mortgagee can likewise rely on a tenant’s covenant in a lease to attorn, there is nothing in the case that explicitly states so.

¹⁶ *Ibid* at para 3.

¹⁷ (2000) 35 RPR (3d) 243 (OSCJ), affirmed in *DeGasperis Muzzo Corp v 951865 Ontario Inc.*, (2001) 42 RPR (3d) 63 (ONCA).

However, in *Vancouver City and Savings Credit Union v Miller Electronic Ltd*¹⁸. the British Columbia Court of Appeal implied that a mortgagee might be able to rely on an attornment provision within a lease, although there was no discussion of privity and the court ultimately found that the lease did not bind the mortgagee and the tenant. The court held that a condition precedent for the attornment provision had not been met, implying that, had the condition precedent been fulfilled, the lease clause would have been sufficient to bind the tenant and the mortgagee.

Generally, the case law on this matter is not reliable to establish that agreements between tenants and landlords are enforceable by mortgagees. Although an NDA will give a tenant comfort that its investment will be preserved despite a failed mortgage, there is the benefit to the mortgagee to consider. An attornment provision is a basic term of an NDA. A mortgagee would be well-advised to enter into an NDA if it intends to enjoy the benefit of a tenancy that is subordinate to the mortgage.

In *473807 Ontario Ltd. v. TDL Group Ltd.*¹⁹ (“Tim Hortons”), the Ontario Court of Appeal held that the NDA established privity of contract between the tenant and the mortgagee. This ruling comes as no surprise. The case concerned the tenant’s right to set-off rents against the mortgagee *qua* landlord, in respect of amounts owed to the tenant by the prior landlord. Unfortunately, the case did not address whether such a result would have been found had the tenant’s commitments to the mortgagee been made solely through lease clauses. As a result of its devastating effect on the mortgagee in that case,

¹⁸ (1987) 13 BCLR (2d) 205, 4 ACWS (3d) 434 (BCCA).

¹⁹ (2006) 47 RPR (4th) 1, 271 DLR (4th) 636 (ONCA).

it would be understandable if a mortgagee were to prefer not to sign an NDA lest it face a similar fate.

Is it good for a mortgage lender to grant NDAs? Are there traps for the unwary?

Some lenders have begun including mortgage terms requiring the borrower/mortgagor to deliver an NDA (containing a covenant to attorn) in respect of every subsequent tenancy over a certain threshold (based on area).

Some landlords have begun including lease terms that purport to give a mortgagee the flexibility to rank behind the lease. Examples of various subordination and attornment lease clauses are appended to this paper; particular attention should be paid to the REALPac standard lease form clauses (which are the first examples in the Appendix).²⁰

Most mortgagees would like to enjoy the greatest of flexibility with the greatest of benefit, but the commercial reality is that a lender may not be able to have all of that. To agree to provide non-disturbance agreements to any tenant who asks for one is likely an overly ambitious commitment that may not pay off in the long run. To only provide non-disturbance agreements when requested leaves a lender in the risky position where it may find out, too late, that a valuable subordinate tenancy may not be preserved due to the insufficiency of a covenant to attorn located solely in the lease.

²⁰ National Standard Office Lease for Single-Building Projects – 1.06 -2008, online: Real Property Association of Canada <<https://c.ymcdn.com/sites/realpac.site-ym.com/resource/resmgr/leases/nsolsinglev1.06released01jun.pdf>>.

If only it were as simple as, “Tenant covenants to attorn. Mortgagee covenants not to disturb.”, followed by two signature lines. In the real world, NDAs are typically far more vexing than that:

1. Tenant seeks more than simply covenant ‘not to disturb’

A tenant may insist that the mortgagee not only covenant not to disturb, but that it covenant to *be bound by* the lease. (It will not alarm you to know that a mortgagee may not be keen to embrace an obligation to pay a lease inducement, or in some circumstances, even to perform a repair. The lender in the Tim Hortons case was certainly not happy to observe the tenant’s right to set-off amounts owed by the former landlord against the rents due to the mortgagee.)

2. NDA & Subsequent amendments to the lease

The mortgagee may not be willing to grant blanket non-disturbance that applies notwithstanding subsequent amendments to the lease. The mortgagee may insist that amendments be subject to its approval. These consent provisions have a tendency to be overlooked and lenders may not have any incentive to consent when they are asked.

3. Remedying default of prior landlord

A mortgagee may not be willing to remedy defaults of the borrower landlord. If the default is “ancient”, this might be an acceptable position, but if the default is either fresh or of an ongoing nature, a tenant may not be content to pay rent to the mortgagee *qua* landlord where the default on the part of the landlord is material.

4. Restricting exercise of termination rights

A mortgagee may not be willing to allow a tenant (who has covenanted to attorn, after all), to exercise a termination right within the lease, without the lender's consent. It may seek to prevent a tenant from negotiating a surrender with the landlord, without the lender's consent.

Appended to this paper are two sample forms of NDA. One is brief and the other is not. It is difficult to suggest that one is better than the other.

Conclusion

A commercial mortgage lender likely counts on tenants' rents to pay the debt, to generate value for the property and to support a liquidation if necessary. While a mortgagee may not be thrilled to offer a non-disturbance agreement in respect of a subordinate tenancy, and the terms of that non-disturbance agreement may be challenging, it is beyond noteworthy that by achieving such a relationship with a tenant, especially a key one, it will gain the benefit of certainty in knowing that the lease will be preserved. If it is a fair statement that mortgagors are more likely to fail in a "down-market", and tenants are more likely to wish to avoid attorning where their leases are "over-market", it may be that the better bet by a mortgagee is to lock in the subordinate tenant rather than to hold the right to disturb. It does seem to be that lately, some mortgagees are insisting on direct relationships with tenants (e.g. estoppel certificates in which the tenant not only attests to the status of the tenancy but covenants to attorn to the mortgagee upon request). Perhaps this signals a shift towards greater emphasis on "Attornment and Non-Disturbance Agreements", by commercial mortgage lenders.

APPENDIX 1

SAMPLES OF SUBORDINATION & ATTORNMENT LEASE CLAUSES

1. REALPac Standard Lease Form Subordination & Attornment clause

ARTICLE 13 - LANDLORD FINANCING AND STATUS CERTIFICATES

13.1 Subordination and Postponement

- (a) This Lease and the rights of the Tenant in this Lease shall be subject and subordinate to any and all Mortgages and the Tenant, on request by and without cost to the Landlord, shall, within five Business Days after such request, execute and deliver any and all instruments required by the Landlord to evidence such subordination. Upon request by the Tenant at the time of any request for confirmation of subordination, the Landlord shall make reasonable commercial efforts to obtain from any Mortgagee an acknowledgement and assurance in writing addressed to the Tenant, whereby such Mortgagee acknowledges that, in the event of any such Mortgagee realizing upon the security, it will not disturb the Tenant and will permit the Tenant to remain in possession under this Lease in accordance with its terms, so long as the Tenant is not in default.
- (b) The Landlord, as to any Mortgage, and a Mortgagee, as to any Mortgage held by it, may, by Notice to the Tenant, elect that this Lease and the rights of the Tenant hereunder shall be prior to such Mortgage(s) and the Tenant, on request by and without cost to the Landlord, shall, within five (5) Business Days after such request, execute and deliver any and all instruments required by the Landlord or the Mortgagee, as the case may be, to confirm priority to this Lease over the Mortgage(s).

13.2 Attornment

At any time after any of the following has occurred:

- (a) if a Mortgagee delivers a Notice of attornment;
- (b) if a Mortgagee shall take possession of the Building or the Premises; or
- (c) if the interest of the Landlord is transferred to any Person (in this Article referred to as a "Purchaser") by reason of foreclosure or other proceedings for enforcement of any Mortgage, or by delivery of a conveyance,

the Tenant shall, at the option of the Mortgagee or the Purchaser, as the case may be, exercisable by Notice in writing to the Tenant, be deemed to have attorned to the Mortgagee or the Purchaser, as the case may be, upon receipt of such Notice. The Landlord, the Mortgagee or the Purchaser, as the case may be, may require the Tenant to enter into all instruments required by the Landlord, the Mortgagee or the Purchaser, as the case may be, to confirm such attornment. Upon such attornment the obligations of the

Tenant under this Lease shall continue in full force and effect upon all the same terms, conditions and covenants in this Lease.

13.3 Status Certificates

The Tenant shall at any time and from time to time execute and deliver to the Landlord, or as the Landlord, a Mortgagee or a Purchaser may direct, within five (5) Business Days after it is requested, a certificate of the Tenant, in the form supplied, addressed to the Landlord, the Mortgagee or the Purchaser, as the case may be, and/or any prospective purchaser, lessor or Mortgagee, certifying such particulars, information and other matters in respect of the Tenant, the Premises and this Lease that the Landlord, the Mortgagee or the Purchaser, as the case may be, may request.

13.4 Reliance

Notwithstanding that a Mortgagee or a Purchaser is not a party to this Lease, it shall be entitled to rely upon and enforce the provisions of this Lease which are stated to be for its benefit and, without limitation, the Mortgagee shall be entitled to act as agent for the Landlord to the extent necessary to enforce any such provisions.

2. Sample Lease #1 - Subordination & Attornment Clause

Section * Subordination and Attornment

- (a) This Lease is and will remain subordinate to every mortgage, charge, trust deed, financing, refinancing or collateral financing and the instruments of, as well as the charge or lien resulting from all or any of them and any renewals or extensions of them from time to time (collectively, an "Encumbrance") against the Premises or the Shopping Centre and the Tenant will, on request, sign any document requested by the Landlord to confirm the subordination of this Lease to any Encumbrance and to all advances made or to be made on the security of the Encumbrance. The Tenant will also, if the Landlord requests it to do so, attorn to the holder of any Encumbrance, to the Owners or to any purchaser, transferee or dispossessor of the Shopping Centre or of an ownership or equity interest in the Shopping Centre and the Tenant will, on request, sign any document requested by the Landlord to confirm this agreement.
- (b) If possession is taken under, or any proceedings are brought for the foreclosure of, or if a power of sale is exercised resulting from an Encumbrance the Tenant will attorn to the Person that so takes possession if that Person requests it and will recognize that Person as the Landlord under this Lease.
- (c) The form and content of any document confirming or effecting the subordination and attornments provided for in this Section * will be that required by the Landlord or the holder of the Encumbrance in each case, and each such document will be delivered by the Tenant to the Landlord within ten (10) days after the Landlord requests it.

Section * Attorney

The Tenant will execute and deliver whatever instruments and certificates are requested by all or any of the Landlord, the Owner(s) and any Mortgagee to give effect to Section *. If the Tenant has not executed whatever instruments and certificates it is required to execute within ten (10) days after the Landlord's request, the Tenant irrevocably appoints the Landlord as the Tenant's attorney with full power and authority to execute and deliver in the name of the Tenant, any of those instruments or certificates or, the Landlord, may, at its option, terminate this Lease without incurring any liability.

3. Sample Lease #2 - Subordination & Attornment Clause

1.01 Subordination - Subject to Section 1.02, this Lease, at the option of any mortgagee, trustee or chargee, is and shall be subject and subordinate in all respects to any and all mortgages (including deeds of trust and mortgage) and other interests in the Project or any part thereof now or hereafter created by Landlord, its predecessors or successors in title and all advances thereunder, past, present and future as amended and extended. Tenant agrees to execute promptly and in any event within 10 days after request therefor by Landlord or the mortgagee under any such mortgage an instrument confirming such subordination in such form as they may request.

1.02 Attornment - Tenant agrees, whenever requested by any mortgagee, trustee or chargee (herein called the "Mortgagee") taking title to the Project by reason of foreclosure or other proceedings for enforcement of any such mortgage or by delivery of a deed in lieu of such foreclosure or other proceeding, to attorn to such Mortgagee as tenant under all of the terms of this Lease. Tenant agrees to execute promptly and in any event within 10 days after a request by any Mortgagee an instrument confirming such attornment in such form as may be required by it.

1.03 Effect of Attornment - Upon attornment pursuant to Section 1.02, this Lease shall continue in full force and effect as a direct lease between the Mortgagee and Tenant, upon all of the same terms, conditions and covenants as are set forth in this Lease except that, after attornment, the Mortgagee and its successors in title shall not be:

- (a) liable for any act or omission of Landlord; or
- (b) subject to any offsets or defences which Tenant might have against Landlord; or
- (c) bound by any prepayment by Tenant of more than one month's instalment of Rent unless the prepayment shall have been approved in writing by the Mortgagee or by any predecessor in title of the Mortgagee's interest as mortgagee of the Project.

4. Sample Lease #3 - Subordination & Attornment Clause

Upon written request by Landlord, Tenant shall execute and deliver, without unreasonable delay, an agreement ("SNDA") subordinating and attorning its rights under this Lease to any Mortgage upon Landlord's interest in the Shopping Centre; provided, however, that such subordination and attornment shall be upon the express condition that the Mortgagee of the Lands shall execute an **SNDA** in form reasonably satisfactory to Tenant which provides, inter alia, that the Lease shall remain in effect as a direct lease between the Tenant and the owner of the Landlord's interest, that the owner of the Landlord's interest will be bound by the terms of this Lease, and that Tenant's possession will not be disturbed except in the event that Landlord would have had the right to terminate this Lease if it had remained the Landlord hereunder, and which includes such other terms as are reasonably satisfactory to Tenant which are commonly found in non-disturbance agreements provided by Mortgagees to major tenants in first-class enclosed mall regional shopping centers. Such SNDA shall be in a form reasonably acceptable to Tenant.

If any Mortgagee or trustee elects to have this Lease and the interest of Tenant hereunder superior to any such mortgage or trust deed and evidences such election by notice given to Tenant, then this Lease and the interest of Tenant hereunder shall be deemed superior to any such mortgage or trust deed, whether this Lease was executed before or after such mortgage or trust deed, and in such event, the Mortgagee or trustee shall have the same rights and obligations with respect to this Lease as if the Lease had been executed, delivered and registered prior to the execution and delivery of the mortgage and the assignment of Landlord's interest hereunder had been assigned to such Mortgagee or trustee. Tenant and the Mortgagee shall execute and deliver whatever instruments may be reasonably required for such purposes.

5. Sample Lease #4 - Subordination & Attornment Clause

Section * Subordination and Attornment

At the option of any Mortgagee or the Landlord, this Lease and the rights of the Tenant hereunder shall be prior to, or shall be subject and subordinate to, all existing or future Mortgages and to all renewals, modifications, consolidations, replacements and extensions thereof. Whenever requested by the Landlord or a Mortgagee, the Tenant shall, within five (5) days after such request, enter into an agreement with the Mortgagee whereby the Tenant postpones or subordinates this Lease to the interest of any stipulated Mortgagee and agrees that whenever requested by such Mortgagee it shall attorn to and become the tenant of such Mortgagee, or any purchaser from such Mortgagee in the event of the exercise by the Mortgagee of its power of sale, for the then unexpired residue of the Term upon all the terms and conditions of this Lease. Upon written request of the Tenant, the Landlord shall use reasonable efforts to obtain at the Tenant's expense, written assurances from any Mortgagee with an interest in the Building prior to that of the Tenant to the effect that so long as the Tenant is not in default under this Lease such Mortgagee will recognize the Tenant's rights under this Lease and not disturb the Tenant's occupancy of the Premises. If the Building is held by the Landlord pursuant to a lease, then the Tenant shall, at the request of the Landlord or any lessor under such lease affecting the Building, enter into an agreement with such lessor to the effect that it shall attorn to and become the tenant of such lessor, or any successor or assign, if the lessor or any successor or assign should take possession of the Building as a result of a default under such lease for the then unexpired residue of the Term upon all the terms and conditions of this Lease.

6. Sample Lease #5 - Subordination & Attornment Clause

SUBORDINATION:

27(3) Upon request of the Landlord at any time and from time to time, the Tenant will subordinate its rights under this Lease to any Mortgage or Mortgages, or the lien resulting from any other method of financing or refinancing, now or hereafter affecting the Premises in whole or in part, or the Shopping Centre in whole or in part, and whether or not such Mortgage or Mortgages affect only the Premises or the Shopping Centre or will be a blanket mortgage affecting other premises as well. No subordination by the Tenant will have the effect of disturbing the Tenant's occupation and possession of the Premises as long as the Tenant complies with all of the terms, covenants, conditions, agreements, and provisos of this Lease.

MORTGAGES:

27(4) The Landlord, upon mortgaging the Shopping Centre or any part thereof, where this Lease does not enjoy priority of registration will cause to be inserted in such Mortgage provisions such that if any default occurs under such Mortgage, the Mortgagee will give the Tenant notice of such default, and if such default is with respect to the payment of any monies due under such Mortgage, the Tenant will be subrogated to the rights of the Landlord to remedy such default, or if such default is with respect to the failure of the Landlord to perform any other of its covenants in such Mortgage the Tenant will have the right, after notice to the Landlord, to remedy such default, and if such default is remedied within a reasonable time the Mortgagee will not by reason of such default exercise any right or remedy which it might have as Mortgagee which would entitle it to possession of the whole or any part of the Shopping Centre. The Tenant shall have a right of set off under this Lease for any monies paid by it to the Mortgagee under the Mortgage pursuant to this Section and the Landlord hereby consents to a judgment in favour of the Tenant for any shortfall between the payment made by the Tenant to the Mortgagee under the Mortgage and the financial obligations of the Tenant under this Lease.

APPENDIX 2

SAMPLE FORMS OF NON-DISTURBANCE AGREEMENTS

[LONG FORM]

NON-DISTURBANCE AND ATTORNMENT AGREEMENT

THIS AGREEMENT made as of the ____ day of _____

B E T W E E N:

(hereinafter called the “Tenant”)

OF THE FIRST PART,

- and -

(hereinafter called the “Chargee”)

OF THE SECOND PART.

WHEREAS by a debenture given _____ (the “**Chargor**” or “**Landlord**”) to the Chargee dated the _____ and registered on the _____ as Instrument No. _____ in the _____ (the “**Charge**”), the Chargor did charge in favour of the Chargee certain lands and premises commonly known as _____ and more particularly described in Schedule “A” hereto (the “**Charged Premises**”) upon, and subject to, the terms and conditions more particularly set forth in the Charge;

AND WHEREAS by a lease (which lease, as same may be amended, modified, supplemented, replaced and/or restated from time to time in accordance with Section 7 is hereinafter called the “**Lease**”) dated the ____ day of _____, the Landlord did demise and lease unto the Tenant a portion of the Charged Premises (the “**Leased Premises**”) for a period for a period commencing on the Commencement Date (as that date is specified in Item 7 of the Term Sheet) and expiring ten (10) years after the Commencement Date, provided that in the event that the Term would otherwise expire on any day between _____ and the following _____, then the Term shall automatically be extended to expire on _____ upon, and subject to, the terms and conditions more particularly set forth in the Lease;

AND WHEREAS the foregoing recitals are made as representations and statements of fact by the Tenant and not by the Chargee;

AND WHEREAS for their mutual protection and benefit the Chargee and the Tenant have agreed to enter into these presents.

NOW THEREFORE this Agreement witnesseth that in consideration of the Lease, and of the Leased Premises and of the terms, covenants and conditions set forth in the Lease and the sum of TEN (\$10.00) DOLLARS now paid by each of the Chargee and the Tenant to each other (the receipt whereof is hereby acknowledged by each) it is hereby covenanted and agreed as follows:

1. The Chargee hereby recognizes the Lease and hereby agrees that so long as the Tenant is not in default in the payment of rent or in the performance of the covenants and terms of the Lease, the Tenant shall have the right to peaceably and quietly have, hold and enjoy the Leased Premises, without interruption or disturbance from or by the Chargee or by any person, firm or corporation claiming by, through or under the Chargee and that the Tenant's rights and privileges under the Lease, and any renewal thereof, shall not be in any way disturbed, diminished or interfered with by the Chargee notwithstanding that the Landlord may be in default under the Charge or the Chargee may exercise any of its rights under the Charge.
2. The Tenant covenants and agrees that the Tenant will not seek to terminate the Lease for reason of any act or omission of the Landlord until the Tenant shall have given written notice of such act or omission to the Chargee and until a reasonable period of time shall have elapsed following the giving of such notice during which period the Chargee shall have the right, but shall not be obligated, to remedy or commence to remedy such act or omission, in which case the Tenant will not seek to terminate the Lease.
3. In the event that the Chargee attorns the rents under the Lease, takes possession of the Charged Premises (directly or indirectly through a receiver or a receiver and manager), forecloses the Charge or otherwise becomes the owner of the Charged Premises (an "Attornment Event") as a result of the occurrence of an Event of Default (as defined in the Charge) which is continuing, the Tenant shall attorn and be bound to the Chargee under all of the terms of the Lease for the balance of the term thereof remaining with the same force and effect as if the Chargee were the landlord under the Lease, and, as at the date of the occurrence of the Attornment Event, the Tenant hereby attorns to the Chargee as landlord under the Lease, such attornment to take effect automatically without the execution of any further instrument on the part of any of the parties hereto, immediately upon the Chargee taking possession of the Charged Premises or foreclosing the Charge or otherwise becoming the owner of the Charged Premises; provided that notwithstanding such attornment, the Tenant shall be under no obligation to pay rent or additional rent to the Chargee by virtue of this Agreement until the Tenant receives written notice pursuant to the Charge or other security from the Chargee or its agent (including any receiver or receiver and manager) that an Event of Default (as defined in the Charge or such other security) has occurred and is continuing and that the Chargee is attorning such rents pursuant to the Charge or such other security. In addition, if the Chargee sells the Charged Premises pursuant to a power of sale, a judicial sale or otherwise, the Tenant shall attorn to the purchaser of the Chargee effective on the date of such sale provided that the Chargee obtains

from such purchaser an agreement pursuant to which such purchaser assumes all obligations as landlord under the Lease from and after the date of such sale and, upon obtaining such assumption agreement, the Chargee shall be relieved of all obligations under the Lease.

4. In the event that the Chargee takes possession of the Charged Premises or forecloses the Charge or otherwise becomes the owner of the Charged Premises, then from and after such event the Chargee shall be bound to the Tenant thereunder and the Tenant shall have the same remedies against the Chargee for the breach of any of the landlord's covenants therein contained that the Tenant would have had under the Lease against the Landlord, as landlord, provided, however, in no event shall the Chargee (i) be liable for any act, omission or default of the Landlord, (ii) be subject to any set off, abatement or defence which the Tenant might have against the Landlord, or (iii) be bound by any minimum rent, percentage rent or additional rent which the Tenant might have paid to the Landlord for more than the current month unless otherwise specifically provided for in the Lease or (iv) be liable for any construction warranty or implied construction warranty. Chargee shall not be bound by any asbestos, hazardous substance or environmental indemnifications given by Landlord, and in any event Chargee and its successors or assigns shall have no personal liability as successor to Landlord and Tenant shall look only to the estate and property of Chargee or its successors or assigns in the Charged Premises for the satisfaction of Tenant's remedies for the collection of a judgement (or other judicial process) requiring the payment of money in the event of any default by Chargee or its successors or assigns as landlord under the Lease, and no other property or assets of Chargee or its successors or assigns shall be subject to levy, execution or other enforcement procedure for the satisfaction of Tenant's remedies under or with respect to the Lease, the relationship of landlord and Tenant thereunder or Tenant's use or occupancy of the Charged Premises. The Chargee's obligation hereunder shall terminate upon the sale of the Charged Premises to a third party.
5. Tenant agrees that the Lease shall be and remain at all times subject and subordinate to the Charge and all modifications, extensions and renewals of the Charge.
6. The rights and obligations hereunder of the Chargee shall enure to the benefit of and be binding upon its respective successors and assigns, including but not limited to, any purchaser of the fee at a foreclosure or other sale of the Charged Premises. Tenant may not assign this Agreement, however, if the Tenant assigns the Lease, the Tenant shall obtain from the assignee an agreement pursuant to which such assignee shall be bound by this Agreement.
7. This Agreement shall only be binding upon the Chargee and its respective successors and assigns, based on the provisions of the Lease and no amendment, supplement or modification to the Lease entered into by the Tenant shall be effective and binding upon the Chargee (although it may be effective between the

Tenant and third parties) unless it has received the prior written consent of the Chargee.

8. Any notice or other communication given by the Tenant to the Landlord under the Lease with respect to substantial default under the Lease which could lead to the termination, surrender or cancellation of the Lease will also be given by the Tenant, at the same time and in the same manner, to the Chargee.
9. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute and be construed as one and the same instrument. Signature and acknowledgement pages may be detached from multiple separate counterparts and attached to a single counterpart so that all signature and acknowledgement pages are physically attached to the same instrument.
10. Any notice or other communication required or permitted to be given pursuant to this Agreement shall be given or made in writing and shall be served personally upon any executive officer of the party for whom it is intended as the case may be, or mailed by prepaid registered mail:
 - (a) In the case of the Tenant addressed to:
[x]
 - (b) In the case of the Chargee addressed to:
[y]

or such other address or in care of such other officer as any party may from time to time advise the other parties hereto by notice in writing. The date of receipt of such notice, election, demand, declaration or request shall be deemed to be the date of delivery of such notice, election, demand, declaration or request if received personally or if mailed as aforesaid on the second business day next following the date of such mailing provided that if at the date of such mailing interruption in the operation of the postal service of Canada does or is likely to delay the mailing, such notice, election, demand, declaration or request shall be serviced personally.

11. OFAC Provisions Tenant hereby represents, warrants and covenants with Chargee either that (i) it is subject to regulation by the SEC, FINRA, Federal Reserve or other comparable financial regulatory authority (a “**Regulated Entity**”), or is a wholly-owned subsidiary or affiliate of a Regulated Entity or (ii) neither it nor any person or entity that directly or indirectly (a) controls it or (b) has an ownership interest in it of twenty-five percent (25%) or more, appears on the list of Specially Designated Nationals and Blocked Persons (“**OFAC List**”) published by the Office of Foreign Assets Control (“**OFAC**”) of the U.S. Department of the Treasury or any similar list maintained by any other governmental authority.

12. The Tenant agrees to attorn to the Trustee and shall covenant with the Trustee to execute all such further instruments as may from time to time be reasonably required by the Trustee or by Counsel to evidence such attornment and that upon failure of the Tenant to execute any such further instrument the agreement between the Trustee and the Tenant shall thereupon terminate.

IN WITNESS WHEREOF the parties hereto have executed this Agreement under the hands of their respective proper officers duly authorized in that behalf as of the day and year first above written.

TENANT:

By: _____

Name:

Title:

By: _____

Name:

Title:

I/We have the authority to bind the Corporation.

CHARGE:

By: _____

Name:

Title:

By: _____

Name:

Title:

I/We have the authority to bind the Corporation.

SCHEDULE "A"

CHARGED PREMISES

LEGAL DESCRIPTION OF SITE:

[SHORT FORM]

NON-DISTURBANCE AGREEMENT

THIS AGREEMENT made the _____ day of _____, 2005
B E T W E E N:

●
(herein called the "Tenant")

OF THE FIRST PART

- and -

●
(herein called the "Mortgagee")

OF THE SECOND PART

WHEREAS:

A. ● (the "Landlord") is the owner of the lands located in the City of ●, in the Province of Ontario, municipally known as ● (the "Property") and has mortgaged the Property in favour of the Mortgagee pursuant to a charge/mortgage of land registered in the Land Registry Office for the Land Titles Division of Toronto on ● as Instrument No. ● (the "Mortgage").

B. The Landlord leased to the Tenant certain premises in the Property (the "Premises") pursuant to a lease dated ● (the "Lease"), a copy of which Lease has been delivered to the Mortgagee.

C. The Tenant has been requested to subordinate the Lease to the Mortgage and the Mortgagee has been requested to provide a non-disturbance agreement to the Tenant and the Mortgagee has agreed to provide such a non-disturbance agreement.

NOW THEREFORE THIS AGREEMENT WITNESSETH that in consideration of other good and valuable consideration and the sum of TEN (\$10.00) DOLLARS now paid by the Tenant to the Mortgagee, the receipt of which by the Mortgagee is hereby acknowledged, the Mortgagee hereby covenants and agrees to and with the Tenant as follows:

1. So long as the Tenant shall keep and perform the terms, covenants and conditions contained in the Lease on its part to be kept and performed, the Tenant shall have the right to peaceably and quietly have, hold and enjoy the Property, without interruption or disturbance from or by the Mortgagee or by any person, firm or corporation claiming by, through or under the Mortgagee, throughout the entire term demised by the Lease, together with any and all rights, privileges and benefits to which the Tenant may be entitled under and pursuant to the terms of the Lease if and so long as the Tenant is not in material default under any of the covenants and agreements contained in the Lease, notwithstanding the fact that the Mortgagee may realize upon its security hereinbefore described.

2. The Tenant agrees that, if the Mortgagee should assume control of the Property pursuant to the Mortgage, the Tenant will upon request of the Mortgagee attorn to and become a tenant of the Mortgagee upon the same terms and conditions as set forth in the Lease and shall execute promptly upon request by the Mortgagee any instrument as from time to time reasonably requested to give full effect to this requirement or to set out the status of the Lease and the state of accounts as between the Tenant and the Landlord under the Lease.
3. The Mortgagee covenants to and with the Tenant that if at any time the Mortgagee enforces its security under the Mortgage or takes possession of the Property pursuant to its remedies under the Mortgage, whether by way of appointment of receiver, foreclosure, sale of the Property or any other remedy provided for therein or at law, the Mortgagee will thereupon be bound by the terms of the Lease as the successor in interest to the Landlord.

Notwithstanding that the Mortgagee becomes bound by the terms of the Lease as successor in interest to the Landlord, the Mortgagee shall not be:

- (a) liable to the Tenant for any past default of the Landlord, which defaults are not continuing defaults;
 - (b) bound by any prepaid rent or security deposit in excess of any amount disclosed to the Mortgagee in writing, the then current month's rent, any over payments of amounts which the Mortgagee reasonably estimates to be additional rent and which the Tenant has paid as regular monthly payments of estimated additional rent, or any other prepayment of rent to which the Mortgagee may have consented.
4. If the Landlord is in default of its obligations under the Lease, then prior to taking any action against the Landlord, the Tenant will give notice to the Mortgagee and the Mortgagee will have a period of 30 days from the date of such notice to cure the Landlord's default, provided, however that if the default of the Landlord is of such a nature that immediate action is necessary for the preservation or safety of the Tenant, its property, its business or its employees or invitees, or is required to avoid the suspension of any necessary services to the Property, the Tenant may take such action as may be necessary and notify the Mortgagee immediately thereafter, including incurring any necessary costs and offsetting same against rent.
 5. Each of the parties will promptly do, make, execute or deliver, or cause to be done, made, executed or delivered, all such further acts, documents and things as the other party hereto may reasonably require from time to time for the purpose of giving effect to this Agreement and will use reasonable efforts and take all such steps as may be reasonably within its power to implement to their full extent the provisions of this Agreement.

6. This Agreement shall enure to the benefit of and be binding upon the parties hereto and their respective successors and assigns.

IN WITNESS WHEREOF the Mortgagee and the Tenant have hereunto affixed their respective corporate seals under the hands of their respective proper officers duly authorized in that behalf as of the day and year first above written.

Per: _____

Name:

Title:

I have authority to bind the Corporation

Per: _____

Name:

Title:

I have authority to bind the Corporation.