Real Estate Update Seminar

Thursday 27 April 2017

@mhclawyers
Chair

Jamie Fitzmaurice
Partner, Real Estate
Mason Hayes & Curran
Burning Buildings

Susan Bryson
Partner, Construction
Mason Hayes & Curran
Reports

- What are the defects?
- What works are required to rectify the defects?
- How urgent are the works?
- How much will they cost?
Legal Advice

• Avenues of recourse
  1. Insurance policy
  2. Recourse to developer/design team/contractor

NB Get the documents and have them reviewed
Construction Litigation

• Do you have a case?
  • Cause of defects – What is wrong?
  • Apportionment of Liability – Who is responsible?
  • Right of Action – Can you bring a case?
    • Contract/ Tort
    • Statute of limitations
Conveyancing Litigation

- Status of Common Areas – Have they transferred?
- MUD Act indemnity
- Conveyancing documents for transfer of common areas
- Original development conveyancing documents
  - Agreement for lease
  - Management agreement
Litigation

• Is the case worth pursuing?
  • Costs
  • Security for costs
  • Mark for recovery
    • Status of defendants
    • Insurance policies
Communications with Fire Officer

- Avoid enforcement action
- Fire Notice
- District Court Appeal
Communications with Home Owners

- AGM/EGM
- Make reports available
- Present professional advice
- Present alternatives
  1. Levy for Litigation
  2. Levy for works
Conclusion

• Get homeowners on board
• Get fire officer on board
• Manage the situation
Owners’ Management Companies

Nick Metcalfe
Senior Associate, Corporate Governance
Mason Hayes & Curran
Owner Management Companies

- Constitutionally fit for purpose
  - Complies with MUD Act
  - Is suitable for operation of the OMC as it is owned and managed

- Control
  - membership by unit ownership
  - Board of directors
Issues: constitution

MUD Act

Voting – one member, one vote (default)

one unit, one vote (section 14(1) MUD Act)

“fair and equitable apportionment” (section 2(4) MUD Act)?
Issues: constitution

Quorum

- Companies Act 2014 default: 2 members present in person or by proxy

- Older companies default: three members present in person
Issues: constitution

Removal of member’s right to vote if any money owed by that member to the OMC is in arrears.

• Standard provision for old and new companies

• Potentially disproportionate where member owns large number of units
**Practical issues**

Missing or incomplete statutory registers

- Offence under Companies Act 2014 (e.g., section 169 for register of members)
- Necessary to identity other members
- Reconstitute from CRO
- Time consuming, scope for inaccuracy
Practical issues

Directors being reluctant to resign

- Ordinary resolution passed at EGM needed if constitution doesn’t provide otherwise

- Members to requisition EGM (directors 21 days to comply)

- Members having to call EGM if (when) directors fail to comply (21 clear days’ notice)

- 28 days’ notice to OMC of intention to remove directors
Solutions

Remedial

- Constitutional issues – special resolution
  - Written unanimous resolution
  - 75% of members voting at an EGM
- Notice period – 21 clear days
- Quorum
- Cost
Solutions

Preventative

• Due diligence – ask questions and identify potential issues

• Take advice on those issues

• Require vendor to remedy steps prior to sale, if possible

• Negotiate an adjustment to the price
Remedies against Defaulting Commercial Tenants

Peter Johnston
Partner, Dispute Resolution
Mason Hayes & Curran
Common Tenant Breaches

- Breach of Finance Covenants
  - Arrears of Rent
    - Arrears of other sums reserved under lease e.g. Service charges, rates, insurance premium
  - User Clause
  - Repair Clause
  - Consent Provisions

- Breach of Non-Financial Covenants
Remedies Arrears of Rent / other sums

- Sue for Arrears
- Petition to wind up tenant company
- Obtain Court Order for possession
- Re-enter if provision in Lease or if breach of condition in lease
Suing for arrears of rent/other sums

Summary Proceedings

District Court
Up to €15k

Circuit Court
€15,001 – €75,000

High Court
Above €75,000
Petition to wind up tenant company

- Debt must be in excess of €10,000
- No priority
- Remain unsecured Creditor
Lease Termination by Court Order – “Rent” Arrears

*It is common for service charges, insurance premiums to be reserved as additional “Rent”*
What is peaceable re-entry

- Landlord/agent physically re-enters a commercial premises for the purposes of terminating the lease
- Service of a notice not sufficient
- Must actually get onto/into the premises – outside premises not sufficient - MacKnight –v-Xtra-Vision
- Legal effect is to terminate the lease from the date of the re-entry releasing the landlord, tenant, guarantors from their lease obligations going forward.
Overview - Peaceable Re-Entry

• It is a fast, effective & economical way in which to terminate commercial lease and obtain possession

• No Court order required / “self help” remedy

• Less legal fees / Less “waiting time”

• However commercial tenants taking steps to try to prevent landlord’s exercising this option
Is there a right to re-enter the premises?

• Identify breach

• Check if breach gives a right to re-enter to terminate lease/breach of condition.

• Does a section 14 notice need to be served – all breaches other than non-payment of rent
  
  • In writing
  • Specify breach
  • Specify what required to remedy breach
  • Call upon tenant to remedy in reasonable timeframe
  • If not remedied landlord will re-enter and determine lease
**Procedure**

- Verified that you have right to re-enter?

- Suitable premises – residential aspects, perishable goods, environmental issues, licenced premises?

- Element of surprise - Usually a late night/early morning procedure to try to ensure no one in the premises!

- Peaceable  
  If have a key to premises use it!  
  If not - cause minimal damage in gaining entry – bore through the barrel of lock  
  If there is resistance, do not proceed

- Secure premises once entry gained

- Letter to former tenant notifying it of re-entry/lease termination
What can a tenant do?

- Relief from forfeiture / injunction – even if all procedures have been properly followed
- Damages
- Deal
High Court lifts legal bar on sale of Lynam's Hotel on O'Connell Street

Lynam's Hotel on O'Connell Street

Aodhan O'Faolain
April 4 2017 6:42 PM

The High Court has removed a legal notice which it was claimed was holding up the sale of a Dublin city hotel which had been used to accommodate homeless families.
Take Aways

- Rateable valuation
- What’s your objective
- MHC is always just a phone call away!