



Commercial Property Update

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Modernising land and conveyancing law

The Land and Conveyancing Law Reform Act 2009 which was signed into law on 21 July 2009 reforms and modernises Irish land and conveyancing law. It repeals about 150 pre-1922 statutes, in whole or in part, and replaces them with more modern provisions and simplifies the law governing title to real property. With the exception of section 132 all of the provisions of the Act will come into effect on 1 December 2009.

Some of the key changes are as follows:

- It abolishes archaic laws and concepts such as feudal tenure, fee tails and prohibits fee farm grants.
- The law relating to appurtenant rights and easements which a person may have over another person's land, for example, rights of way, is clarified.
- It abolishes various complicated rules relating to future interests in land, including the rules against perpetuities and accumulations and reforms the law in relation to the variation of trusts.
- It modernises the law relating to co-ownership of land and gives the courts wide powers to deal with disputes between co-owners.
- All legal mortgages over land will be created by way of a charge on the land. This means that the creation of legal mortgages over unregistered land will be the same as for registered land.
- More protections for mortgagors as regards the enforcement by mortgagees of "housing loan" mortgages will be introduced.
- The execution of all documents under seal by individuals will no longer require the affixing of that individual's seal.
- Upwards only rent review clauses. Section 132 of the Act ends upwards only rent review clauses in new commercial leases. It will therefore only apply to new leases from the date of commencement of the section. Rent review clauses in these leases will permit rent to increase, decrease or remain the same by reference to the rent payable immediately before the review date. It will not be possible to contract out of this provision. There is uncertainty as to when, or if, this section will be commenced.

New levy on second homes

The recently enacted Local Government (Charges) Act 2009 provides for a levy of €200 to be imposed on non-principal private residences such as holiday homes and rental properties. Liability to pay it is determined on the basis of ownership of the property on a particular day each year. 31 July is the date for 2009 and the levy must be paid within two months of that date to the local authority in whose area the property in question is located. For tax years 2010 onwards the liability date will fall on the owner of the property on 31 March of that year.

ePlanning launched

On 1 July 09 the Minister for the Environment, Heritage & Local Government, John Gormley launched a new policy for ePlanning aimed at improving the planning system and making it easier and more efficient for both individuals and planning authorities. The new policy will allow for applications online and for third parties to make submissions or objections online. The new system is already running in Dublin on a pilot basis for small applications.

The Minister acknowledged that an online system was suitable for smaller applications, but that at present there remain issues for larger applications due to map and drawing sizes and large accompanying documents.



NAMA legislation

Following a public consultation on a proposal for a draft Bill, the Irish Government published the National Asset Management Agency Bill 2009 (the Bill) to establish the National Asset Management Agency (NAMA) on 10 September 2009. The Bill states that credit institutions must apply within 30 days of the legislation coming into force to the Minister for Finance (the Minister) to participate in the NAMA process.

NAMA's functions. NAMA will be a separate statutory body and will have all necessary commercial powers of a financial asset management company. The Bill sets out in detail NAMA's powers and functions which include:

- a. acquiring eligible bank assets from participating institutions as it considers necessary or desirable for achieving its purposes;
- b. holding, managing and realising those acquired assets;
- c. performing such other functions relating to the management or realisation of those assets as directed by the Minister; and
- d. taking all steps necessary or expedient to protect, enhance and better realise the value of assets transferred to NAMA.

The Minister, after consultation with NAMA, the Governor of the Central Bank, and the Financial Regulator, has very broad powers to prescribe classes of bank assets as eligible for acquisition by NAMA. After listing various types of bank assets such as credit facilities used to finance the development of land, there is a catch all provision in the Bill which covers "any other class of bank asset of a participating institution the acquisition of which, in the opinion of the Minister, is necessary for the purposes of this Act." Participating institutions may challenge the proposed acquisition of a bank asset as an eligible bank asset through the review procedure set out in the Bill. However the Minister will ultimately determine whether or not it is eligible.

Valuing assets. This is the most controversial aspect of the Bill. NAMA will buy bank assets from the participating institutions at a 30% discount in order to take these riskier loan classes away from the balance sheets of the participating banks thus making them more secure. It will do so on the basis of valuations carried out by experts in accordance with a pre-defined valuation methodology set out in the Bill. It provides for an elaborate method of valuation and states that bank assets will be valued at their long term economic value (LTEV) (calculated in accordance with the provisions of the Bill and regulations to be issued by the Minister and European state aid rules). NAMA may, however, after consultation with the Minister, subject to any ministerial regulations and having regard to certain specified factors, determine that the acquisition value of a bank asset shall be its market value or a value (between its LTEV and its market value) that NAMA considers appropriate in the circumstances. The valuation methodology along with all other State aid aspects of the NAMA initiative will be subject to European Commission approval. The payment for the loans will be in the form of Government debt securities and/or subordinated securities. The Bill provides that the participating banks will receive part of the payment for loans in the form of subordinated debt (debt that takes a lower priority than other debt) and NAMA will suspend payments due on that debt if it cannot realise the full value of properties underlying the loans.

Post acquisition. Once acquired NAMA will manage the eligible bank assets to obtain the best achievable return from them and, in effect, will put itself in the place of the institution that originated the loan, and will have all the same rights to pursue debts, where necessary. NAMA has also been given specific statutory powers in order to facilitate enforcement of security/sale of assets, for example, a limited compulsory acquisition power on application to the High Court in certain circumstances; the power to appoint a statutory receiver; the power to obtain a High Court vesting order for land charged in its favour; to dispose of charged assets; and to convey land that has been mortgaged in its favour.

Other issues. The Landlord and Tenant (Amendment) Act 1980 gives tenants the right to a new tenancy in certain circumstances. The Bill states that the right to renew a tenancy in the Act does not apply in relation to a tenancy (other than a renewal of an existing tenancy) granted by NAMA or a NAMA group entity of a tenement unless NAMA or the NAMA group entity specifies otherwise in writing. The Bill also amends this Act to limit the statutory right to new tenancy after an existing lease has expired where NAMA requires possession "within 5 years after the termination of the existing tenancy, for any purpose for which that Agency [NAMA] is entitled to acquire (by purchase or otherwise) property under the National Asset Management Agency Act 2009."



Damages in lieu of specific performance

Case: Joyce v O Shea High Court 31 July 2009

Background. Specific performance is a court remedy that compels one party to comply with the conditions of a contract existing between both parties.

Facts. The plaintiffs (vendors) successfully sought specific performance of a 2007 contract for the sale of development land in Tullow, Co. Carlow to the defendant purchaser for €10,734,356. The purchaser failed to comply with the order. The vendors then brought further proceedings to dissolve the specific performance order which was granted and for damages in lieu.

Decision. The High Court in this case was concerned with assessing the damages in lieu of specific performance for non-completion of the contract by the purchaser. The valuation report before the court in July 2009 valued the land at only €639,200 due to the falling property market, the large number of newly build unsold houses in the town and the fact that the planning permission on the land runs out in 2011. The planned relief road to service the land was put on hold in May 2009 therefore it was suggested by the valuer that the land would now be difficult to sell.

The court held that the measure of damages that the vendors were entitled to were the difference between the contract price and the value of the lands at the date of the dissolution of the specific performance order (22 June 2009). The court accepted the valuer's report and the vendors were held to be entitled to €10,734,356 less the €100 deposit and the current market value of €636,200 which amounted to €10,095,056. A previous decision granting the vendor interest for the delay in completion was also affirmed.

Comment. This case shows how, in a falling market, damages for failing to proceed with a binding contract for sale reflect the nature of the market and can be substantial.

Non-payment of rent: landlord and tenant obligations

Case: Irish Life Assurance PLC v Quinn [2009] IEHC 153

Facts. The plaintiff landlord, Irish Life, took an action for non-payment of rent and service charges against the defendant tenant on foot of his guarantee to pay them for premises at the Irish Life Mall in Dublin. The tenant argued that the landlord was in breach of its obligation of good estate management. This is on the basis that the anchor tenant in the centre left and was not replaced by a tenant of similar quality and that one third of the other units are vacant. The tenant therefore claimed to be entitled to counterclaim for the resultant loss of business. The tenant did not quantify his loss.

Decision. The High Court held that the tenant was liable to pay the amounts owing. The court noted that there was no attempt by the tenant to quantify the loss alleged and no suggestion that following the demand for payment the tenant raised the issue of the landlord's breach of the good estate management obligation as a defence. The court further stated however that if the tenant had raised the issue of the landlord's alleged breach much earlier he may have been entitled to a set-off in equity in relation to a cross claim arising out of the contract.

Comment. This decision shows the importance of raising issues once they become a problem and keeping a written record of all relevant correspondence. If the tenant in this case had done so he may have been successful.

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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