

## UNDERDOGS VINDICATED

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The May, 2001 issue of *Shopping Centre News* brought to our attention a very interesting case in which subtenants, who were franchisees of a bankrupt franchisor, successfully claimed that pursuant to the provisions of Section 39(2) of the *Commercial Tenancies Act ("CTA")*, they were entitled to assume a direct tenancy with their respective head landlords, notwithstanding that their subleases with the franchisor had not received written consent from the head landlords.

Reported as *Majdpour v. M & B Acquisition Corp.* 43 R.P.R. (3d) 312, the case centred around a number of very unhappy Moneysworth & Best franchisees, who complained that they had not received the support which they had bargained for under their shoe care and repair franchise arrangement.

The franchisees' claim that the franchisor's conduct amounted to a fundamental breach of the franchise agreement failed. To establish a fundamental breach of contract, the franchisees would have had to establish that the conduct of the franchisor had deprived them of "substantially the whole benefit" of the contract. In this case, it was determined that the franchisees did receive essentially what they had bargained for.

The issue of greater significance to those of us in the field of commercial leasing and franchising, however, is the interpretation which was given to Section 39(2) of the *CTA*. Under Section 39(2), in the event of the bankruptcy of a tenant, the subtenant under a sublease, which has been approved or consented to in writing by the landlord, may elect to stand in the same position with the head landlord, as though it were a direct lessee from the head landlord. In the case at hand, the franchisor neglected to obtain the formal written approval of the head landlords to the subleases, and then attacked the subtenants' attempts to invoke the benefit of Section 39(2) on the basis that the requirement of written approval or consent from the head landlords had not been satisfied.

While this does not seem quite fair on the face of it, the appellant, M & B, which had purchased the franchisor's assets from the trustee in bankruptcy, understandably wanted to maintain the original franchise agreements and subleases, and accordingly took the matter to the Court of Appeal for Ontario.

The decision of the Court of Appeal for Ontario has just been released, affirming that the *written* consent of a head landlord, is not in every case, a requirement for success under Section 39(2). In this particular case, it was noted that the head landlords were sophisticated shopping centre owners, who had regular contact with the subtenants in possession of the subject premises, and took no issue with the relief sought by the subtenants. In the words of the Court, "it is obvious that the landlords approved of the franchisees as sub-tenants".

Alternatively, given that the intent of the Section was to protect landlords and assist subtenants under difficult circumstances, and the head landlords had by their conduct impliedly consented to the

subleases and the subtenants, it was decided that the head landlords could be deemed to have waived the requirement for approval or consent in writing.

Furthermore, the failure of the franchisor to ensure that the head landlords formally approved the subleases, so that the franchisees would be in a position to invoke Section 39(2) of the *CTA* if the franchisor ever went bankrupt, disentitled it from attacking the subtenants attempt to invoke that Section on the basis of lack of written consent.

Is *Moneyworth & Best* now authority for the proposition that, regardless of the literal wording of the statute, landlord consent may be inferred and written evidence of such consent dispensed with, if the end result would otherwise be unconscionable? The appeal decision may be found at *Majdpour v. M & B Acquisition Corp.* (November 26, 2001), *Doc C36197(Ont.C.A.)*. It's an interesting read.