



Commercial Property Update

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Enforcing upwards only rent review clauses

In a recent case in relation to the appointment of an arbitrator to carry out a rent review on premises held under a 35 year lease with a five yearly upwards only rent review clause, the Master of the High Court considered the enforceability of these clauses (*Kidney v Charleton* 29 January 2009). It is very important to bear in mind that the Master's comments are not the same as a formal court ruling which states the law and can be binding on other courts.

The Master suggested that:

1. Courts could strike out or sever the upwards-only clause on public policy grounds (the principles and values that underpin the operation of the legal system). In reality, the courts are slow to interfere with commercial arrangements made between parties on these grounds as this would undermine the nature of contractual relations and lead to uncertainty in the marketplace.
2. Because of the economy the government could introduce retrospective legislation to invalidate existing upwards only rent review clauses. There is a common law presumption against retrospective effect for all legislation. That is not to say the Government would not introduce retrospective legislation but a number of factors would have to be weighed up as it could be argued that it would constitute a failure by the State to vindicate the property rights of those affected. As O'Higgins CJ in *Hamilton v Hamilton* ([1982] IR 466) stated "Retrospective legislation, since it necessarily affects vested rights, has always been regarded as being *prima facie* unjust."
3. An arbitrator could question the validity of upwards-only clauses. This is outside an arbitrator's powers as his appointment relates only to the actual valuation of the property for rent review purposes. Therefore an arbitrator who did question these clauses could be legally challenged.
4. Where a rent review clause is unclear the courts, when looking at how to interpret it in the current economic climate where rents are falling, could strike it down. It is important when drafting a lease that all clauses are clear and unambiguous so that this does not occur. However where a court has to interpret a clause which is unclear it always tries to do so in a way that reflects the intent of the parties at the time of making the lease.

Guide for management company directors and property owners

Two publications offering advice on property management companies were published by the Director of Corporate Enforcement on 17 December 2008:

- A *Property Owner's Guide to Company Law* is a booklet that explains the role and function of management companies, their directors and members.
- A more detailed *Company Law Handbook on Residential Property Owners' Management Companies* is intended to be a self-help guide for management company directors and property owners. It discusses the role of management companies relative to managing agents; the voting power of property owners in management companies; the appointment of management company directors; and directors' duties.

See

http://www.odce.ie/en/media_decision_notices_article.aspx?article=12636a04-7d07-4aa8-ba47-eeeb9a8fbc74&mode=author



Environmental Liability Directive: implementation

The European Communities (Environmental Liability) Regulations 2008 which are effective from 1 April 2009 transpose the majority of the Environmental Liability Directive 2004/35/EC into Irish law. This Directive is one of the most significant pieces of EU environmental legislation to date. In some respects existing Irish environmental legislation already meets the requirements of the Directive. Although, in general, the liability regime under the Directive is stricter and broader in scope than the existing Irish regime.

Ireland should have implemented the Directive into national law by 30 April 2007. There is also a draft Environmental Liability Bill 2008 which provides for the implementation of the remaining discretionary provisions in the Directive.

The Directive is aimed at the prevention and remediation of environmental damage and is based on the "polluter pays" principle. It therefore aims to ensure that the burden of paying for the prevention and remediation of damage is borne by the polluter, not the taxpayer. "Environmental damage" is defined as damage to protected species and natural habitats, water and land.

The Directive does not impose criminal liability (such as imprisonment and/or fines), instead it requires the operators of "occupational activities" that cause environmental damage to take immediate preventive action; report an imminent threat to the Environmental Protection Agency; or carry out remedial measures. The definition of "occupational activities" includes public and private activities, business and undertakings, irrespective of whether or not they are formed for view to making a profit.

Enforceability of contracts

Background. Specific performance is where a court compels a party to perform its contractual obligations under a contract. It may be granted in addition to or instead of damages.

Facts. Simpson (the defendant) signed a booking advice form registering his interest to purchase a portion of rural coastal land in Cork for €1,500,000 from Kelly (the plaintiff) on the basis of the site's development potential. Kelly's agent presented the site to Simpson as capable of development by demolishing the existing bungalow and replacing it with three houses and said that the local authority planner had said that she would allow three houses on the site. The payment of a deposit was deferred and never sought due to Simpson's business reputation.

An architect's planning report was then received by Simpson as purchaser which said that the Cork County Development Plan indicated that the site was located in a scenic amenity zone with many planning restrictions and concluded that only one additional dwelling may be permitted on the site. Contracts were exchanged and there were a number of postponements of the closing date by both parties. Kelly then sought specific performance of the sale.

Decision. The High Court said that the fundamental ingredients in a contract for the sale of land were that the parties be identified as seller and purchaser, the land be identified with substantial precision and that the price be agreed. It held that normally the motivation for any person selling or buying land is irrelevant to any consideration of the validity of a contract. In an application for a specific performance order, however, it is crucial. The court found that there was no doubt that Kelly's agent was well aware from the first meeting with Simpson of the planning restrictions in the area. The court held that the high purchase price would not have been achieved had Simpson not been induced to believe that the land was more valuable than it actually was. This was a result of the agent's specific misrepresentations which were designed to undermine the planning process. Therefore the court refused to grant specific performance and enforce the contract.

Case: Kelly v Simpson [2008] IEHC 374



Specific performance and delay

Background. Specific performance is where a court compels a party to perform its contractual obligations under a contract. It may be granted in addition to or instead of damages. A defendant who invokes the doctrine of *laches* is claiming that the plaintiff has delayed in asserting its rights, and, because of this delay, is no longer entitled to bring a claim. However, delay alone is not enough to prevent a plaintiff obtaining relief. The consequence of the delay must be that it would be unfair for the court to give relief having regard to all the circumstances.

Facts. A dispute arose in respect of the sale of two tenanted premises in 1998 and whether specific performance of the agreement was possible. The defendant Stewart held the legal title of the premises and was the solicitor for the owner of the premises Kelly who held the beneficial interest. The plaintiff purchaser McGrath insisted on vacant possession but Stewart was not prepared to close the sale on that basis. McGrath alleged that he was intimidated by Kelly to such an extent that he refrained from enforcing his legal rights and then decided to wait until the properties were vacant before pursuing the matter further. Five years later he became aware that the property was vacant and issued a 28-day completion notice requiring Stewart to close the sales. When this did not happen he instituted proceedings. Stewart invoked the doctrine of *laches* in his defence.

Decision. The High Court confirmed that in a conveyance of freehold land it is the duty of the vendor at common law to ensure the purchaser will have clear vacant possession of the entire property on completion. However because of the delay in issuing proceedings the defence of *laches* had to succeed as it would have been inequitable if it did not apply here. Damages were therefore awarded to McGrath in lieu of specific performance.

Comment. The delay of nearly six years resulted in the value of the properties escalating and therefore it would have been unfair to allow the purchaser delay to such an extent and expect to benefit from a rising market, any more than a seller could delay in a falling market.

Case: McGrath v Stewart [2008] IEHC 348

Deposit forfeiture

Facts. The sale of land in Cavan for €4 million was to be completed by 31 October 2007, on condition that planning permission for houses on the land had issued. A deposit of €400,000 was paid. The contract of sale signed in April 2007 provided that the defendant purchasers, the Duffys, had to use “all reasonable endeavours” to secure planning permission by that date. If planning permission had not issued by 30 June 2007 the Duffys were liable to pay 5% interest per annum on the balance of the purchase price up to 31 October 2007. If there was no permission by that date, the contract provided both parties could terminate the contract and the deposit could be refunded to the Duffys without deduction, interest, costs or compensation.

Another condition in the contract stated that if planning permission was not obtained, Lynch (the seller) could resell the property and forfeit the €400,000 deposit. A valid planning application was lodged on 24 October 2007 and the Duffys then asked for their deposit to be returned, saying it was not anticipated permission would issue before 31 October.

Decision. The High Court ordered that the €400,000 deposit paid should be forfeited as the Duffys had not complied with their contractual obligations having failed to use all reasonable endeavours to ensure that planning was granted by the agreed deadline. The evidence in the case was that there were delays in applying for planning permission. Lynch was therefore entitled to keep the deposit because of the failure of the Duffys to expedite the planning application in accordance with the contract.

Case: Lynch v Duffy [2009] IEHC 59



New Sustainable Residential Development Planning Guidelines

On 31 December 2008 the Government launched statutory planning guidelines on Sustainable Residential Development in Urban Areas, which will act as a blueprint for the future sustainable development of Irish cities, towns and villages. The guidelines are accompanied by a best practice Urban Design Manual, which illustrates how the guidelines can be implemented consistently across different scales of urban development.

The guidelines replace the 1999 Residential Density Guidelines for Planning Authorities and have been prepared as part of the suite of inter-related guidance documents, which also include the Apartment Design Standards guidelines (September 2007) and Quality Housing for Sustainable Communities (March 2007). The guidelines are focused on creating sustainable communities by incorporating the highest design standards and providing a co-ordinated approach to the delivery of essential infrastructure and services.

Planning authorities and An Bord Pleanála are required to take the guidelines into account when preparing or varying development plans and local area plans. They can be accessed at www.environ.ie.

If you have any queries on the contents of this update or if you require advice on any aspect of commercial property, please contact Ainsley Heffernan, Head of the Commercial Property Department.

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