

## **BREACH OF AN EXCLUSIVE**

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A tenant in a centre had negotiated for an exclusive to sell submarine sandwiches and spent considerable funds (a bank loan of \$128,000.00) on renovating his premises. Another tenant commenced the sale of submarine sandwiches, whereupon the first tenant headed for court to enforce the exclusive and the court declared that the tenant's exclusive has been breached. Within three months after the court's decision the competing tenant stopped selling submarine pursuant to an arrangement with the landlord.

Several months later the landlord and tenant return to the court to determine the appropriate remedy for the breach of the exclusive. The tenant asked for damages and cancellation of the lease.

Cancellation, termination or rescission (the terms are interchangeable) is available if there has been a misrepresentation or a fundamental breach of the lease terms by the landlord. There was no misrepresentation in this case but, as the court found, there was a breach.

If the breach was fundamental or, to quote the court, "sufficiently grave", then the tenant had the option to terminate or repudiate the lease. The determining test was stated in an English Court of Appeal decision as:

"does the occurrence of the event deprive the party...of substantially the whole benefit which it was the intention of the parties...that he should obtain...?"

In the submarine sandwich case, the court reviewed the evidence that the breach was capable of being remedied and was in fact remedied, that the breach existed for eleven months out of a ten year lease term, and that the landlord would not likely benefit from the renovations to the premises. The court went on to state that:

"an award of damages can make the plaintiffs whole and would be infinitely fairer to the parties than termination."

In a recent decision of the British Columbia Court of Appeal a tenant received an opposite result. The tenant had an exclusive right to sell certain merchandise. Another tenant started selling the same merchandise and the landlord could not prevent the other tenant from doing so. The tenant with the exclusive moved out and the court terminated the lease and granted damages.

Why the different result? In the British Columbia case the court held the exclusive clause was a fundamental term of the lease and in the sandwich case the court held the exclusive clause was "of great importance". The deciding factor seems to be that in the British Columbia case the breach could not be remedied whereas in the sandwich case the breach was capable of, and was in fact, remedied.

The court in the sandwich case also dealt with a second issue respecting fundamental breach, i.e., if there is a fundamental breach the tenant must take the step of repudiating the lease. In this case the tenant initially asked for an injunction requiring the landlord to remedy the breach. In other words the tenant sought to enforce a contract and at the same time claim that the contract was fundamentally breached and therefore terminated. As one of my law professors used to say -- you cannot suck and whistle at the same time.

When the breach occurs two tough decisions must be made, is the breach a fundamental breach, and if the answer is yes, does the tenant terminate and move out or stay and be compensated by a monetary award. The decisions must be made within a very short time period otherwise the court will determine that you have waived your termination right.

The sandwich tenant ended up with the store and no one else selling sandwiches. The question remained as to damages -- an item that is sometimes treated too lightly or lost in the battle to prove a breach. In this case the court stated "the evidence as to damages was very sparse". Only the tenant gave evidence which included figures prepared by his bookkeeper. The court noted that neither the bookkeeper nor the bank manager approving the loan was called to give evidence. As a result the tenant ended up with a relatively modest award.

The old adage that you have to spend money to make money is quite appropriate when it comes to proving damages and should not be forgotten.