A. Re-Development

- many reasons/types: old commercial, COVID affected, potential for residential use; office to residential; de-malling;
- complete change: demolition; partial re-development
- significant curb on ability to re-develop is existing tenancies: covenant for quiet enjoyment; absent specific contractual provisions, can't simply terminate leases

B. Demolition Clauses; Re-Development Clauses; Termination on Sale

(i) **Demolition Clauses**:

- if an Offer to Lease doesn't include one, can't impose it in the lease
- bargaining power: if tenant can resist altogether, should resist
- if a tenant can't avoid altogether, try to soften:

(A) require that it only be in the renewal/extension term (if there one) or if not, no earlier than several years into the term
(B) require as much advance notice as possible: at least 6-12 months
(C) require compensation for unamortized leasehold improvements and/or allowance for moving
(D) require that it only be for actual demolition or substantial renovation and not simply if LL intends to re-develop and must directly affect the premsies vs. some part of the development
(E) require evidence of bona fide intent to demolish: demolition permit being available or other evidence
(F) require "favourite nations" treatment
(G) language needs to be clear: cases involving lack of clarity
(H) avoid covenant not to oppose any re-zoning, minor variances etc.
(I) research market, area, likelihood of future re-zoning and re-development
(J) look at sample clauses

(ii) **Re-Development without Demolition of Premises:**

- re-development doesn't necessarily require termination of the lease or permanent re-location
- if re-location, ensure all costs are covered, proper notice, similar new premises (size, windows, view, floor level; turnkey new space ready before move-out); compensation
- as far as control of development, ensure that any development activity does not interfere with use, view, visibility, access, parking, change the character of the building (eg. if in major centre with variety of retail uses, don't want to change to only a few retail and primarily res
- require tenant consent to any material change in site plan or the above; maintain any exclusive covenants; blackout periods during which cannot re-locate
- **look at sample clauses**

(iii) **Termination on Sale:**

- best for LL, not good for tenant

- if tenant must agree, require as much notice; actual closing and to arm length 3rd party in bona fie sale (as opposed to conditional sale or sale to related party)

C. Cases Involving Termination with a Demolition Clause

The following cases demonstrate instances in which the landlord tried to enforce a demolition clause in the lease and specifically show how a landlord should avoid conditional/qualified "demo" clauses.

In the Ontario case of *Meridian CC Intl Inc. v. 2745206 Ontario Inc*., the lease contained a qualified demolition clause that allowed the landlord to terminate the lease on 180 days' notice if the landlord desired to remodel or demolish any part of the premises "to an extent that renders continued possession by the tenant impracticable". The landlord sought to enforce the demo clause and the tenant resisted termination. Although Ontario Superior Court held that the landlord was entitled to rely on the demo clause, the Court of Appeal found that the lower court failed to determine the factual question of whether the landlord's proposed renovations rendered "continued possession by the tenant impracticable". The matter was referred back to the Superior Court and is yet to be decided but shows some of the pitfalls of a qualified demo clause.

In contrast, in the Ontario case of *Fairweather Ltd. v. RioCan YEC Holdings Inc.,* the parties negotiated a demo clause which afforded the landlord the unconditional and unilateral right to terminate for demolition purposes. While the original lease did not include a demo clause, the parties subsequently entered into a Lease Amending and Extending Agreement which included a redevelopment termination clause allowing the Landlord to exercise a right of termination if there is an intention to demolish, redevelop or renovate all or any part of the shopping centre, at any time upon fiving 3 months' notice, without any compensation whatsoever. The full clause read as follows:

> If there is an intention to demolish, redevelop or renovate ***all or any*** part of the Shopping Centre, then notwithstanding any other provision of this Agreement, the Landlord's rights in the event of Tenant default, and the exercise by the Tenant of any option to extend or renew, the Landlord, or its successors and assigns, may terminate the Lease ***at any time*** upon giving the Tenant at least three (3) months' notice of such termination (the "Notice"), ***without any compensation or contribution by the Landlord whatsoever***. On the termination date set out in the Notice (the "Termination Date"), the Tenant shall deliver vacant possession of the Leased Premises to the Landlord in the same condition in which it was required to keep the Leased Premises in accordance with the provisions of the Lease. Rent and any other payments hereunder shall be apportioned to the Termination Date. The Tenant covenants and agrees to execute all documentation requested by the Landlord to carry out the intent of this section.

The landlord began a renovation of the shopping centre and provided the tenant with a terminate notice purportedly to exercise its right under the terminate clause. The Tenant disputed the notice of termination, arguing the right to terminate the lease is limited to circumstances where the landlord truly required the tenant's leased premises to carry out the redevelopment, which it asserted the landlord had failed to demonstrate. The landlord submitted that its rights under the clause were not conditional on its ability to demonstrate any additional requirements and that the clause was clear and unambiguous. The court found that the language did not include any requirement for the landlord to show that the intended renovation specifically required the tenant's space, pointing out that the clause stated the right arose where "there is intention to…renovate all *or any part* of the shopping centre". The parties had agreed to the clause and notice periods when entering the extension agreement, The court determined the notice was valid.

In the PEI case of *Crane v. Pharmtech Inc*., the parties entered into a lease agreement which allowed for the landlord's termination in the event that the landlord "bona fide requires the premises for redevelopment or demolition". The landlord served notice of termination and the tenant sought an interlocutory injunction restraining the landlord from interfering with its possession of the premises. The court found the evidence provided by the landlord for its plan to demolish the building was "thin" and that the provided plan showed no structural changes to the floors, ceilings, exterior walls or load bearing walls. The court found the landlord did not show "bona fide" intent to demolish the building, but at most a re-configuration of an existing space. The tenant was granted an injunction so issues could be determined at trial.

D. Cases Involving Termination with No Demolition Clause

Tenants are far greater consumers of injunctions than landlords[1]. A landlord wishing to terminate due to purely financial reasons may apprehend that a tenant will be able to frustrate plans by obtaining an injunction restraining termination of reinstating the lease. When it appears that the landlord is about to do something which may cause a tenant to seek an injunction the landlord should give its litigation counsel forewarning of the possible claim by the tenant as injunctions tend to come up quickly and the ability to respond quickly to the interim injunction motion is critical[2].

When considering a party's chance of success on an interim injunction you must consider the three stage test set out by the House of Lords in *American Cyanamid Co.*[3]as adopted by the Supreme Court of Canada in *R.J.R. Macdonald Inc.*[4]*:*

1. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious issue to be tried;
2. Second, it must be determined whether the applicable would suffer irreparable harm if the application were refused;
3. Finally an assessment must be made as to which of the parties would suffer greater harm form the granting or refusal of the injunction pending a decision on the merits.

In *Evergreen Building Ltd. v. IBI Leasehold Ltd.,* 2005 BCCA 583, the landlord wished to demolish its 10-storey office building and replace it with a 21 storey residential tower. The landlord sought to prematurely terminate the lease in order to convert the property. The 7th floor tenant, having a subsisting lease with right of renewal, resisted the landlord's efforts to terminate its lease, noting the absence of a demolition clause allowing the landlord to terminate early under the prescribed circumstances.

The Landlord acknowledged it would be in breach of the lease for bringing it to early termination and also acknowledged the tenant's right to compensation for the breach of lease. However, it asserted that such compensation should be based on actual loss and that the breach should give right to a remedy in damages and not to specific performance. The court reaffirmed that specific performance and not damages will be available if it can be shown that the leased premises are unique[5]. In the circumstances, the terms of the lease were particularly favourable to the tenant - e.g. low annual rent, allowance for tenant's improvements, and the tenant had invested its own funds in tenant improvements.

At summary trial, the tenant was granted an interlocutory and permanent injunction enjoining the breach of the covenant of quiet enjoyment and restraining the landlord from breaching the lease on the

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[1] "Default Remedies", Wolfgang Kaufman, I.C.S.C (March 2000) at page 23
[2] "Default Remedies", Wolfgang Kaufman, I.C.S.C (March 2000) at page 23
[3] *American Cyanamid Co.v. Ethicon Ltd. [1975] A.C. 396 (H.L.)*
[4] R.J.R. Macdonald Inc. v. Canada (Attorney General) (1994) 54 C.P.R. (3d) 114 at 130 (S.C.C.)
[5] 2005 BCSC 1161 (B.C. S.C. [In Chambers]) at para. 30.

ground that its breach could not be remedied by damages in lieu of specific performance. While the British Columbia Court of Appeal held that the chambers judge erred in granted a permanent injunction, the British Columbia Court of Appeal re-instated the interim injunction and remitted the issue of permanent injunction to the British Columbia Supreme Court to consider the factors relating to the uniqueness of the property and an assessment of the balance of convenience.

In *1465152 Ontario Limited v. Amexon Development Inc.* 2015 ONCA 86, the Landlord decided it wanted to demolish the building and redevelop the property in the absence of a demolition clause or right of the landlord to issue a notice to vacate. It was successful in negotiating lease termination agreements with all the tenants in the property except for the respondent. The notice issued to the tenant did not allege the tenant had breached a term of the lease nor did it identify any provision of the lease under which the landlord was purporting to re-enter the premises. The Tenant commenced an application seeking a permanent injunction restraining the Landlord from terminating the lease.

An injunction will only be granted for breach of contract where damages are an inadequate remedy. The landlord's position was that an award of damages would adequately compensate the Tenant because the leased premises was not unique of special in any way.

The Court quoted Robert J. Sharpe, *Injunctions and Specific Performance* as follows:

> **Where the plaintiff complains of an interference with property rights, injunctive relief is strongly favored**. This is especially so in the case of direct infringement in the nature of trespass.
>
> …
>
> The reason for the primacy of injunctive relief is that an injunction more accurately reflects the substantive definition of property than does a damages award. It is the very essence of the concept of property that the owner should not be deprived without consent. An injunction brings to bear coercive powers to vindicate that right. Compensatory damages for a continuous and wrongful interference with a property interest offers only limited protection in that the plaintiff is, in effect, deprived of property without consent at an objectively determined price. Special justification is required for damages rather than an injunction if the principle of autonomous control over property is to be preserved. A damages award rather than an injunction permits the defendant to carry on interfering with the plaintiff's property.

The court could not determine whether the tenant would be adequately compensated by damages and dismissed the Landlord's appeal of the permanent injunction, stating:

> **Where there is a direct interference with the plaintiff's property constituting a trespass, the rule favoring injunctive relief is even stronger than in the nuisance cases.** Especially where the trespass is deliberate and continuing, it is ordinarily difficult to justify the denial of a prohibitive injunction. A damages award in such circumstances amounts to an expropriation without legislative sanction … In trespass, there has been less concern than in nuisance with the problem of "extortion". Even if the plaintiff is merely holding out for the highest possible price, and suffers no out-of-pocket loss because of the trespass, the courts have awarded injunctions. Such orders may be said to vindicate the plaintiff's right to exploit the property for whatever it is worth to the defendant and prevent the defendant from circumventing the bargaining process.

Landlords must also be wary to include demolition clauses where the tenant is over-holding the property. In the British Columbia case of *0723922 B.C. Ltd. v. Karma Management Systems Ltd.,* the lease included a renewal option in favour of the tenant, but specified that such renewal term shall contain a demolition clause with 180 days of notice to be provided if exercised. The tenant never actually exercised the renewal option but the lease continued past its original expiry date as a month-to-month tenancy. The landlord attempted to terminate the lease on the basis of the "demo" clause and gave 180 days' notice. The

court found the demo clause was not a valid basis upon which the tenant could terminate, as the tenant never exercised its renewal option, and the terminate notice was deemed ineffective. Note that while the landlord could not enforce the demolition clause, it could terminate the tenancy on 30 days' notice as the tenant was a month-to-month tenant.