



Commercial Property Update

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Landlord and tenant: consent to change of use

Case: Dunnes Stores [Ilac Centre] Ltd v Irish Life Assurance PLC & Anor [2008] IEHC 114

Background. Under section 67 of the Landlord and Tenant (Amendment) Act 1980 a lessee is entitled to apply to a lessor for a change of user and such consent must not be unreasonably withheld.

Facts. The plaintiff tenant occupied premises in a shopping centre under a long lease. The change of use clause in the lease provided that the landlord should not unreasonably withhold its consent to a change of use having regard to the fact that the units in the centre should be of “an equally high standard, quality and tone and be as diverse as possible”. Negotiations were ongoing between the parties concerning the possible surrender of all or part of the leases. The tenant then applied for consent to a change of use to a high quality food hall which was refused by the landlord who did not give reasons for the refusal. Eventually the landlord stated the reasons for the refusal were on the grounds of good estate management and the fact that the shopping centre was primarily a retail fashion area. The tenant sought a court declaration that the landlord had unreasonably refused consent to the change of use.

Decision. The High Court held that the landlord had unreasonably refused consent by failing to comply with the obligations in the lease to consider the diversity of the centre. It emerged that the landlord had also suppressed relevant documents in the proceedings. The court reiterated the basic principles that that the landlord was obliged to act reasonably when considering an application for consent to change of use and could not use an application for change of use to try and gain possession of premises. The court also held that because of the earlier negotiations relating to surrendering the lease and the suppression of certain documents as well as the refusal of consent it could be inferred that the landlord had been using the tenant’s application for consent as a way to regain possession.

Compulsory registration of ownership of land

There are two separate systems for recording transactions in relation to property in Ireland managed by the Property Registration Authority:

- The Registration of Title system operated by the Land Registry. This system registers transactions relating to land and property in Ireland.
- The Registry of Deeds system operated by the Registry of Deeds. This is a system of voluntary registration for deeds and conveyances affecting land not registered in the Land Registry and to give priority to registered deeds over unregistered registrable deeds.

The Registration of Title Act (Compulsory Registration of Ownership) (Clare, Kilkenny, Louth, Sligo, Wexford and Wicklow) Order 2008 extended compulsory registration of ownership of land to the counties of Clare, Kilkenny, Louth, Sligo, Wexford and Wicklow from 1 October 2008. Therefore lands sold in 12 counties are now subject to compulsory registration in the Land Registry. They are Carlow, Meath, Laois, Westmeath, Longford, Roscommon, Clare, Kilkenny, Louth, Sligo, Wexford and Wicklow. This means that when anyone buys unregistered property in any of these counties it is compulsory for that property to be registered in the Land Registry.



Forfeiture of deposits

Case: Cregan & Gray v Taviri Ltd [2008] IEHC 159

Background. Under section 66 of the Landlord and Tenant (Amendment) Act 1980 consent to an assignment should not be unreasonably withheld.

Facts. The plaintiffs wished to open a restaurant and agreed to take an assignment of a leasehold interest in premises from the defendant. The transaction was subject to the consent of the defendant's landlord under the terms of the lease between the defendant and the landlord. The special conditions of sale in respect of the lease provided at Clause 6:

"The sale is subject to the consent of the landlord to the assignment herein and the purchasers hereby irrevocably agree and undertake to furnish as expeditiously as possible all reasonable particulars as maybe required by the lessor to enable her consider the application for consent to assignment to herein. In the event of the consent of assignment not being forthcoming on or before [the date of closing] then this contract shall be at an end and the deposit paid on foot thereof shall be returned to the purchasers without deduction and without any claim for interest and/or compensation."

The landlord agreed to give consent providing one of the existing guarantors of the performance of the obligations under the lease remained in place, subject to an indemnity in favour of that guarantor by the new lessee. The plaintiffs sought to repudiate the contract citing the onerous covenant sought by the landlord. The defendant sought to close the transaction but the purchase fell through. The defendant refused to return the deposit to the plaintiffs claiming it was forfeited.

Decision. The High Court considered Condition 41(a) of the General Conditions of Sale applying to the sale of this leasehold which provides:

"If the Purchaser shall fail in any material respect to comply with any of the Conditions, the Vendor (without prejudice to any rights or remedies available to him at law or in equity) shall be entitled to forfeit the deposit and to such purpose unilaterally to direct his solicitors to release same to him."

Even in the absence of such a condition, the law implies into any contract for the purchase of a real property interest, that where a deposit is paid to secure performance of the contract it is to be forfeited where the purchaser is unable to complete and, returned where the vendor does not complete. The landlord's request for one of the existing guarantors to the performance of the obligations under the lease to remain in place to ensure that the new lessees would continue to perform the obligations was not unreasonable. It was also a condition that might reasonably have been anticipated by the plaintiffs. The court held therefore that there was no basis on which to interfere with the contract

Stamp duty changes: non-residential property

The Finance (No 2) Bill 2008 which was published on 20 November 2008 confirms the Budget announcement of a reduction in the top rate of stamp duty for non-residential property from 9% to 6%. It applies where the purchase price is in excess of €80,000 and the deed is executed on or after 15 October 2008.



Environmental impact assessments: recent developments

Case: Case C-215/06 Commission of the European Communities v Ireland

Facts. The European Commission took a case against Ireland for failure to fulfill its obligations in fully implementing the Environmental Impact Assessment (EIA) Directive 85/337/EEC (as amended.) An EIA is the process by which the Environmental Protection Agency measures anticipated effects on the environment of a proposed development and it is mandatory for certain large developments. The case focused on a complaint relating to a wind farm development at Derrybrien, Co Galway and the landslide of peat that occurred in 2003. The Commission argued that Ireland's failure to carry out a proper EIA prior to the development of the wind farm led to a large fish kill as a result of the polluting effect of the peat in the nearby river. Ireland argued that the EIA Directive did not preclude the EIA being carried out during or after development.

Decision. On 3 July 2008, the European Court of Justice held that Ireland had failed to fulfill its obligations in relation to the EIA Directive. It also held that Irish legislation that allows local councils and An Bord Pleanála to grant retention for developments that failed to comply with the EIA Directive were invalid. The court noted that the installation of 46 wind turbines at Derrybrien required an EIA under EU law.

Comment. Amending legislation is currently being drafted to ensure that planning authorities do not grant retrospective permission for unauthorised developments in cases where an EIA is required. Any current retention applications that should have been subject to a prior EIA are being returned to developers on the basis that they are invalid.

BER certificates: reminder

The European Communities (Energy Performance of Buildings) Regulations 2006 will apply to all buildings, new or otherwise, when offered for sale or for letting, after 1 January 2009. From January therefore a building energy rating (BER) certificate will have to be obtained for all properties before they can be offered for sale or for rent. A limited number of building categories are exempt from the Regulations, for example, protected structures and places of worship.

For more information on BER certificates see
<http://www.sei.ie/index.asp?docID=-1&locID=1184>

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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