



# Commercial Property Update

## Issue 6

July 2008

### VAT on property changes in force

A complete new VAT on property regime came into force today, 1 July 2008 which will impact on all commercial property transactions. For more detail see Commercial Property Update no 5.

### Estate agent's commission

**Case: Foxtons Limited v Pelkey Bicknell [2008] EWCA Civ 419**

**Facts.** In 2004, the seller signed a sole agency agreement with Foxtons to sell her house. She agreed to pay a sole agency commission of 2.25% or a multiple agency commission of 3% if contracts were exchanged "with a purchaser introduced by Foxtons during the period of the sole agency". In June 2005, Foxtons showed the property to Mr Low, who was looking for a house for his ex-wife. Mrs Low also viewed the property but did not like it.

In July 2005, the seller appointed another agency Hamptons on a multiple agency basis. Foxtons in the meantime continued to act for the seller, but under a multiple agency basis. In October 2005, Mr and Mrs Low visited the property with Hamptons and decided to buy it. The sale was completed in January 2006 and commission was paid to Hamptons. Foxtons subsequently brought proceedings in order to recover their commission. The county court held that Foxtons, having introduced the property to the purchaser, were therefore entitled to commission payable. The seller appealed.

**Decision.** The English Court of Appeal held that Foxtons were not entitled to recover commission. The court decided that the term "a purchaser introduced by Foxtons" in substantive terms meant that if Foxtons were entitled to commission, they would have had to establish that they had introduced the purchaser and that it was this introduction that led to the decision to buy. In this case although Foxtons had shown the purchaser around the property initially, at the time the purchaser was not interested in the property. The purchaser decided to buy at a later date having been shown around the property and negotiated the purchase through different estate agents. This follows the principle that an agent is not entitled to commission on a transaction unless the agent's services were the "effective cause" of the transaction.

**Comment.** Although an English case, it reinforces the need for estate agents to avoid the risk of litigation by ensuring that their terms and conditions on payment of commission are clear.

### Landlord and tenant: right to a new tenancy

**Case: Like It Love It Productions v Dun Laoghaire/Rathdown County Council [2008] IEHC 26**

**Background.** The Landlord and Tenant (Amendment) Act 1980 (1980 Act) as amended by the Landlord and Tenant (Amendment) Act 1994, broadly provides for a statutory right to a new tenancy where a tenant occupies a premises for the purposes of carrying on a business for any term in excess of five years so long as certain conditions are satisfied.

**Facts.** The appellant TV production company was letting on a monthly basis from Dun Laoghaire/Rathdown County Council since 1998. However, the parties had failed to agree terms for a new tenancy. The appellant's application for a new tenancy was refused by the Circuit Court, which held that the tenancy was terminated validly by the Council.

**Decision.** The High Court affirmed the Circuit Court decision and held that the premises were unambiguously let on a temporary basis. Section 5(1) of the 1980 Act excludes a contract of tenancy which is made for the temporary convenience of the lessor or the lessee from the statutory right to a new tenancy under the Act. The wording in the tenancy agreement and later extension by letter between the parties was held to be unambiguous as to the temporary nature of the letting. Therefore the appellant was not entitled to a new tenancy.



## Multi-unit developments report

On 23 June 2008 the Law Reform Commission's report on Multi-Unit Developments was published. It contains 67 recommendations for reform and a draft Multi-Unit Developments Bill for the Government to consider.

**New developments.** The Commission recommends that, for new apartment developments, legislation should be enacted to include the following:

- A developer would have to incorporate an owners' management company (OMC) for apartment developments of five or more units (co-ownership would be possible for smaller developments);
- The developer would be required to transfer legal title of the development to the OMC and must register the title with the Land Registry/Property Registration Authority before any apartment sale is completed (the developer retains the commercially valuable beneficial title to the development);
- Each apartment buyer would have one vote in the OMC and weighted voting would be prohibited;
- Where the common areas (such as lifts and internal stairs) have not been certified as completed under the Building Control Acts 1990 and 2007, the OMC would hold 5% of the purchase money for each apartment in trust for the developer until completion is certified (this is intended to accelerate completion);
- Apartment owners would receive 21 days notice of an annual general meeting and it would have to be held reasonably near the development and at reasonable times;
- Core covenants (mutual agreements) would have to be agreed between developers, unit owners and the OMCs;
- Property managing agents, who are shortly due to be licensed and regulated by the National Property Services Regulatory Authority would be prohibited from having excessive administrative control over an OMC;
- All developments would have to put in place schemes for annual service charges and building investments funds (sinking funds).

**Existing developments.** The Commission recommends that, for existing apartment developments, legislation should be enacted with the following elements:

- All apartment owners must receive 21 days notice of an annual general meeting and it must be held reasonably near the development and at reasonable times;
- All developments must have schemes for service charges in place;
- All developments must provide specified financial information to apartment owners, including how annual service charges will be spent in the next year;
- Within five years of the legislation coming into force, all existing developments must have in place schemes for building investments funds (sinking funds);
- Existing developments should, if they want to, be allowed to convert relatively easily to the OMC system that applies to new developments;
- Core covenants (mutual agreements) must be agreed between developers, unit owners and the owners' management companies;
- The Small Claims Court could deal with non-payment of service charges or building investment funds up to €3,000 (this would also apply to new developments);
- The Circuit Court could make a "remedial order" to allow the rehabilitation of a multi-unit apartment development (for example, in a situation comparable to where a company goes into examinership) (this would also apply to new developments).



## Discovery and privilege

**Case:** *Tír na nÓg Projects Ireland Ltd v The County Council of the County of Kerry* [2008] IEHC 48

**Background.** The purpose of discovery is to make available such documentation that exists and must be shared, whether it is in support of or undermines the respective parties' case.

Legal professional privilege protects against the compulsory disclosure of communications made between a client and his lawyer in which advice is sought or given within a relevant legal context. Litigation privilege applies only where litigation is anticipated or is, in fact, underway.

**Facts.** The plaintiff sought a declaration that the defendant, Kerry County Council (KCC) had been deemed to grant planning permission for a holiday home development as KCC had not made a decision within the time limit specified in the Planning and Development Act 2000. The issue arose as to whether KCC had been in default and whether it involved a material contravention of the relevant development plan. Discovery of a single document which contained legal advice from KCC's solicitor was sought. KCC argued that the document had been placed in error on the public file, had been withdrawn, and could not be the subject of an order for discovery by virtue of legal professional privilege and/or litigation privilege.

**Decision.** The High Court allowed discovery of the document in question and ruled that any privilege attaching to it had been waived by KCC. The document in question was relevant to the issues arising in the pleadings and while the document provided legal advice, it was available on a public file. The question of whether privilege can be said to have been waived in relation to the document in dispute turns on whether objectively, the plaintiff and its advisors should have realised that the disclosure of the document was by mistake. On the facts it was held that there was no error in this inclusion as there was no explanation given by KCC as to how it was put on the public file by mistake. The legal professional privilege attaching to it therefore had been waived.

## Proprietary estoppel and a developer's share of profits

**Case:** *Sutcliffe v Lloyd and another* [2008] EWHC (Ch) 1329

**Background.** Proprietary estoppel can create or affect property rights. It arises from the courts' equitable jurisdiction and occurs when the assertion of strict legal rights is unconscionable. An equity will arise when:

- The plaintiff is induced, encouraged or allowed to believe that it has or will have some benefit over the landowner's land.
- The plaintiff acts to its detriment by relying on this belief, to the knowledge of the landowner.
- The landowner then refuses to allow the plaintiff the benefit expected.

**Facts.** In an earlier hearing, the English Court of Appeal held that a proprietary estoppel had arisen in favour of a developer who had been promised a share in development profits but did not receive them. The English High Court was then asked to determine the issue of how this equity should be satisfied and by whom.

**Decision.** The English High Court could not, on the evidence, assess precisely what the developer's return would have been. It therefore made a broad assessment of the detriment suffered by the developer and charged this as an expense against the property owning company's profits, backed by a personal guarantee from the company director involved.

**Comment.** This is an English case and therefore would not necessarily be followed in this jurisdiction.



## UK House Builders Federation: Code of Conduct amendments

On 16 April 2008, the House Builders Federation (HBF) made changes to its voluntary Homebuilder Code of Conduct, to ensure that its members made prices for newly built houses more transparent. There has been concern that some sales incentives offered by developers selling homes before construction is completed, may distort the value of a property for borrowing purposes and conceal the real amount paid. Therefore under the amended Code, HBF members have agreed to:

- Provide customers with a sales reservation confirmation showing the gross sale price, any sales incentives and the net sale price, and disclose sales incentives and the net sale price in the sale contract.
- Make the sales reservation available to the buyer's conveyancer as a matter of course, and to the lender or valuer on request.
- Disclose to the buyer's conveyancer, all payments above 5% of the gross sale price to third parties that relate to the sale, including introductory and commission payments, but excluding payments to instructed selling agents.
- Notify the buyer's conveyancer of any sales incentives provided to the buyer prior to exchange of contracts, which the buyer's conveyancer must then disclose to the lender.

## Home Information Packs

Part 5 of the English Housing Act 2004 introduced a requirement to have a Home Information Pack (HIP) when marketing a residential property for sale in England and Wales. It became fully operational on 6 April 2008 and the HIP requirements now apply to all residential dwellings in England and Wales. However, they are not required for commercial properties. A HIP is "a collection of documents relating to the property or the terms on which it is or may become available for sale". Examples include title documents, sustainability information and local authority searches.

If a seller instructs an estate agent, the duty to prepare a HIP will generally rest with the estate agent. Failure to comply with the duties may lead to a penalty charge notice being issued by an enforcement officer from the trading standards authority. The intention is that HIPs will give potential buyers relevant information that may affect their decision to proceed and will ultimately speed up the conveyancing process and will help to prevent gazumping.

## BER certificates: application to new non-domestic buildings

Currently all new homes for which planning permission is applied for on or after 1 January 2007 must have a Building Energy Rating (BER) certificate before they can be offered for sale or for rent. The BER certificate is an energy label for buildings similar to that used on electrical appliances. The scale runs from red to green with a score in the red zone representing homes that consume the most energy.

From 1 July 2008 the European Communities (Energy Performance of Buildings) Regulations 2006 will also apply to new non-domestic buildings for which planning permission is applied. The Regulations will apply to all buildings, new or otherwise, when offered for sale or for letting, after 1 January 2009. A limited number of building categories are exempt from the Regulations, for example, protected structures and places of worship.

**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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