Property Litigation

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Welcome

Michael Doran
Partner, Real Estate
Mason Hayes & Curran
Speakers and topics

**Eimear Collins**  
*Partner, Dispute Resolution*  
**Topic** – *To break or not to break - Recent disputes in commercial leases*

**Peter Johnston,**  
*Senior Associate, Dispute Resolution*  
**Topic** – *Will I stay or will I go – Early termination of commercial leases by tenants*
To break or not to break – Recent disputes in commercial leases

Eimear Collins
Partner, Dispute Resolution
Mason Hayes & Curran
Overview

- Negotiated by the parties - no standard terms
- Governed by contract law – no statutory framework
- Courts will implement terms but will not rewrite
- Not a large body of Irish Case Law – UK Case Law of persuasive authority only
- Decisions seen as harsh as against tenant
Recent disputes in commercial leases

“The tenant shall be entitled to terminate this Lease on 30 April 2015 ("the break date") \textbf{strictly subject to compliance with the following terms and conditions}:\

- Service by the tenant of at least twelve months’ prior written notice on the landlord.

- Discharge by the tenant of the rent and all other outgoings payable under the lease up to the break date.

- Compliance by the tenant of all the tenant’s covenants and conditions under the lease up to the break date.”
“The tenant may terminate this lease at the expiration of the 5\textsuperscript{th} year by serving a notice in writing giving the landlord not less than 12 months prior notice (‘the notice’) of its intention to terminate this lease.

The notice shall not be effective unless it is accompanied by payment of a sum equivalent to 6 months of the rent payable on the date of the services of the notice.”
Procedure

- Usually two stages.
- First stage – service of break notice.
- Second state – delivering up possession on break date having complied with conditions precedent.
“Break Notice Issues”

- Who can serve break notice?
- Who should the break notice be served on?
- Timing of notice?
- Form of notice?
Conditions Precedent – Main Areas of Dispute

- Repairs / dilapidations
- Vacant possession
- Payments due by tenant
Recent UK Supreme Case

- Recent M&S Case in UK has confirmed no refund for any tenant “overpayment” unless expressly provided for in the lease.
Landlord’s Remedies

- Write to tenant confirming break option has not been exercised setting out reasons

- If tenant objects:
  - Issue proceedings against tenant for rent, if not paid
  - Issue proceedings against tenant to perform lease
  - Issue proceedings seeking declaratory order
Take Aways

- Courts recognise and enforce break clauses
- Can be a minefield for tenant
- Non-compliance by tenant of conditions precedent can invalidate break option
- Some degree of uncertainty due to lack of Irish decisions
Will I stay or will I go –
Early termination of commercial leases by tenants

Peter Johnston
Senior Associate, Dispute Resolution
Mason Hayes & Curran
Early Termination by Tenants

“The camel with the broken back is entitled to complain about the last straw”

Hart J., Petra Investments Ltd v Jeffrey Rogers plc (2000) 3 E.G.L.R 120
Early Termination by Tenants

- Non derogation from grant / repudiatory breach
- Section 40 of the Landlord and Tenant Amendment Act 1860 ("Deasy’s Act")
Early Termination by Tenants

Repudiation

where a party to the contract does not perform his contractual obligations and has made his intention to no longer perform his obligations clear, than amounts to a repudiatory breach, and the other party may treat the contract as terminated and sue for damages

Non-derogation from grant

“If one man agrees to confer a particular benefit on another he must not do anything which substantially deprives the other of the enjoyment of that benefit; because that would be to take away with one hand what is given with the other.”
Early Termination by Tenants

Parol Ltd and Carroll Village (Retail) Management Services Ltd

vs

Friends First Pension Funds Limited and Superquinn
“A landlord who either fails to comply with the landlord’s obligation under a lease or acts otherwise in a manner to a sufficient extent so as to substantially prevent a lessee from using the lessee’s premises in a manner contemplated by the lease in question, renders the lease open to being regarded as having been repudiated by the landlord concerned.”
Early Termination by Tenants

1. Recognised Remedy for Tenants in Irish Law

2. Test - “cupable and sufficiently serious to prevent the lessee from carrying on business in the ordinary way…”

3. Difficult
Early Termination by Tenants

Westpark Investments Limited
v
Vencourt Ltd
and
Leisureworld Limited
Early Termination by Tenants

• Section 40 of the Landlord and Tenant Amendment Act 1860 (“Deasy’s Act”)

• “… not containing an express covenant or agreement binding on the tenant to repair the same, shall be destroyed, become ruinous and uninhabitable, or incapable of beneficial occupation or enjoyment, by accidental fire or other inevitable accident, and without the default or neglect of the said tenant, it shall be lawful for such tenant to surrender the said premises…”
Early termination by Tenants

Take Aways

• Difficult
• Subjective
• Topical
Contact Details

Eimear Collins
Partner
Mason Hayes & Curran
t: +353 1 614 5251
e: ecollins@mhc.ie
Contact Details

Peter Johnston
Senior Associate
Mason Hayes & Curran

t: +353 1 614 5282
e: pjohnston@mhc.ie
Contact Details

Michael Doran
Partner
Mason Hayes & Curran
t: +353 1 614 2344
e: mdoran@mhc.ie
Thank you

For any queries on upcoming events, please contact events@mhc.ie

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