



Legal Updates

By **Imelda Reynolds**, IAVI Law Agent, Beauchamps Solicitors

Banning upwards only rent reviews

The Land and Conveyancing Law Reform Act 2009 which reforms and modernises Irish land and conveyancing law came into effect on 1 December 2009 with the exception of section 132 which ends upwards only rent review clauses in new commercial leases (*see autumn issue for more detail on the Act*). However the Minister for Justice, Equality and Law Reform, Mr Dermot Ahern on 1 December 2009 signed a banning order on upward only rent review clauses under section 132. This will come into operation on 28 February 2010 and will therefore apply to new leases from this date. 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.

In his press release Minister Ahern said “*The practice of including upward only review clauses in business leases is a deeply entrenched one. The time has come to end this practice. I look forward to more equitable business arrangements being put in place in the future which take account of the reality facing many business owners and retailers.*” (see Roland O’Connell’s article on page 15).

NAMA update

The National Asset Management Agency Act 2009 which establishes the National Asset Management Agency (NAMA) was signed by the President on 22 November 2009. NAMA will essentially acquire and manage certain bank assets. The Act will come into force on such day or days as the Minister for Finance (the Minister) may appoint by order once it is approved by the EU. Therefore a Government order will direct when its provisions or certain specific provisions will be commenced. NAMA as a separate statutory body will have all necessary commercial powers of a financial asset management company and credit institutions must apply within 60 days of the Act coming into force (or such longer period that the Minister prescribes by order) to the Minister to participate in the NAMA process.

New architects’ register

On 16 November, 2009 the Royal Institute of the Architects of Ireland (RIAI) and the Minister for the Environment, John Gormley launched a new register for architects. The RIAI is the official registration body for architects in Ireland. Established under the Building Control Act 2007, the register lists architects whose qualifications meet the standards set out in the Act. Since the commencement of the Act, only architects who are on the register may use the title ‘architect’.

The register aims to improve and protect the quality of service to consumers by ensuring that people admitted to the register have met defined levels of qualification and competence. The system also provides consumers with an advice service and with dispute resolution mechanisms in the case of poor service or suspected malpractice.

It is possible to check whether an architect is registered by searching on <http://www.riai.ie/register/search/>

RECENT CASES

Unfair terms and conditions

Case: Office of Fair Trading v Foxtons [2009] EWHC 1681

Background. Consumers have legislative protection from unfair terms in consumer contracts. Under the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 consumer contracts are open to a test of fairness. Any term found by a court to be unfair, is ineffective. Also terms must be expressed in clear and intelligible language. The English equivalent of these regulations is the Unfair Contract Terms in Consumer Contracts Regulations 1999 (1999 Regulations).

Facts. The UK’s consumer watchdog the Office of Fair Trading (OFT) took a case against Foxtons estate agents on the basis that certain terms in its contracts for managing tenanted properties were unfair and were not in plain language.

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Foxtons required a renewal commission if a tenant stayed beyond the initial one-year tenancy even where Foxtons had not negotiated the renewal.

Another term entitled Foxtons to charge a 2.5% sales commission where a landlord sold a property to a tenant introduced by Foxtons, even if Foxtons had not negotiated the sale.

A further term allowed Foxtons to recover a commission from a landlord where that landlord had transferred the property to another landlord and it was the other landlord that has renewed the tenancy, again without any intervention from Foxtons.

Decision. The English High Court held that because many landlords only had one or two properties to let they were not sophisticated business people and were to be treated as consumers under the 1999 Regulations. The court held that the renewal commission term was not part of the core bargain between the parties and was therefore subject to review for fairness and that the consumer's perception of the agreement is key. It held that the renewal provision and the third party renewal commission terms were unfair because the commission was significant, operated more adversely from a consumer perspective as time moved on and the terms were hidden in small print. The sales commission clause was also held to be unfair as it imposed a potentially large financial liability on the landlord for a transaction in which Foxtons had no material part.

Comment. The case illustrates how important it is that the terms in all consumer contracts are carefully drafted to avoid failing foul of the unfair contracts legislation. It also highlights the importance of identifying consumers for the purposes of the Unfair Terms Regulations. This is because it would appear from the case that a landlord would need to be operating through a company or be deriving the majority of his income from property transactions to fall outside the definition of consumer and therefore the ambit of the Regulations.

Conduct of auction and recovering fees

*Case: **Campion Property Consultants Ltd v Kilty** [2009] IEHC 147*

Facts. Kilty, the defendant was in financial difficulty as a building society was pressing him for payments on the mortgages of three properties that he owned. He signed a contract to engage the plaintiff auctioneer **Campion** to intervene

with the building society on his behalf and to prepare those properties for auction and advertise them in the national media. A consortium led by the defendant's solicitor indicated that they would pay €3.5 million for them and then increased their offer to €3.6 million on auction day. **Campion** decided to put the three properties on the market individually and then auction them as a whole to see which achieved the higher price. The three properties individually raised €3.3 million. **Campion** then told the auction that there was a standing bid of €3.6 million. A bid of €3.7 million from a different bidder was then accepted and the sale completed a few months later. Upon receipt of **Campion's** bill **Kilty** queried the manner in which he had conducted the auction and did not pay the fee. **Campion** then issued proceedings to recover his fees. **Kilty** claimed that **Campion** failed to conduct the auction in a professional manner and to obtain the best price.

Decision. The High court awarded **Campion** his fees on the basis that **Kilty**, a quantity surveyor and a senior counsel, was fully aware of the content of the contracts he signed and that by signing the contract on the day of the auction and by completing the sale some months later, **Kilty** ratified his agent's conduct, which ratification is retrospective. Once there has been such ratification **Campion** was entitled to recover his commission and expenses. The court also held there was no evidence to suggest improper collusion between **Campion** and the consortium or the successful bidder to secure the properties at a reduced price. While acknowledging that the auction procedure carried risks it found that the manner in which the auction had been conducted could not be faulted.

Pursuing damages in lieu of specific performance

*Case: **Collins & Anor v Duffy & Anor** [2009] IEHC 290*

Background. Specific performance is a court remedy that compels one party to comply with the conditions of a contract existing between both parties. Plaintiffs are only entitled to damages in lieu of specific performance if they establish an entitlement to an order for specific performance of a contract.

Facts. The defendant purchasers are property developers and agreed to buy land from the plaintiffs for €6.3 million in 2007 and paid a 10% deposit. The defendants failed to complete the contract in September 2008. They subsequently claimed that there was a discrepancy in the Land Registry map as regards the

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actual boundary of the land and sought a new map which was not forthcoming. The plaintiff vendors originally pursued a claim for specific performance of the contract and then decided to change their claim to damages in lieu of specific performance. The defendants gave evidence of their inability to raise finance to complete the contract.

Decision. The High Court was satisfied that the plaintiffs, if they had pursued a claim for specific performance they would have been entitled to it and found therefore in their favour. It held that the plaintiffs were ready, willing and able to complete the contract in September 2008. It also found that in accordance with condition 14 of the contract (and therefore the terms under which the defendants agreed to purchase the land) the plaintiffs were not required to define exact boundaries.

In deciding on the amount of damages due the court concluded that the value of the property had reduced from the price agreed by more than 50%. As the plaintiffs had retained the land, credit for that land at its current value of €2.6 million against the gross loss of €5,670,000.00 must be given. The plaintiff vendors were then awarded €3,070,000, together with €175, 621 interest in lieu of specific performance.

Specific performance and lack of finance

Case: Murphy & Mackin v Ryan & McGreevy & McGreevy Enterprises Limited [2009] IEHC 305

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

Facts. In 2006 an agreement to sell land owned by the plaintiffs (vendors) to the first defendant had been reached and was then rescinded. In 2008 the plaintiffs claimed specific performance of a new contract entered into with the first and second defendants in 2008 for the purchase of the same land for a lower price of €16,500,000. The second defendant admitted that he signed the contract to help his friend (the first defendant) without having seen the land. The third defendant was the guarantor of the fiscal obligations of the first and second defendants. The defendant purchasers failed to comply with the terms of the new contract and a completion notice was served by the vendors. The service of the notice, amongst other things, was disputed by the defendants.

Decision. The High Court held that the completion notice was served correctly and that defendants had entered into an unconditional contract without the necessary finance to complete it and they could not now walk away from it. The plaintiffs were entitled to an order for specific performance against the first and second named defendants which was to take place within 21 days from the date of the court decision. The court went on to say that if they failed to comply with the order for specific performance, then the guarantee obligations of the third defendant would be triggered.

The court commented that it was foolish to enter into the contract in the absence of the funds or a binding commitment to provide them. As the second defendant was held to be a very experienced businessman the court expressed astonishment that he entered into the contract concerning lands that he had never seen, never visited and seemed to know little about.

Break clauses in leases: recent English case

Case: Norwich Union Life & Pensions Limited v Linpac Mouldings Limited, May 2009

A break clause in a lease allows either the landlord or the tenant to terminate the lease early in certain circumstances such as delivering vacant possession and complying with the tenant covenants.

Facts. A company Linpac Mouldings leased premises that contained a break clause that was stated to be personal to the company. Linpac assigned the lease to a group company (Ecomold), which was later sold out of the group. Ecomold subsequently went into administration (which is similar to examinership in Irish law) and unsuccessfully applied for the landlord's consent to re-assign the lease to Linpac. The landlord believed that Linpac would try to terminate the lease to his disadvantage. The lease was assigned however and Linpac attempted to exercise the break clause.

Decision. The English High Court held that allowing a lease to be terminated by a previous tenant made no commercial sense. The court clarified that a tenant's personal break option is extinguished once the lease is assigned. If a break right could be revived this would give rise to continuing uncertainty. Further, the court held that a personal break option will not be revived if the lease is subsequently re-assigned back to the original tenant unless there is express wording to that effect. ♦