Full Rent Acceleration as Enforceable Liquidated Damages in Commercial Leases: What Massachusetts' High Court Means for Risk Allocation and Drafting

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Introduction

In *Cummings Properties LLC v. Hines,* 492 Mass. 867 (September 25, 2023), the Massachusetts Supreme Judicial Court affirmed the enforceability of a commercial lease's full rent acceleration clause as liquidated damages, confirming that such provisions are not per se penalties and need not be conditioned on a landlord's reletting of the premises. The Court's decision reversed the Appeals Court and restored confidence that negotiated acceleration provisions can be enforced as written, subject to the traditional liquidated damages analysis.

Applying a "single look" approach, the SJC evaluated the clause based on the circumstances at contract formation, a framework that, while used in some jurisdictions, is not universal and therefore warrants careful drafting by leasing practitioners operating in multiple jurisdictions. The Court held the clause was not an unenforceable penalty, that its enforceability did not turn on if, or when, the premises were relet, and that the guarantor was sufficiently sophisticated to be bound by the provision.

For ACMA members, the opinion underscores that remedies provisions allocating default risk beforehand—when negotiated by sophisticated parties—are likely to be honored in Massachusetts without a mandatory offset for future reletting.

Facts of the Case

Cummings Properties, LLC, the landlord and the plaintiff, entered into a five-year lease with Massachusetts Constable's Office, Inc., the tenant, for office space in Woburn, Massachusetts. The monthly rent was $1,364.50. At the time of the decision, the landlord owned over eleven million square feet of commercial real estate in Woburn. The tenant, a service of process company, had recently secured a new contract with the Massachusetts Department of Revenue. The tenant moved its offices to Woburn, where it expected that most of its business with the Department of Revenue would occur.

Darryl C. Hines, the defendant, the founder and the sole officer and director of the tenant, guaranteed the lease. Hines agreed to "personally and unconditionally guarantee[] the prompt payment of rent by LESSEE and the performance by LESSEE of all financial and nonfinancial obligations arising out of…this lease."

Less than a month after the parties signed the lease, the Department of Revenue "suspended its contract" with the tenant. The guarantor contacted the landlord to "explore his options with regard to the lease". The landlord permitted the tenant to pay the security deposit of $2,700 in three equal installments, but refused to release the tenant from the lease or make any other accommodations.

The following month, the tenant failed to pay the rent due.

The lease permitted the landlord to terminate the lease and accelerate the rent if the tenant defaulted on a payment and failed to cure within ten days pursuant to the following clause:

> "In the event that ... LESSEE defaults in the observance or performance of any term herein, and such default is not corrected within 10 days after written notice thereof, then LESSOR shall have the right thereafter, without demand or further notice, to declare the term of the lease ended, and/or to remove LESSEE's effects, without liability, including for trespass or conversion, and without prejudice to any other remedies. If LESSEE defaults in the payment of any rent, and such default continues for 10 days after written notice thereof, and, because both parties agree that nonpayment of said sums is a substantial breach of the lease, and, because the payment of rent in monthly installments is for the sole benefit and convenience of LESSEE, then, in addition to any other remedies, the net present value of the entire balance of rent due herein as of the date of LESSOR's notice, using the published prime rate then in effect, shall immediately become due and payable as liquidated damages, since both parties agree that such amount is a reasonable estimate of the actual damages likely to result from such breach."

The landlord delivered a default notice to the tenant, asserting that failure to pay rent due within ten days "shall result in the automatic termination of the lease without further notice," eviction and liquidated damages owed to landlord in the amount of $74,076.24, which the landlord later described as representing two months' rent plus the "[n]et present value of future rent owed pursuant to the commercial lease."

The tenant failed to cure and the landlord filed a summary process action against the tenant. Shortly thereafter, the landlord and the tenant resolved the action with an agreement for judgment, providing for a judgment for the landlord on possession and damages and a waiver by the tenant of all rights of appeal. Hines signed the judgment on behalf of the tenant. Inexplicably, the tenant was not represented by counsel.

Approximately one year after the tenant vacated the premises, the landlord relet the premises by entering into a new four-year lease with a new tenant. Almost three years after entering into the new lease, the landlord filed a complaint in Superior Court against Hines, as guarantor under original lease, to enforce his obligations under the lease.

Trial Court

The trial judge in Superior Court ruled in favor of the landlord. The judge concluded that the liquidated damages provision was enforceable because "damages equivalent to the amount owed during the full term of the contract" was a reasonable estimate of the landlord's anticipated damages. The Court also determined that the guarantor was "sufficiently sophisticated" to be held to the terms of the lease, including the rent acceleration clause. The court awarded the landlord $82,143.01, comprising damages, prejudgment interest, and costs.

Appeals Court

The Appeals Court reversed the Superior Court, holding that the liquidated damages provision "bears no reasonable relationship to expected damages and is thus unenforceable as a penalty." The Appeals Court was clearly troubled by the significant benefit the landlord would receive because the acceleration clause would permit the landlord to relet the premises, collect rent from the new tenant, "and recover all the remaining rent owed by [the tenant], without having to account for the rent received from the new tenant during the term of the original lease."

SJC Decision

The SJC reversed the Appeals Court and affirmed the Superior Court, concluding that the liquidated damages provision was a reasonable prediction of damages at the time the lease was entered into by the parties. The Court acknowledged that a liquidated damages provision can result in an "unwarranted penalty" and "harsh results" for some and a "windfall" for others. However, the Court noted that "[i]t has long been the rule in Massachusetts that a contract provision that clearly and reasonably establishes liquidated damages should be enforced, so long as it is not so disproportionate to anticipated damages as to constitute a penalty."[1]

A. Single Look Approach

The Court tests the enforceability of liquidated damages clauses by analyzing the circumstances at the time the contract was formed, known as the "single look" approach.[2] This is in contrast to the "second look" approach, which considers the circumstances at the time of the breach.

The Court wrote that under the single look approach, a liquidated damages clause will be enforced if (1) the actual damages resulting from a breach were difficult to ascertain at the time the contract was signed; and (2) the sum agreed on as liquidated damages represents a "reasonable forecast of damages expected to occur in the event of a breach."[3]

As to the first prong, the Court held that the trial judge properly concluded that damages were difficult to ascertain. The guarantor had claimed with no evidence that the landlord was a "high-volume commercial landlord" likely to relet the premises upon a default. The Court agreed with the trial judge's conclusion that "there was no way to predict when a breach might occur, whether or when a new tenant would be secured, what the new rent might be, and what costs [the landlord] would incur in the meantime…"

As to the second prong, the Court held that where, as here, the liquidated damages amount provided for in the lease represents the agreed-on rental value of the property at the time of the breach and decreases during the term of the lease, it is a "reasonable anticipation of damages that might accrue from the nonpayment of rent."[4] The Court noted that it never has required that liquidated damages clauses account for future rents from a new tenant to be enforceable.

The Court further noted that "where a contract is unambiguous and freely entered into, it is preferable for parties to bargain with one another as they see fit, rather than to have

courts step in to decide whether and how to restructure a contract because certain contingencies were not accounted for by one of the parties."

B. Second Look Approach

The Court's reasoning is an express repudiation of the second look approach. The Court conceded that the second look approach allows for an "after-the-fact adjustment to avoid a windfall" for the landlord by considering the reasonableness of the provision against the actual damages from the default. But the Court maintained that the single look approach best reflects the expectations of the parties, promotes certainty, resolves disputes efficiently and avoids litigation. The second look approach, in the Court's view, encourages litigation so an aggrieved party can attempt to show that the liquidated damages amount is unfair.

The Court stated that many jurisdictions similarly have determined that under the single look approach, actual damages are not relevant in determining the enforceability of a liquidated damages clause.[5] The Court further noted this is the case even where enforcing the clause resulted in the party that did not commit the breach receiving more than it would have under the original contract.[6] The Court further noted that despite some jurisdictions adopting the single look principles, they have included exceptions in the analysis to change it significantly.[7]

C. Sophistication

The guarantor claimed, in what seemed like a final, desperate attempt to avoid liability, that he was not a sophisticated party; therefore, he should not be bound by the liquidated damages provision. The Court rejected this contention, relying on the trial judge's determination that the guarantor was "sufficiently sophisticated to be held to the provisions of the contract he signed." At trial, the guarantor contended that his previous lease was an informal arrangement and this had been his first lease negotiation with a large commercial landlord. He stated that he did not read the lease carefully before signing it on behalf of the tenant and as personal guarantor, and he was not represented by an attorney. However, the record showed that he had started at least two businesses, converted the tenant entity from a for-profit to a not-for-profit company, had up to ten employees and ran another company that provided tax preparation services. This all contributed to the trial judge's determination of the guarantor's sophistication.

REBA and Abstract Brief

It is worth noting that the Real Estate Bar Association for Massachusetts and the Abstract Club[8], filed a joint amicus brief with the SJC, urging adoption of the Appeals Court's approach. In simple terms, the amici argued that the primary objective of default damages is to give the landlord the benefit of its bargain, which is to put the landlord in the same position it would have been had no default occurred[9], not to permit the landlord to receive "duplicative rent payments for the same premises for the same periods of time."[10] Permitting "full rent acceleration" without accounting for fair market rental value in almost every circumstance of a tenant default overstates damages and functions as a penalty.[11]

The amici framed longstanding and conventional commercial leasing practice as requiring damages provisions to account for reletting income, contending that a full acceleration remedy typically yields amounts grossly disproportionate to anticipated loss unless offset by the premises' fair rental value.[12]

They advocated affirmance of the Appeals Court's reasoning that a reasonable forecast at formation must include either crediting reletting rents or discounting the stipulated sum to reflect the likelihood of reletting.[13]

The SJC disagreed. By upholding full acceleration as a permissible liquidated measure without a mandatory reletting offset, the Court declined the amici's proposed rule that would effectively require embedding mitigation into every acceleration formula. In short, while the amici characterized "modified rent acceleration" (net of fair market rental value) as the conventional and legally tenable approach, the SJC held that Massachusetts law does not deem a full acceleration clause a penalty per se, and that enforceability remains a function of the traditional liquidated damages test applied to the parties' bargain.

Takeaways

The SJC's analysis returns to first principles: were damages difficult to ascertain at formation, and was the stipulated sum a reasonable forecast of anticipated loss? Answering those questions in the affirmative, the Court rejected a rule that would require offsets for future reletting or impose a duty to net out potential mitigation within a liquidated damages amount . Enforceability turned on the parties'

agreement and the clause's reasonableness at formation, not on subsequent reletting out-comes, and was not conditioned on whether or when the landlord relet the premises.

For commercial finance and leasing counsel, the emphasis on contract certainty and party sophisti-cation signals that well-drafted acceleration provisions—negotiated between knowledgeable par-ties—will be honored unless shown to be punitive rather than compensatory.

End Notes:

[1] Cummings Props., LLC v. Hines, 492 Mass. 867, 869–70, 217 N.E.3d 604, 607–08 (2023), citing TAL Fin. Corp. v. CSC Consulting, Inc., 446 Mass. 422, 431, 844 N.E.2d 1085 (2006), citing Kaplan v. Gray, 215 Mass. 269, 270-273, 102 N.E. 421 (1913).

[2] Cummings Props., LLC v. Hines, 492 Mass. 867, 870, 217 N.E.3d 604, 608 (2023), citing Kelly v. Marx, 428 Mass. 877, 880, 705 N.E.2d 1114 (1999).

[3] Cummings Props., LLC v. Hines, 492 Mass. 867, 871, 217 N.E.3d 604, 608 (2023), citing NPS, LLC, 451 Mass. at 420, 886 N.E.2d 670, quoting Cummings Props., 449 Mass. at 494, 869 N.E.2d 617.

[4] Cummings Props., LLC v. Hines, 492 Mass. 867, 872, 217 N.E.3d 604, 609 (2023), citing NPS, LLC, 451 Mass. at 422, 886 N.E.2d 670, quoting Cummings Props., 449 Mass. at 496-497, 869 N.E.2d 617.

[5] See, e.g., Old Colony Constr., LLC v. Southington, 316 Conn. 202, 222, 113 A.3d 406 (2015); Proulx v. 1400 Pa. Ave., SE, LLC, 199 A.3d 667, 673-674 (D.C. 2019).

[6] See, e.g., Guiliano v. Cleo, Inc., 995 S.W.2d 88, 100-101 (Tenn. 1999); Stein Eriksen Lodge Owners Ass'n v. MX Techs. Inc., 2022 UT App 30, ¶¶ 57-59, 508 P.3d 138.

[7] "See, e.g., General Elec. Capital Corp. v. Nucor Drilling, Inc., 551 F. Supp. 2d. 1375, 1381 (M.D. Ga. 2008) (mitigation required under Georgia law to enforce liquidated damages clause); Fortune Bridge Co. v. Department of Transp., 242 Ga. 531, 532, 250 S.E.2d 401 (1978) (liquidated damages clauses presumed unenforceable in close cases); 172 Van Duzer Realty Corp. v. Globe Alumni Student Assistance Ass'n, 24 N.Y.3d 528, 536-537, 2 N.Y.S.3d 39, 25 N.E.3d 952 (2014) (remanding judgment enforcing liquidated damages clause for consideration of actual damages); Frank Nero Auto Lease, Inc. v. Townsend, 64 Ohio App. 2d 65, 71, 411 N.E.2d 507 (1979) (mitigation required to enforce liquidated damages clause)."

[8] REBA is the largest specialty bar in the Commonwealth of Massachusetts, a non-profit organization in existence for over 100 years with nearly 2,000 members practicing throughout the Commonwealth. The Abstract Club is a voluntary association of experienced real estate lawyers. Founded over 150 years ago, with membership limited by its by-laws to 100 members, it is comprised of lawyers who are considered leaders in the field of real estate law.

[9] CUMMINGS PROPERTIES, LLC, Plaintiff-Appellee, v. Darryl C. HINES, Defendant-Appellant., 2023 WL 3236315, at 13.

[10] CUMMINGS PROPERTIES, LLC, Plaintiff-Appellee, v. Darryl C. HINES, Defendant-Appellant., 2023 WL 3236315, at 19.

[11] CUMMINGS PROPERTIES, LLC, Plaintiff-Appellee, v. Darryl C. HINES, Defendant-Appellant., 2023 WL 3236315, at 23–24.

[12] CUMMINGS PROPERTIES, LLC, Plaintiff-Appellee, v. Darryl C. HINES, Defendant-Appellant., 2023 WL 3236315, at 23–24.

[13] CUMMINGS PROPERTIES, LLC, Plaintiff-Appellee, v. Darryl C. HINES, Defendant-Appellant., 2023 WL 3236315, at 27.