



Shopping Center Legal Update

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In Depth

Attorney Fees No Longer Recoverable in Summary Ejectment Actions: *Law Offices of Taiwo Agbaje, P.C. v. J LH Properties, II, LLC*

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Until recently, under Maryland law, landlords could expect to recover litigation costs, including reasonable attorney fees, incurred in bringing summary ejectment proceedings against tenants who failed to pay rent. The operative Maryland statute,¹ however, now dictates that the district court will determine the amount of “rent” to be due and owing as of the time of trial and, in granting judgment for possession, order that this amount be paid in order for the tenant to avoid eviction. Under the statute, the court also has the authority, under certain circumstances, to award a money judgment for the unpaid “rent,” giving the landlord an opportunity to obtain a money judgment against the tenant on an expedited basis, on which it can collect if the tenant does not voluntarily pay the amount owed. Most commercial leases include a broad definition of “rent” and “additional rent,” often including litigation expenses and reasonable attorney fees in the definition of “rent.” Accordingly, the statute and these lease provisions allow the landlord to include the costs of the proceedings and legal fees in the amount of the judgment for “rent” owed.

In 2006, the Maryland Court of Special Appeals issued a ruling upsetting this practice, holding that attorney fees and other litigation costs are not “rent” and, therefore, are not to be included in the judgment entered by the district court, regardless of language in the lease to the contrary.² The effect of this ruling is that landlords who have expended significant amounts in legal fees in litigating an ejectment proceeding—a real possibility in some commercial cases—will have to file a separate lawsuit in order to collect their litigation costs, even if they have successfully obtained a judgment for possession and a money judgment against the tenant in the initial summary ejectment proceeding.

Ruling of the Court of Special Appeals

The court based its decision on the legal definition of the term “rent,” not the definition set forth in the lease. It held that litigation costs and attorney fees are not included in the meaning of the term “rent,” as the term has been defined by prior Maryland cases, because they are not amounts payable in connection with the occupancy of leased premises. The court distinguished the recovery of litigation costs from other forms of traditional “pass-through” expenses, which are recoverable as rent.³ In a 1977 case, the court of appeals held that the payment of taxes, insurance premiums and required improvements could be considered rent, depending upon the parties’ agreement. In the context of a commercial lease, the court held that “charges which may be *definitely ascertained*, paid by the tenant, and going to his use, possession and enjoyment are rent if such was the intention of the parties” (emphasis added).⁴ As a result, most commercial leases define “additional rent” to be any amounts payable by a tenant to a landlord, including litigation expenses and attorney fees.

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However, the *JLH Properties* Court distinguished such payments of “pass through expenses” from litigation costs. Although *JLH Properties*’ lease included the reimbursement of attorney fees in the definition of “rent,” suggesting that the parties intended to agree that such amounts would be recoverable as “rent,” the court held the amounts were not really “rent” within the traditional meaning of that term. Instead, “rent,” at least insofar as the term is used in connection with summary ejectment proceedings, only includes those fees and payments that can fairly be attributed to the tenant’s “use, possession and enjoyment” of the premises.⁵ By contrast, while attorney fees and other litigation costs may be damages recoverable under a breach of contract theory, they are not “rent,” as they are not payments made in connection with the use and occupancy of the premises; they are, therefore, not recoverable in a summary ejectment proceeding.

In reaching this conclusion, the court noted that the nature of the summary ejectment proceeding made it inappropriate to include litigation costs in the judgment amount. The court reasoned that the complex factual inquiry required for a determination of attorney fees would “frustrate the expedited design of summary ejectment proceedings” because, in order to recover attorney fees and expenses, the plaintiff must prove entitlement to such damages “with the certainty and under the standards ordinarily applicable for proof of contractual damages.”⁶ That is, the plaintiff must establish that the fees sought are reasonable, and this requires a specific and detailed accounting of the services actually performed. The determination of the “reasonableness” of litigation expenses, especially attorney fees, creates a “genuine dispute of material fact,” a factual inquiry not suited for an expedited summary ejectment proceeding.

The Practical Effect of *JLH Properties*

The outcome of the case is that a landlord would have to bring a separate action if it wants to recover its litigation costs. The true impact of the holding in this case, however, will depend on the circumstances of each case. Major factors in assessing the impact include the amount the landlord expended in litigation costs prior to and in the ejectment proceeding; whether the landlord will seek “future rent;” and whether the landlord wishes to bring an action against any guarantors of the lease.

In many, if not most, cases, the practical effect of the holding in this case will not be significant. In most summary ejectment actions, landlords are concerned primarily with regaining possession of their property and perhaps with obtaining a money judgment for overdue rent. Because summary ejectment proceedings are by nature quick and simple, a landlord does not normally incur significant attorney fees. In addition, in most cases involving a tenant who failed to pay rent, there often is little hope for collecting anything anyway. As a result, landlords are often fortunate if they can collect even a portion of the past-due rent owed, and there would be no reason to bring a second lawsuit. Thus, landlords with easily marketable properties who are primarily concerned with regaining possession of the premises, and whose litigation costs are not significant, will not likely bother with bringing a second lawsuit simply to recover those attorney fees.

There are other circumstances where the landlord would bring a second lawsuit anyway. In such cases, the landlord could simply add, as an additional count, the claim for attorney fees incurred in the first proceeding. For example, neither “future rent” nor relief against guarantors is available in a summary ejectment proceeding brought under Real Property § 8-401. Moreover, the district court may not have awarded a money judgment, as distinct from a judgment for possession, to the landlord in the summary ejectment proceeding. If the landlord wishes to assert any of these claims, it would have to file a separate lawsuit anyway. In such case, the landlord would add a claim for the recovery of its prior litigation costs as part of its claim for damages. In most cases, doing so would not impact or add to the costs of the second lawsuit.

The situation in which a landlord will be most negatively impacted by the holding is where it otherwise obtained all the judicial relief it sought in the ejectment proceeding and would not otherwise file a second lawsuit, but in which it incurred substantial fees in obtaining that result. For example, consider the following situation: There is one tenant on the lease, but no guarantors; the dispute with the tenant was lengthy and expensive, causing the landlord to incur substantial legal fees (e.g., the dispute might have involved the proper calculation of percentage rent, or the tenant challenged the CAM reconciliations); and the landlord brings a successful summary ejectment lawsuit against the tenant, which includes an award of a money judgment for the amount owed. Assuming the premises are easily marketable, there will be no claim for “future rent” after the tenant is evicted. In such cases, there will be no need to bring a second lawsuit, as the landlord has its money judgment against the only entity liable under the lease, for the full amount of “rent” due under the lease. The recovery is not complete, however, in that the landlord would be required to file an entirely new lawsuit simply to collect its attorney fees, thereby incurring additional litigation costs.

Landlords may attempt to test the *JLH Properties* holding by addressing the “reasonableness” and “definitely ascertainable” issues in the lease, and by expressly providing for an agreed amount of legal fees that would be recoverable in the event of an ejectment. Such a provision might read: “The parties agree that reasonable legal fees will be included in the definition of ‘rent’ and are recoverable by the Lessor in an amount the greater of \$2,500, or 15% of the amount of monthly rent owed at the time of ejectment.” Such a provision would presumably satisfy the court’s concern with the problem of determining factually the amount and reasonableness of the landlord’s fees. Moreover, it seems prudent to offer the tenant the option of agreeing to the reasonableness of the fees, in order to minimize the costs incurred by the parties in litigating the matter. Finally, such a clause would also eliminate the waste of judicial resources brought about by a separate lawsuit instituted simply to recover fees. This solution does not address the principal basis for the court’s holding, however. Attorney fees in litigation in fact are probably not payable in connection with the tenant’s use and enjoyment of the premises. Accordingly, based

on the language of the decision, the inclusion of such an express provision in a lease may not be successful in convincing a district court judge to set aside the *JLH Properties* holding.

¹See Md. Code Ann., Real Prop. § 8-401.

²See *Law Offices of Taiwo Agbaje v. JLH Properties, II, LLC*, 169 Md.App. 355, 901 A.2d 249 (2006).

³In addition, Real Property § 8-401 permits a landlord to recover late fees, but there is no provision that permits the court to award litigation costs or attorney fees.

⁴*Univ. Plaza Shopping Ctr., Inc. v. Garcia*, 279 Md. 61, 67 (1977).

⁵*JLH Properties*, 169 Md.App. at 369 (2006) [quoting *Shum v. Gaudreau*, 317 Md. 49, 64 (1989)].

⁶See generally *JLH Properties*, 169 Md.App. at 370.

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Any Way You Slice It, “BRICK OVEN” Cannot Be Trademarked

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The U.S. Court of Appeals for the Eighth Circuit affirmed a district court granting a motion for summary judgment that the term BRICK OVEN for pizza is generic and, therefore, cannot be afforded trademark protection. *Schwan's IP LLC v. Kraft Pizza Co.*, Case No. 05-3463 (8th Cir., Aug. 18, 2006) (Wollman, J.).

In March 2003, Schwan's began selling its Freschetta® brand of frozen pizzas, using the term BRICK OVEN, a term that Kraft also had considered but rejected using in connection with its line of frozen pizzas earlier that same year. However, several months after Schwan's launch of its BRICK OVEN line of pizzas, Kraft created and marketed its Tombstone BRICK OVEN style pizza to compete with Schwan's. Schwan's sued Kraft for trademark infringement, and Kraft filed for summary judgment on the basis that the term BRICK OVEN is generic as used to identify pizza, or, in the alternative, is descriptive and lacks secondary meaning. The district court granted Kraft's motion, finding the term BRICK OVEN to be generic or, at the very least, to be descriptive without secondary meaning. Schwan's appealed.

The Eighth Circuit affirmed, explaining that a generic term is incapable of functioning as a trademark because it does not identify the source of a product, but rather identifies the basic nature of the product; in other words, “it denotes the thing itself.” As such, a party cannot have the exclusive right to use a generic term, regardless of whether the term is associated with a single source of the product, because third parties must be allowed to describe the fundamental characteristics of competing products.

In reviewing the evidence that supported a finding that the term BRICK OVEN was generic, the Eighth Circuit cited the statement by the head of Schwan's Freschetta brand that brick oven pizza is “a pizza that is cooked in a brick oven.” Further, certain language in Schwan's patent application supported the generic quality of the term and Schwan's had even certified to the U.S. Department of Agriculture that it baked its pizza crust in a “direct-fire brick oven.” Additionally, there was substantial evidence that third parties in the industry also used the term to identify pizza baked in a brick oven.

Moreover, the U.S. Patent and Trademark Office (USPTO) had denied registration of Schwan's trademark on three occasions, ultimately concluding that BRICK OVEN was generic of frozen pizza and pizza in general. Schwan's attempts on appeal to distinguish restaurant pizza and frozen pizza markets were also unpersuasive where the head of the Freschetta brand also testified that frozen pizza purchasers were merely a subset of restaurant pizza purchasers.

Finally, the Eighth Circuit rejected Schwan's argument that the district court had erred in refusing to consider Schwan's survey evidence. The court held that where the term at issue was generic prior to its association with the product at issue in the case, survey evidence was irrelevant because it could only demonstrate that consumers had come to identify the term with that product and not that a generic term had become “protectable” as a trademark.

Practice Note

Language used in patents is often considered by trademark examiners when they are evaluating an application for trademark registration. Accordingly, it is important to counsel clients against adopting a mark that is similar to language in a utility patent that could call into question the distinctiveness of the mark. Further, attorneys are advised to review any patents or patent applications associated with the product to be offered under the proposed mark to determine whether language in the patent could adversely affect the overall strength and registrability of the mark.

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The Landlord Program, Or How Landlords Were Drafted Into the World of Trademark Infringement

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Have you heard of the “Landlord Program”? If you are a landlord who leases to tenants who produce or sell goods, I hazard that those who desire to protect the rights of Gucci, Louis Vuitton and a host of other well-known companies whose copy-righted products are often counterfeited and sold illegally by various vendors sincerely hope that you have heard of the Landlord Program. The reason that such companies want landlords to know about the Landlord Program is that these companies want certain landlords to modify their behavior. They want landlords to take an active role in stopping the sale of counterfeit goods by their tenants.

A number of victimized companies have now begun pursuing what has become known as the Landlord Program. A company whose rights have been infringed will sue a landlord, rather than the tenant/vendor of the counterfeit goods. A suit against most such tenants is relatively fruitless. The tenant will have no substantial assets to seize when judgment is obtained. The individuals behind the entity will form a new entity and open up in another location. Suing such tenants is somewhat like playing the kids’ arcade game: “Whack-a-Mole.” Landlords, on the other hand, tend to have many more substantial assets, including the real estate and improvements where the offending products are located. It is harder for them simply to reorganize and move. In many instances, the landlord will have significantly substantial assets at risk.

At this point, you are probably thinking—just as I did when first hearing about holding a landlord liable for a tenant’s copyright or trade name infringement—“What does this have to do with real estate law?” I have learned that trade name infringement has a lot more to do with real estate than I thought. However, before we move into how the Landlord Program will affect your real estate practice, we must take a look at how liability is established against a landlord.

The famous designer brand, Louis Vuitton, successfully sued a New York landlord named Richard E. Carroll, the four landlord entities that he controlled, and others in the United States District Court for the Southern District of New York, for trademark counterfeiting, and trademark and copyright right infringement. *Louis Vuitton Malletier v. Richard E. Carroll*, Case No. 05-cv-3331 (S.D.N.Y. 2005). Louis Vuitton was able to show that the properties were occupied by a multitude of tenants and sub-tenants that operate stores, booths and other retail outlets for the sale and purchase of counterfeit goods in blatant disregard of the rights of Louis Vuitton and others and in violation of the law. The plaintiff also proved that, despite repeated notification of this illegal activity and requests to remedy it, Carroll refused to take any meaningful steps to stop this illegal use of his premises and instead chose to reap the lucrative benefits of continuing to rent to those engaged in such criminal conduct. Judgment was entered in favor of Louis Vuitton, requiring the landlords to post conspicuous signs warning potential customers that the sale and purchase of counterfeit Louis Vuitton goods at those store locations is illegal. The defendants are required, for a period of two years, to inform any tenants of the consequences of selling counterfeit goods. The landlords also are required to provide copies of all leases signed during that time period to Louis Vuitton. The landlords must evict any tenants who sell counterfeit Louis Vuitton merchandise. Also, a monitor is to conduct weekly searches of the properties for a period of one year, with the costs to be shared equally between Louis Vuitton and the landlords.

The action against Carroll was obviously very fact-specific. However, many other landlords engage in certain practices in which Carroll engaged, which has resulted in his vicarious liability for the actions of his tenants in counterfeiting and infringement of Louis Vuitton’s trademarks and copyright. Carroll possessed extensive knowledge of his tenants’ counterfeiting activities, and he was insistent in his failure and refusal to take reasonable steps to abate such activities. Carroll created a bazaar or marketplace by grouping adjacent or nearby storefront real estate, thus providing his tenants with a safe haven in which to sell their counterfeit goods. An owner of real property can be held contributorily liable for trademark infringement if it knows a vendor to which it leases space sells counterfeit merchandise, yet nonetheless stands idly by and continues to supply the marketplace for such sales. See *Finovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996); *Hard Rock Café Licensing Corp. v. Concession Services, Inc.*, 955 F.2d 1143 (7th Cir. 1992); and *UMG Recordings, Inc. v. Simmott*, 300 F.Supp. 2d 993 (E.D. Cal. 2004).

In so holding, these and other courts have relied on the “Inwood test” established by the United States Supreme Court in *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844 (1982). In *Inwood*, manufacturers were found liable based on the fact that the manufacturers continued to supply infringing pharmacists with the product and the means to commit the infringing activities. Under *Inwood*, a finding of contributory liability for trademark infringement is proper if (1) the defendant suggests, directly or indirectly, that another should engage in infringing activity, or (2) the defendant continues to sell or provide products to retailers who it “knew or had reason to know were engaging in infringing practices” or knew that the recipient previously engaged in trademark infringement.

The *Hard Rock Café* court combined principles of common law tort liability (holding a landlord liable for the torts of those it permits on its premises “knowing or having reason to know that the other is acting or will act tortiously”) and the *Inwood*

test to hold a landlord liable who was willfully blind to the trademark violations of a vendor/tenant. The *Finovisa* court adopted the *Hard Rock Café* court's application of the *Inwood* test, and held that "a swap meet cannot disregard its vendors' blatant trademark infringements with impunity." The key question in holding a landlord liable under existing case law is this: Did the landlord continue to provide commercial space to tenants or other occupants that it knew, or had reason to know, were engaging in trademark infringement and illegal counterfeiting activity?

New York Real Property Law §§ 231 (1) and (2) give the landlord a statutory right to terminate a tenant's lease where the tenant is engaged in illegal activity, including counterfeiting. Other states may have similar statutes. By giving the landlord the option to terminate the lease, the statute reflects a legislative determination to engage the assistance of the landlord in carrying out public policy to use all available means to counteract the use of leased property. [See Restatement (Second) of Property, Landlord & Tenant § 12.5, Reporter's Note cmt. 6 (1977).] This conclusion is echoed in the Restatement (Second) of Property, Landlord & Tenant §12.5, Reporter's Note cmt. d: "the failure of the landlord to assert his rights promptly after becoming aware of the illegal use may justify the conclusion that he is condoning the conduct and thereby making himself a party to the illegal use."

Landlords also can be held vicariously liable for a tenant's copyright infringement. Vicarious copyright infringement is found where the defendant (1) has the right and the ability to supervise the activity of the infringer, and (2) derives a financial benefit from the primary infringer's exploitation of the copyrighted materials. *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304 (2nd Cir. 1963). The test for contributory copyright infringement is similar to the test for contributory trademark infringement. "One who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be liable as a 'contributory' infringer." *Fonovisa*, 76 F.3d, at 264. Either of two types of relevant control is sufficient to establish vicarious liability for the copyright infringement of another: (1) supervision over the operation where the infringing activity occurred or (2) control over the specific infringing activity. See *UMG Recordings, Inc. v. Sinnott*, 300 F.Supp. 2d 993 (E.D. Cal. 2004). The court held that knowledge regarding specific instances of infringement is not required, and that the flea-market-operator defendant's actual knowledge was established by having been advised of the infringement. The court held that "merely 'providing the site and facilities for known infringing activities is sufficient to establish contributory liability.'" *Id.* at 1000, citing *Fonovisa*.

Landlord control is evidenced by the many rights possessed by the landlord pursuant to its lease. These rights may include:

1. The right to enter the premises without notice in the event of a default (operating in an unlawful manner should constitute an event of default under most leases),
2. The right to show the premises to prospective tenants,
3. The right to specify or approve uses of the premises,
4. The right to prohibit activities within the premises, and
5. The right to establish rules and regulations governing tenants.

A landlord's failure to exercise its rights under the lease to prevent copyright infringement by its tenant can result in the landlord's being vicariously liable for its tenant's illegal activities. The landlords were held contributorily liable where they had some power to supervise the activities of the actual copyright infringers, but they failed to exercise this power so as to prevent copyright infringement. *Davis v. E.I. DuPont de Nemours & Co.*, 240 F. Supp. 612 (S.D.N.Y. 1965).

As you can see from the dates of some of these cases, the law in this area is not exactly new. What is new is the concentrated effort with which companies such as Louis Vuitton, Gucci, Prada, Chanel and Burberry are pursuing the Landlord Program. A Chinese judge issued an order requiring a group of landlords in Beijing's Silk Market to pay monetary damages to a group of "rights-holders" where the landlords' tenants were selling counterfeit goods. It is being predicted that manufacturers of copyrighted and trademarked goods will take the Landlord Program to other cities in the United States where there is a significant counterfeit goods market. Besides New York, American cities that clearly fit this description include Los Angeles, Dallas, Houston, Miami and Chicago.

Because vicarious liability is premised on the landlord's failure to enforce its rights against or to exercise control over its tenant, an examination of a landlord's existing knowledge of its tenant's operations and existing lease provisions is essential in order to evaluate rights and obligations with respect to its tenant's operations. In any situation where a landlord has knowledge (or should have knowledge under the existing circumstances) that one of its tenants is violating the trademark rights or copyrights of another in the operation of such tenant's business on the landlord's premises, it becomes the obligation of the landlord to enforce its lease rights and/or control the operations of its tenant so as to put an end to the counterfeiting activities. Failure to do so could result in the landlord's being held liable for the damages to the rights-holders caused by its tenant.

A number of lease provisions, which appear in most commercial/retail leases, may be pertinent with respect to controls over a tenant's operations. The use clause needs to be examined to see exactly what uses are permitted and prohibited. If the use is not permitted or is prohibited, the landlord should take such steps as are set forth in its lease to address the issue with its tenant, demanding and enforcing lease compliance. Check the lease to see if there is a requirement that the tenant operate only in compliance with all laws. Violation of copyright and/or trademark laws by a tenant will trigger default rights if such a clause is in the lease, and the landlord is obligated to enforce its default rights to stop the violation or terminate the lease.

There may be a right of entry that could give the landlord the right to enter the premises to enforce compliance with laws. A right to remove all counterfeit goods may exist if the lease gives the landlord the right to enforce compliance. This right may come in the form of a default remedy that gives the landlord the right to perform any action (at the tenant's expense) that the tenant is required to do under the lease.

Lease default provisions should be reviewed thoroughly to establish what may constitute an event of default, what steps the landlord must take to enforce its rights, and what remedies and rights are available to the landlord growing out of such default. At the heart of finding that a landlord is vicariously liable, is the landlord's failure to exercise the control it possesses. If you know your rights as a landlord, and if you actively and timely enforce those rights, then you will not be found liable for your tenant's trademark or copyright violations. The right-holders will be happy to have you as an ally.

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Dukes v. Wal-Mart: Wal-Mart Loses Initial 9th Circuit Battle, But Who Will Win the Class Certification War?

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On Feb. 6, 2007, the Ninth U.S. Circuit Court of Appeals affirmed a federal district court's 2004 decision certifying a nationwide class of approximately 1.6 million current and former female employees alleging sex discrimination.

Within hours of the Ninth Circuit's decision, Wal-Mart declared its intention to seek further appeals, ultimately to the U.S. Supreme Court if necessary. After the dust settles and the interviews are over, the ultimate question remains (and will likely remain unanswered for some time): Wal-Mart has lost some early battles, but who will win this class certification war?

Background and the Ninth Circuit Decision

On June 21, 2004, the United States District Court in San Francisco certified a nationwide case of approximately (at that time) 1.6 million current and former employees of Wal-Mart.¹ The *Dukes* Third Amended Complaint asserted that Wal-Mart discriminated against women as a class in both compensation and promotion, through Wal-Mart's company-wide policies and practices. In an 84-page opinion, the district court agreed and certified the class. Wal-Mart filed an immediate interlocutory appeal.²

Rule 23 (a)

As in the district court's decision, there was significant discussion by the Ninth Circuit of Federal Rules of Civil Procedure, Rule 23(a)'s requirements of numerosity, commonality, typicality and adequacy of representation. Wal-Mart did not contest Rule 23(a)(1)'s numerosity requirement, as the proposed class consisted of approximately 1.5 million women. Wal-Mart did, however, vigorously contest Rule 23(a)'s remaining requirements, putting forth arguments that were as soundly rejected by the Ninth Circuit's majority opinion as by the district court below. Indeed, in large part, the Ninth Circuit adopted the findings and analysis of the district court. Consequently, this article does not attempt to cover all of the points covered in the Ninth Circuit opinion, but rather seeks to highlight key points, discuss its ramifications, and offer some suggestions for employers while the case winds its way toward the U.S. Supreme Court.

Commonality

Like the district court, the Ninth Circuit focused a great deal of attention on Rule 23(a)(2)'s requirement that there be "questions of law or fact common to the class." The court stated that the test is "qualitative rather than quantitative," and held that the two groups of evidence offered by the plaintiffs—(1) the existence of a corporate practice of discrimination and (2) the existence of a subjective decision-making process—satisfied the commonality requirement.

Corporate Policy of Discrimination

The court agreed with the plaintiffs' contention that Wal-Mart is a highly centralized company, and pointed to evidence of uniform personnel and management structure across all Wal-Mart stores; extensive oversight from corporate headquarters of store operations, compensation and promotion decisions; and a strong corporate culture. The court gave greater attention, though, to the plaintiffs' sociological expert.

In *Dukes*, the plaintiffs' sociological expert asserted that Wal-Mart's strong corporate culture was manifested in a centralized company with uniform personnel policies and practices. He asserted that these policies and practices were deficient with respect to equal employment opportunities and that these same policies and practices were such that promotion and compensation decisions made pursuant to those policies were highly susceptible to gender bias. The plaintiffs' sociological expert did not, however, identify a specific discriminatory policy.

Wal-Mart asserted on appeal that the plaintiffs' sociological expert did not meet the necessary standards for experts, generally known as the *Daubert* test, set forth in *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579 (1993). The court, however, rejected Wal-Mart's arguments, instead adopting the district court's reasoning that these arguments went to the weight of the expert opinion, not its admissibility. The weight of evidence, like the merits of the claims, the court stated, were not to be considered at the class certification stage.

The court went even further and stated, affirmatively, that "social science statistics may add probative value to plaintiffs' class-action claims." It also noted that, if a full-blown *Daubert* analysis was proper at the class certification stage, "[the plaintiffs' sociological expert's] testimony would satisfy the *Daubert* test because [he] employed a well-accepted methodology to reach his opinions and because his testimony has a 'reliable basis in the knowledge and experience of [the relevant] discipline.' "

The opinion gives the Ninth Circuit's stamp of approval to social science testimony. Moreover, while the court was careful to note that the district court's *Daubert* ruling had not been appealed, the Ninth Circuit's *dicta*—that the plaintiffs' sociologist would have been approved—will certainly be cited by plaintiffs' counsel in opposition to any *Daubert* motion seeking to exclude a sociologist. It also should be anticipated that the plaintiffs' class-action bar will now proffer social scientists as regularly as it proffers statisticians and economists to support their motions for class certification.

The appeals court also adopted the findings of the district court with respect to the plaintiffs' statistical expert and rejected the contrary findings of Wal-Mart's statistical expert. The report of the plaintiffs' statistical expert (which examined data at a regional level) was found to be more probative than Wal-Mart's statistical expert (who examined data on a store department level).

Likewise, the court agreed that the district court properly credited 120 declarations from named plaintiffs and putative class members—alleging that they received lower pay than similarly situated men, as well as fewer promotions than similarly situated men—in its commonality analysis. The court flatly rejected Wal-Mart's argument that the number of declarations was too small in relation to the size of the class.

Subjective Decision-Making

The allegation of subjective decision-making authority given to Wal-Mart managers further supported a finding of commonality. The court first noted that “discretionary decision-making *by itself* is insufficient to meet Plaintiffs’ burden of proof.” The court held, however, that this discretion was merely one of *several* factors supporting the finding of commonality. The Ninth Circuit noted that when this subjective decision-making is part of a “consistent corporate policy” and is in addition to other evidence, courts have not hesitated to find commonality.

Remaining Rule 23(a) Requirements

The court also affirmed the district court's analysis with respect to the remaining requirements under Rule 23(a). With respect to the requirement that “the claims or defenses of the representative parties are typical of the claims or defenses of the class,” the court noted that the absence of a class representative for each management category was not, as Wal-Mart suggested, fatal to class certification, because discrimination allegedly was the same across all categories. Likewise, with respect to the adequacy of representation requirement, the court quickly rejected the idea that class certification should be denied merely because the class included both supervisors and those they supervised among its members.

Rule 23 (b)

Monetary Relief Versus Injunctive and Declaratory Relief

The district court certified the class under Rule 23(b)(2), which requires that “the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief . . . with respect to the class as a whole.” Courts have held that monetary damages may be claimed so long as those monetary damages are not the “predominant” relief and are secondary to the injunctive or declaratory relief claims.

The court stated that the issue before it was “whether Plaintiffs’ primary goal in bringing this action is to obtain injunctive relief; not whether they will prevail,” and proceeded to test this goal through the plaintiffs’ subjective declaration. Pointing to the Ninth Circuit’s earlier decision in *Molski v. Gleich*, 318 F.3d 937, 946 (9th Cir. 2003), the court stated that it must look to the plaintiffs’ intent in bringing the action and, because the plaintiffs stated that their primary goal was injunctive relief and Wal-Mart failed to rebut these statements, the court held that the district court properly found that damages—despite their potentially astronomical amount—did *not* predominate over claims for injunctive and declaratory relief. It is, of course, somewhat ironic that the test that the Ninth Circuit deemed appropriate to determine intent at this juncture was *purely subjective* and requires that the declarations of the putative class be taken at face value. The Ninth Circuit’s analysis also is in sharp contrast to the majority of circuits that require the court to examine whether or not the final relief sought relates exclusively or predominantly to money damages.

Wal-Mart’s Defenses

Wal-Mart argued on appeal that the district court’s decision improperly denied it the right to defend itself. Specifically, Wal-Mart contended that it was entitled to individualized hearings, both to offer certain defenses to individual class members’ claims and to contest claims for damages. The court rejected these arguments.

Specifically, the court held that neither the U.S. Supreme Court’s decision in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), nor the Civil Rights Act of 1991 provided an absolute right to individualized hearings for the purpose of asserting defenses. Likewise, the court rejected the idea that 42 U.S.C. § 1981 or the U.S. Supreme Court’s decision in *State Farm Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), provided the right to individualized hearings to contest damages in a class action and further pointed out that the district court had put safeguards in place to protect against unjust enrichment.

Dissent—A Ray of Hope?

The dissent noted that the class lacked commonality in large part because, except for excessive subjectivity, no common policy could be found. It also noted that the “Plaintiffs’ only evidence of sex discrimination is that around 2/3 of Wal-Mart employees

are female, but only about 1/3 of its managers are female.” But as the Supreme Court recognized in *Watson*: “It is entirely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance.”

With respect to typicality, the dissent noted and examined in detail the widely divergent claims of the seven named plaintiffs who had varying experiences and were at times hourly employees and at other times managers who made the “subjective decisions” about which the class complains. It also pointed out that, in addition to the claims of sex discrimination, many claimed race discrimination and some simply claimed unfairness. This diverse collection of individual claims was not, according to the dissent, “typical.”

The dissent also noted the short shrift paid by the district court and majority opinion to the adequacy of representation requirement. The sharpest views from the dissent came in discussing the Rule 23(b)(2) analysis, where it was suggested that the punitive damages claims violate Wal-Mart’s due process rights and ignore the Supreme Court’s guidance in *State Farm*.

Gearing Up for War

Some will have a sense of *déjà vu* when reading the Ninth Circuit opinion because the court of appeals adopted so much of the district court’s findings and analysis. Consequently, much of the initial advice given to employers remains the same as after the publication of the district court’s decision in *Dukes I*. Specifically, employers should continue to take the following steps:

- Become familiar with your employment statistics (and the inferences that can be drawn from them) now, before you face a class action lawsuit, and do so *in a privileged fashion*.
- If you are fortunate enough to have already completed the previous step, examine your employment policies (specifically, hiring, promotion and pay policies) *in a privileged fashion* and determine if modifications can be made to eliminate subjective criteria.
- Adopt or modify a posting system so that promotional opportunities (or more of them) are publicized internally.
- Conduct a systematic assessment, *in a privileged fashion*, of potential barriers to the advancement of women and minorities.
- Consider adopting an appeals process for decisions that deny promotions or pay raises.

¹ Given that more than two years have passed since the district court’s order, this number has undoubtedly increased. News articles covering the Ninth Circuit’s ruling quote lead class counsel as stating that now the class likely comprises more than 2 million current and former female employees. (Bob Egelko, “Wal-Mart Sex Discrimination Suit Advances,” *San Francisco Chronicle*, Feb. 7, 2007, at B-1.)

² The district court’s opinion certified a class as to the equal pay claims as well as promotion claims, and allowed injunctive and declaratory relief as to the promotion claims. The district court declined, however, to certify a class with respect to back pay related to the challenged promotions decisions because data were not available. Plaintiffs cross-appealed that ruling.

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Letter-of-Credit Update—Stonebridge Technologies: EOP Colonnade of Dallas Limited Partnership v. Faulkner, Trustee for SBT1 Liquidating Trust

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Introduction

The Fifth Circuit decision in *In re Stonebridge Technologies, Inc.* 430 F. 3d 260 (5th Cir. 2005), reversed a trend among courts to limit the benefits flowing to a landlord from a standby letter of credit, even though the letter of credit was bargained-for as a credit enhancement to the lease. The issue squarely before the court was whether a landlord could retain letter-of-credit proceeds that were in excess of the statutory cap on the landlord's claim to the assets of the bankruptcy estate. The court held that the landlord could retain such proceeds based on the fact that the landlord did not file a proof of claim in the bankruptcy proceeding.

Background

The trustee of the debtor's liquidating trust alleged in an adversary proceeding that EOP Colonnade of Dallas Limited Partnership ("EOP") breached its lease with Stonebridge Technologies, Inc. ("Debtor") and made negligent misrepresentations to the bank that issued a letter of credit. The factual basis for both causes of action was EOP's alleged premature draw under the letter-of-credit and its admitted retention of letter-of-credit proceeds in excess of the claim cap imposed by 11 U.S.C. § 502(b)(6).¹ *EOP Colonnade of Dallas Limited Partnership v. Faulkner, Trustee for SBT1 Liquidating Trust*, 430 F. 3d 260 (2005).

Under the terms of its lease with the debtor, EOP received a cash security deposit in the amount of \$105,298.85 and a standby letter of credit in the face amount of \$1,430,065.74. The debtor pledged a certificate of deposit in the amount of \$1,250,000.00 to the issuing bank to secure its indemnity obligation, which would result in the event EOP drew under the letter of credit. The cap would have limited EOP's claim in the bankruptcy court to \$1,353,032.02. EOP did not file a proof of claim in the proceeding for its rejection damages.

EOP initially drew under the letter of credit on October 22, 2001. The next day the parties agreed, on the record, that the lease would be rejected effective no earlier than October 1, 2001, nor later than October 23, 2001, and, on November 8, 2001, the bankruptcy court issued its *nunc pro tunc* order approving the rejection effective October 1, 2001.

Bankruptcy Court Ruling

The bankruptcy court found that EOP's retention of the letter-of-credit proceeds in excess of the cap was a breach of the lease. It reasoned that because the letter of credit was part of the security deposit, it was subject to the § 502(b)(6) cap.² The bankruptcy court also found that the draw under the letter of credit before the entry of the *nunc pro tunc* order was both a breach of the lease and constituted a negligent misrepresentation to the issuing bank. The issuing bank had assigned its claims to the liquidating trust as part of a settlement that allowed the issuing bank to foreclose on the debtor's certificate of deposit.

Prior Case Law

Until *Stonebridge Technologies*, it was generally assumed that a landlord could retain letter-of-credit proceeds in excess of the § 502(b)(6) cap, but first had to satisfy its "capped" claim fully.³ For instance, in the first case to address this issue, *Solow v. PPI Enterprises (US) Inc. (In re PPI Enterprises (US) Inc.)*, 324 F. 3d 197 (3d Cir. 2002), the court required the landlord to apply its letter-of-credit proceeds to the capped claim and not to its state law damages that exceeded the cap. In this case, these damages exceeded the cap by almost \$4 million. Rather than allow the landlord to apply its \$650,000 letter-of-credit proceeds to its damages in excess of the cap, the court ruled that the proceeds would first be applied to the capped claim, which was in the approximate amount of \$860,000. The court did recognize, however, that monies received by the landlord from re-leasing the premises would not reduce the capped claim.⁴

The next case to reach this issue was *Redback Networks, Inc. v. Mayan Networks Corp. (In re Mayan Networks Corp.)*, 306 B. R. 295 (9th Cir. BAP 2004), where the court again found that the proceeds of a letter of credit first must be applied to the amount sought in the creditor's bankruptcy claim. Interestingly, in its analysis, the court reiterated the majority position of courts dealing with the issues of guaranties of leases, and mentioned that monies received from a guarantor of the lease would not reduce the capped claim.⁵

Finally, in *AMB Properties, L.P. v. Official Creditors Committee for the Estate of AB Liquidating Corp. (In re AB Liquidating Corp.)*, 416 F. 3d 961 (9th Cir. 2005), the court ruled that letter-of-credit proceeds must be applied to the capped claim, even though in this case the landlord had damages in excess of \$3 million over the cap of \$2 million, and had negotiated a letter of credit in the amount of \$1 million.⁶

The unifying theme of these three cases was the conclusion of the courts that the letter of credit was in fact a security deposit and the view that security deposits must always act to reduce the capped claim of a landlord. These cases reach back to *Oldden v. Tonto Realty Corp.*, 143 F.2d 916 (2d Cir. 1944), for support for this conclusion. There, the court held that a security deposit must count toward the total claim of a landlord. In *Oldden*, the court held that \$3,000 deposited as security for a lease should be deducted from the claim after the statutory limit had been applied. In enacting the § 502(b)(6) cap, Congress endorsed this rule.⁷

The Approach of the Fifth Circuit

The court was faced with two issues:

- (1) the claims for drawing under the letter of credit and retention of the proceeds in excess of the § 502(b)(6) cap and
- (2) the claims for premature draw under the letter of credit.

The court did not distinguish between drawing under the letter of credit and retaining the proceeds.⁸ It did, however, conclude that, since no claim was filed by EOP to the assets of the bankruptcy estate, the application of the cap to the letter-of-credit proceeds was unnecessary:

Stated simply, the claim of a lessor against the assets of the estate is an essential precondition to applying the damages cap at all. *See In re Arden*, 176 F.3d 1226, 1229 (9th Cir. 1999) [Section 502(b)(6)] has two predicates: ‘claim of a lessor’ and ‘damages resulting from the termination of a lease or real property.’ Thus, the damages cap of § 502(b)(6) does not apply to limit the beneficiary’s entitlement to the proceeds of the letter of credit unless and until the lessor makes a claim against the estate.ⁿ⁸ We find, therefore, that further [**20] inquiry into the appropriate interpretation of § 502(b)(6) is unnecessary in this case because EOP did not file a claim against the estate. (Emphasis added) *Stonebridge* at 270.

The court was concerned that if the cap applied regardless of whether a landlord filed a proof of claim, it would allow a trustee to commence an adversary proceeding to limit a draw under a letter of credit to the capped amount:

One problematic aspect of this argument is that it converts § 502(b)(6) into a self-effectuating avoiding power that would allow the trustee to bring an adversary proceeding against a lessor who exercises his rights under a letter of credit. This departs from the plain language of § 502(b)(6), which “allows only one thing—disallowance of the filed claim to the extent that it exceeds the statutory cap. (Citations omitted).

The court further held that EOP was entitled to draw the full amount of the letter of credit for three reasons:

- (1) The debtor was in monetary default prior to EOP’s draw under the letter of credit, and sufficient notice of the default was provided by EOP’s filing of a motion to compel payment of post-petition rent;
- (2) The “insolvency clause” in the lease was not a prohibited “*ipso facto*” clause under § 365(e)(1) since EOP’s rights were being exercised against a non-debtor, the issuing bank; and
- (3) The court’s *nunc pro tunc* order “cured” any early draw because the majority of courts have held that the effective date of a rejection order can be retroactive.

Also, the court recognized the savings enjoyed by the debtor with the early rejection date, cutting off administrative rent obligations.

Conclusion

While the court did not have to deal with the issue of cap reduction, it did stem a tide of decisions that were clearly eroding the benefits of bargained-for credit enhancement. Landlords can derive some comfort knowing that they can, in cases where state court damages under the lease exceed the § 502(b)(6) cap amount, draw under a standby letter of credit for the full amount of damages, and not face a claim for breach of lease or misrepresentation. The issue of drafting around the cap will most likely remain an active exercise. Ideas include separating out leasehold improvement costs into a promissory note rather than amortizing them in the lease rental rate, and securing that note with a separate letter of credit or equating the letter of credit to a guaranty in the lease. It remains to be seen whether these will be successful.

¹ Section 502(b) states that if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim . . . and shall allow such claim in such amount, except to the extent that:

if such claim is the claim of a lessor for damages resulting from the termination of a lease of real property, such claim exceeds:

(A) the rent reserved by such lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease. . . .

¹¹ U.S.C. 502(b)(6).

² *In re Stonebridge Technologies*, 291 B.R. 63 (Bankr. N.D. Tex. April 4, 2003).

³ Landlords Use Letters of Credit to Bypass the Claim Cap of §§ 502(b)(6), 20 *Am. Bankr. Inst. J.* (Dec. 2001/Jan. 2002).

⁴ The “overwhelming majority of courts” hold that the § 502(b)(6) statutory cap is not reduced by any amount that a landlord has received by re-letting the leased premises and mitigating its damages. *5th Fifth Ave. Jewelers v. Great E. Mall (In re Fifth Ave. Jewelers)*, 203 B.R. 372, 381(1996); see also *In re Atl. Container Corp.*, 133 B.R. 980, 990 (Bankr. N.D. Ill. 1991).

⁵ Several cases hold that the liability of a guarantor that is not in bankruptcy is not limited by § 502(b)(6). See, e.g., *In re Modern Textile, Inc.*, 900 F.2d 1184 (8th Cir. 1990); *Bel-Ken Associates Ltd. Partnership v. Clark*, 83 B.R. 357 (D. Md. 1988); *Things Remembered, Inc. v. BGTV, Inc.*, 151 B.R. 827 (Bankr. N.D. Ohio 1993). As the court in *Bel-Ken* noted, “common sense dictates that the guarantor remain fully liable even when the principle debtor seeks relief under the Bankruptcy Code. After all, what good is a guaranteed lease if the guarantor escapes liability when the debtor does?” *Bel-Ken*, 83 B.R. at 359.

⁶ AMB argued that the court should adopt the following formula: (1) determine the landlord’s gross damages (net of any recovery through re-letting the property); (2) subtract from those gross damages any “mitigation” from security deposits or letters of credit; (3) compare this “mitigated damages” amount to the statutory cap of one year’s rent; and (4) allow a claim for the lesser of either the “mitigated damages” or one year’s rent. This argument would consider the letter-of-credit proceeds to be analogous to both the re-letting proceeds mentioned in *PPI* and the proceeds of a guarantor’s payment as mentioned in *Mayan*.

⁷ The House Judiciary Report to amended § 502(b)(6) notes:

This paragraph will not overrule *Oldden*, or the proposition for which it has been read to stand: to the extent that a landlord has a security deposit in excess of the amount allowed under this paragraph, the excess comes into the estate. . . . As under *Oldden*, [a landlord] will not be permitted to offset his actual damages against his security deposit and then claim for the balance under this paragraph. Rather, his security deposit will be applied in satisfaction of the claim that is allowed under this paragraph. H.R. Rep. No. 95-595, at 353-54 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6309. The purpose of the cap is “to compensate the landlord for his loss while not permitting a claim so large . . . as to prevent other general unsecured creditors from recovering a dividend from the estate.” 1978 U.S.C.C.A.N. at 6309.

⁸ Although mechanical differences may exist between drawing and retaining funds from a letter of credit, the application of § 502(b)(6) does not turn on these distinctions in this case. See *Eakin v. Cont’l Ill. Nat’l Bank & Trust Co. of Chicago*, 875 F.2d 114, 116 (7th Cir. 1989) *Stonebridge* at 267.

We are unwilling to allow *Stonebridge* to reap the benefits of the retroactive order without also recognizing that the earlier date effectively cured the prematurity of EOP’s draw request on the Letter of Credit. See *Browning v. Navarro*, 743 F.2d 1069, 1081 (5th Cir. 1984) (applying basic rules of contract interpretation to preserve the intended compromise reached by the parties under the terms of an agreement approved by the bankruptcy court). *Stonebridge* at 273.

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Rent Abatement in New York Commercial Leases: Lessons From *Bates Advertising USA, Inc. v. 498 Seventh, LLC*

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Introduction

In negotiating leases for commercial space where landlord improvements are needed, a tenant is often torn between competing interests. On one hand, the tenant is motivated to sign the lease, to take occupancy and to begin conducting business. On the other hand, most tenants understand that once a landlord delivers occupancy and begins receiving rent, the landlord's incentive to complete the improvements will be reduced. In New York City and other sophisticated real estate markets, the concept of rent abatement is a commonly used means of resolving these competing interests in a way that benefits both the landlord and the tenant.

In the above context, a rent abatement clause allows the landlord and the tenant to set an agreed-upon value of damages the tenant might suffer in the event that (i) the tenant takes occupancy of the leased space and begins paying rent, but (ii) the landlord fails to complete certain improvements within a specified time period. In other contexts, this concept of setting an agreed-upon value of damages is generally referred to as a liquidated damages clause. A rent abatement clause benefits the tenant by allowing it to take occupancy while keeping the landlord sufficiently motivated to complete the improvements; the clause benefits the landlord by encouraging the tenant to take occupancy and begin paying rent as expeditiously as possible; and such a clause benefits both parties by reducing the risk of a lengthy and expensive lawsuit in which a judge or a jury determines the value of damages if the landlord's improvements are not completed.

Despite the utility of these clauses, in July 2001, a New York trial court found a rent abatement clause to be an unenforceable penalty against the landlord, rather than an enforceable liquidated damages remedy. *Bates Advertising USA, Inc. v. 498 Seventh, LLC*, July 25, 2001 NYLJ 18 (First Judicial Department, Supreme Court, New York County) ("*Bates I*"). However, through the appellate process, the Bates case evolved from a decision limiting the availability of rent abatement clauses in commercial leases into a decision providing predictability and guidance to the landlord or tenant seeking to incorporate such a provision into a lease. *Bates Advertising USA, Inc. v. 498 Seventh, LLC*, 7 N.Y. 3d 115 (2006). Understanding the evolution of the Bates litigation provides the real estate practitioner with a roadmap for negotiating and drafting rent abatement clauses.

The Bates Decision

Factual and Procedural Background

In November 1997, Bates Advertising USA, Inc., as the tenant ("*Bates*"), negotiated a lease with 498 Seventh, LLC, as the landlord ("*498*"), for property located within a building owned by 498 in New York City's Garment District. Bates was to serve as the building's anchor, or "flagship" tenant, leasing approximately twenty to twenty-five percent (20–25%) of the building's floor space. The courts described both parties as "sophisticated business entities." The parties agreed to incorporate a rent abatement clause in the lease to (i) induce Bates to take occupancy of the space and begin paying rent prior to 498's completion of certain improvements, and (ii) keep 498 sufficiently "incentivized" to complete these improvements after Bates took occupancy. Under the rent abatement clause, if 498 failed to complete any or all of nine enumerated improvements (the "Standard Improvements") before Jan. 1, 1999, there would be an abatement of one-half of one day's rent for each day that the Standard Improvements remained uncompleted. Additionally, if 498 did not complete either or both of two other improvements particularly important to Bates within this time period (the "Premium Improvements"), there would be an abatement of one (1) day's rent for each day that the Premium Improvements remained uncompleted (the Standard Improvements and the Premium Improvements collectively, the "Improvements").¹ Because the remedies available under this clause ran concurrently, there could never be more than one day's rent abated at any given time, regardless of how many Improvements remained uncompleted. *Bates*, 7 N.Y. 3d at 117-120.

Bates took occupancy of the premises in March 1999 and began paying rent in June of that year. Per the lease's terms, Bates was entitled to a "rent free period" from March through May of 1999. *Bates*, 7 N.Y. 3d at 118. Bates paid rent in full from June through December of 1999; but, during this time, 498 failed to deliver a fire alarm and communications system, which was identified as a Premium Improvement under the lease.² In December of 1999, Bates filed suit against 498, seeking a refund of rent paid and other relief. *See generally, Bates I*.

In dismissing the case, the supreme (trial) court found that the rent abatement clause constituted an unenforceable penalty because "its purpose was to compel landlord's performance" and because "there was no attempt to proportion the damages to the probable loss." The trial court further explained that the abatement clause was disproportionate to the probable loss because, under its terms, the landlord's liability would be the same regardless of whether one, or all nine, of the Standard Improvements remained uncompleted after Jan. 1, 1999.

Although only *dicta*, the court suggested that if the Improvements had been “prorated for each failure or perhaps increased as the amount of unfinished work increased,” the abatement clause might have been sufficiently proportionate to the probable loss.

In reversing the *Bates I* decision on appeal, the appellate division found that the “one-to-one proportionality between the days the breach continued and the value of the compensation” prevented Bates from receiving a benefit grossly disproportionate to the injury suffered. *Bates Advertising USA, Inc. v. 498 Seventh, LLC*, March 25, 2002 NYLJ 17 (First Judicial Department, Appellate Division). The appellate division further explained that requiring each Improvement to be prorated under the rent abatement clause took the concept of proportionality to “too great an extreme” and was “contrary to the concept of liquidated damages.” In the words of the court, “[i]t is unclear how the parties could arrive at a set degree of rent abatement for each item breached, without first quantifying that which they agree is unquantifiable.”

Upon remand, the supreme court found that 498’s failure to complete the Improvements constituted a breach of the lease’s rent abatement clause, that the abatement clause was enforceable in light of the appellate division’s analysis of the law, and awarded damages equal to one hundred percent (100%) of the rent Bates paid from June 1999 through May 9, 2000, the day 498 delivered the last outstanding Improvement. Both the appellate division and the court of appeals (highest state court) affirmed the trial court’s decision. *Bates*, 7 N.Y.3d at 119.

Analysis of the Court of Appeals Decision

The threshold issue was whether 498’s failure to complete the Improvements constituted a breach of the lease. Both the supreme court and the appellate division answered that question affirmatively, and the court of appeals affirmed this point with little discussion. *Bates* 7 N.Y.3d at 119-120. As a result, the sole question before the court of appeals was whether the rent abatement clause was the proper remedy to compensate Bates for this breach. *Id.*

The landlord argued that the abatement clause was an improper penalty because it “held a club over [the landlord’s] head to make sure he gets the work done.” As noted above, 498 successfully made this argument before the supreme court the first time the case was tried. However, the court of appeals disagreed, explaining that “the prospect of damages in the event of breach may always be said to encourage parties to comply with their contractual obligations.” *Id.* at 120.

Instead, the court of appeals rested its decision on a two-part analysis consistent with earlier New York case law on liquidated damages in general, and on rent abatement clauses in particular. *Id.* As the party challenging the abatement clause, 498 had the burden of proving either that (i) the damages likely to result from its failure to complete the Improvements were “readily ascertainable” at the time the parties signed the lease, or (ii) enforcing the abatement clause would provide Bates with a remedy “conspicuously disproportionate” to the actual harm suffered. *Id.* [citing *JMD Holding Corp. v. Congress Fin. Corp.*, 4 N.Y.3d 373, 380 (2005)]. Because 498 was not able to satisfy either part of this two-part test, the abatement clause was enforceable.

Practical Considerations

Following *Bates*, rent abatement clauses in New York commercial leases should be drafted and negotiated with the two-part test set forth in this decision as a primary focus. First, the abatement clause should include the parties’ general acknowledgment that the clause is being inserted into the lease because damages likely to result from a breach would be difficult, if not impossible, to ascertain at the time the lease is signed. The tenant should be prepared to substantiate this general acknowledgment with specific facts. Bates successfully argued that it would be impossible to quantify the damages likely to stem from 498’s breach because there would be no way to identify how many employees or clients, if any, would be lost because of the unfinished Improvements. Bates also argued that the risk associated with leasing a building without a sufficient fire and security system would be impossible to quantify due to the variety of consequential damages that could arise from a fire or security emergency resulting from the lack of such a system.

Next, the abatement clause should contain the parties’ acknowledgment that the calculation of damages under the clause constitutes an agreed-upon estimate of the damages likely to be sustained following a breach, and is *not* a penalty imposed on the landlord. Here, too, the tenant should be prepared to substantiate this general acknowledgment with specific facts. The *Bates* abatement clause survived the court’s scrutiny as to whether it constituted a “conspicuously disproportionate” calculation of damages for two reasons: First, the clause categorized default events by priority. Defaults of less importance to the tenant triggered less damages than defaults of greater importance (i.e., completion of Standard Improvements versus completion of Premium Improvements). Second, the clause sought to keep potential damages proportionate by tying the amount of damages awarded to the number of days a default remained outstanding. Although there was some disparity between the *Bates* abatement award and the damages likely to result from 498’s actual breach, the abatement clause ultimately survived judicial scrutiny.

Focusing on the lessons provided in the *Bates* litigation should allow New York landlords and tenants to draft abatement clauses that will encourage tenants to take occupancy of a leased space and begin paying rent, while keeping the landlord sufficiently motivated to complete the improvements negotiated by the parties. These lessons also should help prevent lengthy and costly litigation to determine whether an abatement clause is enforceable. This is an outcome that will benefit both landlords and tenants.

¹The rent abatement clause of the lease read as follows: "If Landlord does not substantially complete the work described in part E of Exhibit C by January 1, 1999 and Tenant has taken full occupancy of the initial demised premises and is conducting its ordinary business therein, then Tenant shall be entitled to a one-half (1/2) day delay in the occurrence of the Commencement Date for all portions of the premises for each day from January 2, 1999 until Landlord substantially completes such work; provided, however, that if the work that landlord so failed to complete is that described in items E-7 or E-8 of Exhibit C, then the one-half (1/2) day delay shall be changed to one (1) day." *Bates Advertising USA, Inc. v. 498 Seventh, LLC*, 2006 WL 1287511 at 9-10 (Plaintiff-Respondent's Brief filed with the Court of Appeals of New York).

²The trial court also determined that 498 had defaulted under the lease's rent abatement clause by delivering a lobby card access system 314 days late and a private passenger elevator service 23 days late. However, because the remedies available under the abatement clause ran concurrently, these defaults did not warrant an award of additional damages. *Id.* at 119.

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■ Of Interest

Articles

Alan M. Ahart, "The Inefficacy of the New Eviction Exceptions to the Automatic Stay," 80 *Am.Bankr.L.J.* 125 (Winter 2006).
Lisa S. Gretchko, "Landlord Beware BAPCPA Affects Nonresidential Real Estate Leases, Too," 25-OCT *Am.Bankr.Inst.J.* 16 (Oct. 2006).

Daniel W. Linna, Jr., "Contract Rejection Damages May Not Be Eligible for Setoff After All, Says Delta Court," 25-SEP *Am. Bankr.Inst.J.* 1 (Sept. 2006).

Richard Lucas, Charles Malloy, John D. Ayer, Michael L. Bernstein & Jonathan Friedland, "The Intersection of Chapter 11 and Real Estate," 25-NOV *Am. Bankr.Inst.J.* 28 (Nov. 2006).

Bruce H. White, William L. Medford and Bryan L. Elwood, "Repurchase Obligations Under Mortgage Loan Sale Agreements—Protection From the Automatic Stay and Future Avoidance Actions," 25-SEP *Am.Bankr.Inst.J.* 40 (Sept. 2006).

Cases

Bankruptcy

A Chapter 11 order authorizing the distribution of \$2.5 million to an individual debtor so that he could meet certain tax obligations did not prejudice the debtor's landlords and would not be disturbed. *1500 Mineral Spring Assoc., LP v. Gencarelli*, 353 B.R. 771 (D.R.I. 2006).

A trustee objected to a secured claim of deed of the trust holder by an assignment of rents. The court held that the deed of trust holder was prevented from asserting an interest in the rents superior to that of the trustee because the trust holder failed prior to the commencement of the Chapter 7 case to take affirmative steps to secure its right to the rents. *In re Spears*, 352 B.R. 83 (Bkrtcy.N.D.Tex. 2006).

An order denying a creditor's motion to compel payment of rent and taxes under certain lease agreements could not be deemed "final" to support an appeal as of right because the order deferred determination on that point until conclusion of a pending adversary proceeding. *In re Collins & Aikman Corp.*, 351 B.R. 459 (E.D.Mich. 2006).

An adversary proceeding commenced by a debtor against its landlord belonged to the Chapter 7 bankruptcy estate after post-confirmation conversion of the Chapter 11 case to one under Chapter 7, where the Chapter 11 reorganization plan explicitly reserved for the debtor's creditors any future benefits from the adversary proceeding. *In re Captain Blythers, Inc.*, 182 Fed. Appx. 708 (9th Cir. 2006).

The bankruptcy court concluded that deferred rent under the commercial lease was capped, and the district court reviewed *de novo* the reasonableness of the order. *In re Malease 14FK Corp.*, 351 B.R. 34 (E.D.N.Y. 2006).

Absent a showing that a Chapter 7 debtor's lease with a bankrupt tenant had been terminated, a lease assignee's claim against a tenant for sums previously allowed for lease rejection damages in the tenant's own bankruptcy case had to be treated as a claim for rents in which the assignee had a perfected, unavoidable security interest. *In Re CP Holdings, Inc.*, 349 B.R. 189 (8th Cir. BAP 2006).

The Bankruptcy Code section requiring a trustee or debtor in possession to surrender property once a lease has been rejected was inapplicable to the purchaser's pre-petition foreclosure and did not mandate the purchaser's immediate possession of the leased sign structures; rather, under the lease, the debtor owned and was entitled to remove the sign structures. *In re Emerald Outdoor Advertising*, 348 B.R. 552 (Bkctcy.E.D. Wash. 2006).

Real property that housed two businesses with a common wall did not qualify as a "shopping center"; consequently, the proposed assumption and assignment of the debtor's lease was not subject to the heightened restrictions of shopping center leases. The debtor's proposed assignment of its lease to a furniture store would not compete with its neighbor—a medical facility—and, therefore, did not upset tenant mix and balance. *In re Ames Dept. Stores, Inc.*, 348 B.R. 91 (Bkrtcy. S.D.N.Y. 2006).

Condemnation/Eminent Domain

Condemnation proceedings may not preclude a breach of contract claim if it is determined that there was an actual breach of the lease prior to the condemnation proceedings. *Wisconsin Mall Properties, LLC v. Younkers, Inc., Saks, Inc., and Parisian, Inc., et al.*, 293 Wis. 2d 573; 717 N.W.2d 703, (2006).

Contracts

An estoppel agreement stating that the tenant found no existing default on the lease does not preclude summary judgment where issues of fact exist surrounding the implied warranty of suitability of the lease. *Lewis et al. v. Pearland Plaza Partners*, No. 01-04-00419-CV, Court of Appeals of Texas, First District, Houston, Aug. 17, 2006.

A would-be purchaser of a vendor's real property sought a declaration in a Chapter 11 proceeding that the debtor's lease of the property was invalid; the would-be purchaser could not maintain a claim for specific performance or rescind the amendment to the purchase agreement because the vendor had not violated the covenant of good faith and fair dealing. *Alameda Produce Market, Inc. v. Air Nail Co., Inc.*, 348 B.R. 39 (W.D. Pa. 2006).

A property manager who negotiated a lease of commercial space on behalf of the landlord was not required to indemnify the landlord under the contract between the parties. The court held that the contract contained only a general indemnification clause, which protected the manager against its own negligence, except for gross negligence. *Grubb & Ellis et al. v. 407417 B.C., L.L.C.*, 138 P.3d 1210. (Ct. App. Az., Div 1., Dept. E 2006); *review denied*, Arizona Supreme Court No. CV-06-0327-PR, Jan. 9, 2007.

Covenants/Clauses

The appellate court reversed the trial court's granting of the tenant's motion for summary judgment and its determination that the tenant did not violate the radius restriction contained in the lease when it opened another location at another mall that was within 7 miles of the landlord's store. The appellate court held that the trial judge had misconstrued the language in the lease by concluding that the restriction required that the doors of both locations be open for business. It also found that the lease was ambiguous and that genuine issues of material fact existed with regard to whether the opening or closing of a store constituted a violation of the restriction. *Wells Fargo Bank Minnesota, N.A. v. Diamond Point Plaza L.P. et al.*, 171 Md. App. 70; 908 A.2d 684 (MD. Ct. Special App. of Maryland, 2006); *cert. granted*, 914 A.2d 768 (2007) and Pet. Docket No. 532, September Term, 2006.

Environment

A city justifiably determined that a site-specific environmental impact report need not address urban decay impact where earlier economic studies and additional information referenced in the review would not yield new information. *Gilroy Citizens for Responsible Planning v. City of Gilroy*, 140 Cal.App. 4th 911, 45 Cal. Rptr. 3d 102 (2006).

An environmental impact report for the demolition of an historic structure to allow construction of a Lowe's retail store did not adequately analyze the alternatives. *Preservation Action Council v. City of San Jose*, 141 Cal. App. 4th 1336; 46 Cal. Rptr. 3d 902 (Cal. App. Ct. 6th Dist., 2006).

Insurance

Where both parties are covered by insurance, and a subrogation waiver clause exists in the lease, the tenant may not recover money from the landlord and must look to its insurance company. *St. Paul Fire and Marine Insurance Co., et al. v. JEMB Realty Corp et al.*, 05 Civ. 1958 (RMB), United States District Court for the Southern District of New York, July 20, 2006.

Where an insurance policy contains a pollution exclusion, an insurer is not required to provide a defense if the damages were caused by a pollutant excluded under the policy. *CBL & Associates Management, Inc. v. Lumbermens Mutual Casualty Company and Travelers Property Casualty Company of America*, Case No. 1:05-cv-210, United States District Court for the Eastern District of Tennessee, July 25, 2006.

Landlord and Tenant

An offer to terminate a lease by a tenant will be deemed accepted by the landlord—even if the landlord uses different words in its acceptance—where the words used by the landlord are not materially different from those used by the tenant in its offer. *Crestwood Shops, L.L.C. v. Sally Hilken and Churchill in Crestwood, L.L.C.*, 197 S.W.3d 641 (W. D. Mo., Ct. App. 2006).

When a landlord sought to develop outparcels that were located in areas designated as "common facilities" in its lease, the tenant sought an injunction. The landlord argued that the tenant could not obtain equitable relief because monetary relief was available. The appellate court, reversing a decision in favor of the landlord, held that a tenant seeking to enforce a restrictive covenant in a lease is entitled to protection of its real property interests by specific remedies designed to secure enjoyment of the intended benefit of the lease, even if it has a remedy at law. *Autozone Stores, Inc. v. Northeast Plaza Venture, LLC*, 934 So. 2d 670, (Fl. Ct App 2d Dist. 2006).

Res judicata and collateral estoppel bar a landlord from commencing a second action in a different court with a higher monetary jurisdictional limit after the first court makes a proper determination of the issues. *Licini v. Graceland Florist, Inc., et al.*, 32 A.D.3d 825; 821 N.Y.S.2d 234 (N.Y.A.D., 2d Dept., 2006).

Where a tenant's construction on leased premises requires the approval of the landlord, the landlord may owe a duty of care to a third party injured as a result of the construction. *Geringer v. Hartz Mountain Development Corporation*, 388 N.J. Super. 392; 908 A.2d 837, (N.J. Sup. Ct., A.D. 2006).

After the expiration of a commercial lease, no renewal lease was tendered; the tenant continued to occupy the space as a month-to-month tenant. The landlord sent rental bills to the tenant at a rate of one-and-one-half times the original rent, but the tenant paid rent at an increased 5% rate rather than the higher rate. After another 12 months, the landlord notified the tenant that because it had stayed on at the reduced rate, a lease was assumed and the landlord was entitled to rent for another 12 months. Alternatively, the landlord notified the tenant that it was entitled to rent at the higher rate. The landlord then commenced an action against the tenant to recover unpaid rent. The court held that the landlord did not waive its right to collect the higher holdover rate by billing the tenant at the lower rate. *Elite Gold, Inc. v. TT Jewelry Outlet Corp. et al.*, 8073, 8074, 31 A.D.3d 338; 819 N.Y.S.2d 516, (N.Y.A.D. 1st Dept. 2006).

Leases

If a tenant fails to notify the owners of a repair that is the owner's obligation as required under the terms of a lease, the owner may not be held liable for any injury that results from the neglected repair. The management company also may not be held liable unless it knew or had reason to know of the repair. *Briggs, et al. v. First Realty Mgmt. Co., et al.*, No. 86354, Court of Appeals of Ohio, Eighth Appellate District, Cuyahoga County, Feb. 2, 2006.

Right of First Refusal/Options

No right of first refusal exists where a lease expires and the tenant continues occupancy as a tenant-at-will. *Mariner Health Care, Inc., et al. v. Foster et al.*, 280 Ga. App. 406; 634 S.E.2d 162 (Ga. Ct. App. 2006); *cert. denied*, Case No. S06C2005 (2006).

Taxation

Where a lease clearly provides that a tenant is not required to pay any future modification of the base assessed value of the leased premises that resulted in increased taxes, a landlord seeking a reduction in its property's assessed value may not then seek additional monies for taxes from a tenant. *Fair Oak, LLC v. Greenpoint Financial Corp.*, 2004-08867, 26 A.D.3d 458; 810 N.Y.S.2d 504, (N.Y.A.D., 2d Dept., 2006).

Tort Liability

In a personal injury action, a commercial tenant is held responsible for all maintenance under a lease except for common areas and areas appurtenant to the leased area. Unlike a residential tenant, a small commercial tenant is not entitled to heightened protection under its lease because a small commercial tenant has a financial interest in the property it leases for commercial purposes and should have an incentive to maintain or improve the property. *Humphrey v. Byron*, 447 Mass. 322; 850 N.E.2d 1044 (Mass., S.J.C., 2006).

From Canada

■ In Depth

Tenant Relocation

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In Canada, relocation rights were introduced into commercial leases sometime around the mid-1980s. Since then, we have seen some litigation concerning the exercise by landlords of these relocation rights. The decisions in these cases tend to suggest that the courts will enforce the clauses faithfully with their wording. Here is a summary of the decisions.

Retail

In the 1993 decision by the Ontario Superior Court, *C.T.R.E.F. Investment Ltd. v. H.G.O. Real Estate Ltd.*,¹ the new premises were supposed to be “at least as good as” the leased premises. The tenant, a real estate company, was not a tenant whose location in the plaza was vital to its prosperity. The tenant refused every offered location until the only locations remaining available were not ideal. The court held that the tenant could not take advantage of its refusals, and was required to relocate.

In the 1994 decision by the British Columbia Superior Court, *Final Touch Gift Shop v. Broadmoor Shopping Centre Ltd.*,² the lease permitted the landlord to relocate the tenant, provided there be no material and permanent reduction in access to the premises and the landlord fixed up the new premises to meet the existing standard. The relocation premises had no exterior windows whereas the original premises did have them. The court concluded that the reference to access included visual as well as physical access to the interior, and that it would not be possible for the landlord to satisfy the requirement to fix up the new premises to meet the existing standard where walls of glass cannot be finished in the same way as a solid wall through which no light passes. The tenant was not required to relocate.

In the 1998 decision by the Newfoundland Superior Court, *St. John's Development Corp. v. Eyeland Enterprises Inc.*,³ the tenant's retail space in the mall had both inside and outside exposure. The relocation clause did not protect the tenant in terms of quality-of-relocation premises. The only protection was in terms of comparable size. The tenant was required to accept relocation premises that did not have outside exposure.

In the 1999 decision by the Manitoba Court of Appeal, *Rivard Ultracuts Ltd. v. Unicity Mall Ltd.*,⁴ the tenants refused to relocate to comparable premises, as required by the lease, and sought and obtained injunctive relief. The landlord intended to demolish the enclosed shopping centre in order to build a power centre. It wanted the tenants to relocate but acknowledged that no premises in the power centre could be comparable *per se* to interior mall space. The landlord ultimately developed around the tenants to the point that the mall became deserted and there was no advantage in doing business there. However, the tables turned. The landlord brought a fresh application and succeeded in having the injunction set aside because the sole remaining purpose of the injunction was to give the tenants an unequal bargaining position in an ultimate settlement. The court noted that “neither side ... secured a victory”; the only reason the court allowed the appeal and set aside the injunction was to prevent an equitable remedy from being used for an improper purpose. The court forced the parties to return to the bargaining table.

In the 2001 decision by the Ontario Superior Court, *First Windsor Shopping Centres Ltd. v. Langille*,⁵ the lease gave the landlord the right to relocate the tenant to replacement premises within the property. The landlord planned to demolish the building in which the leased premises were located, to expand the shopping centre and to move the tenant to premises outside the original parcel of land on which the original building containing the premises was situated. According to the lease, replacement premises were to have visibility and accessibility equal to or better than that of the existing premises. The tenant refused to relocate and the court held in the tenant's favour, because the replacement premises did not meet the terms of the lease by virtue of (1) not being located on the property, and (2) not having visibility equal to or better than that of the original premises.

In the 2002 decision by the British Columbia Superior Court, *Stonegate Enterprises Ltd. v. West Oaks Mall Ltd.*,⁶ the lease gave the landlord the right to relocate the tenant, provided the relocated premises were in a location similar to the existing premises and of a similar size and finish. The landlord undertook a major renovation of an enclosed shopping centre and relocated the tenant from its existing location between two anchor tenants to new premises at the end of the shopping centre. Also, after the renovation, access to the anchor tenants was primarily from outside of the shopping centre. The tenant argued that the new premises did not provide similar traffic flow, visibility and accessibility to the existing premises. The court agreed with the tenant, and held that the new premises were not similar to the existing premises. The tenant had contracted for a location in an interior shopping centre between two anchor tenants, with an obvious advantage to shopper traffic flow. As a result of the landlord's renovation, the visibility, accessibility and convenience to shopper traffic of the new premises were greatly reduced from that of the existing premises. The landlord was ordered to pay damages to the tenant.

In the 2005 decision by the Ontario Superior Court, *Nicholby's Franchise Development Inc. v. 1263448 Ontario Ltd.*,⁷ the relocation clause was not to be exercised "for the purpose of depriving the Tenant of the use and enjoyment of the Premises or in order to relet the Premises to another party." The landlord sought to demolish the interior of the leased premises and consolidate them with common areas and other leasable premises to create a large leasable unit for a grocery store. The tenant argued that the landlord was relocating for the purpose of re-letting the premises to the grocery store tenant. The landlord argued that the leased premises would no longer exist following the redevelopment and that the purpose of the redevelopment was to improve the shopping centre; the landlord did not want to re-let the premises to another party. The landlord also argued that to allow the tenant to resist relocation in this context would effectively negate the purpose of the clause. The court agreed with the tenant and granted an injunction in its favour.

Office

There is one other Ontario decision dealing with a relocation dispute, arising in an office setting: *Bennett v. Exchange Tower Limited*.⁸ The issue was whether the landlord had provided a comparable alternate location in the project, as required by the relocation clause. The landlord and the tenant agreed substantially as to the factors involved in defining "comparable alternate location": the term does not mean "identical"; rather, it means "similar." The parties acknowledged that the location within a floor plan, elevator access and exposure are important criteria in determining comparability of office space, and that the location offered by the landlord was substantially inferior in terms of location though similar in respect of the other relevant criteria. The landlord argued that, in effect, all the criteria should be combined in determining comparability. The tenant maintained that to be comparable, a property must be comparable in each area of relevant inquiry. The court held that the latter is the preferable view and that where a proposed comparable property is substantially inferior in an important respect, the property cannot be said to be comparable in the sense of being "similar." Another issue to be ruled on in this case was what the term "reasonable expenses" included, since the landlord was obliged to pay the tenant's "reasonable expenses" in connection with the relocation. The court found that the tenant, a lawyer, was not entitled to be paid for his time and business interruption loss as a condition of his compliance with the relocation clause, if and when comparable premises were offered to his firm.

Related to Relocation, But Not Really

In a case where the landlord was pursuing a redevelopment opportunity and needed its tenants to get out of the way (*Evergreen Building Ltd. v. IBI Leaseholds Ltd.*)⁹, the landlord pressed its recalcitrant tenant to leave, but the plan backfired. The tenant had a lease for five (5) years, with a right of renewal, for an entire floor in an older 10-story building. One year into the term, the landlord informed the tenant that it planned to demolish the building and replace it with a residential condominium. The lease did not contain a termination right and the tenant refused to leave, claiming security of tenure under its lease. The landlord commenced proceedings for re-entry and sought a declaration that damages were the appropriate remedy. The tenant applied for an injunction to prevent the landlord from breaching the covenant of quiet enjoyment.

The landlord argued that it should be allowed to terminate the contract and pay damages to the tenant, based on the common law doctrine of "efficient breach of contract." Under this doctrine, provided the innocent party is fully compensated for the breach, both parties can be released from their contractual obligations where the benefits of the breach would be so great that even if the innocent party is made whole, the breaching party would still turn a profit. The tenant argued in *Evergreen* that its lease gave it an interest in land; such interests have always been protected by the courts by way of an injunction, preventing the landlord from interfering with the tenancy. The tenant maintained that the building had many unique architectural features that it could not find in other buildings. In deciding whether the injunction should be granted, the court applied the classic test: (i) Is there a "serious issue to be tried?" (ii) Will the party seeking the injunction suffer irreparable harm (harm that cannot be adequately compensated by damages)? (iii) Is the balance of convenience in the favour of the party seeking the injunction (i.e., the inconvenience of not granting the injunction outweighs the inconvenience to the other party of granting the injunction)? The court considered these three factors, and granted the injunction.

The injunction expired shortly thereafter and the parties went back to court, with both parties reiterating their arguments. The judge emphasized that the lease conveyed an interest in land; the landlord had no right to reenter and retake possession; and the theory of efficient breach was better-suited to a contract breach and did not enable the landlord to take back the leasehold interest. The court declared the injunction to be permanent.

The landlord appealed to the British Columbia Court of Appeal, which found that the lower court did not appropriately exercise its discretion in deciding to grant an injunction. The Court of Appeal held that the court must not automatically grant an injunction on the basis of protecting an interest in land. Although it must be said that contract remedies do not preclude injunctions, awards of damage are far more common for breach of contract. The court ruled that it was necessary to consider all of the equities between the parties, particularly that it would be unfair to the landlord to allow one tenant to prevent the landlord from redeveloping the building. The permanent injunction was revoked; an interim injunction was reinstated; and the case was sent back to the lower court to be reconsidered (on the basis that the lower court would apply the law as stated by the Court of Appeal).

The tenant obtained leave to appeal to the Supreme Court of Canada, but later dropped the matter, as it ultimately decided to vacate. Now the case is "dead."

The Conclusions to Be Drawn

All of this case law reveals that landlords generally encounter some risk in dealing with tenants who are prepared to fight when faced with a relocation right being invoked by their landlord. It is often frustrating for landlords, who have invested financially and emotionally in a “better plan” or the “next big deal,” to contend with tenants who do not necessarily embrace the grand plans of the landlord.. However, these cases send a message to landlords—to venture cautiously and carefully into the exercise of their relocation rights. The bully does not always succeed.

As is evident from the cases summarized above, tenants hold a significant degree of leverage where landlords attempt to exercise relocation rights. It is reasonably likely, if there is some degree of error in attempting to exercise the right, that injunctive relief can be obtained.

To address this commercial reality, it has been suggested by some practitioners that landlords ought to write broader relocation rights into their leases (e.g., “The Landlord may at any time relocate the premises to any other premises in the Complex.”). The writer does not favour this approach. Leaving aside the issue of whether astute tenants would agree to such terms, there remains the risk that the courts will imply protective terms in favour of the tenant (given courts’ apparent tendency to assist tenants to remain in the location for which they initially bargained).

Although every clause can be undermined by creative interpretation means, this does not suggest that landlords should abandon the attempt to relieve a well-written one that covers all the important terms (e.g., factors of comparability, degree of comparability that will suffice, responsibility for build-out, timing/notice, costs of disruption/moving, unlimited purpose of relocation).

Perhaps it is time to introduce acknowledgments within relocation clauses, whereby the tenant states that:

- The general purpose of the clause is to allow the landlord to take back the premises to put them to another purpose,
- The clause is not to be interpreted in a limiting manner, and
- Any ambiguity is to be construed generously in favour of the landlord and its objectives at the time that the landlord, in good faith, seeks to exercise its right.

Do you know any tenant who will sign such a clause?

¹[1993] O.J. No. 1194 (Ont. Sup. Ct.) (QL).

²[1994] B.C.J. No. 1479 (B.C. Sup. Ct.) (QL).

³[1998] N.J. No. 295 (Nfld. Sup. Ct.) (QL).

⁴[1999] M.J. No. 459 (Man. C.A.) (QL).

⁵[2001] O.J. No. 5584 (Ont. Sup. Ct.) (QL).

⁶[2002] B.C.J. No. 1098 (B.C. Sup. Ct.) (QL).

⁷[2005] O.J. No. 4396 (Ont. Sup. Ct.) (QL).

⁸[22 February 1999] Toronto 99-CV-163514 (Ont. Gen. Div.) (unreported).

⁹[2005] B.C.J. No. 2552 (B.C.C.A.) (QL).

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Canadian Division Report on Legislative and Judicial Developments

I. GOVERNMENT RELATIONS GENERALLY

A. Parking Tax

British Columbia

Efforts in B.C. to fight against the parking tax continue. The *Park The Tax* website (www.noparkingtax.ca) outlines efforts in coordination with B.C. appraisers to continue industry's challenge to the B.C. tax. In addition, efforts are now focused on moving the government toward finding a more appropriate source of funding RAV.

Ontario

It appears that the City of Toronto will not be proposing a parking tax. Toronto is focused on larger, more substantial capital sources.

Quebec

In Montreal, the Mayor's office has once again raised the scepter of a parking tax. The ICSC has again agreed to participate in the coalition, which has so far been successful in keeping such a tax at bay.

II. TORONTO ACT—Sabrina A. Gherbaz, Torys LLP

On June 12, 2006, Bill 53, the *Stronger City of Toronto for a Stronger Ontario Act* received Royal Assent and came into force (excluding the schedules). The *Stronger City of Toronto for a Stronger Ontario Act* contains three schedules: a new City of Toronto Act (Schedule A); amendments and repeals of certain public acts respecting municipal matters (Schedule B); and repeals of certain private acts relating to the City of Toronto (Schedule C). Schedules A and C and parts of Schedule B came into force on Jan. 1, 2007.

The most substantive and important part of the *Stronger City of Toronto for a Stronger Ontario Act* is the schedule relating to the new *City of Toronto Act, 2006* (the "Act"). This legislative summary focuses on the Act.

The Act replaces the *City of Toronto Act, 1997* (No.1) and *City of Toronto Act, 1997* (No.2) (collectively, the "Prior Acts"). The purpose of the Act is to provide the City with greater powers, accountability and responsibility than previously afforded to the City under the Prior Acts and under the various other public and private acts relating to the City. According to the preamble of the Act, broadening the City's powers, accountability and responsibility will assist the City in building "a strong, vibrant and sustainable city that is capable of thriving in the global economy."

The Act includes provisions similar (but not identical) to those included in the *Municipal Act, 2001* and, as a result thereof, the *Municipal Act, 2001*, except in certain specified circumstances, will no longer apply to the City or any of its local boards or corporations; members of City Council, the City's local boards or its corporations; directors of the City's corporations; officers, employees and agents of the City, its boards and its corporations.

For the shopping centre industry, the most notable features of the Act are the City's express authority to:

- a) provide for a system of licences with respect to a business carried on within the City;
- b) impose direct taxes (subject to specified limitations);
- c) Require retail business establishments (other than prescribed retail business establishments and retail business establishments offering for sale goods or services in connection with prepared meals or living accommodations) to be closed to the public at any time;
- d) Prohibit the demolition of residential rental properties containing six (6) or more units and prohibit the conversion of residential rental properties containing six (6) or more units to a use other than a residential rental property; and
- e) Pass a by-law requiring and governing the construction of "green roofs" if the provisions of the by-law do not conflict with the provisions of a regulation made under the Building Code Act, 1992, respecting public health and safety, fire protection, structural sufficiency, conservation and environmental protection, and the requirements respecting barrier-free access.

III. PROVINCIAL REPORTS

1) British Columbia

No updates reported.

a) Legislative Developments

There are no updates at the time of writing.

2) Alberta

a) Legislative Developments – Murray Tait, T&T Properties

There are no updates at the time of writing.

b) Case Law

Alberta Importers and Distributors (1993) Inc. et al. v. Phoenix Marble Ltd. et al., 2006 ABQB 854 (CanLII), Alberta Court of Queen's Bench, Clark, J.

The negligence of the Tenant in the handling and storage of flammable chemicals used in its manufacturing operations in its Leased Premises, caused a fire that destroyed two bays of an industrial warehouse, which consisted of five bays, owned by the Landlord. The Landlord and a neighbouring tenant commenced an action against the negligent Tenant for damages stemming from the fire, for some alleged uninsured rental loss incurred by the Landlord on the negligent Tenant's unit and for business interruption loss by the neighbouring tenant.

The Lease between the Landlord and the negligent Tenant provided that the Tenant was to pay as additional rent its proportionate share of all premiums with respect to insurance placed by the Landlord for fire, lightning, explosion, sprinkler leakage, etc. The Lease did not contain a separate covenant of the Landlord to take out insurance.

The Lease also provided that the Tenant was to take out its own comprehensive general liability insurance, which was to add the Landlord as an additional named insured. As well, the Tenant was obligated under the Lease to repair and maintain at its own expense, the glass, exterior doors and interior of the Leased Premises, and all fixtures and improvements thereto.

The negligent Tenant defended the claim advanced by the Landlord, arguing that pursuant to the supreme court trilogy of cases, *Ross Southward Tire Limited v. Pyrotech Products Limited* [1976] 2 S.C.R. 35, *T. Eaton Company v. Smith et al.* [1978] 2 S.C.R. 749, and *Agnew-Surpass Shoe Stores Ltd. v. Cummer-Yonge Investments Ltd.* [1976] 2 S.C.R. 221, as the Tenant was required to pay for insurance purchased by the Landlord and as the Landlord presented a bill to the negligent Tenant, which included a specific reference to fire insurance premiums, and as the negligent Tenant paid the bill, then the negligent Tenant was entitled to receive the benefit of whatever insurance policy the Tenant reimbursed the Landlord for.

The Landlord's insurer argued that as the Lease also contained an indemnity and save harmless clause, a Tenant's covenant to obtain general liability insurance clause and a Landlord's liability clause, that pursuant to the 2006 Manitoba Court of Appeal decision in *Sooter Studios Ltd. v. 74963 Manitoba Ltd.* [2006] 5 W.W.R. 511 [2006] MBCA 12, that the indemnity and save harmless clause would lead to the conclusion that the Lease did not bar subrogated claims against the Tenant.

The court concluded that in the trilogy of supreme court cases, once it is established that the Tenant was obligated to and did in fact pay for insurance premiums of the Landlord through additional rent, then subrogated claims against the Tenant were barred, and there was no additional requirement that the Lease express an intention that the Tenant was not to be legally liable for damage caused by its negligence. None of the requirements of the Tenant to obtain general liability insurance, the absence of an express Landlord's covenant to insure, or the existence of an indemnity clause expressed the intent that the Tenant should be denied benefit of its obligatory outlays (i.e. the insurance for which the Tenant paid the premiums). The court was of the view that the Landlord's insurer's subrogation claim could not proceed against the Tenant.

The Landlord also claimed that due to the Tenant's negligence it suffered uninsured rental losses for the Tenant's premises for the period of time between the expiration of the Tenant's term and when these premises were relet. The Landlord argued that, were it not for the fire, the Tenant would have renewed its lease and because it did not, the Landlord was required to search for a new tenant and therefore the Landlord lost rent.

The court concluded that in the six months following the fire and the expiration of the Tenant's term, the Tenant at no time indicated that it wished to renew the Lease and in fact the Tenant was under no obligation to renew. As there was no evidence that any discussion or correspondence between the Tenant and the Landlord took place regarding the renewal issue, the Landlord knew well before the expiration of the Tenant's Lease that the Landlord would be required to look for a new tenant. The Landlord did not begin such search for four months following the expiration of the Tenant's term. The court disallowed the Landlord's claim in this regard.

With respect to the claim of the neighbouring tenant for lost business, the court was of the view that the evidence presented by the neighbouring tenant did not establish that any business of the neighbouring tenant was lost. At worst, the evidence only established that sales of that tenant were delayed for approximately one month. The court awarded this tenant interest on the sales, which were delayed for this one month.

Canyon Roofing (1995) Ltd. v. Royal & Sunalliance Insurance Co. of Canada [2006] ABQB 719, Alberta Court of Queen's Bench, Macleod, J.

A contractor who was undertaking roof repairs on the Landlord's building sought a declaration that: (a) the policy of insurance provided to the Landlord by the insurance company defendant applied to cover the damages suffered by the Landlord as a result of the roofing company, plaintiff's, negligent actions; and (b) the insurer is obligated to defend the claim made against the roofing company by the Landlord.

Under the roofing contract, the Landlord agreed to provide, maintain and pay for a Wrap-up Liability Insurance Policy and it is under that policy that the roofing company plaintiff demanded the insured to provide a defense in the action brought against the roofing contractor by the Landlord. The insurance company denied coverage.

The Wrap-up Liability Insurance Policy set forth that coverage would be provided to pay for “those sums that the insured becomes legally obligated to pay as compensatory damages because of “bodily injury” or “property damage” arising out of the insured’s operations in connection with the project....” Property damage was defined to mean “(a) physical injury to tangible property, including all resulting use of that property; or (b) loss of use of tangible property that is not physically injured.”

The contract of insurance also contained numerous exclusions; one such exclusion was that the insurance did not apply to “property damage.” Another exclusion was that the insurance did not apply to any part of the property not on premises owned by or rented to the insured (Landlord). The roofing contractor argued that the exclusions to property damage exclude physical injury to the Landlord’s project and also exclude damages for loss of use of the Landlord’s project. However they did not exclude compensatory damages because of physical injury to the Landlord’s property. The roofing contractor argued that an insured’s grant of coverage is to be interpreted broadly and exclusion clauses are to be interpreted narrowly.

The court concluded that the policy was a liability policy and the duty to defend arises only when there is a claim against an insured, the roofing contractor, for compensatory damages. In this case, the claim brought by the Landlord against the roofing contractor was for property damage for the building and that claim fell within the scope of the exclusion and therefore the insuring agreement did not apply. As such, there was no obligation on the insurance company to provide the roofing contractor with coverage and no duty to defend the action brought by the Landlord against the roofing contractor.

Hackett Drugs Ltd. et al. v. Ponoka Foods Ltd. [2006] ABQB 722 (CanLII), Alberta Court of Queen’s Bench, Slatter, J. The Landlord entered into an 8-year Lease with the Tenant for the operation of a drug store. That Lease was guaranteed individually by the owner of the Tenant. During the term of the Lease, the owner of the Tenant sold all of its shares to another corporation that carried on business from the premises under that corporation’s name.

At the time of the sale, the purchasing corporation sought the Landlord’s consent to an assignment of the Lease and a release of both the original tenant and the original guarantor from their obligations under the Lease and the guarantee. The Landlord agreed that it would release the original tenant and presumably the guarantor if the principal of the purchasing corporation or his personal holding company would guarantee the obligations of the Lease. The principal of the purchasing corporation was unwilling to provide the requested guarantee. Nonetheless the transaction closed, and the purchasing corporation took possession of the premises, changed the name of the store to the purchasing corporation’s name, changed the inventory to include the purchasing corporation’s branded products and changed the store signage. At this time the Landlord realized that the pharmacy was now being operated by the purchasing corporation.

Under the Lease, the premises were to be used and occupied only for the purposes of “a drugstore, pharmacy, and Sears sales and catalogue office, and for no other purpose whatsoever.” The Lease also provided that the Tenant “is prohibited from selling, stocking, or disposing of any food items that are goods and services tax zero-rated grocery products.”

The purchasing corporation began selling goods (groceries) that were zero-rated for GST purposes.

The Landlord demanded that the purchasing corporation cease selling zero-rated items. The Landlord also requested from the purchasing corporation the income and expense statements that were required under the Lease for the purchasing corporation’s operation of the pharmacy. As well, the Landlord, based upon total sales from the premises, including sales of prescription drugs, demanded certain percentage rent from the purchasing corporation. The Tenant ignored the Landlord’s initial demands and the Landlord subsequently forwarded to the original Tenant and guarantor a default notice under the Lease. The purchasing corporation responded to the Landlord’s demand notice arguing that all percentage rent had been paid, all required financial information had been provided and that the Landlord had unreasonably withheld its consent to the assignment of the Lease and therefore the Landlord was not entitled to rely on any breaches of the Lease by the Tenant.

Ultimately the purchasing corporation refused to vacate in accordance with a final termination notice and the purchasing corporation sought a declaration that it had a valid tenancy in the premises and the Landlord brought a cross-application for declaration that the purchasing corporation, which was carrying on business from the premises, had no leasehold or other interest.

The court concluded as follows:

1. The Lease required the Landlord to act reasonably with respect to any request for an assignment or sublease. Had the original Tenant asked the Landlord for consent to a simple assignment or subletting, without the additional request of the release of the initial tenant and the initial guarantor, then the Landlord’s refusal to agree to such simple assignment might well have been unreasonable. However no such request had been made. The relationship between the initial tenant, the Landlord and the purchasing corporation was unclear. The court concluded that the purchasing corporation entered into the premises under some sort of license from the initial tenant. The purchasing corporation had no

title independent of its rights through the initial tenant and the initial Lease. In the end, the initial tenant did allow the purchasing corporation to take possession of the premises and the Landlord acquiesced to that taking of possession

2. With respect to the sale of zero-rated items, the purchasing corporation argued that it was not bound by the restrictive covenant in the Lease, as that restrictive covenant was personal only to the initial tenant. However the court disagreed, holding that as the purchasing corporation obtained its right to occupy the premises only through the initial Lease, and as the initial Lease contained the restrictive covenant, then that restrictive covenant was binding upon the purchasing corporation. With respect to the purchasing corporation's argument that as the Landlord had unreasonably refused its consent to the assignment, it could no longer enforce the restrictive covenant, the court rejected that argument stating that there was no rule of law that if one party is in breach of a covenant to a contract, the other party can then pick and choose which covenants it itself will respect.

3. The court concluded that as the purchasing corporation had provided the Landlord with income statements, the Lease required the Tenant to deliver to the Landlord at the end of the Tenant's fiscal year, financial statements relevant to both income and expense from the premises, certified correct by the Tenant's independent accountant. The purchasing corporation was in breach of this obligation as it had not provided any expense statement for the premises and had not provided any statements that were certified by the Tenant's independent accountant. The purchasing corporation objected arguing that it did not have financial statements for individual stores. Nonetheless, the court was of the view that it had to prepare such statements in order to not be in breach of the Lease.

4. With respect to the payment of percentage rent, the Lease provided that percentage rent was payable on all sales that were in excess of \$3.0 million per year. Taking into account all sales from the Leased Premises, including the sales of pharmaceutical prescription drugs, the Tenant's sales were over this threshold. However, pursuant to the *Pharmaceutical Profession Act*, R.S.A. 2000, c. P-12, no rent can be payable in respect of a percentage of the sales by the pharmacy of drugs sold pursuant to prescriptions. Therefore, so as not to violate Alberta law, the sales of all prescription drugs could not be included in determining whether the Tenant had reached the threshold.

The court concluded that the purchasing corporation was in possession of the premises as a licensee from the initial tenant, but that the Landlord was entitled to a declaration that the initial tenant and the purchasing corporation were in breach of the initial Lease for failing to provide the required financial information and for persisting in the sale of zero-rated goods, contrary to the restrictive covenant.

3) Saskatchewan

a) Legislative Developments

There are no updates at the time of writing.

b) Case Law

There are no updates at the time of writing.

4) Manitoba – Glen R. Peters, Fillmore Riley LLP

a) Legislative Developments

There are two recent Province of Manitoba legislative amendments that may be of interest to members.

1. *Employment Standards Code*

There were a number of recent amendments to the *Employment Standards Code* of which the following may be of interest to members.

Section 2(4) has been added, which deals with the application of the Code to certain employees. Specifically the Act exempts certain management employees and those employees who substantially control their hours of work from the parts of the Act dealing with overtime and standard hours of work.

Exemption—standard hours of work and overtime

2(4) Division 2 (standard hours of work) and Division 3 (overtime) of Part 2 do not apply to any of the following:

- (a) An employee who performs management functions primarily;
- (b) An employee who has substantial control over his or her hours of work and whose annual regular wage is at least two times the Manitoba industrial average wage, as defined by regulation.

The following sections have been added respecting unpaid family and bereavement leave. The new provisions provide for three days per year of unpaid family and bereavement leave per year, which is in addition to the periods of leave found in Section 59.2, which are paid leaves of absence.

FAMILY LEAVE

Unpaid leave for family responsibilities

59.3(1) An employee who has been employed for at least 30 days may take up to three days of unpaid leave each year, but only to the extent that the leave is necessary

- (a) For the health of the employee; or

(b) For the employee to meet his or her family responsibilities in relation to a family member as defined in subsection 59.2(1).

Notice to employer

59.3(2) An employee wishing to take a leave under subsection (1) must give the employer as much notice as is reasonable and practicable in the circumstances. The employer may require the employee to provide reasonable verification of the necessity of the leave.

Leave for part day

59.3(3) If an employee takes any part of a day as leave under this section, the employer may count that day as a day of leave for the purpose of this section.

BEREAVEMENT LEAVE

Unpaid bereavement leave

59.4(1) An employee who has been employed for at least 30 days may take up to three days of unpaid leave on the death of a family member as defined in subsection 59.2(1).

Notice to employer

59.4(2) Before taking a leave under this section, the employee must give the employer notice of the amount and timing of the leave to be taken and of the death to which it relates. If requested by the employer, the employee must also provide evidence of his or her entitlement to the leave.

Leave for part day

59.4(3) If an employee takes any part of a day as leave under this section, the employer may count that day as a day of leave for the purpose of this section.

26 The following is added after subsection 60(4):

Vacation deferred because of leave

60(4.1) An employee on a leave under this Division may defer taking vacation. Section 36 applies to the deferred vacation.

Vacation and leave entitlements not reduced

60(4.2) An employee's leave under this Division does not reduce his or her vacation entitlement, and an employee's vacation entitlement does not reduce his or her entitlement to a leave under this Division.

Section 83(4) has been added, which deals with the employment of children under the age of 16. The amendment provides restricted hours of work for children under the age of 16.

Restricted hours of employment

83(4) No person shall employ a child under the age of 16 years

(a) Between 11:00 p.m. and 6:00 a.m.; or

(b) For more than 20 hours during a week of school; except as permitted by the regulations or as authorized by the director in special circumstances.

The amendment has also added restrictions on employing adolescents between the ages of 16-17 years.

Protection of children working at night

84(1) Subject to the regulations, no employer shall require or allow an employee under the age of 18 years to work alone between the hours of 11:00 p.m. and 6:00 a.m.

Restricted employment of children

84(2) Subject to the regulations, no employer shall require or allow an employee under the age of 18 years to work in a prescribed industry or occupation.

2. Consumer Protection Act (Prepaid Purchase Cards)

This amendment adds Part XX (Prepaid Purchase Cards) to the Act.

The part governs the use and sale of prepaid purchase cards and specifically prohibits expiry dates on such cards, as well as requiring certain information to be disclosed by merchants who sell prepaid purchase cards.

This legislation has been passed, but is not yet proclaimed in force. We are not currently aware of a definitive date for completion of the regulations and/or a proclamation date.

PART XX PREPAID PURCHASE CARDS

Definition

170 In this Part, "prepaid purchase card" means, subject to the regulations, an electronic card, written certificate or other voucher or device with a monetary value, that is issued or sold in exchange for the future purchase or delivery of goods or services, and includes a gift card and gift certificate.

No expiry date

171(1) No person shall issue or sell a prepaid purchase card that has an expiry date, except as may be provided in the regulations.

Valid until redeemed or replaced

171(2) A prepaid purchase card that is issued or sold without an expiry date is valid until fully redeemed or replaced.

Information to be provided

172 A person who issues or sells a prepaid purchase card must provide information to the consumer as specified in the regulations.

Regulations

173 The Lieutenant Governor in Council may make regulations respecting prepaid purchase cards, including, without limitation,

- (a) Extending or limiting the meaning of “prepaid purchase card” for the purpose of this Part;
- (b) exempting classes of prepaid purchase cards and classes of persons who issue, sell or redeem prepaid purchase cards from the application of this Part or any provision of it;
- (c) Governing the use of expiry dates for prepaid purchase cards that are exempt from subsection 171(1);
- (d) Respecting the imposition of restrictions, prohibitions and other terms and conditions on the issuance, sale, redemption, replacement and use of prepaid purchase cards;
- (e) Respecting the information that must be provided in relation to prepaid purchase cards, and the form, timing and manner of providing that information;
- (f) Governing the fees, including inactivity fees or service fees, that may be charged in relation to prepaid purchase cards, including prescribing the amount of a fee or a method of determining the amount of a fee, and prescribing circumstances in which no fee is payable;
- (g) Defining any word or phrase used but not defined in this Part;
- (h) Respecting any matter that the Lieutenant Governor in Council considers necessary for the administration of this Part.

CITY OF WINNIPEG BY-LAWS

There are no recent City of Winnipeg by-law amendments that may be of interest to members.

b) Case Law Development

The following is the recent Manitoba decisions that may be of interest to members:

- 1.) *Owiafe v. Zubriski* [2006] MBQB 209

FACTS: The plaintiff, Owiafe, was the tenant of the defendant, Zubriski. The case concerned an action by the plaintiff to set aside a distraint of his goods. The plaintiff sought a return of his goods and chattels which were seized. The property in question was a car parking lot.

ISSUE: The basis for the plaintiff’s argument was that the distraint of his goods was unlawful, as the Landlord had locked the plaintiff out of the Premises and had thereby terminated the lease. In Manitoba, a landlord may not terminate the Lease and then attempt to seize the Tenant’s goods and chattels held on the Landlord’s Premises. The Landlord’s position was that the padlocking of the Premises was not a termination of the Lease but was the only effective way to distraint the chattels on the Premises, as they were cars and the Premises was a parking lot.

HELD: The court confirmed that a Landlord may not terminate the lease and then distraint. On the facts of the case, the court found that the Landlord effectively terminated the Lease and therefore the distraint was unlawful.

- 2.) *A.A. Miracle Janitor Service Co Ltd. v. Westfair Foods Ltd.* [2006] MBQB 270

FACTS: The plaintiff sued the defendant for monies due to be owing under contracts for janitorial services. The parties had entered into a series of contracts whereby the plaintiff was to provide services to a number of Superstore locations. The defendant alleged that the plaintiff was inadequately performing its services under the contract. The defendant alleged that the poor workmanship of the plaintiff led to a wax buildup on the floors, which had to be repaired at a cost of \$10,000 to the defendant. In canceling the contract, the plaintiff’s felt that it had been mistreated by the defendant, and should therefore be entitled to aggravated damages. The contracts canceled represented over 50% of the plaintiff’s business, and the plaintiff’s claimed that the loss of business coupled with the lack of courtesy on the part of the defendants, caused emotional distress for the plaintiff.

ISSUE: Is the plaintiff entitled to damages for breach of contract? Is the plaintiff entitled to aggravated damages due to the conduct of the defendant in canceling the contracts? Is the defendant entitled to offset the repair amounts against the damages for breach of contract?

HELD: The judge was satisfied that the workmanship of the plaintiff was not substandard. However, because there was some evidence of wax buildup, they allowed the offsetting of the repair costs. The court did not find that the conduct of the defendant warranted aggravated damages.

ANALYSIS: Despite the long business relationship and the relatively abrupt cancellation of the defendants, the court refused to accept the argument of the plaintiff that aggravated damages were warranted. The court found that the failure of the defendant to explain the reasons for the cancellation and their general dismissive attitude was not to be commended, but did not warrant aggravated damages. As the court found that the workmanship of the plaintiffs was not faulty, there was clearly a claim for breach of contract. Nevertheless, given that there was some evidence of wax buildup, the judge allowed the defendant to offset the repair amounts against the breach-of-contract damages. The reasoning was that the plaintiff did cause the wax buildup, but that didn't justify the defendant's cancellation of the contracts. In reaching this conclusion, the court relied on the past conduct of the defendant where they had completed quality assurance reports of the plaintiff's work and had found it to be adequate.

5) Ontario

a) Legislative Developments

No updates reported.

b) Case Law Developments - Joseph Grignano & Gasper Galati, Daoust Vukovich LLP

Set out below are summaries of cases that have been ruled upon in the Ontario courts since our last report to the Committee of September 1, 2006.

Spirent Communications of Ottawa Ltd. v. Quake Technologies (Canada) Inc. [2006] O.J. No. 2644 (Ontario Superior Court of Justice, June 28, 2006, A. Panet J.)

The sublandlord sought to recover damages for rent due under an offer to sublease. The subtenant had unilaterally terminated the agreement on the basis of anticipatory breach by the sublandlord.

The sublandlord had entered into a head lease for premises located in an office building that was to be constructed by April 30, 2001. The head lease afforded the sublandlord more space than it required and, as such, it sought to sublease part of its premises. During the initial stages of construction, the sublandlord and the subtenant entered into an offer to sublease for a term that was to commence on June 1, 2001. Pursuant to the terms of the offer to sublease, the sublandlord agreed to provide the subtenant, "in addition to the Landlord's base building," with demised premises and suite entry doors, prior to the subtenant's occupancy of the premises. The sublandlord was also required under the terms of the offer to sublease to deliver its standard form of sublease to the subtenant and the date for finalizing the sublease was stated to be Nov. 22, 2000. The sublandlord did not deliver its standard form of sublease to the subtenant until April 25, 2001, after the subtenant notified the sublandlord that it considered the offer to sublease terminated.

The construction of the building was delayed and the subtenant became concerned that its occupancy date would also be delayed and that its business would be interrupted. In response to this concern, the subtenant's contractor spoke with the general contractor of the building project, at which time the general contractor advised the subtenant's contractor that occupancy by the subtenant was not achievable until mid-July, 2001. This advice was confirmed in writing by the general contractor of the building project by a facsimile to the subtenant. After receiving such written confirmation, the subtenant advised the sublandlord that the subtenant considered the offer to sublease to be terminated and that it would not proceed with the sublease due to the default by the sublandlord of its obligations under the offer to sublease, including the failure to deliver the premises by June 1, 2001 and the failure to deliver and finalize the sublease by Nov. 22, 2000.

The Court held that according to the offer to sublease the intention of the parties was that the demised premises were to be provided to the subtenant prior to June 1, 2001, so that the subtenant could carry out its fit-ups prior to the specified occupancy date and be in a position to take over the premises and be up and running by June 1, 2001. After determining that the sublandlord had breached the offer to sublease, the Court applied the test set out in *1193430 Ontario Inc. v. Boa-Franc Inc.* [2006], 78 O.R. (3d) 81, in considering whether the sublandlord's breach was fundamental to the contract. In the *Boa-Franc* case, the Court stated:

The test for determining whether a breach amounts to a fundamental breach that deprives the innocent party of "substantially the whole benefit of the contract" was recently re-stated by this court in *Shelanu Inc. v. Print 3 Franchising Corp.* (2003), 64 O.R. (3d) 533. In that case, the court adopted the application of five factors extrapolated by Professor Waddams from the case law to analyze whether there has been a substantial failure or performance amounting to fundamental breach. They are: (1) the ratio of the party's obligation not performed to the obligation as a whole; (2) the seriousness of the breach to the innocent party; (3) the likelihood of repetition of such breach; (4) the seriousness of the consequences of the breach; and (5) the relationship of the part of the obligation performed to the whole obligation.

After applying the test the Court found that the anticipated delay by the sublandlord of a period of at least six weeks in delivering the premises, in relationship to the three year term, was a fundamental breach and the consequences of such breach were material. As such, the Court ruled in favour of the subtenant and found that it was reasonable for the subtenant to conclude that there was a repudiation and anticipatory breach by the sublandlord of its obligations under the offer to sublease and the subtenant was entitled to treat the offer to sublease as at an end.

The Court also addressed the issue of the sublandlord's breach of its obligation to deliver a draft form of sublease on or about Nov. 22, 2000. The sublandlord argued that the sublease was to be worked on by both parties on a cooperative basis and that the delivery of the sublease was not the sole obligation of the sublandlord. The Court did not agree with the sublandlord and found that it was the sole obligation of the sublandlord to prepare the form of sublease based on the terms contained in the offer and deliver such form of sublease to the subtenant on or about Nov. 22, 2000 or some reasonable period of time thereafter. The failure of the sublandlord to do so was a breach of its obligations under the offer to sublease. However, the Court found that this breach by the sublandlord was not fundamental as the material terms of the agreement to lease were contained in the offer to sublease and both parties treated the offer as a binding agreement between them.

Amexon Property Management Inc. v. Unique Benefits Group Corp. [2006] O.J. No. 2542 (Ontario Superior Court of Justice, June 21, 2006, M.K. Fuerst J.)

The parties to this dispute entered into an offer to lease for a five year term. A formal lease was not executed, although the offer did call for one. Sixteen months after taking possession of the premises, the tenant moved out. The tenant did not advise the landlord in advance of its intention to leave the premises. Upon abandoning the premises the tenant re-entered and removed all of its goods and chattels. The landlord commenced an action against the tenant for rent owing and against the tenant and its principal, on a joint and several basis, for double the value of the goods and chattels removed from the premises. With respect to the latter claim, the landlord relied on Section 50 of the *Commercial Tenancies Act*, which provides that the tenant, and persons who knowingly assist the tenant, are liable to the landlord if goods or chattels are fraudulently removed for the purpose of depriving the landlord of its right of distress. Liability under Section 50 is set at double the value of the goods removed.

The landlord brought a motion for summary judgment.

The tenant defended the landlord's motion on the grounds that: (1) it was not in arrears of rent, rather the landlord owed it a rent abatement; (2) there was no binding lease agreement between the parties as the offer was meant to be a starting point of a real lease negotiation (the tenant had asked for a formal lease, but never received one); and (3) its removal of its goods and chattels was not fraudulent as they were removed for the purpose of furnishing one of the tenant's offices in another location and neither the tenant nor its principal were aware that removing the goods and chattels from the premises was illegal or improper.

The Court concluded that there were two main issues for it to decide on the motion: (1) whether the tenant breached a valid lease contract when it moved out of the premises; and (2) whether the landlord was entitled to distrain against the equity the tenant held in the property removed.

The Court considered the first legal issue and noted that the common law test for a legally enforceable agreement to lease requires the following requisites to be included: 1) the parties; 2) a description of the premises; 3) the commencement of the term; 4) the duration of the term; 5) the rent; and 6) all material terms of the contract not being matters incidental to the relation of the landlord and tenant. The Court agreed with the landlord that the lease agreement signed by the parties set out all of the information necessary to constitute a binding contract, notwithstanding that a formal lease was never signed. The Court held that the parties had a valid lease and that the tenant did in fact abandon the premises and as such breached the lease. The Court disagreed with the affidavit evidence set out by the tenant and held that the landlord met the statutory and common law test for summary judgment. As such, the Court ruled in favour of the landlord and granted summary judgment in connection with the tenant's rental arrears.

The Court then went on to consider whether judgment could be rendered for the second legal issue. The Court acknowledged that the removal of the property prevented the landlord from distraining for the rental arrears, however, it was not convinced that the landlord had established a fraudulent intent on the part of the tenant or its principal. The Court held that the tenant did in fact move out of the premises without prior notice to the landlord, however, the Court was unable to agree with the landlord that the move was clandestine. Therefore, the Court concluded on the second issue that it must cross-examine the tenant and its principal on their affidavit evidence in relation to this issue and it would be unjust to award summary judgment against the tenant and its principal without a proper cross-examination. As a result, summary judgment was not given to the landlord with respect to the distraint of the goods.

6) Quebec—Fred Carsley and Philippe de Grandmont, De Grandpré Chait

a) Government Relations matters

Canada Interest Act

Steven Dover of The Capital Hill Group advised Fred Carsley just after the New Year that the internal approvals for the amendment to Section 10 (2) of the *Canada Interest Act* are proceeding well, and that it is possible this amendment may appear in the next Federal budget, expected to be brought down in the House of Commons in late February or early March 2007.

b) Québec Parking Tax

An article in the Jan. 4, 2007, edition of the *Journal de Montréal* reports that the City of Montreal is preparing its financial wish list for Quebec City, which would include a renewed request for the Provincial Government to enact the legislation required to permit municipalities to levy taxes on non-residential parking spaces. The Coalition, of which ICSC is a major participant, has been summoned to fight this endeavour once again.

c) Brossard Parking Tax

As well, the City of Brossard on the south shore of Montreal is imposing a “parking fee” of \$2.50 per space on non-residential parking. It claims that this is lawful, as the funds generated will be dedicated to a special fund for road improvements. The Coalition has been requested to examine this as well.

b) Case Law

Goodman c. Groupe de divertissement S.A.F. Inc. (C.S. Montréal, Sept. 12, 2006), EYB 2006-109707

The tenant abandoned the leased premises during the term of the lease. The landlord subsequently applied to the Court for cancellation of the lease and recovery of arrears of rent. The tenant counter-claimed, alleging that municipal zoning prohibited the use initially intended by the tenant, i.e., a bar and dance studio, and claiming the reimbursement of fitting-out expenses as well as exemplary damages.

The Court ruled that the landlord had an obligation to apprise himself of the zoning restrictions concerning the premises, and to place a prospective tenant on notice of these restrictions. Pursuant to Article 1854 of the Civil Code of Québec: “The landlord is bound to warrant the lessee that the property may be used for the purpose for which it was leased” Moreover, the impossibility for the tenant to obtain a municipal permit to conduct its intended commercial activities constituted a legal disturbance, against which the landlord was bound to warrant the tenant pursuant to Art. 1858 C.C.Q.

The tenant had an obligation to mitigate its damages, and could have done so by enquiring about zoning soon after executing the offer to lease, which it neglected to do. Therefore, the lease was canceled, the tenant’s claim for damages was dismissed and the landlord was awarded a portion of the unpaid rent arrears.

Immeubles Gabriel Azzouz Inc. c. Orbite Optique Ghobril Inc. (C.S. Longueuil, May 30, 2006), EYB 2006-107961

The landlord of an enclosed shopping mall proceeded to a major reconfiguration of the mall in order to allow direct access to some major tenants’ stores directly from the parking lot. The tenant, a small optometry clinic, agreed to being relocated further in the mall, next to a cinema. Shortly thereafter, the cinema ceased its operations, causing a domino effect of store closures and dwindling customer traffic in that section of the shopping mall, to the point where the tenant and a tobacco store remained the only businesses in operation.

The landlord neglected this area of the centre, increasingly reducing basic maintenance and other services, while preferring to concentrate its efforts on an area that was more of a power-centre type.

The tenant vacated, and in defence to the landlord’s claim for rental arrears, pleaded that the landlord was not fulfilling its obligation to operate a shopping centre. It also claimed damages by way of cross-demand.

The Court, citing previously decided authorities on the subject, accepted the argument that where there are multiple vacancies, it becomes increasingly difficult to continue to characterize the property as a viable shopping centre, and this is what the tenant expected when it contracted the lease. The Court dismissed the principal action, canceled the lease and awarded the tenant damages.

MDS (Canada) Inc. c. Groupe Accueil International Ltée and Parksmart Inc. (C.S. Montréal, Sept. 28, 2006), EYB 2006-110132

The tenant, a pharmaceutical clinical studies enterprise, has leased since 1998 a part of a suburban building adjacent to a 218-space parking lot. Since then, the tenant’s employees and visitors (mostly volunteers who submit to clinical tests) had used the parking facilities without charge. In October 2005, the landlord allocated 120 spaces to specific tenants of the building, under a free permits scheme. The remaining 98 spaces remained available to the general public and visitors, for an hourly fee. The tenant alleges that it hosts about 100,000 volunteers per year, 50% of which drive a car to the premises. To avoid losing volunteers because of parking difficulty, the tenant then began to reimburse parking fees to the volunteers, thereby incurring over \$20,000 per year.

The lease stated that the tenant was entitled to the use and benefit of “Common Areas and Facilities of the Building” which the Court found to be defined so as to include the parking lot. Nowhere did the lease allow the landlord to charge for such use. Moreover, the availability of free parking had been a determining factor in the tenant’s decision to lease the premises. Finally, the landlord had not raised any concern or objection over the tenant’s use of the parking lot for the seven previous years, although it was fully aware of it.

The landlord argued that it had the right, even the obligation as a matter of good management, to introduce some sort of control system to manage the ever-increasing flow of traffic to the parking, which oftentimes had nothing to do with the building.

The Court agreed that the free parking permits allotted to tenants based on their proportionate occupancy was not in and of itself objectionable, but granted an injunction prohibiting the landlord from charging a fee for the use of the “common portion” of the parking lot.

In 1991, Centre commercial Victoriaville granted a hypothec to the plaintiff as part of an \$11.8M financing. Following a disagreement over the financing terms and the plaintiff's refusal to renew the loan at the expiry of the term, the debtor voluntarily surrendered ownership of the shopping centre to the plaintiff in 1996.

During the term of this loan, the owner experienced considerable pressure on the centre and its viability, occasioned by the loss of the Woolco Department Store that was not acquired by Wal-Mart and a decision by Wal-Mart not to re-establish in this centre, the opening of a competing centre within the trade area that was well-anchored, new and well-tenanted by satellites, and a Metro food store whose lease was expiring and would not be renewed in the existing space.

Canadian Tire operated from land contiguous to the centre, and struck a deal with the landlord to relocate into the centre. An affiliated entity to the landlord acquired the Canadian Tire property, and leased it to Metro for a Super C. Metro vacated its premises in the centre and opened as a new Super C. As an essential condition of the Super C transaction, the landlord agreed to encumber the centre with a servitude prohibiting another food supermarket in the centre for as long as the Metro remained operational as a supermarket.

At the time of the failed renegotiation of the loan, Standard Life wished to impose new conditions, which the owner was not prepared to accept. So the owner voluntarily surrendered the centre to Standard, which in turn appointed a new property manager to manage and lease the centre on its behalf.

The new manager was fixated on the necessity of having a supermarket in the centre, and even had a deal signed with a local operator, which, according to the judge, really had little chance of succeeding against the Super C banner.

In the meantime, Standard Life instituted proceedings to have the Courts declare that the so-called servitude was not a real servitude, and thus not binding upon successors and assigns that did not agree to respect its terms. The Quebec Court of Appeal eventually ruled in this manner, and leave to appeal to the Supreme Court of Canada was refused.

Standard Life now sued its former borrower on the basis that by having granted the servitude, its security was diminished in contravention of Article 2734 of the Quebec Civil Code, which states:

"Neither the grantor nor his successors may destroy or deteriorate the hypothecated property or materially reduce its value except by normal use or in a case of necessity".."

Standard Life argued that the centre suffered a significant diminution in value as a result of the servitude, which prevented it from completing a new supermarket transaction, and that furthermore, by not informing Standard Life that it was encumbering the centre with this servitude, it acted in bad faith. It claimed damages in the sum of \$ 8, 443, 000 plus interest.

Justice Diane Marcellin, certainly no stranger to these matters, being for many years Vice-President and General Counsel of Steinberg Inc., concluded otherwise. She noted that Article 2734 CCQ changed the previous position on this subject, which required proof of an intention to defraud. However, she ruled that Article 2734 is not of strict liability, and can be successfully defended against based upon the evidence presented. She also noted that to be successful, the plaintiff must not only prove that the diminution, but also the causal link between the act and the damage.

In ruling for the owner, she pointed to the following factors:

- By switching Canadian Tire for Super C, the owner improved the cash flow of the centre, despite the fierce competitive environment it was facing.
- By keeping Super C within the confines of the centre as a "shadow anchor," it retained the supermarket clientele, within a format that was becoming more and more prevalent among large surface supermarkets—that is, free-standing as opposed to being within a mall.
- The value decline analysis by the plaintiff's expert was at best a hypothetical analysis, and significantly outweighed by the defendant's proof as to why the centre fell in value.
- Among the factors cited were Westcliff's attempts to convince Wal-Mart to come to the centre (including an unsuccessful trip to Bentonville); the recession of the early 1990s which, in the centre's case, was compounded only by the new competition; the major leases expiring around the same time (which Standard knew about when it agreed to the original loan on a limited recourse basis); and Standard's decision to take back the centre in payment and replace proven quality management with a manager that clearly was not guiding Standard or the centre in the right direction.

The Court also addressed the phrase "normal use" and concluded that, in the context, Westcliff was doing what a prudent shopping centre owner/manager ought to be doing in the face of a rapidly deteriorating economic situation. The action was dismissed with costs.

7) New Brunswick—Serena R. Newman, Barry Spalding Lawyers—Avocats

We have conducted a review of recent case law and legislative developments and note that there have been several developments since our report of August 2006, which may be of interest to those ICSC members operating small businesses in the Province of New Brunswick.

Firstly, the newly elected New Brunswick Liberal government honoured one of its election promises to increase minimum wage levels beginning early in 2007. Effective Jan. 1, the minimum wage was increased from \$6.40 to \$7.00 per hour. An additional increase to \$7.25 per hour will take effect on July 1, 2007. The government has also pledged to review the minimum wage levels at least once a year.

Secondly, Bill 6, the *Franchise Act*, which was discussed in our August 2006 report (and was similar to the bill that was introduced in May 2005 as Bill 34 “*Franchises Act*”), was not passed.

Thirdly, the New Brunswick Government has introduced changes to the taxation of dividend income similar to changes introduced by its federal counterpart. Through the introduction of a higher dividend tax credit, these changes will see a reduction in the tax burden on dividend income previously earned by New Brunswickers. This tax credit will reduce the current double taxation of income in both the personal and the corporate tax systems. While the current rate of 3.7 percent for small businesses will go unchanged, the dividend tax credit being introduced on eligible dividends from Canadian businesses operating in New Brunswick and elsewhere in Canada paid on or before Jan. 1, 2006, will increase to 12 percent. These amendments will be introduced in February 2007 at the next Legislative Assembly session.

Finally, there have not been any judicial developments since the August 2006 report that would be of particular concern to ICSC members.

8) Nova Scotia—Alanna D. Robinson, Wickwire Holm

Retail Business Uniform Closing Day Act

On Oct. 4, 2006, the Supreme Court of Nova Scotia invalidated certain regulations restricting shopping on Sundays and holidays in Nova Scotia.

In *Sobeys Group Inc. et al. v. The Attorney General of Nova Scotia*, 2006 CarswellNS 433, NSSC 290 [2006] C.L.L.C. 210, Sobeys Group Inc. made an application to the Supreme Court of Nova Scotia to determine whether the Governor-in-Council had the authority to make certain regulations enacted pursuant to the *Retail Business Uniform Closing Day Act* (the “Act”). Atlantic Wholesalers Ltd. joined the action as an Intervenor.

The issue to be determined was not whether Sunday shopping is acceptable, but rather to determine the scope of the Cabinet’s power to pass regulations pursuant to the Act. The action arose out of the legislature enacting regulations on June 23, 2006, prohibiting grocery retailers from opening their stores on Sundays if they had reorganized their business as separate companies after June 1, 2006. Businesses had been circumventing the regulations by reorganizing their businesses into separate companies so that each smaller company would be exempt from the regulations.

The Province of Nova Scotia released a press release stating shortly after the Supreme Court handed down its decision. The press release stated that Province has “decided to change its regulations to allow retail stores of all kinds to determine the days they choose to be open.”

As of Oct. 6, 2006, amendments to the *Retail Business Uniform Closing Day Regulations* (the “Regulations”) were approved pursuant to an order in council (2006-423). The amendments removed the restrictions preventing some retail establishments from legally opening on Sundays and holidays, effectively allowing owners of retail establishments to determine the days they may or may not open.

Section 2 of the revised regulations states as follows:

“All goods and services sold, offered for sale or purchased by retail are prescribed as goods and services to which Section 3 of the Retail Business Uniform Closing Day Act does not apply.”

Section 3 of the Act lists the retail establishments that cannot open on a uniform closing day. A “Uniform Closing Day” includes Boxing Day, Canada Day, Christmas Day, Good Friday, Labour Day, New Year’s Day, Sunday and Thanksgiving Day.

Remembrance Day is now the only day that retail stores must close. Restrictions related to retail store openings on Remembrance Day remain unchanged as the *Remembrance Day Act* governs these restrictions.

9) Prince Edward Island

a) Legislative Developments

No updates reported.

b) Case Law Developments

No updates reported.

10) Newfoundland and Labrador—Robert B. Andrews, White, Ottenheimer & Baker

a) Legislative Developments

1. City of St. John's Municipal Taxation Act

This Act has been passed as a replacement of that portion of the *St. John's Assessment Act* dealing with the taxation of property by the City of St. John's. The former *St. John's Assessment Act* has been replaced.

2. Assessment Act, 2006

This Act has been passed to consolidate the law with respect to assessments of property for the purpose of municipal taxation. It consolidates assessments that were formerly carried out under the *Assessment Act* and the *St. John's Assessment Act*. These Acts have been replaced.

3. Liquor Control Act

The *Liquor Control Act* has been amended to provide that a liquor license shall remain in effect until it is canceled at the request of the licensee or is suspended or canceled by the Board. Formerly, a license expired on March 31 following the date on which it became effective. There is also a provision allowing for the lapse of a license, under which no wine, beer or spirits have been sold, after a period of time. This period of time is determined by the Board of the Liquor Corporation.

4. Judgment Enforcement Act

This Act has been amended to exempt from enforcement proceedings under the Act retirement funds defined in the *Income Tax Act*. This includes deferred profit sharing plans (DPSP), registered retirement income funds (RRIF) and registered retirement savings plans (RRSP).

b) Judicial—Case Law

A recent Court of Appeal decision is of interest with respect to a municipality's discretion in granting, or not granting, permits for development. *Sun Life Assurance Co. of Canada v. St. John's (City)* involved an application by a developer to build condominiums in an area of St. John's, which was zoned CCM (Commercial Central Mixed Use Zone).

The City's Development Regulations set out that residential use was permitted in this area for dwelling units located in the second or higher stories of a commercial building and that a dwelling unit on the ground floor was a discretionary use. The application for development was granted by the City on the basis that the development met all zoning requirements and therefore the City Council did not have discretion to not permit the development.

A neighbouring hotel brought application to the Court to have the issue sent back to City Council on the basis that the *City of St. John's Act* provided discretion to City Council to refuse to issue a permit on the basis of the size, design or appearance of the building. The Court of Appeal confirmed that City Council does not have any discretion to refuse a permit if the application meets all zoning and development regulations.

It further went on to note that, in this case, the condominium development did not meet the zoning regulations because it was intended for use as an entirely residential building. It is a prerequisite of residential use in the CCM zone that the building be commercial in nature. As a result, it was determined that this proposal did not comply with the Development Regulations, and the matter was sent to City Council to reconsider it in accordance with the *Urban and Rural Planning Act* and the Development Regulations.

This case confirms that City Council does not have discretion to refuse an application for development as long as it meets all zoning and development regulations and does not violate the *Urban and Rural Planning Act*.

Prepared by Kieran F. Mulroy, Senior Vice President, General Counsel and Secretary, Ivanhoe Cambridge, Toronto, Ontario,

