

Rarely Used Way Of Terminating A Lease

Most well-drafted leases of premises in Scotland contain an irritancy clause - a mechanism which allows the landlord to terminate the lease in the event that the tenant breaches its obligations under the lease. But what if the lease does not contain an irritancy clause?

The landlord may be entitled to rescind the lease on the basis that the tenant is in material breach of its obligations. Such cases are rare.

The recently decided Court of Session case of Crieff Highland Gathering Limited v Perth & Kinross Council is one such case. In 1983, Crieff Highland Gathering (CHG) granted the Council a sixty year lease over a park in Crieff. The Council were to maintain and promote the park's sporting facilities and relieve CHG of the responsibility of its day-to-day management. Difficulties arose, however, when CHG obtained planning permission to sell the ground for development as a site of a Sainsbury's supermarket. CHG tried to terminate the lease, ostensibly on the grounds that the Council had failed to maintain and repair the park.

The Court's view of the law is that a landlord cannot terminate a lease unless all of the following conditions are satisfied:

1. the tenant has committed a material breach of the lease;
2. the landlord has given the tenant a fair and reasonable opportunity to fulfil its contractual obligations; and
3. the tenant has demonstrated an unwillingness or inability to perform its contractual obligations in the future.

What is a 'material' breach?

The breach cannot be trivial: it must go to the root of the contract. In the Crieff case, it was decided that the Council was in breach because it had failed to carry out repairs to boundary walls of the park. But the breach was not material: the poor state of the walls had never been sufficiently serious to stop the public making full use of the park as a municipal sports ground and for the annual Highland Gathering event.

What is a 'fair and reasonable' opportunity?

This will depend on the particular circumstances of each case. In the Crieff case, the period given by CHG to the Council to repair the boundary walls was held to be unreasonable.

Future breaches

The Court ruled a landlord cannot rescind the lease solely on the basis that the tenant has committed past breaches of their obligations under the lease. The tenant must be unable or unwilling to implement its obligations in the future. This confirms that the right to rescind a lease for material breach is narrower than the general right to rescind other types of contract. In the Crieff case, the Council had eventually carried out repairs to the boundary walls, albeit after CHG purported to terminate the lease, and had also made it clear that it was committed to continuing to run the park as an important public facility and to fulfilling its contractual obligations for the remaining thirty years of the lease.

As CHG had not satisfied any of the 3 conditions for rescission, they were not entitled to terminate the lease.

In contrast, although the ability of a landlord to irritate a lease is not straightforward where the breach is not simply arrears of rent or service charge, the contractual remedy of irritancy puts the landlord in a better position - mainly due to the importance attached to past breaches as opposed to the prospect of future breaches.

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