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Welcome to Folio - the Conveyancing and Land Law Journal from the Law Society of Northern Ireland. We hope you find the journal interesting and informative.

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

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## EVERSHIFTING SANDS

Simon Murray\*

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### Introduction

I am often asked why I practice conveyancing and not some other more interesting area of law. Conveyancing is deemed to be boring, routine and mundane. I find this general view strange, as one of the most important things I have learnt is that you cannot rest on your laurels if you are a conveyancer. To be a competent conveyancer you have to keep up-to-date with ever-increasing changes. These changes are not necessarily in legislation, or in practice, but they evolve sometimes in a rather unusual way. If you're minded to rely on the practices that were in place in conveyancing when you qualified, you can find yourself in difficulties. (I must confess though I do still occasionally dip into my excellent Institute of Professional Legal Studies extracts, on land law legislation, provided by James Russell when he was Director of the Institute in the 80s.) It is imperative therefore to keep current to learn from mistakes, and to pick up on small changes in our practices and procedures. A competent conveyancer has to continually adapt and learn.

Due to the very high level of professional negligence conveyancing cases that arose from the property crash of 2007, conveyancing solicitors are now compelled to do a minimum of 3 hours conveyancing-related CPD a year. This step was taken to demonstrate to those insurance companies underwriting the Law Society Master Policy that those solicitors practising conveyancing were up-to-date. Three hours per annum of professional CPD is not an unreasonable amount of time to be carried out. The Law Society's annual Conveyancing Conference is one such well-attended event and attempts to try and educate conveyancers on evolving topical matters. One of the most significant recent changes has been Home Charter Review and the 4th Edition of the General Conditions of Sale.

### General Conditions of Sale

It took approximately four years to complete the 4th Edition of the General Conditions of Sale. The 4th Edition was a necessity as it had been 20 years since the last review in 1999. After the introduction of the new General Conditions, a seven-member Sub-Committee completed a preliminary review of how the new 4th Edition has been operating. The general consensus was very favourable as there had been some concerns prior to its introduction about the adaptation of a number of fundamental changes in conveyancing practice.

### *Ground rent*

Probably the most significant change was with regard to ground rent. The Sub-Committee largely felt that the new system in the 4th Edition of the General Conditions of Sale was working well. Whilst some solicitors possibly were not tuned into the change and were therefore forgetting to deduct six years ground rent from the sale proceeds if a ground rent

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\* Principal Solicitor, Murray Kelly Moore

receipt was not provided prior to the completion date, on the whole, the Sub-Committee felt that vendors are much more active now in obtaining ground rent receipts prior to completion date and this change had been positive.

#### *Completion protocol*

The Sub-Committee felt the new Completion Protocol and completion letter had also bedded in well. Providing the standard Home Charter Scheme draft completion letter with the contract had improved the practice of completing a transaction. In dealing with the three standard undertakings, there were fewer difficulties and negotiations required on the morning of the completion date. A lot of additional undertakings were unnecessary as they were dealt with under the General Conditions in any event. Once again, overall, the Sub-Committee felt that the new system was positive.

#### *Sales of repossessed premises*

Issues remain regarding sales of repossessed premises, particularly in relation to bespoke special conditions. The Law Society's Conveyancing & Property Committee is currently reviewing this matter and there may therefore be in the future an agreed set of repossession special conditions that a lender/vendor must use.

#### *Other matters*

There were other matters discussed, including the requirements to provide gas safety certificates; searches if the vendor is selling as a personal representative and also the Home Charter Scheme Practice Direction in relation to alterations to a property. These are under further consideration but there are not likely to be any further major changes which will be welcome news to all practising conveyancers.

#### *The Regional Property Certificate*

If I was to illustrate one of the most important examples of how such a small change can have a radical impact on conveyancing practice, it would be in connection with the Regional Property Certificate. The Regional Property Certificate is a key document for the purchaser and needs to be carefully scrutinised. This is to ascertain the position in relation to the road, water, and sewer services to the property and also to establish if there has been any planning activity historically in relation to the property. The format of this document has changed on occasions over the last 30-40 years, but these changes have been rare. The old DOE Property Certificate remained a constant document for approximately 20-25 years. More recently the process of obtaining the Property Certificate was regionalised to Enniskillen. The new Regional Property Certificate then appeared and again the format of this has remained constant for some time.

One such change was the small change in reply to enquiry 3 and 4 relating to sewers and water services. There occasionally appeared the word "traverses". Just one word and one simple change. This had a major impact on conveyancing practice. With time, the significance of this word, which basically meant that there was a sewer or waterpipe that "traversed" or crossed the property for sale, became more apparent.

Conveyancers started to request from NI Water (at an additional expense) a letter and map showing the location of the sewer or water pipe that traversed the site. These NI Water

maps have now also become a very important document in the conveyancing process, and provision for these is included in Practice Direction 2015/1.

The letter or email that accompanies the map has a very strongly worded warning. The warning indicates that certain sewers and water pipes are not to be within three or four metres from any structure. It may be clear from the map that the existing house or an extension or garage has already been constructed over the sewer or water pipe. Alternatively, it may be clear from the map that the sewer or water pipe is clearly within the three to four metre distance to a building.

On occasion, I had clients withdrawing their offers to purchase as a result of the position of a sewer or water pipe as had appeared on the NI Water map. Mainly this was because they intended to carry out extensions to the rear of the property and felt that they might be inhibited in doing this.

If there appears to be a sewer built over or close to a property, you need to enquire about an existing build over agreement. This document allows the statutory authority to carry out repairs to sewers and drains if they have been built over. The availability of these documents has also caused an issue, as they were very rarely available as it was generally believed they could not be obtained retrospectively. Solicitors then adapted a practice whereby they would obtain a defective title indemnity insurance policy for lack of build over agreement in circumstances where there had been an alteration carried out over a sewer or water pipe. On the whole, the insurance industry provided satisfactory policies which have always oiled the wheels of the conveyancing process and allowed purchasers to proceed to complete their purchases. This whole procedure evolved over a number of years, and it became common practice that if the NI Water map showed that the sewer or water pipe was within three to four metres or a part of the building had been built over the water or sewer pipe, then the defective title indemnity insurance policy was deemed a reasonable solution to this issue.

At the end of June 2021 another minor alteration appeared in connection with the Regional Property Certificate enquiries 3 and 4 relating to sewers and water pipes and has caused considerable confusion and difficulty. Instead of the definitive yes or no response to question 4 "Is a public sewer available to serve the property?" and to question 5 "Is a public water main available to serve the property?", the following words were added: "there is a foul sewer within 20 metres of the boundary of the site as indicated on the map provided with the property certificate enquiry". There was also further comment relating to a storm sewer. The response was similarly changed for the question regarding a water main to note if this was located within 20 metres of the boundary of the site as indicated on the map provided with the property certificate enquiry.

Where the response is "no" to these questions, and particularly in relation to the storm sewer, a purchaser's solicitor may need to raise additional enquiries and requisitions pertaining to this and whether or not there has been any issues in connection with the same.

The Replies to Pre-Contract Enquiries contain an enquiry if the property is connected to the mains sewer and water which the vendor can confirm. The Regional Property Certificate does not confirm this, and this has caused considerable concern to conveyancers.

The pre-contract enquiry regarding any issues the vendors may have had with the services to the premises during their ownership can provide comfort to a purchaser's solicitor, particularly if the vendor does not declare any issues with the services including water and sewer to the property during their period of ownership.

It is hard to ascertain exactly what a competent purchaser's solicitor should advise the purchaser in connection with the change in the replies to the Regional Property Certificate since June 2021.

The Law Society has been engaging with NI Water regarding the difficulties that have arisen. These issues not only highlight to those practitioners who are not aware of the ongoing difficulty, but also illustrate how something so minor can have such an impact. It is for this reason I believe that conveyancing is not boring, because you have to be tuned in to major and minor changes that invariably occur - that is what keeps it interesting.

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## THE PROS AND CONS OF AUCTION CONTRACTS

**Catherine Heyes\***

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When we think of a property auction, we picture a packed room, a hushed crowd and a prevailing sense of anticipation, where fortunes can be made or lost. The stakes might be high, but conveyancing solicitors will be aware that the real stress and drama actually exist outside the auction room.

We are all too familiar with the complaint that the conveyancing process is too slow, too stressful and fraught with uncertainty. The pressures placed on all parties involved in the process were very apparent approaching the end of the initial phase of the stamp duty land tax holiday at the end of June 2021 and the subsequent tapering of the holiday towards the end of September 2021. The frustration of a purchaser missing out on a hefty tax saving because of a title issue discovered potentially several months after having their offer accepted is understandable, as is the frustration of a vendor being asked to reduce the agreed price for their property by a purchaser finding themselves required to pay stamp duty land tax to HMRC that they did not budget for or potentially losing the sale entirely. It is with this in mind that the Law Society of Northern Ireland has worked in recent years to front-load the conveyancing process as much as possible by the implementation of a Joint Memorandum in improving communications between the professions issued alongside RICS and NAEA Propertymark (now known as People Professionals and Property) and by the introduction of the new General Conditions of Sale, 4th Edition, in use since the beginning of 2021. These documents place the onus on the vendor to provide all required documentation much earlier in the process and particularly in advance of the contract being signed.

The ideal scenario for both vendor and purchaser (and their solicitors) is to have a contract signed well before the proposed completion date with no documents to follow that threaten to derail the whole process. For those individuals opting to sell or buy at auction, this is exactly what happens. At auction, the contract becomes binding when the hammer falls to the highest accepted bidder. A deposit is typically paid immediately and a completion date four weeks later is set. Any complaints of a slow and uncertain journey to completion are removed.

Despite these apparent advantages, an auction is still not a commonly used way of selling or buying property. The advantages can easily become disadvantages depending on the individual circumstances of those involved. A vendor selling their home who needs to find somewhere else to live will not want a legal commitment to hand over the keys in 4 weeks' time and a purchaser who needs a mortgage or the completion of an associated sale to complete their purchase will not want to be left with no way out should either not materialise. Furthermore, either the selling or buying of property at auction will, or certainly should, require initial expenditure on both sides. A vendor will need to instruct a solicitor to prepare a title pack and contract in advance with no guarantee of securing a purchase. A prospective purchaser is well advised to instruct their own solicitor to check the title pack prior to them attending the auction. They may also instruct a surveyor to produce a Homebuyers Report in advance, but with no guarantee that they will be the winning bidder and secure the property. This

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\* Solicitor, Director, Peter Bowles & Co.



does all mean that the scope of an auction is limited, both in providing a range of properties for the prospective purchaser and a range of buyers for the prospective vendor. For certain properties, though, an auction is a desirable approach, and a look at any auction catalogue will identify what those properties commonly are – plots of land, commercial properties or residential properties marketed at cash buyers, often ‘doer-uppers’. Where that is the case, both sides need to be aware of the pros and cons it entails.

On making a decision to sell a property at auction, a vendor’s first step is to instruct an auctioneer to market the property on his behalf. The RICS guidance under which many auctioneers operate<sup>1</sup> requires the auctioneer to ensure, insofar as possible, that the particulars of sale in the auction contract are factual and accurate and to seek approval of same from the vendor, the vendor’s solicitor and their managing agents (if any). The auctioneer will typically seek an indemnity from the vendor against any liability for inaccuracies, thus making it clear that it is for the vendor to ensure that the information and documentation being provided to prospective purchasers is accurate and can be relied upon by them. The advantage to the vendor of a successful sale at auction and securing a legally binding commitment from a purchaser can be lost if, up to that point, the vendor has not remained mindful of his legal obligations to the purchaser under the contract.

This is of all the more importance following the introduction of the General Conditions of Sale, 4th Edition, at the start of 2021. Simon Murray’s article in Issue 2 of Folio in 2020 observed that the previous General Conditions of Sale, 3rd Edition 2nd Revision, were predicated on a system of conveyancing that was no longer the case in practice. The new 4th Edition was designed with the realities of conveyancing today in mind, whereby a purchaser signs the contract, often quite close to completion, once all required documentation has been provided to his solicitor. This has led to a focus on front-loading the process. A vendor selling at auction who does not appreciate the implications could find themselves at risk of financial loss or of giving their purchaser a reason to rescind the contract entirely in certain circumstances.

As far as auctions in general are concerned, the General Condition relating to sales by auction (Condition 20 in both in the 3rd Edition 2nd Revision and the 4th Edition) contains a significant amendment at Clause 20.2 – which states that *‘The Vendor shall prior to the auction provide all documents required to be provided by these General Conditions of Sale, including for the avoidance of doubt (but not limited to) the searches and property certificates set out in Condition 2’*<sup>2</sup> as opposed to the previous position (also detailed at Condition 20.2) which stated that *‘the Vendor shall at the time of the auction provide for inspection the searches and certificates set out in Condition 2.3’*<sup>3</sup>. Even apart from the requirement to provide documents in advance rather than at the auction, General Condition 2 has been extensively re-drafted, and now contains a much longer list of documents, including, among other things, *‘full and complete replies to the enquiries contained in the current version of the Law Society Replies to Pre-Contract Enquiries’*. The reference to replies to enquiries is a departure from that previously expounded in theory (if not necessarily in practice) under Condition 2.1 of the 3rd Edition 2nd Revision by which the vendor was to disclose to the purchaser prior to completion *‘all matters of which he has or ought to have knowledge.....’*, with the proviso that production of the searches and property certificates detailed in those conditions and clear replies to any enquiries raised by the purchaser prior to the formation of the contract would satisfy that condition. It is likely that previously in a sale by auction, it would be relatively rare for a

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<sup>1</sup> ‘Auctioneers selling real estate (Incorporating Common Auction Conditions)’ – 7th Edition – RICS.org

<sup>2</sup> Law Society of NI General Conditions of Sale, 4th Edition.

<sup>3</sup> Law Society of NI General Conditions of Sale, 3rd Edition, 2nd Revision.

prospective purchaser to raise any such enquiries prior to formation of the contract at auction however the default position now is that all purchasers would have the benefit of considering these Replies and the benefit of the vendor confirming the replies to be unaltered on the date of the auction by signing the Memorandum of Sale. This may all seem onerous to a vendor selling at auction but for those prepared to invest the time and expense into providing a comprehensive legal pack, there are great advantages to the new General Conditions and its front-loading focus. Where a purchaser has been provided with any search, certificate or document prior to the contract being formed then the contract will be unconditional in respect of that document and no query or objection may be raised by a purchaser in respect of any matters appearing on such a document. On the other hand, failure to provide any such document in advance of the auction will mean a vendor having to provide it in advance of the agreed completion date instead with the risk that should the document be unsatisfactory the purchaser will be permitted to rescind the contract.

The suite of updated Home Charter Scheme documentation issued alongside the new General Conditions in January 2021 included a new Commercial Schedule, discussed in detail by Ben Fraser in Issue 1 of Folio 2021. Given the prevalence of commercial properties appearing at auction these are likely to become more commonly used, and it is essential for a vendor that where this is the case they are properly completed, including noting the requirement to tick the box on the Memorandum of Sale that they do apply to the transaction. Of particular importance is the amendment to the Memorandum of Sale to state the purchase price as being inclusive of VAT, with this position being varied by incorporation of the Commercial Schedule. For the unwary vendor who has exercised an option to tax their property, a failure to consider this could have serious financial implications.

The proviso to all of the above, as with any contract, is that a vendor always has the option of adding tailored Special Conditions to the contract provided with the auction pack. I would suggest that in many cases it will be as straightforward, and maybe even more so, to simply provide the various documents detailed by the General Conditions, rather than spend that time drafting extensive special conditions particularly as Special Conditions should be specific to each transaction and not 'cut and paste' for all transactions. A purchaser faced with a long list of opt-outs would be wise to wonder what the vendor does not want them to see.

We are all familiar with the principle of caveat emptor and the accepted position that a purchaser should make any enquiries they deem necessary about the property, either concerning its legal title or its physical condition, before committing to the purchase. This does not, however, excuse the vendor from any attempt to misrepresent to a purchaser what they are actually selling. The first port of call for a purchaser seeking to buy at auction is the sale particulars produced by the auctioneer and appearing in the auction catalogue, and whilst these do not form part of the sale contract, it is in the interests of the vendor to ensure that these particulars are accurate.

The old case of *Flight v Booth*<sup>4</sup> in which the full extent of restrictive covenants in the lease under which the property was held were not detailed in the particulars of sale, permitted a purchaser to rescind the contract for sale entered into at auction on the basis that '*where a misdescription in the particulars on a sale auction, although unintentional, is in a material and substantial point, and of such a nature as to lead to a reasonable inference that, but for such misdescription, the purchaser would never have entered into the contract for sale, he....*

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<sup>4</sup> (1834) 1 Bing NC 370, 4 LJCP 66, 1 Scott 190, 131 ER 1160, [1824-34] All ER Rep 43

*may rescind the contract, and recover back his deposit*'. That case is approaching 200 years old, and the circumstances in which the auction sale were conducted were very different (in that case the original lease was not produced until after the auction, under the present-day General Conditions in Northern Ireland that would not be the case), but the principle of ensuring that the property is not misdescribed to the purchaser remains and has been the subject of further case law over the years since.

The 1991 case of *Atlantic Estates plc v Ezekiel*<sup>5</sup> was a case in which particulars of a property in an auction catalogue suggested that the property in sale was trading as a wine bar at the time of the auction. The auction particulars contained photographs showing the premises with an awning that read 'Wine Bar by day, cocktail bar by night', with people entering and leaving the property, and the list of subsisting tenancies provided with the auction particulars included a reference to tenant 'A Pommell (Wine Bar)'. The particulars correctly described the term and the rental, but stopped short of describing the recent travails of that tenant, namely that he had lost his licence, closed the premises for trade and stopped paying rent.

The successful purchaser, Freddy Jacob Ezekiel, only became aware of these facts following the auction, when his solicitors enquired of the vendor why rent had not been paid. Having found out what had happened to the tenant, Mr. Ezekiel refused to complete, and the vendors issued a writ for specific performance of the contract formed at auction. The Chancery Division of the High Court in England and Wales ruled in favour of the vendor, ordering specific performance of the contract, and the purchaser appealed.

The Court of Appeal allowed Mr. Ezekiel's appeal. The judgement by Lord Justice Mustill observed that the case raised no new issues of the principle of the formation of contracts, but rather turned on the application of well-established rules in that area, as follows:

- 1) The question whether one party has made a representation in the course of negotiations for a contract depends on what he has actually conveyed by writing, words or conduct, such as a nod or a wink.
- 2) If one party does in fact make a "nod or a wink" representation, it is no defence to argue that had the representee taken the trouble to enquire he could have discovered that it was untrue.
- 3) Except in those cases where the nature of the contract is such as to require certain facts to be disclosed, for example where the contract is one of the utmost good faith, one party has no ground for complaint simply because the other has not disclosed a fact which, if disclosed, would have influenced the first party in deciding whether to enter into the contract.
- 4) There may, however, be circumstances in which the true import of what was said or written is distorted by what is left unsaid, so that even if the representation is literally true in every particular it is nevertheless misleading.

The question on which this case turned was whether, applying these principles to the facts of this case, did the fact of the tenant having lost his licence, stopped trading and fallen into arrears call for inquiry by an intending purchaser rather than spontaneous disclosure by a vendor, or did the omission of these facts cause the particulars of sale to give a false impression of what was being sold? The trial Judge had assigned the case to the first category, thus finding in favour of the vendors, but the Court of Appeal assigned the case to the second category, describing it as 'essentially a point of impression' in that the particulars

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<sup>5</sup> Court of Appeal [1991] 2 EGLR 202

viewed as a whole conveyed that the tenant was running a wine bar, which was not the case, and thus allowing the purchaser's appeal. The judgment is an interesting one in that it attaches less importance to the principle of *caveat emptor* than to the vendor's obligations to provide accurate information to the purchaser – even while observing that it was the practice of the purchaser *'to buy such properties at auction on the strength of the description in the auction catalogue without himself making anything substantial in the way of inquiries....'* The judgment may provide some comfort to purchasers seeking a bargain at auction that the risk of a bad investment is somewhat mitigated where the decision to buy rests on misleading particulars provided by the auctioneer on behalf of the vendor.

The more recent case of *Harsten Developments Ltd v Bleaken and others; Devlin & others v Harsten Developments Limited*<sup>6</sup> was also concerned with the issue of misrepresentation at auction. This was a case in which Harsten Developments Limited purchased a building plot at auction which was situated between two properties, No. 27, (owned by the Bleakens who were the vendors of the building plot), and No. 25, (owned by a Mr. Devlin and Ms. Powell). Following completion, a dispute arose as to the correct position of the boundary between No. 25 and the building plot, and Mr. Devlin and Ms. Powell brought proceedings against Harsten Developments Ltd as the owner of the plot. Harsten Developments Ltd in turn brought proceedings against the Bleakens, seeking rescission of the sale contract on the basis of misrepresentation together with damages.

The auction particulars had been prepared by the auctioneers instructed by the Bleakens, David James & Partners, and approved by the Bleakens. The particulars contained details variously concerning the boundaries of the plot to be sold, and also stated that the property was sold subject to *'all rights including rights of way...drainage, water and electricity supplies... whether referred to in these particulars or not'*. There followed an extensive list of disclaimers that will be familiar to anyone who has reviewed an auction pack on behalf of a prospective purchaser, that:

*'Both plan and particulars are believed to be correct but they do not constitute any part of any offer or contract and any intending purchaser must satisfy himself as to the correctness of each of the statements contained in these particulars as all such statements are made without responsibility on the part of David James & Partners or the vendor or his solicitor'; that 'Prospective purchasers shall be deemed to have inspected the relevant property and made all usual and necessary searches and enquiries', and 'Prospective purchasers are strongly advised to check these particulars as to measurements, areas and all other matters...by making inspection of the property....All measurements and areas referred to in these particulars are approximate only. All location plans published in the Particulars of Sale are to enable prospective purchaser to locate the property only...Purchasers are advised to view the precise interest to be conveyed'*

The section headed 'Boundaries' in the auction particulars stated that *'the box hedge to the rear and east will be owned by the plot and it is assumed that these will be removed to produce the above quoted dimensions'* (referring to the Planning Permission for the plot). This was of particular relevance since there was uncertainty surrounding the mapping of the property – the plan used for the contract was stated as being to a scale of 1:100 showing distances in metres, but against that the drawing was annotated to state that *"This drawing must not be scaled all dimensions and particulars to be checked on site before work commences"*.

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<sup>6</sup> Chancery Division [2012] EWHC 2704 (Ch)

Subsequently an auction pack was produced by the Bleakens' solicitor which included, among other documents, a draft agreement for sale and a Sellers Property Information Form (SPIF), signed by the Bleakens the month before the auction date. As is the case with our own Replies to Pre-Contract Enquiries in Northern Ireland, the SPIF alerted the vendor completing the form to the fact that the answers given were important, that a purchaser was entitled to rely on them and that incorrect or incomplete information given by the vendor to the purchaser may mean that the purchaser could claim compensation or refuse to complete the purchase. Of relevance were the Bleakens' responses to the following enquiries:

- 5.5 – 'Do any drains, pipes or wires leading to any Neighbours property cross your property' to which the answer given was 'No'. In fact, there was a pipe in a ditch within the building plot and evidence from the previous owners who sold the property to the Bleakens suggested that they were aware of this.
- 6.7 – 'Do any of the neighbours need to come onto your land to repair or decorate their building or maintain their boundaries or any drains, pipes or wires', to which the answer given was also 'No'.

When Harsten commenced development, it identified four main issues that would prevent it from carrying out the proposed development in accordance with the planning permission in place for the plot at the time of the auction, and it alleged the following misrepresentations by the Bleakens:

1. The position of the western boundary (between the building plot and the Bleakens property at No 27).
2. The position of the eastern boundary (between the building plot and the Devlin/Powell property at No. 25).
3. The existence of a drain running along the boundary of the property not being disclosed.
4. The description of the land as a building plot, together with references to the applicable planning permission and a planning application for variation of a planning condition not being accurate.

The Court of Appeal Judge did not uphold all of these arguments, but did agree that the following representations had been made:

1. That the eastern boundary had been represented as being at the far side of the box hedge falling between the building plot and No. 25. This hedge needed to be removed to implement the planning permission. Although the auction particulars stated that an intending purchaser should inspect the property and that the particulars did not constitute any offer or contract, the Judge noted that this did not stop that from being a statement of fact, and in any event such an inspection on the ground would not have revealed that this representation was wrong. It was therefore a misrepresentation. The statement in the particulars that they were without responsibility on the part of the vendor was not relied upon by the Bleakens in argument.
2. On the evidence in the case, it was established that the owner of a field to the north of the building plot had acquired a prescriptive easement of drainage through the pipe. The answers provided at enquiries 5.5 and 6.7 of the SPIF represented that no such easement existed. Whilst the auction particulars did state that the land was sold subject to all rights including rights of drainage whether or not referred

to in the particulars, the Judge observed that this did not prevent answers given in the SPIF from being representations, and indeed made them all the more important to a prospective purchaser. The answers were therefore not correct, and so were misrepresentations.

The next question was whether the position was affected by the contract itself. It is the contractual conditions that govern the actual legal relationship between the parties, but it was judged that this does not prevent the purchaser from relying on earlier statements of fact. Special Condition 7.1.3 to the agreement for sale permitted rescission of the contract only if an error or omission either resulted from fraud or recklessness or resulted in the purchaser being obliged, to his prejudice, to accept property differing substantially (in quantity, quality or tenure) from what the error or omission had led him to expect. The Judge did consider that to be the case here, and so Harsten were entitled to rescission of the contract.

This case demonstrates that misrepresentations made in the auction particulars that cannot be disproved by purchaser inspection are potential grounds for rescission, so a vendor should take care to ensure accuracy to avoid any future difficulties either pre-completion or even, as in the Harsten case, afterwards.

If selling at auction carries the risk of potential pitfalls for a vendor, the purchaser actually paying for the property shoulders a far greater potential risk. The cases detailed above are unusual, in that the purchasers did manage to find their way out of a legally binding contract that had turned out, on further investigation, to be disadvantageous to them as a result of some carelessness pre-contract by the vendor. The general position, of course, is that a purchaser to whom the hammer falls at auction is bound to purchase the property as it is.

It is fair to say it is generally the case that prospective purchasers at auction are well warned of the importance of consulting the legal documentation in advance of the auction, of inspecting the property, and of seeking advice from a solicitor and any other necessary professional. They are warned that when the gavel falls with them as the successful bidder, they are in an unconditional binding contract to purchase the property. For the sensible purchaser, buying a property at auction having put in the necessary groundwork offers the potential of a bargain, with relatively few competitors in the picture compared to the open market. There is also the assurance of a speedy completion, saving the frustrations of a lengthy wait to get keys. On the other hand, that same purchaser runs the risk of not being the successful bidder and not benefitting from any money spent on solicitors or surveys prior to the auction.

However, such costs are minor compared to what else a purchaser may stand to lose following a successful bid at auction with potentially huge sums of money required to put right physical or legal defects following completion. They may also find themselves the subject of an application for specific performance by a vendor if they are unable to source the necessary finance to complete their purchase. Nonetheless, anecdotally, it seems to be the predominantly the case that a purchaser will first consult with their solicitor after, rather than before, the auction. It must be acknowledged that we, as a profession, are not vocal enough about the amount of time and skill that goes into reviewing contracts and title deeds and dealing with any issues arising. It follows that purchasers looking through an auction catalogue do not recognise just how much trouble can result to them from matters contained in title deeds, property certificates and searches, either in terms of their practical enjoyment of the property or in any attempt to sell it on or to secure finance against it down the line. This is all the more relevant where an auction contract includes multiple special conditions in the vendor's favour. A solicitor advising a prospective purchaser will be able to ensure that they are fully aware of what disadvantages may result from these, compared to a contract for a sale agreed on

the open market, which will typically have few or no such special conditions attached. A brief look through some of the legal packs in an upcoming auction feature an apartment with the lessor company responsible for insurance and maintenance of the apartment building being in liquidation; several apartments for which management arrangements are not clear (either because of the relevant title deed not being provided or no information being provided regarding operations of the management company), and several properties with a tenant in situ but no detail regarding their terms of occupation. We are all too aware of the potential problems in any of these scenarios.

In a world of voluminous terms and conditions that are box ticked but rarely read, it is completely understandable that a prospective purchaser will see 22 pages of auction conditions, 17 pages of contract conditions, possibly 12 pages of commercial conditions and who knows how many special conditions and be tempted to skip past them without considering the consequences for them should things go wrong. The Covid-19 pandemic has taken this relaxed approach one step further by moving property auctions online. We are all used to one click purchases, and to returning goods we have changed our mind about just as easily. Without the sense of occasion imparted by a physical auction room, it is surely all the more likely that properties will be purchased at auction with even less thought given to the consequences. A typical set of 'Online Auction Terms and Conditions' authorises the auctioneer to *'populate and sign the [contract] on behalf of the winning Bidder'*. Whilst an auctioneer can also sign on behalf of a successful purchaser at a physical auction, the remoteness of the experience must remove an element of gravitas from the occasion. As I heard a solicitor colleague observe recently, seeing the whites of our clients' eyes as they sign a contract for possibly the most expensive purchase they will ever make is no bad thing in emphasising the seriousness of the commitment being made.

Ultimately, whether buying or selling at auction or on the open market, the conveyancing process is the same with the same scope for stresses and problems. Those who do participate in the auction process can learn from the 'typical' process by recognising the significance of the legal commitment being made, and the importance of due diligence before signing the contract. Even with the move online, it is still unlikely that the auction process will be embraced by the majority of vendors and purchasers for the foreseeable future, but the 'typical' process can still embrace some of the lessons that can be learned from auctions to make the standard homebuying experience a happier one for everybody concerned. By applying the forward planning and preparation approach made necessary by the auction experience to every sale and purchase we can improve the client experience and avoid delays, even where an impending auction date is not dictating the pace. This embracing of the front-loading process is what underpins recent developments such as the new General Conditions of Sale and the Joint Memorandum, and using these to their full potential allows us all to look to a future in which our clients can enjoy many of the benefits of an auction, with few of the risks.

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## AN OVERVIEW OF THE PRIVATE TENANCIES ACT (NI) 2022

Charles O'Neill\*

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The Private Tenancies Act (NI) 2022 (the 2022 Act) represents the biggest change in the law relating to private tenancies in Northern Ireland since the Private Tenancies (NI) Order in 2006 (the Private Tenancies Order). It covers areas such as: notices to be given by a landlord to a tenant, the provision of a rent receipt for payment in cash, provisions regarding tenancy deposits, provisions regarding the amount of rent that can be charged to tenants, the provision of fire, smoke and carbon monoxide alarms in tenanted properties, provisions regarding energy efficiency and electrical safety standards. It also includes provisions regarding the notice to quit periods and how notices to quit are to be served. Finally, the new legislation provides for a consultation on payment options for tenants. This article gives an overview of the provisions of the 2022 Act with further articles to follow once further provisions in the Act come into force.

### The history of the Act

The Private Tenancies Bill was introduced into the Northern Ireland Assembly on 6 July 2021. It is the culmination of work carried out in relation to private tenancies since the consultation entitled *Private Rented Sector in Northern Ireland – Proposals for Change in 2017*.<sup>1</sup> This consultation had focused on elements such as the supply of private rented homes, affordability, security of tenure, tenancy management, property standards and dispute resolution. The 2022 Act, which received Royal Assent on 27 April 2022, contains 15 sections and three Schedules. It largely consists of amendments to the Private Tenancies Order,<sup>2</sup> although the provisions relating to notices regarding certain past matters and the power to make payment options for tenants and the duty to consult on these are contained in the 2022 Act alone.<sup>3</sup> Some of the provisions of the 2022 Act relating to notices to quit came into force immediately upon Royal Assent being granted. Other provisions came into force on 1 April 2023<sup>4</sup> and other provisions will come into force once further commencement orders have been made.<sup>5</sup> Many aspects of the Act are framework provisions with the detail to follow in regulations to be made by the Department for Communities (DfC).<sup>6</sup>

In two aspects the Act requires DfC to issue consultations on certain issues – rent decreases<sup>7</sup> and payment options for tenants<sup>8</sup>. These had to be conducted within 6 and 18 months respectively of the Act receiving Royal Assent.

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<sup>1</sup> Department for Communities, *Private Rented Sector in Northern Ireland – Proposals for Change*, (DfC, 2017).

<sup>2</sup> As amended by the Housing (Amendment) Act (NI) 2010 and Housing (Amendment) Act (NI) 2011.

<sup>3</sup> i.e. these provisions do not amend the Private Tenancies Order.

<sup>4</sup> Ss 1–6 of the 2022 Act by the Private Tenancies (2022 Act) (Commencement No. 1) Order (NI) 2023 (SR 2023/20).

<sup>5</sup> Under the 2022 Act, s 14.

<sup>6</sup> Regulations will provide the detail of the legislative requirements.

<sup>7</sup> S 7 of the 2022 Act.

<sup>8</sup> S 12 of the 2022 Act.



The result of this is that the law relating to private tenancies is becoming ever more complicated as the legislation will now involve consideration of five items of legislation.<sup>9</sup> This surely makes the case for the law to be consolidated into one piece of legislation.

Each of the areas in the 2022 Act will be considered in turn. In this regard it will be appreciated that where relevant, the provisions will be supplemented by detailed regulations and that these will provide in many respects for the practical implementation of aspects of the 2022 Act.

### **Notice to quit periods**

The only provisions that came into force when the Act received Royal Assent are those relating to notices to quit. These took effect from 5 May 2022.<sup>10</sup> The new legislation makes provision for changes to the notice to quit periods that a landlord is required to give a tenant to end a tenancy and vice versa. A consultation was issued by the DfC during the passage of the new legislation through the Assembly.<sup>11</sup> The notice to quit periods have become somewhat complicated and different rules apply depending on whether the landlord is giving notice to a tenant, or a tenant is giving notice to a landlord.

#### *Landlord serving a notice to quit*

Under the 2022 Act, from 5 May 2022, a landlord has to give a tenant:

- (a) Four weeks' notice to quit if the tenancy has not been in existence for more than 12 months;
- (b) Eight weeks' notice if the tenancy has been in existence for more than 12 months but not for more than 10 years; and
- (c) 12 weeks' notice if the tenancy has been in existence for more than 10 years.<sup>12</sup>

The notice to quit must be in writing. These requirements do not apply to a notice to quit given before the section came into operation, in which case previous notice periods apply.<sup>13</sup>

There are also provisions in the 2022 Act to change the notice to quit periods for which a landlord must give a tenant and the format of the notice that must be given. This is to be undertaken by regulations to be made by the DfC at a later stage. In this regard the notice to quit will have to be in a prescribed format and must be given by a landlord to a tenant complying with the following notice periods:

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<sup>9</sup> The relevant legislation being: the Rent (NI) Order 1978; the Private Tenancies (NI) Order 2006 as amended by the Housing (Amendment) Act (NI) 2010 and the Housing (Amendment) Act (NI) 2011; and the Private Tenancies Act (NI) 2022.

<sup>10</sup> The legislation itself provided that the notice to quit provisions came into effect on the day after the 2022 Act received Royal Assent (s 11 of the 2022 Act). However, it was further provided that if the provisions would come into effect before the end of the emergency period within the meaning of the Private Tenancies (Coronavirus Modifications) Act (NI) 2020 they would come into operation at the end of that period (s 14(5) of the 2022 Act). The emergency period ended on 4 May 2022.

<sup>11</sup> DfC, Notice to Quit Consultation (DfC, December 2021).

<sup>12</sup> Art 14 of the Private Tenancies Order as inserted by s 11 of the 2022 Act.

<sup>13</sup> The notice to quit period for a landlord giving notice to a tenant under the Private Tenancies (Coronavirus Modifications) Act (NI) 2020 was 12 weeks regardless of how long the tenancy had been in existence. This applied during the emergency period which ran from 5 May 2020 to 4 May 2022. Prior to that, under the Order the notice to quit periods for a landlord giving notice to a tenant had been four weeks' notice if the tenancy had not been in existence for more than five years, eight weeks' notice if the tenancy was in existence for more than five years but not more than 10 years, and 12 weeks' notice if the tenancy was in existence for more than 10 years.

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- (a) Eight weeks if the tenancy has not been in existence for more than 12 months;
  - (b) Four months if the tenancy has been in existence for more than 12 months but not for more than three years;
  - (c) Six months if the tenancy has been in existence for more than three years but not for more than eight years; and
  - (d) Seven months if the tenancy has been in existence for more than eight years.

The regulations to be made may provide that the relevant periods may be different if the tenant: is in substantial arrears of rent, the tenant or a member of his or her household has engaged in serious anti-social behaviour in or in the locality of the dwelling-house, or the tenant or a member of the tenant's household is convicted of a relevant criminal offence, or other circumstances as may be stated in the regulations. These regulations must be made within two years of the Act receiving Royal Assent.<sup>14</sup>

### *Tenant serving a notice to quit*

With the new legislation, the notice period to be served by a tenant on a landlord is four weeks if the tenancy has not been in existence for more than 10 years and 12 weeks if the tenancy has been in existence for more than 10 years. This applies regardless of the date on which the tenancy was granted.<sup>15</sup> The notice to quit must be given in writing.

There is power in the new Act for regulations to be made to amend the notice to quit period to more than four weeks and not more than 12 weeks if the tenancy has been in existence for more than 12 months but not more than 10 years.<sup>16</sup> No such regulations have been made as yet.

### **Notice regarding certain matters**

Section 1 of the 2022 Act (which amends the Private Tenancies Order) requires a landlord under a tenancy to give a tenant a written notice regarding certain matters regarding the tenancy within 28 days after the date on which the tenancy is granted.<sup>17</sup> This section of the 2022 Act was commenced on 1 April 2023.<sup>18</sup> The contents and format of the notice are provided for in the Tenancy Information Regulations (Northern Ireland) 2023.<sup>19</sup> This notice contains, among other things, largely the same information that was previously contained in the statement of tenancy terms and the rent book.<sup>20</sup> This notice must be given free of charge.<sup>21</sup>

If there is a variation of any of these terms contained in the tenancy information notice, then a notice of the change must be given to the tenant (free of charge) within 28 days of the

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<sup>14</sup> See s 11 of the 2022 Act.

<sup>15</sup> The notice to quit periods for a tenant giving notice to a landlord before the 2022 Act were as follows: four weeks if the tenancy had not been in existence for more than five years, eight weeks if the tenancy was in existence for more than five years but not more than 10 years and 12 weeks if the tenancy was in existence for more than 10 years. The notice must be in writing. It will be noted these notice periods to be given by a tenant were not changed by the temporary Private Tenancies (Coronavirus Modifications) Act (NI) 2020.

<sup>16</sup> See s 11 of the 2022 Act.

<sup>17</sup> Private Tenancies Order, art 4A(2).

<sup>18</sup> By the Private Tenancies (2022 Act) (Commencement No. 1) Order (NI) 2023 (SR 2023/20).

<sup>19</sup> SR 2023/19.

<sup>20</sup> Under the Tenancy Terms Regulations (NI) 2007 and the Rent Book Regulations (NI) 2007.

<sup>21</sup> Private Tenancies Order, art 4A(3).

variation of the relevant term.<sup>22</sup> This notice of variation must be in a prescribed format.<sup>23</sup> There are offences if the notice is not given when required.<sup>24</sup>

### **Notice regarding certain past matters**

It will be recalled that under the Private Tenancies Order, a landlord was required to give to a tenant a statement of tenancy terms within 28 days of the grant of the tenancy and a notice of variation if any of the contents of the statement of tenancy terms were varied.<sup>25</sup> Inadvertently, this requirement was repealed by the Housing (Amendment) Act (NI) 2011. However, it remained good practice to serve a statement of tenancy terms on a tenant.

To correct this defect, the 2022 Act provides that if there was a tenancy in place on 1 April 2023 and that tenancy was created on or after 30 June 2011 then the landlord had to serve a notice of certain past matters on the tenant within 28 days of 1 April 2023.<sup>26</sup> The notice of past matters is required to be in a certain format.<sup>27</sup> There is a saving provision if between the granting of the tenancy and 1 April 2023 the landlord has served a notice that substantially meets these requirements then this will have been complied with.

Similarly, if on or after 30 June 2011 but before 1 April 2023 a prescribed term of the private tenancy was varied and the property is let under that tenancy on 1 April 2023, the landlord had to serve a notice of variation to the tenant within 28 days of 1 April 2023.<sup>28</sup> This notice of variation was required to be in a certain format.<sup>29</sup> If, however, the landlord has before that date given a notice of variation that substantially meets the requirements of the legislation then the landlord will be regarded as having complied with this requirement.

### **Receipt for payment in cash**

The requirement on a landlord to give a tenant a rent book had been required in the Rent (NI) Order 1978<sup>30</sup> and was required as part of the Private Tenancies Order. A landlord had to give the rent book to the tenant within 28 days of the grant of the tenancy.<sup>31</sup>

It is recognised that a rent book in its current format is somewhat outdated in that it is unlikely that a tenant will present the rent book to the landlord every time a payment is made to have the rent book made up. Therefore the 2022 Act provides that the rent book requirement is replaced with a requirement that a tenant is to be given a rent receipt for payment in cash in relation to the grant, renewal or continuance of a private tenancy.<sup>32</sup> This receipt has to state the date of payment; what the payment was for; the amount paid; and, if there is any further amount outstanding, that amount or if no amount remains outstanding then that fact. There are requirements as to the time within which the receipt must be provided and offences may be committed if this is not complied with. This requirement came into force on 1 April 2023.

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<sup>22</sup> Private Tenancies Order, art 4B.

<sup>23</sup> It must be in the format contained in Sch 2 to the Tenancy Information Regulations (NI) 2023.

<sup>24</sup> Private Tenancies Order art4A(4) and 4B(5).

<sup>25</sup> This had to be served within 28 days of the variation.

<sup>26</sup> The 2022 Act, Sch 1, para 1(2).

<sup>27</sup> This format is contained in Sch 1 to the Tenancy Information Regulations (NI) 2023.

<sup>28</sup> The 2022 Act, Sch 1, para 2(3).

<sup>29</sup> This format is contained in Sch 2 to the Tenancy Information Regulations (NI) 2023.

<sup>30</sup> Art 38.

<sup>31</sup> Private Tenancies Order, art 5. This was prior to the introduction of the 2022 Act.

<sup>32</sup> The 2022 Act, s.3, which substitutes art 5 of the Private Tenancies Order. This section was commenced on 1 April 2023 by the Private Tenancies (2022 Act) (Commencement No. 1) Order (NI) 2023 (SR 2023/20).

## Tenancy deposits

The new aspects of tenancy deposit law introduced in the 2022 Act were brought into force on 1 April 2023.<sup>33</sup> The amount of a tenancy deposit is limited to an amount equivalent to one month's rent.<sup>34</sup> There are provisions regarding recovery of any excess paid and offences to require a tenancy deposit in excess of this amount.

The 2022 Act also provides for an extension of the period within which the tenancy deposit must be protected in an approved scheme from 14 days to 28 days and the period within which the landlord must give the tenant prescribed information from 28 days to 35 days.<sup>35</sup>

Finally, the 2022 Act provides that certain offences regarding the breach of tenancy deposit rules are continuing offences.<sup>36</sup>

## Rent control provisions

For anyone who has had the task of navigating the forms of rent control in Northern Ireland (latterly under the Rent (NI) Order 1978) they will know that establishing whether a tenancy is a protected tenancy or a statutory tenancy is a complex task. The Private Tenancies Order removed some of the complexity by stating that no private tenancy granted on after 1 April 2007 shall be a protected tenancy.<sup>37</sup> The Private Tenancies Order did introduce a new form of rent control based on the condition of the property in that if a landlord lets a property without a certificate of fitness (where one is required) then that tenancy will be subject to rent control.<sup>38</sup>

### *Restriction on rent increases*

The 2022 Act contains two provisions regarding rent control. One of these relates to the amount of rent that can be charged during a tenancy in that in a private tenancy<sup>39</sup> the rent charged cannot be increased within 12 months from the date on which the tenancy is granted or within any period of 12 months from the date on which the last increase took effect.<sup>40</sup> This provision is not yet in force.

### *Rent decreases*

The second, and potentially more controversial issue contained in the 2022 Act relates to rent decreases. It first arose when a non-Governmental amendment inserted into the Bill at Consideration Stage would have provided that where a tenancy has been in place for more than six months the rent must be reduced by 10% for 12 months following Royal Assent and on expiration of this the rent must return to no more than the rent payable immediately before the reduction for three years. At Further Consideration stage this was replaced with a provision requiring the DfC to consult on proposals to make regulations to introduce a rent decrease of up to 10% or a rent freeze for a maximum period of four years in relation to any particular tenancy. The proposals were required to be consulted upon and the report

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<sup>33</sup> By the Private Tenancies (2022 Act) (Commencement No. 1) Order (NI) 2023 (SR 2023/20).

<sup>34</sup> The 2022 Act, s 4. See also the Tenancy Deposit Schemes (Amendment) Regulations (NI) 2023 (SR 2023/18).

<sup>35</sup> Private Tenancies Order, art 5B(3) and 5B(6)(b) respectively.

<sup>36</sup> Private Tenancies Order, art 5B(11)(A).

<sup>37</sup> There were savings for protected tenancies already in existence at the time.

<sup>38</sup> Private Tenancies Order, art. 40.

<sup>39</sup> Save a controlled tenancy.

<sup>40</sup> The 2022 Act, s 7.

on the consultation laid before the Northern Ireland Assembly within six months of the 2022 Act receiving Royal Assent and regulations made within 12 months of the date on which the report is laid before the Assembly. The DfC commissioned the CIH to undertake research into rent regulation in the private rented sector in Northern Ireland.<sup>41</sup> This report was laid before the Northern Ireland Assembly in October 2022. No regulations have been made under this part of the legislation.<sup>42</sup>

### **Tenant safety measures**

The 2022 Act provides that a landlord will be required to provide sufficient appliances for detecting fire or smoke and for giving warning in the event that they are detected and appliances for detecting whether carbon monoxide is present at levels that are harmful to people and for giving warning if it is.<sup>43</sup> These provisions are not yet in force and will come into effect for all tenancies whether granted before or after this section comes into effect but it will only apply to those granted before the commencement of the section from a date set by the DfC in regulations. The tenant will be under a duty to take proper care of such appliances installed in the property as a good tenant and must make good any damage caused to those appliances wilfully or negligently done by the tenant or his tenant or any other person lawfully living in or visiting the property. The DfC has recently issued a consultation on draft regulations and guidance in relation to this issue.<sup>44</sup>

The 2022 Act also makes provision for electrical safety measures in private rented properties.<sup>45</sup> The DfC is given the power to make regulations which impose standards in relation to the installation for the supply and use of electricity or electrical fixtures, fittings or appliances provided by the landlord. These duties may include duties to ensure that checks are carried out by a qualified person and may cover how and when the checks are carried out and who is qualified to do the checks. Additionally, the regulations may require the landlord to carry out works as a result of the checks carried out by the qualified person. Before making the regulations, the DfC has to consult with various interested parties. The DfC has recently issued a consultation on draft regulations and guidance in relation to this issue.<sup>46</sup>

### **Energy efficiency regulations**

The 2022 Act empowers the DfC to make regulations in respect of energy efficiency of private rented properties by providing that a person may not grant a private tenancy of a dwelling-house or continue to let out a dwelling-house where there is an energy performance certificate in relation to the dwelling and it falls below the level of energy efficiency as prescribed in the regulations. There may also be provisions regarding exemptions in relation to this. Before making the regulations there is a requirement on the DfC to consult with various interested parties.<sup>47</sup>

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<sup>41</sup> CIH, *Rent Regulation in the Private Rented Sector in Northern Ireland* (CIH, September 2022).

<sup>42</sup> See the Private Tenancies Order, art 5C and in particular 5C(9) which states that if the Department does not make regulations before the end of the period of 12 months beginning with the date on which it lays the report art 5C ceases to have effect.

<sup>43</sup> The 2022 Act, s 8.

<sup>44</sup> See the draft Smoke, Heat and Carbon Monoxide Alarms for Private Tenancies Regulations (NI) 2024 and guidance notes on these.

<sup>45</sup> The 2022 Act, s 10 and Sch 3.

<sup>46</sup> See the draft Electrical Safety Standards for Private Tenancies Regulations (NI) 2024 and guidance notes on these.

<sup>47</sup> The 2022 Act, s 9 and Sch 2.

## Payment options for tenants

During its discussions on the 2022 Act the Committee for Communities expressed concerns that it had been made known to them that some landlords insist on cash payments for payments only in connection with the tenancy for mainly deposit and rent.<sup>48</sup> As a result, the Bill was amended to include provision that the DfC would consult on whether it should exercise powers to impose duties on prospective landlords to give specified information or documents before the tenancy is agreed and specify methods of payment that must or must not be offered by a landlord for payment of rent or other payments as part of the tenancy. The consultation on this aspect had to be carried out and a report laid before the Assembly before 18 months after the Act received Royal Assent.<sup>49</sup> In October 2023 the DfC published a report on the consultation that had been carried out.<sup>50</sup> The results of the survey indicated that paying in cash is a limited practice and that the majority of tenants were happy with their current method of payment. The report indicated that final decisions on legislation would be up to the Minister and in the meantime the DfC would use its website to indicate that it is good practice for landlords to offer tenants a choice of payment methods.

## Conclusion

As can be seen from the above comments, the new private tenancies legislation is wide-ranging and will have an impact on the relationship between landlords and tenants. While some of the provisions of the legislation are in force and some are not yet in force, it is useful that both landlords and tenants are aware of the provisions in the new legislation so that they can implement the provisions currently in force and prepare for the introduction of the remaining measures once these are implemented in full.

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<sup>48</sup> See the Committee for Communities, Report on the Private Tenancies Bill (Report NIA 157-17/22, 2022).

<sup>49</sup> The 2022 Act, s 12.

<sup>50</sup> DfC, *Private Tenancies Act – Payment Options Survey – Summary of Results* (DfC, October 2023).

## CONVEYANCING RISK MANAGEMENT: A CRITICAL APPRAISAL OF RELEVANT CASE LAW

Gary Thompson\*

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### Introduction

From time to time the work undertaken by a conveyancing solicitor is subject to judicial scrutiny and judgment. This may be as a consequence of a professional negligence claim initiated by a disappointed client and such real-life litigation examples can provide a useful narrative upon which a solicitor might reflect and take corrective action, if necessary, on the policies, procedures, controls and risk management systems within their practice. Many negligence claims against conveyancing solicitors manifest after a property transaction has been completed and it is not uncommon for such claims to be made many years after the event. Problems with title or a client who has become dissatisfied with their property purchase can be precursors to a negligence action and if such a claim is to be successfully defended a solicitor will be required to demonstrate they acted competently and they followed good practice. It is also critical that such evidence is reflected in the conveyancing file as this will form the foundation of any defence and support the solicitor in their recollection of events, especially bearing in mind the disputed transaction might have completed many years previously.

A court examining a conveyancing transaction with the benefit of hindsight is unlikely to have any sympathy for a solicitor who is unable to demonstrate from their papers that they followed best practice and acted with the requisite standard of care. However, if a solicitor can overcome this evidential burden, then it is possible in the right case to mount a successful defence to a claim alleging professional negligence and a recent decision by HHJ Mitchell sitting at Plymouth County Court serves to highlight this point.

### **A successful defence: *Harry v Curtis Law LLP t/a Curtis Whiteford Crocker*<sup>1</sup>**

This case was referenced in The Law Society Gazette on 21st March 2022 and I would like to thank Francesca O'Neill, DEKA Chambers who represented the successful defendant for providing additional information and insights as to the basis of the successful defence.

### *Background*

On or about 17th May 2018 the claimant instructed Curtis Law LLP t/a Curtis Whiteford Crocker to act on her behalf in the purchase of a new build residential property. The property formed part of a substantial housing development and the vendors were Persimmon Plc. The conveyancing fee was fixed at £695 plus VAT and disbursements. The transaction completed on or about 29th June 2018. However, the claimant subsequently commenced a professional negligence action against the solicitors alleging that she would not have purchased the

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<sup>1</sup> Unreported.

property had she been advised that a link road was to be constructed near to her home. The claim however, was not pursued on a non-transaction basis but on the basis of diminution in value and damages for distress.

### *The Allegations*

The claimant alleged that, as a consequence of the proposed construction of a link road near to her home, there would be a degradation of the local environment and she would suffer loss of amenity normally associated with the construction of a major highway. She argued that Curtis Whiteford Crocker as her conveyancing solicitors failed to exercise reasonable care and skill and were negligent in failing to provide her with adequate advice in relation to the local authorities' proposed construction of the link road close by. Had she been provided with this information, the claimant asserted, she would not have proceeded with her house purchase.

Specifically, it was alleged there was a failure on the part of the solicitors to pay sufficient attention to the information gathered in the course of the conveyancing process and in particular to the information in the local searches. Their failure to determine that the proposed link road was to pass close to the claimant's home and the likely impact this would have on the claimant's enjoyment of her property coupled with a diminution in value was a failure on the part of the solicitors to take reasonable care.

### *The Defence*

The defendant firm accepted that it was instructed by the claimant in May 2018 to act on her behalf in the purchase of a new build property on a major new housing development for a fixed fee of £695 plus VAT. However, it was denied that the scope of the defendant's retainer extended to advising the claimant about wider road development schemes in the locality, and the results of local searches indicated that no such developments were contemplated within close proximity to the claimant's property.

Further, the claimant put pressure on the solicitors to complete the transaction in a short timeframe in order that she might take advantage of incentives offered by the developer and in any event the claimant failed to establish she had suffered a loss.

### *The Issues*

The Court was asked to consider if it was within the scope of the retainer and whether there was a duty for the defendant to advise the claimant about the proposed construction and location of the link road. In considering this the Court was asked to have regard to:

- a) The written terms of the retainer;
- b) The extent of the claimant's knowledge about the development and the public information about the link road given that the property was located on a new housing development;
- c) The effect of both time pressure and the low fixed fee;
- d) The effect of the searches obtained by the defendant and the extent to which the defendant was able to rely on them;
- e) Whether the claimant ever informed the defendant that she required a quiet location;
- f) Whether the result of the Property Search Group search was discussed with the claimant at a completion meeting.



The Court was also asked to consider whether, even if a breach of duty was established, the claimant would have purchased the property in any event and could the claimant establish she had suffered a loss. If it was accepted there was a breach, how were damages to be assessed and was the claimant contributorily negligent?

### *Scope of Retainer*

The defendant submitted that the written retainer between the parties limited the scope of the work to be done having due regard to the low fixed fee. Additional work would have necessitated an increased fee. Importantly, the defendant did not seek to argue that the low fixed fee reduced or affected the standard of its work. However, it contended that the low fixed fee was reflective of a limited retainer that did not require it to pass on information that was not relevant to title or that would not affect the property directly.

It was accepted that under the terms of its retainer the defendant was obliged to undertake specific searches and enquiries; however, it was argued that the defendant fulfilled its obligations by undertaking the Property Service Group Homecheck Search and the Local Authority Search. Those search results confirmed that there were no nearby road schemes, traffic schemes or outstanding notices in relation to (e) 'highways'.

The following question was also responded to in the negative: 'Is the property (or will it be) within 200 metres of any of the following?:'

- i. The centre line of a new trunk road or special road specified in any order, draft order or scheme;
- ii. The centre line of a proposed alteration or improvement to an existing road involving construction of a subway, underpass, flyover, elevated road or dual carriageway;
- iii. The outer limits of construction works of a proposed alteration or improvement to an existing road involving: (i) construction of a roundabout (other than a mini roundabout); or (ii) widening by construction of one or more additional traffic lanes;
- iv. The outer limits of: (i) construction for a new road to be built by a local authority' (ii) an approved alteration or improvement to an existing road involving construction of a subway, underpass, flyover, footbridge, elevated road or dual carriageway; (iii) construction of a roundabout (other than a mini-roundabout) or widening by the construction or one or more additional traffic lanes;
- v. The centre line of the proposed route of a new road under proposals published for public consultation;
- vi. The outer limits of: (i) construction for a proposed alteration or improvement to an existing road involving the construction of a subway, underpass, flyover, footbridge, elevated road or dual carriageway; (ii) construction of a roundabout (other than a mini-roundabout); (iii) widening by construction of one or more additional traffic lanes, under proposals published for public consideration?

Within the planning section, the search stated:

'12/02027/OUT RESIDENTIAL LED MIX OF USES ON 32.07 HECTARES OF LAND INCLUDING UP TO 873 DWELLINGS (2, 3, 4 BEDROOM HOUSES, 1, 2 BEDROOM FLATS); 8,800 SQ M OF BUSINESS SPACE (USE CLASS D1); 2,000 SQ M OF COMMERCIAL

FLOOR SPACE TO INCLUDE A MIX OF SHOPS (USE CLASS A1), FINANCIAL AND PROFESSIONAL SERVICES (USE CLASS 2), RESTAURANTS, ACES (USE CLASS A3), DRINKING ESTABLISHMENTS (USE CLASS A4), HOT FOOD TAKEAWAYS (USE CLASS A5); CONSTRUCTION OF A NEW LINK ROAD AND BRIDGE ACROSS FORDER VALLEY; COMBINED WITH A FULL APPLICATION FOR THE CHANGE OF USE OF 38.67 HECTARES OF AGRICULTURAL LAND TO PUBLIC OPEN SPACE (OUTLINE)'

The searches did not disclose the link road was to be constructed close to the property and specifically the results confirmed there were no road schemes contemplated within 200m of the property.

The limited scope of the retainer did not require the defendant to check all of the documents on Persimmon's planning cloud, which related to the whole development. Nor were the solicitors required to pass on plans and search results that related to the whole development or to local road schemes that would not affect the property.

### *Other Considerations*

The defendant also stated that the claimant gave no instructions that she required a quiet location, or that she had any special requirement to purchase a home in a quiet locale. In addition, the claimant knew the property she was purchasing was a show home on a major residential housing development and she could not assume that the wider development would remain exactly as it was. Construction was ongoing and the claimant did not ask any questions about the wider development.

Additionally, the content of the searches and plans were brought to the claimant's attention at the completion meeting with the solicitors on 28th June 2018 but the claimant was entirely concerned with contracts being exchanged and completion taking place the following day.

The defendant further made out that the claimant would have purchased the property in any event, but for the alleged breach of duty. Correspondence contained in the conveyancing file demonstrated the claimant was very keen to exchange contracts and complete the transaction on 29th June 2018. The vendors (Persimmon) had offered substantial incentives to purchasers who completed within 28 days of reservation and in the claimant's case this represented a £2,995 reduction in price, plus some fixtures and fittings to include curtains and light fittings. Even when the defendant explained to the claimant in a telephone call on 26th June that it would not be possible to complete the transaction so quickly, the claimant responded by email confirming that she would still like to complete as soon as possible and warned that her incentives were at risk.

### *Decision*

It was held that the starting point in determining the scope of the defendant's duty was the retainer. In this case this provided for a fixed fee of £695 plus VAT and identified the work that would be undertaken by the firm. Such work included undertaking searches, reviewing replies and reporting on title. The fixed fee was agreed on the basis there would be no title defects and if any unforeseen circumstances were to manifest then it was presumed the retainer might be invalid and the firm might increase its charges.

The claimant accepted that it was the defendant's duty in relation to the Conveyancing Handbook to verify that the property corresponds to the purchaser's understanding. Also, due consideration is given to the property's title and that it is free from any charges or encumbrance.

The defendant was under a duty to undertake a local search using nationally accepted standard forms. The prescribed forms make provision for a specific enquiry in relation to the relevant property “being within 200m of the following [...]” (thereafter there is a list of different roads etc). The implication of the search is that the claimant should be made aware of a road scheme within the prescribed distance but not otherwise. The information provided to the defendant on foot of their search was wrong as a link road was to be constructed within 50m of the claimant’s home.

HHJ Mitchell, after a two-day hearing, dismissed the claim and held there was no obligation on the defendant’s part to provide advice on matters that formed part of the wider development as opposed to the claimant’s property. The defendant was entitled to rely on the results of the searches, which in this instance did not raise any particular concerns sufficient to place the defendant on further enquiry. There was no need for the defendant to read hundreds of pages of planning material relating to the development.

### *Conclusion*

As in any solicitor’s professional negligence action the successful defence of this case was very sensitive to its own facts. However, it is encouraging to note that the Judge was prepared to accept that the low fixed fee for high volume conveyancing work and strict limitation of the retainer did limit the work required to be undertaken by the solicitors.

### *Additional Observations*

Conveyancing solicitors will be only too aware that in many instances they are working under considerable time constraints which may be the result of pressure being exerted on a purchaser client by a vendor. Undoubtedly this can create considerable tension in the solicitor/client relationship. This is especially so in circumstances where a client, through a fear of failing to complete in compliance with the vendor’s timescale, insists that a solicitor proceeds with haste, in order to ensure completion. However, experience dictates, as evidenced in this case, that if, following completion, a former client becomes dissatisfied with their house purchase then they may decide to instigate a claim against their solicitor alleging professional negligence. In those circumstances it is important that the solicitor is in a position to demonstrate that they fully complied with all of the obligations required under the terms of the retainer.

## **A Northern Ireland Retrospective**

### *Pre-Contract Enquiries*

Reflecting on the successful defence in the case cited above it is perhaps timely to recall some Northern Ireland judgments that highlight judicial thinking on conveyancing practice.

The issue of pre-contract enquiries was considered by the Northern Ireland Court of Appeal in *Young v Hamilton and Others*<sup>2</sup> with judgment being delivered by Morgan LCJ.

This case involved a dispute in relation to ownership of and rights of way over a section of laneway giving access to a building site purchased by the plaintiff. The plaintiff’s allegations focused on misrepresentations on the part of the vendors made by their solicitors. It was also

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<sup>2</sup> [2014] NICA 48

alleged there was failure on the part of the solicitor acting in the purchase to pursue adequate enquiries. In a first instance decision Treacy J found that there were misrepresentations on the part of the vendors and these had induced the plaintiff to enter into the contract. However, he also held that the enquiries made by the plaintiff's solicitor were not sufficient and there was a breach of duty to advise and warn the plaintiff of the risks involved in buying the site..

In overturning the original Trial Judge's findings against the solicitor, the Court of Appeal observed:

*“[41] When considering the extent to which the solicitor has complied with the duty of investigation it is important to avoid the temptation to analyse the question with the benefit of the facts as we now know them. Liability does not depend on hindsight (see Morrill LJ in Adams v Rhymney Valley DC [2000] 3 EGLR 25 CA). As the Judge found the PCE replies and the associated correspondence constituted a misrepresentation in that they asserted that there was no adverse claim, no neighbour dispute and no anticipation of litigation whereas in fact there were such claims and disputes and litigation was anticipated. The learned judge recognised that the correspondence of 22 August 2000 compounded the misleading impact of the replies. Having been alerted to the dispute affecting the upper laneway Mrs Thompson properly made enquiries in respect of the lower laneway. The correspondence of 22 August 2000 alerted her to the fact that there were Heads of Agreement proposed in relation to the dispute affecting the upper laneway. The upper laneway did not affect her clients' interest. Her enquiry about any document leading Mr Haddick to believe that there was an adverse claim ought to have led to disclosure of the Heads of Agreement which specifically dealt with the lower laneway.*

*[42] Where a solicitor in general practice receives representations from a colleague acting on behalf of the vendor the solicitor is not fixed with an obligation to anticipate or assume that the representations are false. Such representations form a proper basis upon which to advise a purchaser in the absence of something giving rise to a further duty of enquiry. Mrs Thompson sensibly inspected the laneway to ensure that there was nothing about the lower laneway to suggest that it might be the subject of a successful adverse claim. She was entitled to take that into account along with the representations. She was also entitled to take into account Mr Haddick's indication that there was no documentary material supporting a claim affecting the lower laneway. The correspondence to Mr Bradley containing the without prejudice proposal should have been disclosed in answer to that enquiry. The failure to disclose it compounded the misrepresentation further”*

The arguments advanced on the part of the solicitor on appeal focused on her entitlement to rely on the representations made by the vendors' solicitors and in the course of her conduct of the conveyance she had not fallen below the standard of what would be expected of a reasonably competent solicitor. The court found favour with these arguments and allowing the appeal held:

*In our view the learned Trial Judge approached this matter as an obligation of result in light of the facts as he then knew them. It is clear that there were steps which Mrs Thompson might have taken which would have exposed the truth, but that is not the test of liability in these circumstances. We consider that the obligations on Mrs Thompson have to be viewed taking into account firstly, the representations made to her upon which she was entitled to rely and secondly, the investigations carried out by her. We do not consider that the level of investigation fell below the standard of the reasonably competent solicitor in all the circumstances”*

### *Breach of the UK Finance Handbook*

Following the catastrophic collapse of the Northern Ireland property market in 2007/8 there was a surge in professional negligence claims against solicitors. Many such claims were initiated by lenders who sought to rely on a failure on the part of a solicitor, acting on their behalf, to comply with the UK Finance Handbook (then known as the CML Handbook). The judgment of Horner J in the case of *Capital Home Loans Limited v Hewitt and Gilpin Solicitors Limited*<sup>3</sup> is a case in point. Whilst the case was successfully defended on causation the solicitors were held to have been in breach of their duty to the plaintiff. It is the Judge's observations in deciding this issue that are insightful from a conveyancing perspective.

The allegations in this case can be briefly summarised as follows:

*"The defendant and its employees have been guilty of breach of the CML Handbook ("the Handbook"), breach of the terms of its retainer, breach of its fiduciary duty and/or negligent. In particular it complained that the defendant had failed to carry out its duties in respect of transactions involving 13 Dhu Varren, 9 Ballysillan Close, 10 Ballygomartin Drive, 20 Silverstream Drive, 74 Alliance Avenue, 13 Prestwick Park and 94 Ainsworth Drive ("the Properties") between Geoff Young ("GY") who owned the Properties and Nendrum Properties Limited ("Nendrum"), a company wholly owned by GY, who sold the Properties to Nendrum as part of a tax avoidance scheme.*

*[3] Essentially the plaintiff was funding the purchase of the Properties by Nendrum. The transaction took place in the Autumn of 2007 just as the property market in Northern Ireland was about to go into freefall. The plaintiff says that if it had known the true nature of the transaction, a matter about which the defendant was duty bound to inform it, then it would not have considered providing any finance to Nendrum. The deal would not have proceeded and the money it has lost because of the catastrophic collapse of the property market in general and, in the buy to let market in particular, would not have occurred. That loss, the plaintiff claims, amounts to £325,848.99"*

In terms of the Handbook, it was observed that:

*"There are a number of matters that the plaintiff would reasonably expect the solicitor to have passed on and "feel understandably aggrieved if (she) did not". These are, given the correspondence between the Solicitors and the plaintiff, and the plaintiff's instructions:*

- (a) This was a sale by GY to Nendrum, a company owned and controlled by GY absolutely. It was not a re-mortgage. It was a sale and a mortgage. The Solicitors regardless of their view of the transaction and the state of their client's knowledge, should have spelt out in clear terms that this was a sale and mortgage.*
- (b) Part of the consideration involved shares in Nendrum. This was a matter that should have been drawn to the attention of the plaintiff for two reasons:*
  - (i) The solicitors could have no idea what the shares were worth. Further shares have the ability to change in value depending on the underlying assets and this can occur without warning.*

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<sup>3</sup> *Capital Home Loans Limited v Hewitt and Gilpin Solicitors Limited* [2016] NIQB 13

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- (ii) *The balance of the consideration for the sale was not going through the solicitors' account.*
  - (c) *The full consideration was not being paid as part of the money being loaned by the plaintiff was being used to pay stamp duty and other outlay. There was a 5% discrepancy, meaning the sale was at an undervalue.*
  - (d) *The legal costs of GY were being paid out of the monies advanced by the plaintiff and this could amount to a "kick back".*

In its defence the solicitors sought to argue *"that those matters at (b)-(d) would have been known to the plaintiff or should have come as no surprise to the plaintiff"*. Rejecting this, Horner J stated *"The solicitors should not be guessing at the plaintiff's knowledge"* and he went on to confirm that the solicitor who had conduct of the transaction *"should have expressly drawn all these relevant matters to the plaintiff's attention unless she could be wholly satisfied that the plaintiff already had the requisite knowledge. This was not the position here. In the circumstances I am satisfied that the Solicitors did not discharge their duties under the retainer to the plaintiff"*.

In commenting further on what the bank may or may not have known in terms of the transaction Horner J was unequivocal in what was required of a solicitor in such circumstances holding *"the reasonably careful and competent solicitor would have put this matter beyond doubt by correcting what must have appeared as an error in her original instructions"*.

It should be noted that the plaintiff's appeal against the decision of Horner J was dismissed<sup>4</sup>.

#### *Incidental Advice – Effective Client Communication*

Acting for an unsophisticated purchaser in a domestic conveyance and how any unusual features with a property's title should be addressed was considered in *Hickland v McKeone*<sup>5</sup>

This case involved the purchase of an apartment with a flying freehold title as opposed to the usual leasehold. The effect of this was that the *"mutual covenants in the deeds between the owners of the apartments relating to obligations to clean, maintain and repair party walls, the roof, external walls, floors and foundations would, in effect, be unenforceable."*

Whilst the solicitor who had conduct of the conveyance identified the title issue and discussed this with her client the plaintiff asserted:

- "(a) There was a failure to properly advise Ms Farren as to the problems involved in purchasing a "flying freehold";*
- (b) There was a failure to explain to her the implications these problems would have on her;*
- (c) There was a failure to ensure that Ms Farren understood the limited advice she was given"*

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<sup>4</sup> See *Capital Home Loans Ltd v Hewitt and Gilpin Solicitors Ltd* [2016] NICA 45.

<sup>5</sup> [2018] NIQB 81.

In response, the defendant argued that the conveyancing solicitor was an experienced practitioner who properly identified the flying freehold issue and fully discussed this with her client and ensured that the advice was fully understood. It was further argued on behalf of the defendant:

*“that within the terms of the retainer between the parties, it considered and advised upon all the matters with which the retainer was concerned; it advised as to different types of titles; it advised as to the difficulties which a freehold title would have in terms of a limited resale market; it advised that circumstances could change and it advised as to the one specific aspect of the title with which Ms Farren raised an issue that is, who would bear the costs of repairs”.*

In considering a solicitor’s obligations, Colton J highlighted the relevant principles enunciated by Jackson LJ in *Minkin v Landsberg*<sup>6</sup> and these are worthy of repetition:

- “(i) A solicitor’s contractual duty is to carry out the tasks which the client has instructed and the solicitor has agreed to undertake.*
- (ii) It is implicit in the solicitor’s retainer that he/she will proffer advice which is reasonably incidental to the work that he/she is carrying out.*
- (iii) In determining what advice is reasonably incidental, it is necessary to have regard to all the circumstances of the case, including the character and experience of the client.*
- (iv) In relation to (iii), it is not possible to give definitive guidance, but one can give fairly bland illustrations. An experienced businessman will not wish to pay for being told that which he/she already knows. An impoverished client will not wish to pay for advice which he/she cannot afford. An inexperienced client will expect to be warned of risks which are (or should be) apparent to the solicitor but not to the client.*
- (v) The solicitor and client may, by agreement, limit the duties which would otherwise form part of the solicitor’s retainer. As a matter of good practice the solicitor should confirm such agreement in writing. If the solicitor does not do so, the court may not accept that any such restriction was agreed.”*

As already highlighted the conveyancing solicitor was alert to the title issue and in March 2008 she met with her client in order that she could discuss potential difficulties her client might face and to ensure that her client fully understood her position. The solicitor prudently prepared a contemporaneous note of the meeting and this showed that:

- (a) Ms McGinley explained the risk involved in not having title by way of a lease.
- (b) Ms McGinley explained that Ms Farren’s future purchaser’s market would be limited.
- (c) Ms Farren was aware of the risk.
- (d) Ms Farren understood the difference between freehold and leasehold and what Ms McGinley was explaining to her.

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<sup>6</sup> [2015] EWCA Civ 1152

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- (e) Ms Farren wanted to go ahead with the transaction.
  - (f) Ms McGinley noted that Ms Farren said she did not plan to sell and that this was her retirement home.
  - (g) Ms McGinley advised that, notwithstanding Ms Farren's views about her future plans, things could change.
  - (h) Ms McGinley noted that Ms Farren wanted to proceed.
  - (i) Ms McGinley noted that Ms Farren said that she had looked at many apartments and this was the only one she wanted to buy.
  - (j) Ms McGinley confirmed that she wanted to complete the transaction.

Many practising solicitors would consider the actions taken by the solicitor at this point were sufficient, especially as the Judge found:

*“On balance and with some reservation I am not prepared to find that there has been negligence in respect of how Ms McGinley conducted this meeting. It may well be that a different solicitor would have taken a different course, advising against proceeding... The fact that some solicitors may have given this advice does not mean that Ms McGinley has not met the test of what a reasonably competent practitioner would do having regard to the standards normally adopted by the profession. She had identified the difficulty and explained it to the client in terms she felt the client understood. She specifically identified the risk of a potential difficulty in selling the property in the future”.*

However, the Judge went on to explore the issue of roof repairs which was a query raised by the client and a matter upon which the solicitor indicated she would seek clarification. Accordingly further contact was made with the vendor's solicitors who in turn simply referred to the clauses in the lease, such clauses being of no benefit to the purchaser Ms Farren.

It was held that the response from the vendor's solicitors *“failed to deal with the issue raised by Ms McGinley. This could not amount to a clarification. Nor would a competent solicitor in my view consider these would suffice in this case”*. Flowing from this, the Judge was of the opinion that *“there was an obligation on the defendant to return to Ms Farren after the meeting of 27 March 2008 particularly with regard to the issue of the repair of the roof and the inadequate clarification provided by the vendor's solicitors”*.

In argument for the plaintiff, counsel maintained there was an obligation to provide Ms Farren with written advice on title and made reference to Regulation 8(A) Part I(d) (now Regulation 8(A) Part II (t)) of the Law Society of Northern Ireland Solicitors' Practice Regulations 1987 which states that:

*“When acting for a purchaser in a transaction to which Regulation 8(A) applies a solicitor shall [...] report to the client from time to time as may be required, and, in particular, report to the client;*

- (i) *when title is received to provide the client with details of premises, easements, owner's covenants etc and to enclose copy map of premises” [...]*



It was further stated that this obligation was reinforced by the Home Charter Scheme which requires compliance with the 1987 Regulations.

In addressing this point, it was the Judge's view that;

*"The mandatory obligation under the Regulations clearly envisages a report to the client when the title is received and the clear inference is that this "in particular" should be in writing, given that the obligation also requires the solicitor to enclose a copy map of premises"*

In finding for the plaintiff, it was held amongst other things that;

*"Ms Farren should have been written to in clear terms after the meeting of 27 March. I consider that there was an obligation to do so under the Law Society Regulations.*

*It was obvious that Ms Farren was obtaining a defective title in the sense that the transfer deed contained easements and covenants which were in effect worthless. Given that this touched on an issue in respect of which Ms Farren was promised a clarification there was a particular obligation to ensure that this was done and in my view should have been done in writing.*

*Given the particular difficulties with this title I consider that there was an onus to ensure that Ms Farren was fully informed and fully understood those difficulties. I consider that on the facts of this case Ms Farren should have been provided with written advice setting out the difficulties clearly and providing her with the clarification she sought on 27 March.*

*The Law Society Regulations and Home Charter Scheme to which I have referred recognise the importance of providing a written report on title advising in respect of easements and covenants. Undoubtedly Ms Farren was determined to proceed notwithstanding the problems identified and explained to her at the meeting on 27 March.*

*In all of these circumstances I take the view that independent of any obligations under the Law Society Regulations it was negligent not to have formally written to her after clarification was sought, confirming and setting out the many potential difficulties in clear terms, advising her of the potential problems and advising her at the very least to consider these carefully and fully before committing to the purchase.*

*This view is confirmed and reinforced by the obligations of the Law Society Regulations and Home Charter Scheme which exist to promote good conveyancing practice by solicitors. A written report was clearly "required" in the circumstances of this case."*

#### *Home Charter Scheme – Timely Advice*

A significant judgment for conveyancing practitioners in Northern Ireland was the decision by the Court of Appeal in *Baird v Stephen W R Hastings (Practising As Hastings & Company, Solicitors)*<sup>7</sup>.

The allegations against the solicitor related to his conduct of conveyancing transactions in 2007. In the original judgment it was held the solicitor had failed to provide timely advice in relation to the potential consequences of his clients failing to sell their property.

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<sup>7</sup> [2015] NICA 22

The background to this action is not untypical of events that manifest in a rising property market. In 2007 the claimants decided to sell their family home having become aware that it had development potential. Accordingly, they placed it on the market with an asking price of offers over £1m. Shortly thereafter they identified a property they wished to purchase and made an offer of £385,000 which was well above the original asking price. Concurrently the claimants negotiated a bridging financial arrangement with their bank to cover the purchase price of their selected property and to discharge the outstanding mortgage on their home, upon which the bank were to obtain a first charge.

In May 2007 the claimants met with the solicitor and signed the offer to purchase their selected property. The purchase was not conditional on the sale of their existing home.

The purchase transaction was completed towards the end of May 2007 and at the beginning of June there was an offer of £1.275m on the claimant's property with an anticipated completion date of 27th July 2007. Unfortunately, however, the prospective purchaser failed to complete the transaction.

In addressing the first judgment the Court of Appeal observed that the Trial Judge when considering the solicitor's duty highlighted that there had been no written retainer. However, the implied terms required the solicitor to complete the sale and purchase transactions and treat them as connected. There was also an obligation to provide advice in relation to the financial arrangements, the undertakings that had been provided to the bank and the risks relating to default on the completion of the connected transactions.

In relation to the solicitor experts who had given evidence, it was noted that on behalf of the claimant it was argued;

*“the solicitor was in breach of the duty of care and skill owed to the Bairds by failing to point to the risks of contracting and completing the purchase of the Castlerock property before any contract was concluded on the sale of the Ballymoney property and by failing to advise them that they would be left with two properties and a loan account of well over three times the amount of their existing obligations with an unattractively high interest rate and subject to withdrawal of the loan facility at short notice...”*

There was also reference to the Home Charter Scheme operated by the Law Society and it was asserted that written advice should have been offered to the clients.

For the defendant the solicitor expert considered that there was no evidence in the papers to suggest that the purchase of the Castlerock property was dependent on the sale of the Ballymoney property. He stated that the solicitor was required to provide advice to the Bairds in relation to the terms of the bank agreement and to obtain their authority to give the undertakings to the bank. He opined that there was no duty to warn the Bairds about what he described as the self-evident risks of the commercial arrangements which had been made.

In the first judgment a solicitor's duty was given as:

*“The duty of the defendant was to perform what he was retained to do as a reasonably competent practitioner would have done having regard to the standards normally adopted by the profession. Flenley and Leech at page 443 states in relation to the solicitor acting for the purchaser that in general the solicitor has no duty to inform the client if the purchase of the property which he or she is to make will be unwise or commercially imprudent. Undoubtedly, that is the case. The commercial wisdom of the transaction is*

*not the province of the solicitor. Further, the advice which would be required by a first time buyer with no legal experience whatsoever may differ from that required by a client who is an experienced business man who is moving house for a second or third time. The Bairds would have fallen somewhere in the middle of the spectrum as they were not first-time buyers nor were they experienced business people.”*

Consideration was also given to the Home Charter Scheme in the following terms:

*“The trial Judge considered the Law Society’s Code of Practice known as the Home Charter Scheme which refers to the Solicitors’ Practice Regulations 1987. Regulation 8(1) requires solicitors to carry out their work and conduct their practice to the highest professional standards and to observe in relation thereto any decision or directions which may be adopted, issued or promulgated by the Council either to the solicitor personally or to the profession at large. Regulation 8A provides that where a solicitor is acting in the purchase or sale of domestic property for the purposes of Regulation 8(1) the solicitor shall comply with the Code of Practice and associated forms described as the Home Charter Scheme and contained in Schedules 1 and 2 of the Regulations. The solicitor for a purchaser is required to advise the client of the consequences of any mortgage involved and a suggested form of letter is prescribed by Form 5. Form 5 sets out that it is important to understand that the arrangement between the client and lender is a business transaction which imposes legal duties on the client the most important being that the client is required to make regular monthly payments of the amount and at the time specified by the bank or the building society and that if the payments are not made the clients are at risk of losing their home. Particular directions are given in relation to the lenders letter of offer in that the client should study what it says about the insurance of the structure of the property, should remember to take out separate insurance to cover the contents of the house, should consider that it may also be wise to take out some kind of life insurance so that in the event of death the mortgage would be paid off and that this is something the solicitor would be happy to discuss with the client. The trial judge noted that to the legal world all this might seem self-evident but to the lay world it may not and, consistent with this, the Law Society considered it appropriate to require the solicitor to provide the client with written advice to the above effect”.*

The findings of the original Trial Judge as highlighted by the Court of Appeal can be summarised as:

- The sale and purchase transactions were connected;
- The solicitor did not send any forms or other equivalent documents to the Bairds;
- The solicitor took no attendance notes of meetings and made no record of any discussions that took place.

In upholding the original finding that the solicitor was in breach of his duty of care it was held having due regard to the sale and purchase arrangements that:

*“As a solicitor advising a client in such a situation he would have been aware that the bridging finance arrangements were highly unusual. Bridging finance, he recognised, normally covers a financial loan advanced to cover the period between the completion of a purchase contract on property and the later completion of a sale contract of other property. That is say it normally arises when there are two binding contracts and the bridging finance covers the relatively short period between the commitment to complete the purchase of one piece of land and the obtaining of the funds arising from the sale of another. The arrangement in this case was quite different. There was no binding contract*

*to sell the Ballymoney property. The bridging arrangement imposed a relatively high rate of interest (as compared to interest under traditional mortgage arrangements). It was time limited to six months. There was no guarantee that it would be extended beyond six months. Even if it was extended the rate of interest could very well increase and would still remain high and might not be rolled over, thus exposing the Bairds to an obligation to pay regular interest out of an income which would have been insufficient to fund such a high principal sum. Even in a rising market the sale of any property can always present difficulties and no assurance that a sale can be effected within a particular timeframe could be given. The solicitor was aware of the income of the Bairds. He was aware of the family circumstances, that Mrs Baird was the carer of a handicapped son and that there was a need to ensure availability of accommodation. He failed to explain the default provisions of the bridging agreement and what consequences would flow from default in accordance with the terms of the bridging arrangement. He did not explain the effect of those terms on the potential living arrangements of the parties or their financial commitments. None of those are matters which could be said to be necessarily self-evident to a lay client who was proceeding in an obviously very optimistic frame of mind induced by his estate agent's apparent assessment of the situation. In particular, it could not be said to be self-evident to Mrs Baird, a joint owner of the property without the benefit of separate advice, who on the evidence was simply a mother and carer.*

*[30] Accordingly, the trial judge did not in our view err in his conclusion that the Solicitor was in breach of the duty of care in failing to provide appropriate advice in a timely manner as to the consequences of a failure to sell the Ballymoney property”.*

## **Conclusion**

Whilst the atmosphere in the current property market could not be described as febrile coupled with a boundless optimism that property prices will continue to rise ever upwards (see Horner J at para 38 *Capital Home Loans Limited v Hewit and Gilpin Limited*), it remains prudent, even in what might be viewed as a relatively benign market, that solicitors have in place effective conveyancing risk management policies, controls and procedures. It would appear opportune therefore for solicitors to reflect on how the Courts have examined and judged conveyancing transactions to ensure that they are providing services to the requisite standard and that in the unfortunate event they are faced with a professional negligence claim they are in a position to mount, where appropriate, a robust defence.

The cases discussed above highlight a number of important issues for conveyancing solicitors to bear in mind, including:

- Having robust client on-boarding procedures;
- Having a written retainer;
- Complying with the terms of a retainer;
- Complying with the terms of the Home Charter Scheme;
- Knowing your client;
- Understanding and reporting on any unusual aspects of a transaction;
- Maintaining a comprehensive file that is capable of standing up to scrutiny;
- Prepare file notes and records of discussions and telephone conversations;
- Provide written advice as appropriate;
- Do not allow custom and practice to dilute what is required under your retainer or the Home Charter Scheme.

## FOLIO INTERNATIONAL

Charles O'Neill\*

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In this edition of Folio we look to the jurisdiction of England and Wales and to the introduction of new laws relating to ground rents.

Readers may be familiar with the controversy that has been widespread in England and Wales whereby ground rents can be substantial and can be increased over time. In an effort to address this, the Westminster Government has enacted the Leasehold Reform (Ground Rent) Act 2022. With this legislation the landlord of a long lease of a single dwelling, granted for a premium on or after the commencement day is not permitted to require a tenant to make a prohibited rent. A prohibited rent is defined as a rent which is greater than a peppercorn rent.<sup>1</sup>

There are certain types of leases that are excepted from this requirement. They relate to business leases, statutory lease extensions, community housing leases and home finance plan leases.<sup>2</sup>

The new legislation is enforced by local weights and measures authorities for England and Wales<sup>3</sup> which may impose a financial penalty for breach of the legislation. In addition, the enforcement authority may order the landlord to pay the tenant the amount of the prohibited rent paid.<sup>4</sup> The tenant may also apply to the appropriate tribunal for recovery of any prohibited rent paid by the tenant.<sup>5</sup> The Government introduced the measure that ground rent is banned on most new residential leases from 30 June 2022 and for new regulated retirement leases from 1 April 2023.<sup>6</sup>

The new legislation brings to mind the law in relation to the creation of long leases of dwelling-houses in Northern Ireland. Under article 30 of the Property (NI) Order 1997, on or after 10 January 2000 a lease of a dwelling-house for a term of more than 50 years is incapable of being created at law or in equity.<sup>7</sup> Any agreement with a purchaser on or after that date has effect as an agreement with the purchaser requiring the vendor to acquire the fee simple estate in the land (if he does not already own such a fee) at no expense to the purchaser and to convey it to the purchaser at no additional expense to the purchaser. There are exceptions to the rule. These relate to: the grant of a long lease in pursuance of an obligation assumed on or before 10 January 2000, the grant of a concurrent lease, the grant of a long lease by way of mortgage, the grant of an equity sharing lease, the grant of a long lease of a flat and the grant of a long lease by the National Trust.

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<sup>1</sup> Leasehold Reform (Ground Rent) Act 2022, s. 1(1).

<sup>2</sup> Leasehold Reform (Ground Rent) Act 2022, s. 2. There are also specific provisions relating to shared ownership leases.

<sup>3</sup> Leasehold Reform (Ground Rent) Act 2022, s. 8.

<sup>4</sup> Leasehold Reform (Ground Rent) Act 2022, s. 10.

<sup>5</sup> Leasehold Reform (Ground Rent) Act 2022, s. 13.

<sup>6</sup> Department for Levelling Up, Housing and Communities Press Release issued 22 April 2022.

<sup>7</sup> Under the Property (1997 Order) (Commencement No. 2) Order (NI) 1999.

Article 31 of the Property (NI) Order provides that any provision in a fee farm grant or a long lease of a dwelling-house made on or after 1 September 1997 for the increase or review of a ground rent on one or more than one occasion is of no effect.<sup>8</sup>

The above illustrates the different approaches to ground rents in the various jurisdictions.

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<sup>8</sup> Under the Property (1997 Order) (Commencement No. 1) Order (NI) 1997.

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