



Legal Updates

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House price register proposal

A national house price register based on actual sales prices rather than asking prices is to be set up for the first time by the Government. It will form the basis of a house price index that would monitor the fluctuation in house prices and will replace the current quarterly index published by the Department of the Environment, Heritage and Local Government. The Minister for Housing and Local Services, Martin Finneran, told a Construction Industry Federation conference on 10 March 2010 that a number of bodies and agencies are in talks to set up the register.

Home Information Packs suspended in England

The English government has suspended the use of Home Information Packs (HIPs) with immediate effect from 21 May 2010 (*see the summer 2008 issue for more background*). The effect of this is to provide that sellers and estate agents in England and Wales are no longer required to have or to provide copies of HIPs with effect from this date when marketing residential properties. The reason for the decision is to remove a layer of regulation from the process. The energy performance certificate requirement (a less expensive element of the HIPs) will be retained but their validity extended from three to ten years. The energy performance certificate is similar to the Irish building energy rating (BER) certificate which is valid for ten years provided that the rated building is not materially changed during that time.

RECENT CASES

COMPANIES IN EXAMINERSHIP CAN REPUDIATE LEASES: UPDATE

Case: Linen Supply of Ireland Limited (in examinership) [2010] IEHC 28

Background. Section 20 of the Companies (Amendment) Act 1990 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. A recent Supreme Court ruling in *Linen Supply of Ireland Limited (in examinership) ([2009] IEHC 544)* paves the way for a company to repudiate onerous leases prior to the formulation of a scheme of arrangement in the examinership process (*see the spring 2010 issue of The Property Valuer for the background to this case*). In brief 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. This case was then remitted back to the High Court in December 2009 which decided that the five leases held by the company in examinership ought to be repudiated as they were onerous to the company.

Decision. The scheme of arrangement was approved by the High Court in February 2010 and the company has now successfully emerged from examinership. The scheme provided that the landlords would receive 30% of the agreed figure for loss and damages arising from the repudiation of the lease. The landlords unsuccessfully argued that this was a post petition liability and had to be paid in full. The court ruled that an examiner under section 3 of the Act may present a scheme of arrangement that impairs the rights of a creditor, including prospective creditors such as the landlords. The fact that the landlords argued that their claim was for damages arising from the repudiation rather than unpaid rent did not alter their status.

EXERCISING PERSONAL BREAK CLAUSE FOLLOWING AN ASSIGNMENT

Case: Linpac Mouldings Ltd and others v Aviva Life and Pensions UK Ltd [2010] EWCA Civ 395

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.

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Facts. A company, Linpac Mouldings, had a lease of 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.

The English High Court held that allowing a lease to be terminated by a previous tenant made no commercial sense (*this decision was reported in the winter 2009 issue*). It 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. The tenant appealed this finding.

Decision. The English Court of Appeal upheld the English High Court's ruling that a personal break right was not exercisable at a time when the beneficiary of that right was not the tenant in possession. This decision confirms that clear drafting is required for a break clause to be exercisable by a former tenant. A tenant with the benefit of a personal break clause could consider whether to underlet, if possible, rather than assign to keep its right to exercise the break clause.

SELLER'S RIGHT TO DEPOSIT ON RESCISSION OF CONTRACT

Case: Ng & Anor v Ashley King (Developments) Ltd [2010] EWHC 456

A fundamental or repudiatory breach of a contract is a breach so fundamental that it permits the aggrieved party to terminate performance of the contract.

Facts. Ashley King (Developments) Ltd (Ashley) entered into a contract to buy back a house it had built from Mr and Mrs Ng for £380,000. The Ngs subsequently entered into a contract with their neighbours to purchase their house for the same price.

No deposit was paid but both contracts contained a condition that if the seller served notice on the buyer to complete and the buyer did not complete, a deposit of 10% of the purchase price would be payable by the buyer "without prejudice to any other rights or remedies of the seller".

On being served notice, Ashley failed to complete the purchase and pay the deposit. The Ngs then obtained a court order against Ashley for £38,000 (the 10% deposit) which Ashley then paid. As a result of the non-completion the Ngs were unable to complete the purchase from their neighbour, who demanded the £38,000 deposit plus interest, which the Ngs paid. The Ngs then sought damages and the deposit from Ashley. The court had to decide whether the Ngs had to give credit for the deposit in reducing the damages that they would otherwise be entitled to recover from Ashley.

Decision. The English High Court held that where a buyer is in repudiatory breach of a contract for the sale of land and the seller is entitled to forfeit the deposit, the court must give credit for the deposit in assessing damages. This applies whether the property is resold or not. The Ngs therefore had to give credit to Ashley for the deposit they had received and the award of damages was reduced by £38,000.

This is the first time that an English court has held that a court should give credit for a deposit where the property has not been resold. It has been long established that a court must give credit where the property has been resold. It highlights that a court will not seek to penalise a buyer for failing to complete.

LANDLORD AND TENANT AND FORFEITURE

Case: Foley v Mangan [2009] IEHC 404

Facts. Due to financial pressures the defendant Mangan entered into a contract with the plaintiffs, the Foleys to sell farm land for €4 million to them providing the Foleys entered into an agreement to lease back the land for four years, nine months to Mangan. Mangan was to pay some rent and make other land available to the Foleys for tillage during this period. The contract also stated that it was subject to the parties entering into an option agreement allowing Mangan to buy back the sold land. The option agreement provided that this right was only

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exercisable subject to all rents being paid by Mangan and the lease not having been terminated in the relevant period.

Post completion of the contract and execution of the lease and option agreement the Foleys sought a declaration that the lease had been terminated by forfeiture for breaches of covenants relating to the payment of rent, the prevention of waste due to slurry run off on the land and a duty to insure and sought possession. The rent was divided between “the old yard” and “the new yard”. It was agreed that the rent for the old yard would be discharged by Mangan renting a further 205 acres for the benefit of the Foleys. He was 65 acres short of the 205 acres but the Foleys had accepted the shortfall and had not made a formal demand for rent.

Mangan applied for relief against forfeiture, contending that the Foleys wanted a forfeiture of the lease in the hope of forfeiting his rights under the option agreement.

Decision. The High Court held that there had been substantial compliance by Mangan with his obligations under the lease to provide suitable land to the Foleys as payment of rent in kind. As no formal demand had been made for the rent arrears, the Foleys had not established a right of re-entry under the forfeiture clause for non-payment of rent. However Mangan was held to have breached the lease by committing waste due to allowing the slurry run off and not remedying the breach when asked to do so by the Foleys.

The court confirmed its broad discretion to grant relief against forfeiture and it held that preventing Mangan from exercising the option was one of the Foleys’ reasons in seeking forfeiture. The court held the lease had been forfeited but granted Mangan relief against forfeiture provided the sale on foot of the option agreement was completed; he undertook to comply with all waste management regulations; and paid the costs of the litigation.

THE SMOKING BAN AND RETRACTABLE ROOFS

Case: HSE v Brookshore Ltd [2010] IEHC 165

Background. In 2002 the Government banned smoking in a range of enclosed, as opposed to outdoor, public places, including public houses and restaurants. Some exceptions were allowed.

Facts. A pub was charged with being in breach of the smoking ban by the Health Services Executive (HSE) because it allowed smokers to smoke in an enclosed laneway between two parts of the premises covered by a retractable canvas awning.

The pub argued that the retractable roof fell within the exception in the Public Health (Tobacco) Act 2002 (as amended) where the smoking prohibition does not apply to “a place or premises, or a part of a place or premises that is wholly uncovered by any roof, whether it is fixed or moveable”. The area was furnished with bar stools and a TV and had wooden counters with ash trays. The District Court held that the retractable canvas awning was not a fixed or movable roof within the meaning of the Act. The judge then referred the matter to the High Court, asking if he was correct in his view.

Decision. The High Court ruled the District Court was wrong to dismiss the charge of a breach of the smoking ban against the pub. The court held that the area was clearly designed to attract smoking customers where they could be protected from the elements by a continuous sloped canvas membrane. It also stated that as the retractable roof impeded the dispersal of tobacco fumes as well as giving protection from rain, it was therefore a roof. It makes no difference if it is made of steel or slates, of canvas, of plastic or of glass. It held it is also irrelevant if it leaks or it provides little in the way of insulation. ♦

