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A declaration of war: breaking into the business

The desperation tactic of gaining entry to a locked business, known as 'self-help', is seen as an occasionally useful skill when relations hit a sour note.

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Gaining entry to a locked business under cover of darkness isn't taught in franchise manuals, but it's a skill that both franchisees and franchisors occasionally find useful.

It's known as "self-help" and it marks the low tide in franchise relations – one of the desperation tactics that both sides use when they feel there's no more room for talk. It's franchising's declaration of war.

The surreptitious entries generally occur just before the combatants head for the court. The premise behind these incursions is that possession is nine-tenths of the law.

In other words, if the franchisor is trying to oust the franchisee from the system, it will be easier if the franchisee is already physically out of the store. Likewise, franchisees who don't want to lose their stores and their contents stand a much better chance if they remain in their outlets and operate them as going concerns.

Here's what usually happens. The franchisor generally holds the store's lease and sublets the premises to the franchisee. When the franchisee's businesses falter, they soon default on royalties, the percentage of sales paid for the use of trademarks and system support.

This violates the franchise agreement, which usually authorizes the franchisor to declare a default on the lease as well.

Accompanied by a bailiff, the franchisor enters the store, usually when the franchisee is not present. The locks are changed and he bailiff posts an official notice on the door saying the site has been repossessed.

"The franchisor saves a ton of money if he can repossess the franchise by himself rather than going to court and getting an order," says Ned Levitt, a Toronto franchise lawyer.

Despite the nonpayment, however, the franchisee may have a legitimate legal claim to remain open, leaving the franchisor open to liability.

"But the franchisor might take those risks," Mr. Levitt says, "because the strategic advantage is so much greater than the potential loss."

Some franchisees decide that the answer is to fight fire with fire. Claiming either that they are not in default or that the franchisor caused them to default, franchisees sometimes go back into their stores after they have been repossessed, perhaps through a back entry or a window, usually at night, in order to occupy and run the business.

If the store is still operating, it's not likely that either the police or the courts will throw the franchise owner out in the streets. In some cases, a franchisee sleeps inside the store for months to forestall a franchisor taking possession. No one – neither franchisor, franchisee nor bailiff – is entitled to use force on another person in repossessing property.

"The franchisee puts himself in a better position if he can stay in the store when they want him out," Mr. Levitt says. "If he walks out of the store, he no longer has the revenue to fight the legal battle. If you go the self-help route, you can negotiate later from a position of strength to get a better deal even if you don't want to keep the store."

Whose side do the police take in these apparently absurd situations, where two sides take turns breaking into the same premises? Neither. The police don't get involved in contract disputes. They encourage arguments to be settled in court if they can't be settled amicably.

"The police are not judges," Mr. Levitt says. "In these situations, they have to opt for the status quo."

A recent Toronto case demonstrates how this can work in practice. Nhan Van Nguyen, a 33-year-old franchisee with Toronto-based 3 Pizza 3 Wings Ltd., says he defaulted on royalties. (The amount of the default is disputed by the two parties.) According to Mr. Van Nguyen, the pizza franchisor entered his 3 For 1 Pizza & Wings franchise with a bailiff early on Nov. 5 and changed the locks. Officials at the company have acknowledged this.

Before dawn the next day, accompanied by his lawyer, he re-entered the outlet located at 2382 Lakeshore Blvd. West in Toronto. "We needed to get back into his premises," says David Sterns, a Toronto franchise lawyer who represents Mr. Van Nguyen.

To go to court for an order allowing him back into his store "would have cost him \$20,000 and four to six months." Mr. Van Nguyen could not afford to wait. "This was his premises, and he had every right to be in there."

The franchisee claims that right because of a somewhat unusual twist of circumstances. Mr. Van Nguyen says that he – and not the pizza franchisor – holds a lease on the premises.

In front of a justice of the peace, Mr. Van Nguyen has sworn charges of break and enter and theft under \$1,000 against a manager with the pizza chain who allegedly accompanied the bailiff. He alleges that stock such as cigarettes, his cheque book and \$300 in cash were missing when he re-entered the franchise.

Reza Solhi, president of the pizza chain, says the charge is "nothing but baloney," and litigation experts say that charges sworn by private citizens seldom reach court. However, Mr. Solhi says that the manager named in the charges will demand Mr. Van Nguyen to cover his legal costs when the charges are dealt with.

In a statement of claim filed by the franchisor, it claims it had the right to enter the premises because it holds a long-standing lease on the property. The company also claims that Mr. Van Nguyen breached his franchise agreement by not purchasing supplies from the franchisor and taking orders over his own telephone line. Statements of claim contain allegations that have not been proven in court.

Mr. Sterns says such circumstances require that franchisees use creative means of entry. The bailiff's notice with its red seal and official language make it certain that no locksmith will help. "Our advice was that [Mr. Van Nguyen] should regain access, telephone the police and notify them that there had been an unlawful entry."

The police, he says, viewed it as a civil matter for the courts to decide. But Mr. Sterns says it was crucial for Mr. Van Nguyen to have a lawyer with him in case police found him in the act of entering and misinterpreted his actions.

The franchisor has since applied to the courts to fight Mr. Van Nguyen's right to carrying on business as an independent while the legal battle with the pizza chain takes shape.

Mr. Levitt urges any franchisee to get proper legal advice before taking matters in their own hands. "Self help should be used only where you have a tactical strategic advantage in using it," he says. "You need professionals who know how to deal with these situations. The secret to walking on water is knowing where the stones are."