



Legal Updates

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Banning upwards only rent reviews

The Land and Conveyancing Law Reform Act 2009 which reforms 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 commercial leases. However, Section 132 came into operation on 28 February 2010 and applies to new leases from that date. Rent review clauses in these leases can therefore permit rent to increase, decrease or remain the same by reference to the rent payable immediately before the review date. It is not possible to contract out of this provision. (See article on The Land and Conveyancing Law Reform Act 2009 on page 20)

NAMA update

On 23 December 2009 the Minister for Finance announced the names of the nine members and CEO of the NAMA Board and signed the National Asset Management Agency (Designation of Eligible Bank Assets) Regulations 2009 which set out the classes of bank assets that are prescribed as classes of eligible bank assets for the purposes of the National Asset Management Agency Act 2009 (the Act).

This follows on from the signing of the National Asset Management Agency (Determination of Long-Term Economic Value of Property and Bank Assets) Regulations 2009 on 21 December 2009 and the commencement of the Act on the same date.

Rezoning tax. The Act introduced a new rezoning tax of 80% on trading profits or capital gains arising from the rezoning of land. It applies to disposals post 30 October 2009. The Finance Bill 2010 exempts a disposal of a small site from the tax. (A small site is defined as up to one acre and less than €250,000 in value at the time of disposal.) It also extends the charge to gains arising from a decision which is in material contravention of a development plan, the effect of which is to increase the value of land. (see article on page 12)

EU approval. On 26 February 2010 the European Commission approved the establishment of the NAMA under EU state aid rules. As a result the process of transferring the eligible loans

from the ownership of the designated credit institutions to NAMA will shortly proceed with the transfer of the first tranche which had an original book value of approximately €17 billion in respect of the ten largest borrowers. NAMA will also report to the Commission annually on the use of certain powers in the NAMA legislation.

Code of Conduct on Mortgage Arrears Amended

The Statutory Code of Conduct on Mortgage Arrears came into effect on 27 February 2009. It covers the mortgage lending activities of all regulated entities operating in the State but applies only to mortgage lending activities to consumers in respect of their principal private residence in the State.

On 17 February 2010, the Code was amended to require all regulated firms to wait at least 12 months from the time arrears first arise before applying to court to commence enforcement of any legal action on repossession of a borrower's primary residence. Previously the moratorium was six months. This extended moratorium applies only where the borrower engages with the lender in dealing with arrears and will commence from the date the borrower first goes into arrears. The 12 month requirement therefore does not apply where the borrower is deliberately not engaging with the lender. The Financial Regulator believes that lenders should only seek repossession in less than 12 months in very exceptional circumstances and when all reasonable attempts to encourage engagement by the borrower have failed.

English Report on Home Buying and Selling

On 18 February 2010, the English consumer protection body, the Office of Fair Trading (OFT) published its market study report into home buying and selling. It found that consumer satisfaction levels have increased in recent years but that the market is dominated by traditional estate agents and there is weak competition between them on price. The OFT believes that innovation in this sector, in particular, through online

Legal Updates

services, could have a dramatic impact on the cost of buying and selling a home by increasing competition and efficiency as well as updating legislation to allow new entrants into the market. The OFT also advises that sellers should negotiate commissions with estate agents and be prepared to shop around.

In addition, the OFT is recommending that the English Government introduce additional rules relating to the fees received by estate agents for referring buyers to ancillary services providers (such as surveys and conveyancing) as these fees could cause an estate agent to favour one buyer over another, to the seller's disadvantage.

The full report is available at:

http://www.ofi.gov.uk/shared_ofi/reports/property/OFT1186.pdf

RECENT CASES

COMPANIES IN EXAMINERSHIP CAN REPUDIATE LEASES

A recent Supreme Court ruling in *Linen Supply of Ireland Limited (in examinership)* paves the way for a company to repudiate onerous leases prior to the formulation of a scheme of arrangement in the examinership process.

What is examinership?

The examinership process under the Companies (Amendment) Act 1990 is a rescue procedure aimed at helping insolvent companies survive. It involves obtaining High Court protection from creditors for a limited period (up to 100 days), while an independent court appointed examiner considers the company's affairs with a view to formulating proposals for a compromise or scheme of arrangement between the company, its members and its creditors which will allow the company survive as a going concern. Before a court can appoint an examiner it must be "satisfied" that there is "a reasonable prospect" of the survival of the company as a whole or part of its undertaking as a going concern. Section 20 of the Act (section 20) allows a company in examinership to, subject to court approval, affirm or repudiate any contract under which some element of performance other than payment remains to be rendered both by the company and the other contracting party.

Facts. The company in this case has been in examinership for the past two months, but the High Court had refused to allow it to repudiate leases on five premises as part of a proposed rescue package. The company's examiner wanted to reduce fixed costs and obtain better rental terms by repudiating the leases. The Supreme Court held that leases are contracts that were capable of repudiation within the meaning of Section 20. The court held that Section 20 should be interpreted in its ordinary meaning and that as leases are "contracts" under this Section. This case was then remitted back to the High Court which decided that the five leases held by Linen Supply ought to be repudiated as they were onerous to the company. In doing so the High Court acknowledged the hardship which the repudiation of the leases would mean for the landlords in question however the court did not have to determine the amount of compensation payable as that had already been agreed between the examiner and the landlords.

Implications. Because it has been confirmed that a company in examinership can repudiate onerous leases this could help more companies successfully complete the examinership process and therefore facilitate their survival. As it means that examiners can now ask the High Court to terminate leases or change the terms of agreements, from a landlord's viewpoint it can be harsh medicine. If it appears that the court will accept the repudiation of a lease as part of a scheme of arrangement, it is likely to be in a landlord's best interests to co-operate with an examiner to try and secure the best possible compensation depending on the company's financial health.

INTEREST IN LAND AND "UNDER THE COUNTER" PAYMENTS

Case: Sheridan & Anor practicing as Sheridan Quinn v Gaynor [2009] IEHC 421

Facts. The plaintiff, Cecilia Gaynor alleged that she had part-purchased with her brother certain lands from her cousin Edward Rogers (now deceased), had discharged monies towards the purchase price and claimed that she was entitled to 50% of the interest in the land. The contract for sale was between Gaynor's brother and the vendor and identified a purchase price of €25,000. The plaintiff claimed that the real purchase price was €40,000 of which she had paid half "under the counter". It was claimed that this agreement was evidenced by a handwritten document signed by all three parties. The reason for the side agreement was that Edward Rogers was in receipt of a small pension and he was apprehensive that if the payment of €20,000 was disclosed that it might affect his entitlement to it.

Legal Updates

Decision. The High Court held that, on the facts, Cecilia Gaynor did not have an interest in the lands as there was no agreement or contract for the transfer of any property to Cecilia Gaynor which can be identified with certainty. The court held that the side agreement in relation to the interest was no more than an agreement to agree at some future date as to the identity of the property to be transferred to Cecilia Gaynor and at no time was a legal or equitable interest given to her.

The court also stated that even if its conclusion was incorrect, it was clear that all the parties were aware that they were participating in a scheme to hide the true extent of the payment to Edward Rogers. Therefore it would be in breach of public policy if such an agreement was held to be enforceable.

Comment. This case confirms that the fact that terms of any agreement must be sufficiently certain so that, if necessary, a court will be able to see precisely what the parties have agreed. It also reinforces the fact that a contract which is illegal on its face is illegal at its inception and unenforceable.

DAMAGES IN LIEU OF SPECIFIC PERFORMANCE

Case: Collins & Collins v Duffy & Callan [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.

Facts. The plaintiffs sought damages in lieu of specific performance of a contract where the defendants agreed to purchase land from the plaintiffs for €6.3 million. The

defendants failed to complete the contract on the completion date and subsequently told the plaintiffs that there was a discrepancy between the Property Registration Authority map for the land and the actual boundaries on the ground. The defendants claimed that the contract was contingent on the plaintiffs ensuring that the first named plaintiff purchased other land from a company owned by the defendants; the completion notice pursuant to condition 40 of the general conditions of sale was not served; and the plaintiffs were not ready, willing and able to complete the sale at the time of the issue of the proceedings due to the boundary issue.

Decision. The High Court awarded damages of €3,070,000 plus interest to the plaintiffs on the basis that the contract contained the entire terms and conditions of the agreement between the parties and the sale was not contingent on any purchase of other land. It also held that under condition 14 of the contract, the plaintiffs did not have to define the exact boundaries. It also stated that general condition 40 does not in any way alter the entitlement of a seller to bring proceedings, certainly after a closing date, where a purchaser has indicated an unwillingness to complete as he was contracted to do.

The plaintiffs were ready, willing and able to complete the contract on the completion date and on all material dates subsequently and, therefore, if the plaintiffs had pursued a claim for specific performance, they would have been entitled to it.

Comment. The amount of damages awarded to the plaintiffs in these cases are always an amount that will put the plaintiffs in as good a position as if the contract had been performed. The judge in this case noted that this was difficult in the current economic market and relied on valuer's reports to ascertain the amounts due.

