

Update on 1497777 Ontario Inc. v. Leon's Furniture Limited

April 1, 2004

Subtenants (and head tenants) may be surprised by the September 2003 decision of the Ontario Court of Appeal in **1497777 Ontario Inc. v. Leon's Furniture Limited** ("Leon's"). The court overturned the June 2002 decision of the Superior Court of Justice of Ontario, which we reported in the Winter/Spring 2003 issue of *The Advantage*.

In *Leon's*, the head landlord had sought a declaration that the head lease terminated due to Leon's default or not obtaining the head landlord's written consent to the renewal of a sublease with Marca. The head tenant (Leon's) argued that the head landlord was using a technical argument to justify terminating the head lease, when what the head landlord really wanted was to terminate because the head lease provided for rent well below market rate.

Leon's took the position on the application that because:

(a) the head landlord had previously provided written consent to the original sublease and to an expansion agreement involving Marca, and

(b) the head landlord had no legitimate basis to argue that Marca was an unsuitable subtenant,

the head landlord was disentitled to terminate. While the applications judge agreed with Leon's and Marca and found that the head landlord was not entitled to terminate, the Ontario Court of Appeal disagreed, allowing the head landlord's appeal and setting aside the judgment.

The applications judge had found most helpful the decision in *St. Jane Plaza Ltd. v. Sunoco Inc.* ("*St. Jane*"), in which the head landlord of a longterm lease had sat back and collected rent for many years while the assignee was in possession, notwithstanding the absence of written consent. Unfortunately for Leon's and the subtenant, the Ontario Court of Appeal distinguished it on the basis that *St. Jane* revolved around a request for a declaration that the head landlord had unreasonably withheld consent, not a claim for relief from forfeiture. In addition, the Court of Appeal found that the previous consents had to be "read in a particular context and not as unprompted and unilateral gestures on the part of the [head] landlord". It did not "make sense to interpret the scope of the consent to include a period of time slightly more than twenty years in addition to that sought in the requests".

The Court of Appeal therefore determined that the head landlord was indeed entitled to terminate and that Leon's recourse was a claim for relief from forfeiture. However, given the need to glean more facts, the Court ordered that Leon's claim for relief proceed back to the Superior Court of Justice by way of trial and that the subtenant's accompanying claim for relief under section 21 of the *Commercial Tenancies Act* be determined (if necessary) at the same time.

It is interesting to note that while the head landlord was successful in the instant appeal, in that it obtained its termination order, the decision is also quite positive for head tenants and subtenants across Ontario seeking equitable relief. The head landlord immediately

raised the argument that relief from forfeiture for sublet without consent is prohibited by section 20(7) of the *Commercial Tenancies Act*; however, the Court of Appeal voiced the view that section 20(7) “does not stand in the way of resort to the equitable jurisdiction of the court” (e.g., under section 98 of the *Courts of Justice Act*). Stay tuned for further developments.

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