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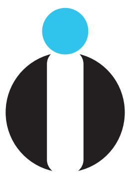

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The Editor would welcome comments on any of the articles which appear in this issue or articles for future issues.

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DRAFTING A LEASE IN AN APARTMENT DEVELOPMENT

Ruth Craig[1]

In this article the author discusses some of the thinking behind the drafting of the key elements of a precedent apartment lease which has been published by the Law Society.

Over the last months I have had the privilege of being on a working group within the Law Society to examine some of the issues being encountered in the creation and ongoing management of apartment developments. As part of this involvement we have created a draft lease which might prove useful as a model when selling apartments in newly created developments. (Please note that all of the comment in this article are my own; in this article I am not speaking for the other members of the working group).

In the previous issue of the Writ I examined the consequences of trying to sell an apartment by way of conveyance. For the reasons set out in that article I concluded that this is not a viable option in any circumstances and that, no matter how few the apartments contained in a development, these should always be sold by way of long lease.

As a group, we also came to the conclusion that, perhaps with the exception of very small developments of two or three apartments, it is necessary for the developer to create a residents' management company with responsibility for the ongoing management of the development. Multi-occupancy developments of commercial buildings can be successfully managed by the developer/landlord but leases in this type of development are relatively short (even at their longest they were rarely for more than twenty years or so and current trends are even shorter); many tenants have little capital investment in their units and, even when a premium has been paid, this can be adequately protected within the landlord/tenant relationship. The fundamental difference in residential developments is that leases are usually granted for periods of 999 years or more. This means that there must be some means of ensuring the proper management of the development for many years to come; at the moment the only viable means of doing this is by the involvement of a residents' management company.

Having taken these two principles as the legal foundations of the development structure some other key issues must be addressed.

The management company ("the Company") must be incorporated at the very beginning of the development and must be a party to the lease to each apartment purchaser. Readers will be aware that the lease provides that the Company will carry out all the day-to-day maintenance and administration of the development and that the lessees will pay it an annual service charge to cover the cost of these duties; the Company will also have the long-term responsibility for enforcing the lessees' covenants. Arising from this, certain key elements governing the relationship between the lessor/developer, the Company and the apartment lessee must be included in the lease.

[1] Senior Lecturer, Institute of Professional Legal Studies.

In this article I will refer to the developer as a person rather than a company to avoid confusion with the management company.

The first and overriding principle is that there must be a binding obligation on the developer to convey to the Company his title to the development (including his reversions to the apartment leases) once all of the apartments have been sold. Some of the problems currently being encountered in certain apartment developments derive from the fact that they seem to have been set up, so to speak, so that the developer could have his cake and eat it. The only way that the Company and the lessees can enforce their respective obligations against each other over an extended period of time is by having the privity of estate arising from a lessor/lessee relationship. Until the Company has the lessor's title, its ability to enforce covenants disappears as soon as the original lessee of an apartment assigns that title to someone else (and indeed, that successor will not be able to enforce covenants against the Company). This means that, if the developer is interested in the ongoing good management of an apartment development, he must accept that he should not try to engineer a relationship which allows him to collect the ground rent on the apartments whilst leaving it to the Company to manage the development.

Alternative arrangements have been attempted. One is that of putting obligations on the lessee to ensure that any assignee has to enter into a separate deed with the Company – this deed will contain similar obligations to that contained in the lease. The obvious problem with this arrangement is that it collapses as soon as an apartment owner fails in this duty. This obligation could be further strengthened by the requirement that the lessee must obtain the lessor's consent to assign and that this consent is conditional on the appropriate deed with the Company being executed by the assignee; but this is dependent on the lessor remaining in existence and continuing to be interested in the proper management of the development. Once an apartment owner has assigned without seeking consent, what exactly are the remedies against his successor and how many developers would be interested in pursuing these?

Again, the Company could be given the right to register inhibitions against the apartment owners, preventing the latter from selling unless their successors enter into a fresh deed with the Company; but this is administratively burdensome, could cause significant delay and involves the expense of legal representation on both sides each time an apartment is sold.

Some leases state that the lessor holds the development on trust for himself, the Company and the apartment lessees. This is a very worthwhile provision and should be included in all apartment leases. Apart from anything else, it provides very useful protections for the apartment owners should a developer go into liquidation. However, this should be in addition to the requirement that the title be transferred to the Company, not in substitution for this requirement. Whilst it does give the Company an equitable interest in the development, the Company and lessees will have the uncertainty and expense of protecting their interests through the Chancery Court if the developer behaves in breach of the trust or indeed if the lessor ceases to exist; and the relationship still depends entirely on the developer ensuring that any assignee of the original lessee meets his obligations to the Company and vice versa. This is not viable as an enforcement mechanism over decades and centuries.

Developers need to understand that their profit comes from the sale of the apartments, not from the ongoing income stream from relatively modest ground rents. They have adapted to this truth in relation to housing developments and accepting this in relation to apartments would clear the way for apartment developments which have a much better chance of working

well in the long term and of being acceptable to properly advised purchasers and their lenders.

In the draft model lease, in addition to providing that the developer's title would be transferred to the Company and that it would be held in trust in the meantime, various other clauses were included, such as ones requiring the lessor to enforce the covenants made by the Company and the lessee; these are useful in the short term but as additions to rather than replacements of the core requirement of transferring the title. Several other clauses have also be included:

- that, during his period of ownership, the developer/lessor would pay any ground rent collected to the Company so that the latter could use same towards the provision of services;
- that the lessor will not create short term tenancies in respect of any of the apartments without the consent of the Company (not to be unreasonably withheld);
- that the lessor will not use any of the apartments for "Airbnb" arrangements.

These are not essential to the proper transition of the control of the development from developer to the Company (and they are unlikely to be popular with some developers) but they encourage the developer to concentrate on completing and selling the apartments rather than holding on to them. This is important as, even if the lease is drafted so that the developer has an obligation to transfer his title to the development once the last apartment has been sold, this purpose is thwarted if the developer decides to keep some of the apartments indefinitely.

In the draft, lessees make their covenants with the lessees of the other apartments as well as with the lessor and the Company. This is useful in the short term whilst the apartments are owned by the original lessees but loses effectiveness once apartments are assigned to successors. When this happens, privity of contract is lost between the lessees. Whilst the principles set out in Elliston and Reacher ([1908] Ch 374) allow for the continued enforcement between owners of restrictive covenants in qualifying developments this does not help with the enforcement of positive covenants. Again, the only long term means of making sure that all lessees have to comply with their obligations is to include an obligation on both the lessor and the Company to enforce each lessee's covenants.

One of the matters which must always be decided when drafting an apartment lease is what elements of the apartment building will be included in each demise. Again, in all but the very smallest developments, it is suggested that each apartment lease should stop at the inner finishes on all load bearing walls, the ceilings and the floors. In effect, no structural elements of the building should be demised. This is for two reasons:

- the lessee is made responsible for the repair of his apartment. By limiting this obligation to non-structural elements, any failure to comply with this responsibility will not endanger the structural integrity of the building. The Company is left with the responsibility of repairing and maintaining all structural elements. This is advantageous to each lessee because he has only one other party to "police" in this regard and because he will have direct input to the activities of the Company in which he will be a share-holder;
- the building as a whole will be insured via a block insurance policy which will be paid for by the apartment owners. In this draft the policy is dealt with separately from the other services and is taken out by the lessor rather than the Company. This is because insurance may only be effected by someone with a title in the property; until the Company becomes the lessor (and the owner of the common parts), it has no title to the apartment building. Some insurers may be prepared to allow a management company to insure if the premises are held in trust for it but this is not necessarily the approach adopted by all

insurance companies. By making insurance the responsibility of the lessor the number of potential insurers is maximised and the cost of insurance is reduced. The draft allows the lessor to give the Company a power of attorney in respect of obtaining insurance (and indeed irrevocably allows the Company to assume this power if the lessor fails to provide evidence that he has obtained insurance in a timely manner or if he becomes bankrupt or goes into administration/liquidation); it is assumed that the developer would usually exercise this option.

The draft provides for a reserve fund to cover the cost of substantial repairs and replacement of plant and machinery. Eventually it will be up to the apartment owners to decide how much should be contributed towards this fund but it is useful to build up a reasonable amount which can be used where appropriate. From personal experience I am aware of a development where an apartment owner lost over 10% of the price which they paid for their apartment because the roof of the apartment building needed to be replaced; the reserve fund had been starved of contributions for years and there was real doubt that the other apartment owners had the funds to contribute to the significant costs involved.

In relation to both any insurance proceeds and the reserve fund the draft contains an obligation on the lessor and the Company respectively to ensure that these sums are kept in trust on separate accounts (whether or not they are being managed by an agent on their behalf). This should protect against large sums of money being lost to the apartment owners if the party looking after these monies becomes bankrupt or goes into liquidation/administration.

The other documents which must be carefully considered by the solicitor acting in the setting up of an apartment development are the memorandum and articles of association of the management company. This has not yet been considered by the working group but I would like to suggest one matter which could be addressed. At the moment the memorandum and articles are almost invariably drafted so that two nominees of the developer hold the only shares with voting rights until the last two apartments in the development are sold (at which point these shares are transferred to the purchasers of these apartments and all shares gain voting rights). This has the very sensible purpose of allowing the developer to control the Company whilst he is trying to sell the apartments and avoiding a very few apartment owners having control of the Company when only some of the apartments have been sold. However, this practice developed on the presumption that the developer would sell the apartments as quickly as he reasonably could so that the period during which apartment owners did not have control was relatively short. Particularly following the market crash, this period lengthened significantly for many developments, especially as some developers decided to keep one or more apartments indefinitely. How this practice can be discouraged has already been discussed but there is no sensible way of preventing this completely. It can be seriously disadvantageous to apartment owners if they cannot control the Company within a reasonable period of the development being completed. For example, there is anecdotal evidence that some developers continue to use management agents who are not particularly good at their job or very expensive (or both). One way of dealing with this possibility is to include in the memorandum and articles of association provision that the share owners will be granted voting rights when the last two apartments are sold or two years after the first apartment is sold, whichever is earlier.

Purchasing an apartment involves more risk than buying a house, this is unavoidable as owners will always be dependent on the cooperation and good sense of their fellow owners. No matter how well a development is set up from a legal perspective, the developer may cease to operate before all the apartments are sold and the title is transferred to the Company; and, of course, the Company will only function as well as the people who run it. No solicitor can be

blamed if the Company fails to lodge annual accounts or to manage the development properly. However, a sound legal framework gives the development its best chance to prosper. If this framework is weak, solicitors acting for succeeding purchasers will be faced with one of two situations: a development which is working well at the moment but only because of the happy accident that the apartment owners are behaving in a reasonable and responsible manner; or one where the proper administration of the development is not being attended to and there is no mechanism for correcting this.

If the original framework is robust and properly drafted there is a great deal which can be done to “fix” developments which have got into difficulties but if this framework was inadequate to begin with, there may be some developments which just cannot be rescued.

COMMERCIAL SCHEDULE TO THE LAW SOCIETY OF NORTHERN IRELAND GENERAL CONDITIONS OF SALE (4TH EDITION 2020)

Ben Fraser[1]

This article takes us on a tour of the new Commercial Schedule to the new General Conditions. The aim of the Commercial Schedule is to change the current status quo whereby each firm has their own special conditions and/or bespoke contracts which can be heavily negotiated even for the most straight-forward of commercial property sales. The hope is that firms and their solicitors will adopt the Commercial Schedule as a matter of course for commercial property transactions moving forward.

Introduction

Whilst we all perhaps welcomed in the New Year in a slightly different manner than that which we are usually accustomed to, there was some optimism across Zoom calls and MS Teams parties that 2021 might be a turning point on the path back to normality (or at least a new normal!). It seems that we are moving in the right direction; albeit perhaps a little more slowly than most of us would like.

1 January 2021 was also a turning point for property solicitors throughout Northern Ireland with the formal release of the new Law Society of Northern Ireland General Conditions of Sale (4th edition 2020). The new General Conditions are to be used for all new instructions from 1 January 2021 and the LSNI's Home Charter Scheme together with associated prescribed and recommended documentation have also been updated as a result.

There are lots of benefits to the new General Conditions and updated Home Charter documentation as highlighted by Simon Murray's helpful article in Folio Issue 2 (2020). There is also one new piece of recommended documentation which will have caught the eye of all commercial property solicitors. That is the Commercial Schedule to the new General Conditions, which was prepared by LSNI in conjunction with the Northern Ireland Commercial Property Lawyers Association (NICPLA). This new Commercial Schedule is based very closely on the Standard Commercial Property Conditions which have been widely adopted into use in England & Wales for many years.

For many years solicitors in Northern Ireland have relied on one set of general conditions for all manner of property transactions. Whilst there are some benefits to a "one size fits all" approach in terms of consistency, having just one set of general conditions for both residential and commercial property matters simply resulted in firms creating their own standard special conditions to "bolt on" to the general conditions. This ultimately led to firms creating their own bespoke precedent contracts; some of which do not even refer to the general conditions at all.

[1] Senior Solicitor, Davidson McDonnell.

2021 therefore marks the start of a new era for commercial property solicitors in Northern Ireland – there is a LSNI approved Commercial Schedule that "bolts on" to the new General Conditions. This could foreseeably save commercial property solicitors considerable time preparing and negotiating special conditions for straight-forward commercial property transactions and the hope of NICPLA is that the Commercial Schedule achieves a fair balance in terms of drafting so that it can be used without amendment (or, at least, without substantial amendment) in commercial property transactions of all shapes and sizes.

The starting point is to remember to tick the relevant "yes" box on the Memorandum of Sale to the new General Conditions if the Commercial Schedule is to be incorporated. It is the writer's view that simply forgetting to tick either "yes" or "no" on the Memorandum of Sale would (by implication) result in the Commercial Schedule not being incorporated.

At the time of writing, we are a few months into 2021 so it is hard to say with any certainty whether the Commercial Schedule has been a resounding success and will be used (without substantial amendment) for a wide range of commercial property transactions across Northern Ireland. In this article, I shall review the various matters covered by the conditions contained within the Commercial Schedule and, in doing so, would hope to encourage solicitors to use the Commercial Schedule for commercial property transactions whenever possible rather than simply reverting to their firm's own template contracts.

1. Definitions

Condition 1 of the Commercial Schedule gives us a flavour of what is to follow. There is mention of capital allowances and criminal damage legislation together with VAT and transfers of a business as a going concern (TOGC). All of these should be familiar phrases to those regularly involved in commercial property transactions and references to **"parties"** throughout the remainder of this article are to the vendor and the purchaser under the sale contract of which the Commercial Schedule will form part alongside the new General Conditions.

2. VAT

There are three main VAT scenarios for commercial property transactions. The first thing to do is clarify that the purchase price agreed between the parties is exclusive of any VAT payable. The options are then as follows:

Option 1 – The vendor has opted to tax the property and the purchaser is therefore to pay VAT on top of the purchase price in exchange for a VAT invoice from the vendor.

Option 2 – The vendor has *not* opted to tax the property and agrees not to exercise an option to tax the property, which results in the purchaser not being required to pay VAT on the sale of the property.

This is strictly subject to any change in law between the date of the contract and completion that means the sale of the property becomes a supply chargeable to VAT. If that happens, the purchaser is to pay VAT on top of the purchase price in exchange for a VAT invoice from the vendor. Note that the purchaser is still required to pay VAT charged on the supply of any contents included in the sale in exchange for a VAT invoice.

Option 3 – The vendor has opted to tax the property, but the sale qualifies as a TOGC (i.e. the property is used for the business of letting to produce rental income).

For the sale to qualify as a TOGC, the purchaser must opt to tax the property before completion and both parties must comply with various statutory conditions relating to the same. An accountant's advice should always be sought here but if the sale does qualify as a TOGC then no VAT is payable on the purchase price for the property. There are provisions in the Commercial Schedule for circumstances where the parties treat the sale as a TOGC at completion, but it is later determined that the sale was in fact not a TOGC.

3. Capital Allowances

Substantial savings can be made by both vendors and purchasers if they deal with capital allowances correctly on the sale and purchase of commercial property. Some parties cannot claim capital allowances, which might allow the other party to obtain the maximum value for itself. However, the rules are complex and constantly changing so the advice of your client's accountant should always be sought. For example, the Chancellor recently announced in his April 2021 Budget that there will be "super deductions" (essentially new, enhanced first year allowances) to reward expenditure on "plant and machinery" (as defined in the Capital Allowances Code) in preparation for the 2023 corporation tax hike.

The effect of incorporating Condition 3 is that both parties must provide each other/ their agents with the necessary information and on completion the parties will make a joint election under section 198 of the Capital Allowances Act 2001 which is consistent with the agreed apportionment. Solicitors will need to remember to get this joint election prepared and signed in readiness for completion.

4. Leases Affecting the Property

Ticking the box for Condition 4 will disapply new General Condition 3.2 and instead Conditions 4 to 8 of the Commercial Schedule will then apply.

Condition 4 itself relates to the actual leases affecting the property in sale and requires the vendor to provide the purchaser with full details of each lease so that the purchaser enters the contract knowing and fully accepting those terms. Condition 4 then provides for some specific agreements between the parties with respect to the leases. I will not go through them all, but these are clearly intended to be commercially fair and reasonable. For example:

- The vendor cannot serve notice to end the lease(s) nor accept any surrender. This would have a direct impact on the value of the property and the price the purchaser is willing to pay.
- The purchaser is to indemnify the vendor against all claims arising from the lease(s) after actual completion. This allows both parties to enjoy a clean break at completion.
- The vendor is to promptly provide full details to the purchaser of any proceedings connected to the lease(s) or applications for consent, licence, or approval under the lease(s). There are then provisions covering how such proceedings and applications must be dealt with (i.e. generally in accordance with written directions from the purchaser subject to a couple of caveats and time restraints).
- In addition, there are requirements for the vendor to (a) deliver rent authority letters; and (b) otherwise manage the property in accordance with the principles of good estate management until completion. Neither of these should be controversial nor objectionable.

5. Rent Reviews

Whilst Condition 5 regarding rent reviews will automatically apply to the contract if the box at Condition 4 is ticked, it will not necessarily be applicable in all transactions, but it is useful for those situations where it does. It applies if (a) the rent reserved by a lease relating to the property is to be reviewed; (b) the vendor is the landlord *or* tenant; (c) the rent review process starts before actual completion; *and* (d) no reviewed rent has been agreed (or determined) at the date of the contract.

In its most simplistic terms, the vendor is to conduct the review process until actual completion then the purchaser is to conduct it. The vendor and purchaser are likely to have a common aim when it comes to rent review because if the vendor is the landlord, then both it and the purchaser will (at least in theory) want to increase the rent. Conversely, if the vendor is the tenant, it is in both parties' interests to try to agree a nil (or minimal) increase in the rent. Of course, this will depend upon the specifics of the rent review provisions in the relevant lease. To ensure both parties are not still dealing with rent review matters and liaising with each other indefinitely after completion, the rent review provisions in the Commercial Schedule will cease to apply on actual completion if the reviewed rent will only be payable in respect of a period after that date (i.e. a rent review date after actual completion) or if the rent review date precedes the completion date by more than two years. The intention is to afford the parties a clean break at completion. However, there are obvious consequences for vendors (but benefits for purchasers) if they complete a sale prior to a large rent increase being agreed at review which is then payable back to a review date falling within the period of two years prior to the completion date.

Separately, there are requirements as to the conduct of both parties such as that neither can agree a reviewed rent figure without the other's approval in writing and each party will bear its own costs.

6. Pending Lease Renewals

As with the rent review condition, Condition 6 regarding pending lease renewals will not apply in all instances but the provisions are sensible if it does. This Condition applies if (a) a lease is continuing under the Business Tenancies (Northern Ireland) Order 1996 at either the date of the contract or at actual completion; (b) the vendor is the "competent landlord" (as referred to in the 1996 Order); and (c) any of the following have not been agreed or determined at the date of the contract – (i) an interim rent; (ii) the termination of the tenancy; or (iii) the terms of a new tenancy.

In brief, the vendor is to conduct any negotiations or proceedings until actual completion then the purchaser takes over and must apply to be substituted for the vendor as a party in any proceedings. The parties are to act in the same co-operative manner as with rent review and both parties are to bear their own costs.

Neither party is to agree an interim rent or any of the terms of the new tenancy without the written approval of the other (such approval not to be unreasonably withheld or delayed). However, to ensure a clean break where possible, from actual completion the relevant provisions will only apply to negotiations or proceedings relating to or affecting the amount of any rent (including any interim rent) payable from a date before actual completion.

7. Apportionments

Condition 7.9 provides that the purchase price (less any deposit already paid) is to be adjusted to account for the Condition 7 apportionments described below together with any compensation paid or allowed under Condition 7.8 (see below), and any sum payable under Condition 8.2 (see insurance below).

Income – Subject to the service charge point below, income received from tenant(s) is to be apportioned between the vendor and purchaser so far as the sale of the property affects their entitlement to receive or liability to pay them. The "apportionment day" is the date of actual completion and it is assumed that the purchaser owns the property from the beginning of the day on which the apportionment is to be made (i.e. the purchaser benefits from the income but is responsible for the outgoings for the day of actual completion itself).

Sums to be apportioned are treated as payable for the period they cover. However, if it is an instalment of an annual sum the purchaser is entitled to an amount equal to 1/365th of the annual sum for each day from and including the apportionment day to the end of the instalment period. The sums are deemed to accrue from day to day and at the rate applicable from time to time.

If sums not known or easily ascertainable are to be apportioned, a provisional apportionment is to be made on completion based on a "best estimate" but according to the amount payable on account where the sum is rent or service charge subject to review, final determination, or adjustment. A final apportionment is to be made as soon as the final amount is known (i.e. not a clean break at completion for the parties) and the resulting balance to be paid within 10 working days (subject to Condition 7.8). Depending on the complexity of the transaction and the sums involved, the parties may wish to agree an alternative arrangement here to ensure a clean break at completion but the parties' respective views on this might depend on the risk of under/ over-payments being recovered/ lost.

Service Charge – Where a lease of the whole or part of the property requires the tenant to reimburse the landlord for expenditure on goods or services, on completion:

- the purchaser is to pay the vendor for any expenditure already incurred by the vendor but not yet due from the tenant and the vendor must provide the information and vouchers required for its recovery from the tenant; and
- the vendor is to credit the purchaser with payments already recovered from the tenant but not yet incurred by the vendor.

Compensation – There are two situations when Condition 7.8 applies (known as Case 1 and Case 2).

Case 1 deals with arrears and applies where (a) any rent or sum due under the lease is due but not paid on completion; (b) the contract does not provide that the purchaser is to assign to the vendor the right to collect any arrears due to the vendor under the contract; and (c) the vendor is not entitled to recover any arrears from the tenant. It may be that the parties wish to have a different agreement in terms of the arrears.

Case 2 is where (i) a reviewed or interim rent is agreed or determined after actual completion because of either Condition 5 (rent review) or Condition 6 (pending lease renewals); and (ii) an additional sum then becomes payable, or an allowance becomes due, in respect of a period before the "apportionment day". This case covers pending rent reviews and lease renewals.

Condition 7.8 aims to provide a fair balance between the vendor recovering sums properly due to them but not putting too heavy (or costly!) a burden on the purchaser to pursue the same; particularly in the context of maintaining the purchaser's relationship with its newly acquired tenant(s). Firstly, the purchaser is to seek to collect all sums due from the tenant in Case 1 and Case 2 in the ordinary course of management but need not take legal proceedings. A payment made on account of those sums is to be apportioned between the parties in the ratio of the amounts owed to each (as is any allowance due to the tenant). Finally, any part of a payment on account received by one party (but due to the other) is to be paid within 10 working days after receipt.

8. Insurance

Option 1 – The main insurance provisions (Conditions 8.2 to 8.4 inclusive) apply if the property (or any part) is let on terms under which the vendor (as landlord *or* tenant) is obliged to insure against loss or damage in which case new General Condition 6 shall not apply.

The provisions are in line with market practice for commercial property transactions in that the vendor insures until actual completion with the purchaser permitted to inspect the policy and entitled to ask the vendor to protect the purchaser's contractual interest (at the purchaser's cost) subject to the insurer's agreement. The purchaser can also (again at the purchaser's cost and subject to agreement of the insurers) request that the vendor extends the cover provided that the vendor shall not be under any obligation to seek any refund from any tenant or third party of this additional cost.

There is no apportionment of any insurance rents received (or receivable) but the vendor is to pay to the purchaser any part of the premium returned by the insurers following the cancellation of the policy on the date of actual completion. The purchaser is to hold any money paid to it subject to the rights of any tenant or third party that paid or reimbursed the vendor for the premium.

The provisions also set out what happens in the event of damage to the property before actual completion by (a) a risk which the vendor should have insured under the contract or (b) an event giving rise to an entitlement to compensation under the Criminal Damage (Compensation) (Northern Ireland) Order 1977. Essentially, the purchaser is not entitled to a reduction in the purchase price or to refuse or delay completion provided that the vendor will:

- make the necessary claim(s);
- hold compensation or insurance monies received on trust for and pay the same to the purchaser (save to the extent money has been paid to the vendor for works carried out pre-completion); and
- assign to the purchaser all rights to claim compensation or insurance monies to the extent the monies have not been paid to the vendor pre-completion.

Any money received by the purchaser in accordance with Condition 8 shall be applied by the purchaser in accordance with the terms of any lease and the purchaser give an indemnity to the vendor for this.

Option 2 – Alternatively, if the property is leasehold and the property (or any building containing it) is insured by a reversioner or other third party (Condition 8.6) then the vendor must use reasonable efforts to ensure the insurance is maintained until completion and

if, before completion, there is any damage by an insured risk or an event giving rise to an entitlement to compensation under the 1977 Order then the vendor will (to the extent permitted) assign to the purchaser all rights to the claim.

Option 3 – If neither option 1 or option 2 for insurance apply then the vendor is under no obligation to the purchaser to insure the property and new General Condition 6 shall continue to apply. If a payment under a policy effected by the purchaser is reduced because the purchaser is covered by an insurance policy effected by the vendor, the purchaser price is to be abated by the amount of that reduction.

Conclusion

I hope that this article has given you a useful summary of the new Commercial Schedule and will make you consider using (or rather give you the confidence to use) the Commercial Schedule for commercial property transactions going forward. LSNI and NICPLA hope that widespread adoption of the Commercial Schedule will mean that the current practice of firms using bespoke precedent contracts which require considerable negotiations, even in the case of simple commercial property transactions for which lengthy negotiations are cost-prohibitive, should no longer be the status quo.

As a final aide memoir, please do not forget to tick the relevant “yes” or “no” box regarding the Commercial Schedule on the Memorandum of Sale to the new General Conditions and, if you are ticking “yes”, then you should ensure that you annex the Commercial Schedule and remember to tick the further relevant boxes throughout the Commercial Schedule in respect of VAT, capital allowances and leases affecting the property.

THE HOUSING (AMENDMENT) ACT 2020

Charles O'Neill[1]

Introduction

The origins of the Housing (Amendment) Act 2020 ("the 2020 Act") arose in somewhat unusual circumstances. The legislation was enacted to facilitate the reversal of a decision by the Office of National Statistics ("ONS") to classify registered housing associations in Northern Ireland as Public Non-Financial Corporations. This article outlines the background to the legislation and the reason for the decision of the ONS and the impact of this. It goes on to explore the amendments to the regulatory regime for registered housing associations as outlined in the legislation and the consequences of this. Finally, it will examine the implications of the legislation on conveyancing practice in Northern Ireland.

Housing associations in Northern Ireland

A housing association is defined in the Housing (NI) Order 1992 "(the 1992 Order") as[2] a society or body of trustees or company;

(a) which is established for the purpose of or among whose objects or powers are included those of providing, constructing, improving or managing or facilitating or encouraging the construction or improvement of housing accommodation, and;

(b) which does not trade for profit or whose constitution or rules prohibit the issue of capital with interest or dividend exceeding such rate as may be prescribed.

There is a distinction between unregistered housing associations and registered housing associations. Registered housing associations are housing associations which are registered by the Department for Communities ("DFC") under article 16 of the 1992 Order. To be eligible for registration a housing association must be an industrial and provident society registered under the Community and Cooperative Societies Act 1969 as amended.[3] It must not trade for profit and must be established for certain purposes associated with housing.[4] It will also be noted that all registered housing associations in Northern Ireland are also charities registered with the Charities Commission for Northern Ireland.

Registered housing associations are regulated by the DFC. The supervisory and regulatory powers of the DFC are contained in the 1992 Order. It was the nature of these powers, which

[1] LLB, MBA, Solicitor.

[2] 1992 Order, art 3.

[3] Industrial and Provident Societies Act 1969 was amended by the Industrial and Provident Societies (Amendment) (NI) Order 1976. The 1969 Act was itself renamed as the Co-Operative and Community Benefit Societies Act (NI) 1969 by the Credit Unions and Co-operative and Community Benefit Societies Act (NI) 2016.

[4] These are outlined in full in article 15 of the 1992 Order. Under art 15(5) there is power for the Department for Communities to amend these powers by secondary legislation but the powers outlined in the 1992 Order cannot be restricted or limited by any new legislation.

among other things, caused the ONS to make their decision as to the status of registered housing associations.[5]

The distinction between unregistered and registered housing associations will be explored further in this article in connection with the requirement to obtain the consent of the DFC to the disposal of land.

The ONS decision

On 29 September 2016 the ONS announced that registered housing associations in Northern Ireland would be reclassified to the public sector and designated as Public Non-Financial Corporations.[6] This was due to the control that government had over registered housing associations. Three areas were identified as examples of control, namely:[7]

- the requirement that a registered housing association obtain the consent of the DFC to the disposal of land;
- the powers of government to manage an RHA including the power to remove, suspend or appoint a member to a committee of an RHA if an inquiry instituted by government has found there to be mismanagement; and
- the powers of government to direct an RHA to transfer land it owns to another body if an inquiry instigated by government has satisfied it that the management of the land would be improved.

The effects of the decision were wide ranging. Registered housing associations provide new build social housing and Co-Ownership operates its shared ownership product. The ONS decision meant that the private borrowing by the registered housing association sector would be considered public expenditure. This would mean that the Northern Ireland Executive would have to in effect cover the entire cost of building new social homes and borrowing by registered housing associations would be deemed to be public expenditure. It would also mean that organisations such as Co-Ownership would not be able to access financial transactions capital (“FTC”) which are loans only available to private sector bodies. A derogation from the reclassification was obtained from HM Treasury but this meant that access to other streams of funding such FTC was not possible during the period of this classification.

Proposals to seek the reversal of the ONS decision where consulted upon[8] and legislation in the form of the Housing (Amendment) Bill was introduced into the Northern Ireland Assembly in 2020. The Bill proceeded by way of accelerated passage and achieved Royal Assent on 28 August 2020. The 2020 Act covers issues such as the disposal of land by housing associations, the governance of housing associations and the right to buy scheme for housing association tenants. The enacting of the 2020 Act resulted in the ONS reclassifying registered housing

[5] DFC, Proposals to seek reversal of the reclassification of registered social housing providers in Northern Ireland, (DFC, 8 December 2016) p12.

[6] Similar decisions had been made in respect of the equivalent of housing associations in England, Scotland and Wales and amending legislation was enacted in each of these jurisdictions to enable the ONS to reclassify such organisations.

[7] The list was stated to be not an exhaustive list.

[8] There were two consultations - one on the proposals to seek reversal of the reclassification of registered social housing providers in Northern Ireland on 8 December 2016 and one on the classification of registered housing associations in Northern Ireland and the future of the House Sales Scheme on 3 July 2018.

associations back into the private sector on 30 October 2020 with effect from 28 August 2020. The remainder of this article will examine the legislation contained in the 2020 Act.

Disposal of land by registered housing associations

The 1992 Order had provided that a registered housing association could not dispose of or mortgage any land without the consent of the DFC.[9] This was repealed by section 1 of the 2020 Act which replaced the consent procedure with a notification procedure. Under the substituted form of article 13 of the 1992 Order (introduced by the 2020 Act), a registered housing association must notify the DFC of any disposal or mortgage of land within 28 days of the disposal taking place or the mortgage being created.[10] The notification may be in such manner as the DFC may prescribe. There is also provision that the DFC may dispense with such notifications as may be prescribed in regulations.

Entries on the statutory charges register

Historically, article 13(7) of the 1992 Order[11] required that the condition that a registered housing association may not dispose of or mortgage land without the consent of the Department be registered as a statutory charge on the statutory charges register.[12]

The position in relation to the requirement to register a statutory charge in respect of a disposal or mortgage of land by a registered housing association has now changed with the 2020 Act in that in consequence of the changes made by this new legislation any entry on the statutory charges register made in pursuance of article 13(7) of the 1992 Order ceases to have effect.[13]

Disposal of land by unregistered housing associations

The distinction between registered and unregistered housing associations has been discussed earlier in this article. There is power for the DFC to make grants to unregistered housing associations. If such an unregistered housing association has been given a grant in respect of any land, then if the housing association seeks to dispose of or mortgage that land the position remains under article 13A of the 1992 Order that it may only do so with the consent of the DFC.[14]

This consent procedure is not required if an unregistered housing association grants a lease of the land on short term leases.[15]

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[9] There were certain exceptions to this as noted in the legislation. There were also provisions as to the nature of the consent.

[10] Art 13 of the 1992 Order.

[11] And also article 123 of the Housing (NI) Order 1981 before it.

[12] Under article 141 of the Housing (NI) Order 2003 the requirement to place such an entry on the statutory charges register in relation to the granting of an equity sharing lease was removed.

[13] S 1(3) of the 2020 Act states that para 41(a) of Sch. 11 to the Land Registration Act (NI) 1970 is repealed and that any entry in the Statutory Charges Register that was made in pursuance of art 13(7) of the 1992 Order ceases to have effect.

[14] This consent may be given either generally in relation to all unregistered housing associations or to a particular unregistered housing association or description of an unregistered housing association or in relation to particular land or in relation to a particular description of land (art 13A(3) of the 1992 Order).

[15] These are defined in the 2020 Act as a lease for a term ending within a period of seven years and three months beginning on the date of the grant unless the lessee has an option to renew the lease for a term which would mean that in total the lease would expire outside of this period or the lease is granted wholly or partly in consideration of a fine (art 13A(4) of the 1992 Order).

Governance of housing associations

Registered housing associations are regulated by the DFC Housing Regulation Branch. The issue highlighted by the ONS decision was not an objection to the concept of regulation itself but rather the extent of government control through regulation.[16] Therefore the amendments to the governance of registered housing associations were to clarify aspects of when the regulator can intervene in the affairs of a registered housing association.

Inquiries into the affairs of a registered housing association

Under the 1992 Order the DFC had power to appoint a person to conduct an inquiry into the affairs of any registered housing association.[17] There was no restriction on the circumstances which had to exist before such a person could be appointed.

The 2020 Act clarifies the power in that the DFC may appoint a person to conduct an inquiry into the affairs of the registered housing association where the DFC has reasonable grounds to suspect that a registered housing association has failed or is failing to comply with any of the following relating to its housing activities or its financial or other affairs:

(a) a duty imposed under the 1992 Order or by another statutory provision;

(b) a requirement imposed on the association by DFC under the 1992 Order or by another statutory provision; or

(c) any guidance issued by the DFC under the 1992 Order[18]

If necessary for the purposes of the inquiry that person may also inquire into the business of any subsidiary or associate of the association concerned.[19]

It will be noted that an inquiry may be started in respect of a failure to comply with guidance issued by the DFC. The explanatory notes to the 2020 Act clarify that this is because it may be that failure to comply with such guidance could be an indicator of more serious failings within an association. However, the powers under article 25 of the 1992 Order may not be commenced on foot of a failure to comply with guidance.

Power to act for the protection of a registered housing association

The 1992 Order provided for circumstances in which the DFC could take action to protect a registered housing association. The 2020 Act provides that in addition to the conditions for the DFC to act its powers can only be exercised where the DFC considers that (a) the action is needed to protect the interests of tenants of the association or to protect the assets of the association and (b) the committee of the association is unwilling to take appropriate action for that purpose. This relates to its actions on foot of an inquiry or audit under article 24 of the 1992 Order, on foot of an interim inquiry report and immediate action after an inquiry or audit has started.

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[16] DFC, Proposals to seek reversal of the reclassification of registered Social Housing providers in Northern Ireland, (DFC, Dec 2016), p22.
[17] Art 23 of the 1992 Order, as amended.
[18] Art 23(1B) of the 1992 Order, as amended.
[19] Art 23(1B) of the 1992 Order, as amended.

The actions that the DFC could take if the required circumstances relating to the inquiry or audit exist are; to remove any committee member, officer, agent or employee of the association, suspend such a person for up to six months, freeze any securities held by the association or restrict the transactions or nature and amount of payments made in the administration of the association.[20]

Article 25(4) of the 1992 Order empowered the DFC by order to remove a member of a Committee of a registered housing association;

- who is a bankrupt;[21] or
- is incapable of acting due to a mental disorder under the Mental Health (NI) Order 1986; or
- has not acted or
- cannot be found or does not act and his absence to act compromises the committee's ability to ensure that the association complies with its duties and requirements to comply with (a) a duty imposed by the 1992 Order or by any other statutory provision or (b) a requirement of the DFC under the 1992 Order or any other statutory provision in either (a) or (b) relating to its housing activities or its financial or other affairs.

The 2020 Act amends this so that in addition to these conditions the circumstances must exist such that (a) the action is needed to protect the interests of tenants of the association or to protect the assets of the association and (b) the committee of the association is unwilling to take appropriate action for that purpose.

There are also powers to enable the DFC to appoint members of the Committee of an association for a period and to renew such appointment where (a) the action is needed to protect the interests of tenants of the association or to protect the assets of the association and (b) the committee of the association is unwilling to take appropriate action for that purpose.

Transfer of land of a registered housing association

The 2020 Act contains provisions under which the DFC may direct that a housing association transfers land to another body. This is where as a result of an inquiry under section 23 or an audit under section 24 certain conditions are met. The first condition is that a registered housing association has failed or is failing to comply with;

(a) a duty imposed under the 1992 Order or by another statutory provision or

(b) a requirement imposed on the association by the DFC under the 1992 Order or any other statutory provision

relating to its housing activities or its financial or other affairs.

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[20] Other requirements exist for action to be taken on foot of an interim inquiry report, immediate action after an inquiry or audit has started.
[21] Or is the subject of other specified bankruptcy or debt related issues.

The second condition is that it is desirable for the transfer to take place for the purpose of protecting the interests of the tenants of the association or protecting the assets of the association. The third condition is that the association is unwilling to take that action. There are also provisions as to the sum to be paid for such land.

If the association is a charity the land will be transferred to another charitable registered housing association that appears to the DFC to match the association's objects. In any other case the land may be transferred to another registered housing association or to the DFC.

Power to petition for a winding up of a registered housing association

The power[22] of the DFC to present a petition for the winding up of a registered housing association under the Insolvency (NI) Order 1989 on the ground (a) that it is failing properly to carry out its purposes or objects or (b) on the ground that the association is unable to pay its debts within the meaning of article 103 of that Order has been repealed.

Constitutional changes in registered housing associations

The 2020 Act makes certain changes in relation to aspects of the constitution of registered housing associations. Before the introduction of the changes, if a housing association wished to amend its rules, register a special resolution relating to the amalgamation, or transfer of engagements between societies or voluntary winding up of the registered housing association it had to obtain the consent of the DFC to this and provide a copy of the consent to the registrar to enable such an action to be registered.

The 2020 Act changes this in that if a registered housing association wishes to change their rules or amalgamate or transfer their engagements or voluntarily wind up the association it must firstly notify the DFC of this. DFC will then issue a certificate confirming that it has been notified and the association must send to the registrar the certificate from the DFC together with the copy of the special resolution giving effect to the change.[23]

The housing association right-to-buy scheme

Northern Ireland currently has a right to buy scheme called the house sales scheme whereby tenants of registered housing associations have a statutory right to buy their home. DFC is required to make a right-to-buy scheme for the tenants of registered housing associations under the Housing (NI) Order 1983. Importantly, under article 3A of the Housing (NI) Order 1983 a housing association is required to comply with the scheme. The ONS decision considered that the fact that this was under a statutory scheme meant that it was evidence of control over registered housing associations.

In the light of this, after consultation, the DFC enacted in section 7 of the 2020 Act that the right to buy scheme is abolished but that it will not come into effect until 2 years after the date of Royal Assent.[24] This will not affect the position where a person has before that date applied to buy their housing association home.[25] Nothing in the 2020 Act relates to the right to buy of Northern Ireland Housing Executive tenants.

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[22] Under article 27 of the 1992 Order.
[23] Sn. 29 of the 1992 Order (as amended).
[24] Sn. August 2020.
[25] Sn.7(2) of the 2020 Act.

The 2020 Act also makes provision that the DFC may make grants to registered housing associations in respect of right-to-buy discounts.[26] Such a grant may be made on any terms and conditions that the DFC consider appropriate.

Conclusion

The introduction of the 2020 Act presented the biggest change in the regulation of registered housing associations since the 1990s. Its result was to enable the ONS to reclassify such housing associations back into the private sector, thus meaning that their borrowing would not be classed as public sector debt and also would unlock access to innovative capital funding regimes such as FTC to enable the continuance of the government's social and intermediate housing programmes.

[26] Art 8 of the 2020 Act.

HAVE LESSONS BEEN LEARNT ON RISK MANAGING YOUR CONVEYANCING DURING THE RECENT LOCKDOWNS?

Simon Murray[1]

In this article the author highlights the similarities of the conveyancing challenges faced by the profession during the property collapse and with the recent Covid-19 pandemic.

When the property market stuttered to an abrupt halt in March 2020, the main focus and worry for practices was initially dealing with those residential transactions where the vendor and purchaser were already tied into an existing contract. The Covid-19 restrictions and Regulations did not allow completion to take place, removal men and estate agents were not able to fully operate. The Land and Property Services were effectively closed and many of the other third-party support providers such as Local Councils and Regional Property Unit were unable to operate to their normal capacity. There were also problems with delay in post and DX services. With the introduction of widespread furlough, lenders had cut back their staff numbers in their security departments and there was a major difficulty in obtaining title documents. This continues to be a problem.

It was therefore surprising that, as far as I know, most of the transactions in these circumstances did complete with a delay which did not require High Court litigation. This is a good reflection of the profession as the skilful use of negotiation between the solicitors managed what could have been a considerable wave of cases presenting themselves to the High Court, similar to what happened after the 2007/8 property valuation collapse.

Also, there was the timely introduction by the Law Society of Northern Ireland of Covid-19 Special Conditions. Although these Conditions are not perfect, they did provide a sensible alternative route to avoiding litigation for breach of contract. The Conditions introduced a number of Covid-19 events which allowed the parties to delay a completion until the Covid-19 event had passed. The involvement of the Law Society in drafting and producing these Conditions should be congratulated. The Conditions have been very helpful in supporting conveyances since they were introduced nearly a year ago. The vast majority of transactions are currently subject to these Conditions and I would strongly advise solicitors that in all residential contracts, the Conditions should be attached, whether or not you are acting for the vendor or purchaser.

When the market was re-opened, there was a huge wave of activity. First, all the transactions that had stalled for the three or four months of the first lockdown mostly proceeded to complete and also mostly at the original agreed price. There had been consistent press suggestion that prices would collapse by between 10-15% and this does not appear to have happened. If anything, the opposite has manifested itself, fuelled by the pent-up desire for more space and also the introduction of the Stamp Duty Land Tax holiday. Other factors were also noticeable,

[1] Principal Solicitor, Murray Kelly Moore

such as a strong willingness by vendors and purchasers, that now was the time to move was evident despite the doom and gloom message and negativity surrounding both Brexit and the Covid-19 pandemic.

I believe the Stamp Duty Land Tax holiday may have been misconceived as there was an overreaction and an ill-founded feeling that the property market would collapse. The estimate of the cost of the decision to the Exchequer up to the 31st March 2021 was £12 billion. The holiday has now been extended to the 31st June 2021 and a further extension for less expensive properties up to 30th September 2021. There is no doubt that the holiday has fuelled the property market and it has kept conveyancing activity at a very high level for a long time. It has been all hands to the pumps since the end of the first lockdown, and also for a first time in a while, the market appears to be shifting towards a seller's market rather than a buyer's market. A seller's market makes life a lot easier for the vendor's solicitor provided they get their clients instructions at a very early stage and are able to get hold of their title deeds. They need to apply for all documentation required without any due delay.

This type of market is not so good for the purchaser or their solicitor. There is more pressure to cut corners. The solicitor may have to pander to this pressure from the purchaser as they become desperate to complete their purchase and avail of the Stamp Duty Land Tax holiday. This sounds very familiar and there has already been talks about a comparison to the current market today with that of the market 2006 up to the property collapse in May 2007. Anecdotally, we hear of houses going on the market and being agreed within a day. There are some hotspots where the prices are being agreed at a much higher level than the asking price. This is worrying as practices struggle to keep up and also to safely complete all post completion matters in good time. Practices are focusing on doing everything that they can just to complete, so the saving of Stamp Duty is guaranteed. This type of scenario led to a lot of claims being made against solicitors' practices for negligence that emerged after the property crash in 2007 and there are simple lessons that need to be observed which are aimed at ensuring that history does not repeat itself;

- It is particularly important to keep good file attendance notes and back these up with clearly worded letters after the meetings advising the client of what you informed them of and what their instructions have been.

- If a solicitor feels that a client is taking a considerable risk in relation to an issue that has evolved during a transaction, the solicitor should consider preparing a form of indemnity for the client to sign. This sometimes focuses the clients' minds, particularly if their decision to proceed with the transaction may be deemed reckless. Any form of indemnity should clearly state that the solicitor has advised the client not to proceed, as they have concerns about the marketability of the title, or the ability to re-sell the property or even to borrow against the property in future. There should also be a clear attendance note confirming that the solicitor clearly explained to the client the risks they were undertaking.

Solicitors should always remember that if there is a lender involved, they are of equal importance as to the purchaser client. In fact, it could be argued that the lenders' importance is greater since it was the lenders in particular that sued a lot of solicitors for negligence after the last property crash. A lot of the lenders requested the solicitors to provide their files, as purchaser properties became repossessed and these files then became the basis upon which the lender tried to recoup their losses by taking action against the purchaser's solicitor for negligence. In these circumstances, everyone needs to be very mindful of all the requirements under the UK Finance Handbook and similarly the post completion

requirements under the Lenders Exchange and LMS Schemes for panel management of solicitors.

I am confident that we have learnt from these lessons and also there are not necessarily the same circumstances in the current market as there were previously. Certainly, the lenders' criteria for borrowing is more sensible and in Northern Ireland, the property valuations have increased in a steady flow in more recent years. Hopefully, we will not have another boom and bust market.

AGRICULTURAL PROPERTY LAW

Brian Walker[1]

In this article the author highlights the wide-ranging legal and regulatory framework that applies to the agricultural property sector and discusses the issues that can arise.

Practitioners who are involved in the sale or purchase of agricultural property should be aware that the agricultural sector is more heavily regulated than the legal sector. There are a number of statutory agencies: DAERA, NIEA and Rivers Agency. I am subject to regular inspections for ISO purposes and for Law Society purposes. I am also subject to inspections for Farm Quality Assurance on my farm at home. Most Solicitors will be surprised to note that the Regulations for Farm Quality Assurance are much more voluminous than any Regulations which the Law Society make. Inspection results indicating breaches are forwarded to the farmer but it is important to realise that some of these breaches may refer to conditions of buildings both above ground and below ground. There are specific requirements to provide appropriate facilities for animal feedstuffs, chemicals, oils and other potential pollutants.

Legally Farm Quality Assurance and the Red Tractor Scheme are voluntary but, in practice, it is very difficult to conduct a farm operation without one or other of the appropriate accreditation.

In addition to these requirements, if the sale or purchase of a farm includes machinery, then there are various statutory requirements in relation to the machinery. For example, if a sprayer is more than three years old then it must have a certificate of calibration. Similarly, a farmer who operates a sprayer must have the equivalent of a driving licence to operate such. This involves both a practical and theoretical course. This usually lasts a full day.

It is well known that Health & Safety is a major issue in the agricultural sector and there are many cases involving significant consequences where machinery is in some way defective or doesn't have, for example, the appropriate Power Take Off guard. Road Traffic law relating to agricultural machinery, and the requirements in relation to the driver and the machinery, is a complex subject on its own.

We are all well aware of issues involving climate change and the environment and we all should be aware that both at Westminster and Stormont there is draft legislation which will have significant impact on the agricultural sector. It is too early to say precisely what this impact will be, but it is very clear that the use of land is going to be governed by various mechanisms which are going to be the equivalent of Statutory Charges. There will be a huge impact on Land Registry practice but, for the purpose of this article, I intend to concentrate on the present situation.

[1] Principal Solicitor, Walker McDonald

There are existing management plans which are enforceable under statute. These include ESA, ASSI, Forestry and Woodland Schemes, Flood Alleviation Schemes etc. However, I anticipate that the focus of impending legislation will be in all cases to preserve habitat and encourage various measures to reduce or alleviate climate change. Certainly the abstraction of peat is going to be heavily regulated.

Inevitably farmers are interested in agricultural subsidies and you will be asked about Entitlements. My very clear advice is that unless you are familiar with the law and practice relating to Entitlements then you would be well advised to inform your client in writing that your knowledge is limited in this field and you should refer your client to a specialist who deals with the sale and leasing of Entitlements and the various time limits etc. These Entitlements will probably be phased out in the foreseeable future but it is important to remember that Entitlements are decoupled from the land and they are a separate legal entity. They are subject to VAT. The most important matter which you should note is that if Entitlements are not claimed for a period of two years, the Entitlements are forfeit. This is important in dealing with the administration of the estate of a deceased person.

In dealing with the estate of a deceased farmer there is frequently advice that the Deceased and another member of the family operated as a partnership. In many cases the partnership agreement has never been reduced to writing and you should be very careful to remind all concerned of partnership law in that if a partner dies the partnership ceases. This can have very significant tax consequences and, once again, you should limit your responsibilities in advising the client if you are not familiar with these tax matters.

I assume, for the purposes of this article, that you have studied the Pre-Contract Enquiries which have been published by the Law Society in relation to agricultural property. I, therefore, don’t wish to rehearse the various subjects which are addressed in those Enquiries but rather wish to draw your particular attention to a few of the major issues.

You should in all cases ensure that you have a copy of the relevant up to date DAERA farm map. You should establish with your client the ownership of each field according to Land Registry or any Deed map. In many cases your client will be anxious to establish the precise acreage. The acreage shown on the DAERA map will usually be less than the acreage in the Land Registry map. There are a number of reasons for this. Firstly, that the Department map will exclude farm buildings and any land that is not used for agriculture. Secondly, the Land Registry title will usually include half of any public roadway but, of course, the public roadway is dedicated to the relevant Department.

I am frequently asked about the possibility of obtaining Planning Permission for another dwelling on the farm. My general advice is that the client should obtain detailed advice from a qualified Planning Consultant. However, Policy CTY10 sets out the position. Planning Permission will be granted for a house on a farm once every 10 years starting from 25th November 2008. The farm business should be established for a minimum of 6 years and should be currently activated. Agricultural activity is defined in this document. The DAERA Business ID is required along with other evidence of active farming. Dwellings should not have been sold off in the last 10 years starting from 25th November 2008. There are other provisions in CTY10 which should be noted. You should also have in your possession a copy of PPS 21 headed ‘Sustainable development in the Countryside’ issued in June 2010.

The Planning Act (Northern Ireland) 2011 Section 132 (1) states that no enforcement action can be taken after 5 years from the date of substantial completion of the works. Part 7 of PPS21 sets out in detail what is permitted development for agricultural buildings and

operations and what developments are not permitted. The majority of agricultural buildings do not require Building Control Approval.

Many outbuildings on farms have asbestos in some form or other. A type 2 Asbestos Survey carried out in accordance with the Control of Asbestos at Work Regulations[2] and relevant guidance document will be sufficient if the building is sold while standing. Providing this survey report will enable the Vendor to demonstrate that he has done what is reasonably practical to meet statutory requirements and make the Purchaser aware of any hazards on site. Should a Purchaser be intending to develop the building it will then be up to him to arrange a Type 3 Asbestos Survey. I would always advise the Purchaser to obtain a Type 3 Survey regardless of the findings in the Type 2 Survey if the building was built, refurbished or renovated prior to 5th May 2000. I am of the view that including a disclaimer or waiver in the Contract for Sale would not provide any legal protection from prosecution or compensation claims against the Vendor in the event of release of asbestos fibres or a case brought by a Purchaser for expenses incurred in removing the asbestos materials.

Since farms are commercial operations there will usually be a water meter. It is important to identify the position of the water meter and the location of any pipe to the farmyard. On many occasions such a pipe may be over lands which are not in sale and you then have to address the issue of whether or not an easement exists. Since water charges are an increasing burden, many farmers have constructed boreholes. If this is the case then you must establish that the water from such a well cannot enter the mains water supply from NIW. If no such air valve is installed then the landowner might be subject to prosecution. There is a legal obligation for the driller to send information on the construction of a borehole drilled for water deeper than 15 metres to the Geological Survey of Northern Ireland.

Water abstraction control regulations are in force since 2007. A licence is not required for abstraction from a single supply point that on average extracts less than 20 cubic metres of water per day. This is 20 times greater than the requirements of an average domestic household.

Climate change is the subject of increased attention both in the public and private sectors. You should in all cases, therefore, ensure that the Purchaser is aware of the extent of the flood plain according to the latest information available online. If the farm is adjacent to or includes a designated waterway then the relevant Agency has the necessary authorisation to carry out regular maintenance of such a waterway. The definition of a watercourse is contained in the Drainage (Northern Ireland) Order 1973.[3] An Application for consent to undertake works to a watercourse is required for a discharge of storm water to a watercourse, a culvert of a watercourse, a diversion of a watercourse, a cross over or under a watercourse and other works adjacent to or affecting a watercourse. In essence a watercourse is any channel or passage of whatever kind whether natural or artificial through which water flows.

There are many occasions when your advice will be sought about septic tanks and the requirement for an easement for a soakaway. If a soakaway exists on a farm and it ceases to function then pollution will occur and this may reduce the entitlement to an agricultural subsidy. The average life of a soakaway is about 20 years and replacement can be a significant operation. No new septic tanks can be created and in the foreseeable future it is extremely

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[2] 2003 SR33
[3] A.2

likely, if not inevitable, that there will be a statutory requirement to replace all septic tanks with treatment plants.

The law on easements is not simple and it is beyond the scope of this short article to review this matter in detail. It is sufficient, however, to say that I have experience of a number of cases in which practitioners have had totally unnecessary panic attacks. My own view is that every rural practitioner should have not only a copy of Wylie on Land Law but a recent edition of the leading textbook on Easements.

Rights of way frequently lead to litigation. The vast majority of rights of way are not registered and there is no requirement at present in this jurisdiction to register such. In recent years Courts have become very impatient about disputes concerning rights of way and, in practice, Courts will give every encouragement to mediation. There is no doubt that the process of mediation is an efficient way of resolving such disputes. However, it is very important that prior to entering into any mediation a practitioner should make the client aware of the process of mediation. Mediation is not a Court of law. It is a process, hopefully, to lead to a resolution which will, in essence, be a compromise. The entire process, therefore, is completely different from advocacy in a Court. It is an entirely different skill.

Land prices in this jurisdiction are higher than any other part of the British Isles. It is not for me to advise clients as to whether or not it is a justifiable business decision to acquire land which will not achieve a reasonable annual return. However, mortgages are now being obtained for a period of 30 years and quite often the farmhouse is mortgaged to a different Lender. This leads to a number of difficulties. Firstly, in establishing clearly defined physical boundaries and easements for water, electricity and sewer. Secondly, Surveyors on behalf of Lenders are very reluctant to approve a common entrance and I have even seen cases where Surveyors object to a valuation because a dwelling house is adjacent to a farmyard. In one case the farmyard was owned by a different person and had absolutely nothing to do with the enjoyment of the dwelling house.

Mains services can be a significant issue. For example, if there is an electricity supply line crossing the land in question then the existence of such a supply line might affect the possible use of the land adjacent to that supply line. For example, it will make little difference if the electricity supply line is in the middle of a large field but if the supply line is adjacent to farm buildings then there are significant Health & Safety issues. If an extension to a farm building doesn't require statutory approvals, work might commence underneath a powerline and workers may not be aware of the risk of working underneath such a powerline. I even had one case where cattle were affected by electric shocks when using drinkers in the cattle shed.

The law in relation to telephone masts is a specialist area on its own. It is sufficient here to say that specialist advice should be obtained before entering into any agreement either to release or to terminate any lease of such equipment. The location of underground electricity cables is very important not only as to where the cable is, but the depth of the cable.

Most practitioners are aware of statutory and other agencies who have rights to lay services through agricultural lands and the law in relation to compensation. However, recent Decisions of the Lands Tribunal have the consequence of significantly reducing the compensation potential in many cases. If a farmer is served with an appropriate Notice then my very clear advice in all cases is that a specialist report is prepared on the soil profile both before and after the works have been completed. Frequently the existing soil profile and drainage pattern will have been disrupted to such an extent that the fertility of the land has been drastically

affected. In most cases existing stone drains have been installed for many years and these have been installed at an average 22 yards apart. The farmer will not be aware of precisely where these drains are and in many cases not even aware that they exist but when these drains are damaged significant problems might arise.

The existing Agricultural Pre-Contract Enquiries raise issues about Notices involving diseases of animals and plants. At first sight these might not appear to be very relevant but if an adjoining farm has been served with a Notice as a result of an outbreak of a disease then a consequence of that Notice may well be increased inspection and testing facilities of farms within a particular distance of the outbreak. Perhaps the most difficult problem arises in relation to poultry farming. Poultry litter can be a significant cause of Botulism which can be spread by wildlife to adjoining farms. Botulism can cause a particular agonising death to a bovine and, at present, there is no explicit statutory requirement in relation to the management and spreading of poultry litter.

Frequently I have to address the issue of Agricultural Relief in relation to the provision of the Inheritance Tax Act 1984. One of the provisions relates to the Deceased owning a property throughout 7 years ending with his death and the Deceased or another occupied the land for the purposes of agriculture then Agricultural Relief applies. In very broad terms the relief is dependent upon a definition of occupation.

Frequently an elderly farmer has entered into a Conacre Agreement and you, therefore, should pay particular attention to the Decisions of the Irish Courts in the nineteenth century as to the legal principles relating to conacre. Conacre is unique to Ireland. It is a licence to take a crop. It is not a Lease nor a right to exclusive possession. The owner of the property is still entitled to occupation.

There is considerable confusion in the minds of many persons between the provisions of the 1984 Act and the EU definition of an active farmer. It may be at some future date that Parliament might limit Agricultural Relief to active farmers but that is not the case at present.

Many farmers are anxious that the family farm is inherited by a son. Wills are frequently made without any attention to Family Inheritance Provisions. Similarly many intestacies are often administered by a Widow not being advised of her rights under the Inheritance Tax Provisions legislation, as opposed to her entitlement under law of intestacy.

The most important advice that a Solicitor should give to any farmer before making a Will is to draw the attention of the client to these matters and emphasise to the client that the client should discuss a succession plan with his family before making his Will.

FOLIO INTERNATIONAL

Charles O'Neill[1]

In this issue of Folio International we focus on recent measures introduced in the Republic of Ireland concerning the bulk purchase of homes in certain developments and also a change in the Stamp Duty regime relating to this.

The Irish government has indicated that it wishes to provide a solution to provide a level playing field for first-time buyers and owner-occupiers.[2] Among the measures introduced include a new planning circular[3] which regulates commercial institutional investment in granting planning permission for certain types of new residential developments – namely houses and duplex units. For the purposes of the circular the terms 'house' and 'duplex unit' are defined. A house is a structure to be used as a dwelling and does not include a building designed for use or used as two or more dwellings or a flat, an apartment or other dwelling in such a building. A duplex is defined as a dwelling within a building designed for use as two individual dwellings and/or on one shared plot, with separate entrances.

The circular states that on granting planning permission for residential development which is not build-to rent in respect of all housing developments that include five or more houses and/or duplex units the planning authority has to have regard to the need to apply certain conditions. If the application is for a mixed unit-type development, comprising partly of houses and/or duplexes the applicant has to enter an agreement (specifying the number and location of each house or duplex) that restricts all houses and duplexes to first occupation by individual buyers and/or by those eligible for the occupation of social and/or affordable housing, which includes low cost rental housing.

If the application is for a development of all houses and/or duplexes the applicant[4] has to enter into an agreement (specifying the number and location of each housing unit) that restricts all residential units permitted to first occupation by individual purchasers and /or by those eligible for the occupation of social and/or affordable housing, including cost rental housing.

There is a provision that such an agreement will last for the duration of the planning permission except where after not less than two years from the date of completion of each specified housing unit it is demonstrated that it has not been possible to transact each of the residential units for use by the parties named above.

These specific measures do not apply to apartment developments due to fundamental viability issues. This is in recognition of the need for continued investment from international capital to ensure supply in core urban and high density areas.[5]

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[1] LLB, MBA, Solicitor.

[2] Press release by the Department of Housing, Local Government and Heritage dated 18 May 2021.

[3] Department of Housing, Local Government and Heritage, Regulation of Commercial Institutional Investment in Housing – Guidelines for Planning Authorities (May 2021).

[4] Or any person with an interest in the land.

[5] Press release by the Department of Housing, Local Government and Heritage dated 18 May 2021.

At the same time, the Irish government has also increased stamp duty for buyers of ten or more residential properties to 10% to dissuade the practice whereby institutional investors buy homes that are close to completion or fully completed.[6] This higher stamp duty does not apply to the multiple purchase of apartments or to multiple purchases by local authorities, approved housing bodies or the Housing Agency.[7]

Both these measures are designed to increase the ability of first-time buyers to acquire and own their own home.

[6] Press release by the Department of Finance dated 18 May 2021.
[7] The measure was introduced by way of a Financial Resolution.

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