



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".

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.

RECENT CASES

Estate agent's commission

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

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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

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.

Discovery and privilege

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. Clarke J in the High Court in directing discovery of the document in question 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. ■