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Damages for loss of bargain

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 plaintiff Duffy signed a contract to buy land from the vendor but they could not agree on the boundary. Subsequently, the vendor served a completion notice on the plaintiff which the plaintiff contended was invalid as the vendor was not able to complete the sale. The vendor then sold on the land to someone else. The plaintiff sought specific performance of the contract or damages for loss of bargain.

The High Court held that the plaintiff was entitled to €880,000 damages in lieu of specific performance. The court exercised its discretion to refuse an order for specific performance and to award damages on the basis that the vendor was not ready, willing and able to complete the contract as he had failed to comply with a special condition in the contract; the boundary was still in dispute; and the contract did not provide any mechanism as to how the boundaries should be defined.

In determining the amount of damages the court took into account the loss suffered by the plaintiff purchaser in not getting the property and the loss under that head was the difference between the value of the property at the date of the judgment and the contract price.

Decision. On appeal the Supreme Court affirmed the High Court decision that the court had power to award damages where it refused to order specific performance, save that the award of damages should be adjusted by the deduction of the stamp duty and other expenses which would have been incurred by the purchaser if the sale completed.

Case: Duffy v Ridley Properties Ltd [2008] IESC 23

Rights of way and the right to rescind

Facts. The plaintiff agreed to sell land to the defendants. The plaintiff represented that the property had the benefit of a right of way which provided access to a main road. The right of way was registered in the Land Registry. It transpired that the plaintiff's predecessor in title had sold land between the property and the right of way and therefore the right of way no longer existed. The defendant sought compensation. An arbitrator was appointed to resolve the matter but the plaintiff was uncooperative. The plaintiff then sought to rescind the agreement under the terms of the contract.

Decision. The High Court held that the plaintiff tried to avoid the arbitration proceedings and on the basis of her conduct lost the right to rescind as a vendor's rescission is a restriction on a purchaser's rights and could not be invoked without reasonable cause. Also the right of rescission could not be invoked where a vendor was guilty of recklessly entering into a contract and making a misrepresentation and then trying to rescind the contract when an objection was raised. The plaintiff had also failed to exercise the right to rescind promptly.

Comment. This case emphasises the restrictive nature of the right to rescind and the need to act quickly and reasonably in all cases.

Case: Kiely v Delaney [2008] IESC 69

Landlord and tenant law: renewal rights changes

Since 20 July 2008 all tenants (regardless of user) can contract out of the statutory provisions under the Landlord and Tenant Acts that confer the right to a new tenancy in certain circumstances. This change was introduced by the Civil Law (Miscellaneous Provisions) Act 2008 (2008 Act).

Background. Since 1980 a business tenant could acquire renewal rights after five years continuous use of a 'tenement' or building which rights could only be defeated in narrow circumstances. The law changed in 1994 to allow tenants to waive these provided:

1. They received independent legal advice in relation to the matter and signed a waiver;
2. The waiver was signed before the commencement of the tenancy; and
3. The premises were used exclusively and wholly as office premises.

The desire of landlords to prevent these rights arising led to the concept of 4 years and 9 month tenancies being granted to businesses. Landlords did not wish to allow tenants acquire these rights as it would mean that an element of control would be ceded by landlords as, in the absence of agreement of rent or terms for the renewal of the tenancy, either party had to make an application to the Circuit Court who would determine the terms of the tenancy. The difficulty for non-office users was that it did not always suit either landlords or tenants to leave properties at the end of a 4 year 9 month term. Further, the courts were alert to mechanisms employed by landlords and tenants to defeat the operation of the Landlord and Tenant Acts stating that they would not allow such artificial mechanisms (for example, moving out for a day or week before granting a subsequent 4 year, 9 month tenancy.)

2008 Act. This Act allows all business tenants, regardless of user, to waive landlord and tenant rights provided they receive independent legal advice and sign a waiver. This will mean that the parties can now agree a lease term, which can be for more than five years, and which reflects the commercial realities, with the knowledge that a landlord will have vacant possession at the end of the term, if required. A significant change from the Landlord and Tenant (Amendment) Act 1994 is that the waiver does not have to be signed prior to the commencement of the tenancy.

Advantages

1. Landlords and tenants can now agree commercial terms which will reflect their intentions and wishes.
2. This mechanism can be used for ***existing*** tenancies where a tenant is currently on a short term letting and has built up goodwill and a customer base in particular premises. Now, provided the formalities are properly followed, the landlord and tenant can seek to add another term at the expiry of the existing short term tenancy. Care should be exercised in renewing any lease – bear in mind that more onerous obligations are imposed on tenants in possession for longer terms, particularly in relation to the covenant to repair.
3. Many landlords wish to redevelop their premises and are either caught in the planning process or, where they have planning permission, are finding it difficult to get development finance. Landlords (and their banks) need to get income from their property during the planning / pre-development process and this legislation will enable landlords to let to tenants without the concern that they could acquire renewal rights which would interfere with the landlord getting vacant possession of the property to enable redevelopment.

Disadvantages

1. Most prudent landlords will seek waivers for all leases going forward. While powerful or anchor tenants can resist a landlord's request to contract out, many small businesses will not have this power and thus may have to accept that they will not have renewal rights. This will weaken their position.
2. The rule changes will not affect existing tenancies as the pre-conditions for waiving renewal rights will not have been complied with, that is, tenants will not have signed a valid waiver after receiving independent legal advice. Accordingly the rule changes are not retrospective.

Comment. This legislation, combined with the recent VAT on property changes which came into effect on 1 July 2008, could have a radical effect on future lease terms – it is no longer necessary for tenants to consider taking terms of either 4 years 9 months or in excess of 20 years. Parties to leases are free to negotiate whatever lease duration they wish. If the practice develops of taking shorter lease terms, this will have an implication for valuers in terms of valuing leases and investments. It remains to be seen whether these combined legislative changes will alter current practice.

BER certificates: application to new non-domestic buildings

Under the European Communities (Energy Performance of Buildings) Regulations 2006 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. BER certificates are valid for ten years from the date of issue unless the building is substantially refurbished during that period (in these cases a new certificate will be required post refurbishment). Since 1 July 2008 the Regulations 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 certain agricultural and industrial buildings.

IHBA: code of practice for management companies

The Irish Home Builders Association (IHBA) recently issued a code of practice for management companies in respect of multi-unit developments. The IHBA is the representative body for house builders nationally. The code sets out best practice to be followed by developers who are members of the IHBA in their dealings in relation to the development, interim management and sale of multi-unit development properties. Its scope relates, in particular, to responsibilities around the ownership, management and maintenance of common areas and the provision of common services within multi-unit developments.

The code is applicable to all new multi-unit developments of IHBA members where management company arrangements are put in place after 1 September 2008.

Link to code
http://www.consumerconnect.ie/eng/Hot_Topics/Campaigns/Property_Forum/nca_code_of_practice_developers.pdf

Service charges on commercial property: new code of practice

Launched in June 2008, the new code of practice code for applying service charges in the commercial property sector is a joint initiative by the Irish Property and Facility Management Association (IPFMA) and the Society of Chartered Surveyors (SCS). The code is not mandatory and is not intended to override existing leases. It is recommended best practice that new leases incorporate the new code.

The code addresses the various key areas associated with service charges including management, transparency for all parties involved, communications, service charge costs, budgets/accounts and the proposal for alternative dispute resolution.

The code stipulates that services be procured on a value for money basis and that competitive quotations be obtained for the supply of services. The service charge itself will be on a 'not for profit, not for loss' basis. This does not mean that suppliers of services cannot make a reasonable profit on the services they provide but that the costs be transparent so that all parties are kept aware of how the costs are made up. The code also states that the service charge itself should be apportioned using one of a series of recognised methods and the most important function of this is that it reflects the benefits of the services for individual occupiers. Any inducements to attract occupiers to a property should be borne by the owners and not the occupiers.

The code is available on the home page of the members section of the IPFMA website www.ipfma.com

Developer's share in development value

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.

Unjust enrichment is where one party profits financially in a way which is unfair to another.

Facts. A developer had spent time and money obtaining planning permission to redevelop property, relying on an oral agreement that the owner would sell it to the developer once planning permission had been granted.

Decision. The UK House of Lords overturned the Court of Appeal's decision to award the developer a half share of the increase in value of the property attributable to planning permission having been granted on the basis of a proprietary estoppel. However, the developer was entitled to a common law remedy for unjust enrichment as the landowner had been unjustly enriched by obtaining the value of the developer's services without paying for them.

Comment. The decision confirms that a strict approach to proprietary estoppel claims should be taken and should reduce the uncertainty that has threatened commercial negotiations following recent UK decisions on this topic. Although an English case, the Irish courts constantly seek guidance from English case law.

Case: Yeomans Row Management Ltd v Cobbe [2008] UKHL 55

Upcoming event

Beauchamps Solicitors are sponsoring the first Thomson Reuters Corporate Restructuring Conference in the Westbury Hotel, Grafton St, Dublin 2 on 21 October 2008. Gabriel Daly a partner in the Litigation and Dispute Resolution Department will be speaking at it. For further information please contact Aideen O' Regan at 01-662 5302 or at aideen.oregan@thomsonreuters.com.

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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