

Property Changes from the 2008 Budget

Bernie Coleman,
Senior Associate/Dept Head,
Commercial Property

The following are just some of the changes introduced by the Minister for Finance, Mr. Brian Lenihan T.D. affecting Property in the 2008 Budget.

Stamp Duty on non-residential property

The top rate of Stamp Duty is reduced from 9% to 6% in respect of transactions where the consideration or value of a property exceeds €80,000. The reduced rate applies to deeds executed on or after 15th October 2008 regardless of the date of the Contract. Other rates remain unchanged.

Stamp Duty Amnesty

Where a deed has been executed but has not been presented for stamping within the prescribed period of 30 days from its execution date, the fixed penalty of €25 and the surcharge on the unpaid duty (being 10%, 20% or 30% of the duty payable depending on the length of time the duty has remained unpaid) will not be imposed. This occurs only if the deed together with the appropriate Stamp Duty and interest payment is lodged with the Revenue Commissioners for stamping within a period of 56 days. This commenced on the enactment of the Finance Bill 2008 which was signed by the President on 24th December 2008.

Resting in Contract Provisions

The 2007 Finance Act contained special provisions whereby Contracts for Sale, Licences and Agreements for Lease (for more than 35 years) would become stampable if 25% or more of the consideration or value was paid over on signing of the relevant document. These provisions were to be activated by a Commencement Order which has not been issued. The Finance Bill 2008 repeals these provisions and re-enacts them with certain exemptions.

The exemptions are:-

- Contracts for the sale of land entered into solely in connection with a public private partnership arrangement; or
- Contracts in connection with tax based investments in nursing homes, convalescent homes, qualifying hospitals; palliative care units, certain holiday camps, certain tourism

infrastructure facilities and certain childcare facilities.

None of these exemptions are available to property developers or persons connected to property developers. The exemption regarding tax-based investments will not apply to a party involved in the operation or management of the relevant facility. All of these changes remain subject to a Commencement Order.

Capital Gains Tax Rate

The CGT rate has increased from 20% to 22% for all disposals from 15th October 2008.

Disposal dates

In an unconditional contract, the date of disposal is the day on which the exchange of contract occurs and not the completion date of the transaction. In a conditional contract, the date of disposal is the date on which the condition is satisfied.

Where land is acquired by Compulsory Purchase Order (CPO), the date of disposal is the earlier of the date of the agreement or entry onto the land by the local authority. Where farming land is acquired by a local authority for road widening or road building, the gain is deemed to accrue in the year of assessment in which the consideration is received.

Due dates for payment

With respect to disposals during the period 1st January to 30th November 2009 and subsequent years, the due date for payment will be the 15th December in each year. With respect to disposals from the 1st to 31st December 2009, the due date for payment is the 31st January 2010. This will have significant cash flow implications for taxpayers.

Important Note for taxpayers:

Where a contract is exchanged prior to a due date for payment but the contract closing date is after the due date for payment, the CGT is payable on the due date. This requires the taxpayer to make a payment in respect of his CGT liability prior to receiving the full consideration. Any payment made after the due date for payment is subject to statutory interest.



**orourke
reid**

LAW FIRM

DUBLIN
LEEDS

www.orourkereid.com

NEWSLETTER



quality
people
service
clients

SEE INSIDE FOR ARTICLES ON...

Deferred Annuities	Page 2
Let Me Out !	Page 2
Management Companies	Page 3
Ocean's Apart	Page 3
Power of Attorney	Page 4

orourke reid bookmark...

Deferred Annuities

Erika O'Leary,
Corporate Law

Members of Defined Contribution Pension Schemes who retire in the period from 4th December 2008 to 31st December 2010 have the option of taking their tax-free lump sum and purchasing a retirement annuity immediately or deferring the purchase of an annuity up to and including 31st December 2010. The power to defer the purchase of a retirement annuity was announced by the Minister for Finance in December 2008.

Prior to availing of this option independent professional advice should be sought. The concession is optional but to avail of it the member must secure the agreement of the scheme trustees. In the event of the death of the member prior to the annuity purchase, the deferred annuity option may be offered to a spouse and /or a dependant.

The Pensions Board recommends that any member of a defined contribution scheme who wishes to avail of the deferral should sign, in conjunction with the trustee(s) a Declaration. A copy of this Declaration is available on the Pensions Board website at www.pensionsboard.ie. This confirms that the deferral option is being exercised and acknowledges that the value of the pension may in fact be less favourable at the time of the purchase than it is now.

ISSUE No. 17
FEBRUARY 2009



**orourke
reid**
LAWFIRM

**DUBLIN
LEEDS**

www.orourkereid.com

Let Me Out! The shift in landlord tenant relations

Fiona Kilrane,
Solicitor,
Commercial Property

From bank bailouts to market mayhem, 2008 was a year to remember, or rather one to forget. Amidst the gloom there was some high profile activity in the Dublin lettings market including the opening of South King Street Centre and new extensions to Dundrum shopping centre.

Right now the primary concern for landlords is the retention of existing tenants. It is vital that landlords recognise the seismic shift in the balance of power and exercise reason and understanding with tenants particularly in rent reviews.

Reviews due 12 to 18 months ago are only now being considered. Consequently tenants may have to agree rents achieved in a totally different economic climate to that prevailing currently. Inevitably many reviews in the next year(s) will be hotly contested.

Already, anecdotal evidence points to mechanisms being employed to keep recorded reviewed rents artificially high including landlords paying cash back to tenants off the record (*reverse premia*) and using rent free periods to distort reality.

Rent reviews aside, the difficult trading environment has led to high profile walkouts by tenants like Habitat and Mango, causing widespread shock in the industry.

So what happens when a tenant makes a unilateral decision to vacate a premises? The landlord's only option is to pursue the tenant in the courts. If a tenant company is wound up then the landlord joins other unsecured creditors. In the meantime the landlord has a duty to mitigate its losses by seeking a new tenant as soon as possible.

To avoid legal proceedings, a tenant may approach the landlord first to terminate the lease. If the landlord accepts the return of keys as a surrender of the lease, it cannot seek payment of future rent, only monies due at the date of surrender.

A tenant on the other hand cannot assume that handing over keys automatically constitutes a surrender unless this is clear from the circumstances and the intentions

of both parties. To prove a physical surrender, an affidavit should be sworn by a witness to the surrender and the original lease returned to the landlord.

When agreeing the conditions of a termination, the lease should be reviewed to ascertain the tenant's responsibilities regarding the condition of the property, a schedule of dilapidations agreed and the cost of works included in the commercial deal.

Terminations aside, many tenants with trading difficulties are continuing in occupation while in arrears. A landlord has the following options with non-paying tenants.

- Issue debt collection proceedings for arrears;
- Call in any personal guarantee(s).
- Recover possession of the property by peaceable re-entry or court proceedings.
- Sue for breach of covenant;
- Issue ejectment proceedings under Deasy's Act; and
- Petition the High Court under Section 214 of the Companies Act 1963. This allows creditors including landlords to petition to have a company wound up on the basis of insolvency (it is unable to pay its debts). The section is not designed as a debt collection tool and an unsuccessful petitioner can be left with a bill for expensive High Court costs.

In general, if a dispute arises it is important to be seen to act reasonably. Calderbank Letters, long since used in the UK, are increasingly being invoked in property disputes in Ireland. The mechanism effectively compels reasonable behaviour by both parties to a dispute. If one party submits to the other side proposed settlement terms which are either rejected or ignored and a court subsequently makes an order in those terms, the unco-operative party can be liable for costs.

Whether using this mechanism or not, it is advisable to keep a written record exhibiting a pattern of reasonable behaviour. This is very important if a dispute ends up in court. It will also benefit landlords when the eagerly anticipated upturn arrives.

Please tear along perforated line & keep

Residents, You Own Your Management Company

Robert Haniver,
Solicitor,
Corporate Law

The most common legal structure used for managing residential developments is an owners' management company, in the form of a company limited by guarantee. The National Consumer Agency (NCA) estimates there are approximately 4,600 of such companies in operation.

Management companies are usually formed by property developers to transfer their ownership of the development's common areas, such as car parks, green spaces and communal hallways. The management company then becomes responsible for maintaining the common areas and providing common services for the benefit of the property owners. Management companies usually contract management agents to carry out the day to day upkeep of the common areas.

When purchasing a property in a multi-unit residential development it is usually a condition of sale that the purchaser becomes a member of the management company. Many are not aware that members of a management company legally control the company and have certain rights and responsibilities under the Companies Acts 1963 - 2006 ("the Acts").

The Office of the Director of Corporate Enforcement (ODCE), whose functions include encouraging compliance with and enforcing the Acts, recently issued the following publications in response to the increased number of complaints received regarding management companies:-

'A Property Owner's Guide to Company Law'

This is a summary booklet aimed at providing residents with information on the role and function of management companies and how Company Law is relevant to them.

Some of the key points highlighted in this booklet are:-

- Property owners become members of the management company and may be appointed as directors. Members are usually entitled to attend and vote at the Annual General Meetings and Extraordinary General Meetings.
- The directors of a management company run the company for its members. They

must act in the best interests of the company and may be held personally liable for any breach of their duties as directors.

- The management company and its directors are obliged to keep proper financial accounts and prepare financial statements for its annual return to the Companies Registration Office. Failure to file its annual return can result in the company being struck off the Register of Companies. This can cause difficulty for residents looking to sell their property.
- If the management company, through any of its officers, commits a Company Law offence a complaint may be made to the ODCE which can attempt to remedy the breach and/or seek prosecution. Furthermore, if the directors or the management company are not fulfilling their Company Law obligations a member may seek compliance through the High Court.

It must be noted that the ODCE is confined to matters falling within the Acts. Issues concerning breaches of the Companies Acts or breaches of law by an officer of the management company may be referred to the ODCE. However, complaints concerning management company issues such as service charges, quality of management services and delays by developers in transferring common areas to the management company are discouraged.

'Company Law Handbook on Residential Property Owners' Management Companies'

This is intended to be a 'self-help' guide for management company members and directors on specific company law issues. The 258 page handbook includes guidance on corporate governance matters and options for property owners with management company issues.

There have been mixed views as to the merits of the recent publications given the limited role of the ODCE. Opposition Parties have called on the Government to introduce a Bill based on the Law Reform Commission's Report on Multi-Unit Developments (June 2008). However, the Government may be waiting for the Company Law Reform and Consolidation Bill to be published.

Ocean's Apart

Helen H. Whelan,
Senior Associate/Dept Head,
Corporate Law

On 2nd December 2008 the High Court approved a scheme of arrangement in an Examinership, that reduced the value of a loan secured on the Ocean Bar in favour of ACC Bank plc from €1.4 million to €950,000. Prior to the making of this Order by Justice Finlay Geoghegan, existing case law implied that loans secured on property retained the original value of the collateral rather than a reduced amount.

Under Section 11 of the Companies (Amendment) Act 1990, the High Court is empowered to determine the open market value of property. The significant decline in commercial property prices meant that the lease of the Ocean Bar was worth less than the security of €1.4 million. According to newspaper reports, valuations of the property ranged from €500,000 to €950,000.

The shortfall between the valuation of €950,000 agreed by the High Court and the balance due to ACC Bank of just under €300,000 was treated as an unsecured debt. In the Ocean Bar case this meant that ACC Bank received just 10% of the value of the unsecured part of the debt.

Before a secured debt such as that due to ACC Bank can be compromised as it was in the Ocean Bar case, at least one class of creditors must accept the scheme of arrangement in order for it to be presented to the High Court for approval. However, there is no guarantee that a scheme of arrangement will be approved as they usually require new investment in the business, something Maryborough Construction failed to secure for its Portlaoise office/retail development.

Where a scheme of arrangement is not approved, the result is the liquidation of the company. In the winding up of a company, a secured creditor may take ownership of the property and take their chances by selling it on the open market. However, given the state of the commercial property market at present secured lenders may prefer to avoid an outright sale.

All competent adults have the legal right to make decisions about how they manage their affairs, both financially and otherwise. Should you become incapable of managing your own affairs due to mental incapacity, it is important to have legal arrangements in place. You can do this by establishing an Enduring Power of Attorney (EPA).

What is an Enduring Power of Attorney?

An EPA is an authority executed by a person which only takes effect when that person (known as the Donor), loses mental capacity. Once the power comes into force, the Attorney (the person given the authority) has the ability to make decisions on the Donor's behalf. These decisions range from the organisation of the donor's assets, to his financial affairs and his personal care decisions. A number of important safeguards are in place under the Powers of Attorney Act 1996 ('the Act') to protect the Donor and his interests from abuse while vulnerable. For example, when drafting the Enduring Power of Attorney the Donor can make the exercise of the Power subject to any reasonable limitations and restrictions. The Courts operate a supervisory role over the exercise of this Power.

Why should I create an EPA?

An EPA can be seen as a type of insurance cover should your mental awareness or ability deteriorate. There are a number of ways in which people can assign the power to manage their affairs. However some of these arrangements, such as a general Power of Attorney, only subsist whilst the Donor has full mental capacity. Should the Donor subsequently become mentally incapable, the risk is that you will be declared a Ward of Court.

If you are made a Ward of Court, your money is lodged in the Courts and managed by the Courts Service. Effectively, you lose all control over your own assets and property and the Court has the final say in all matters relating to them.

The benefit of the EPA system is that the Donor decides the powers to be assigned and to whom they will be assigned. This ensures a level of control and certainty to the Donor. Furthermore, the EPA does not take effect unless and until the Donor loses mental capacity. The EPA is only registered in court when the Donor becomes incapacitated. The Donor or any other interested party is allowed a period of five weeks to make objections to the application to have the EPA registered. The Donor can revoke the EPA at any time before registration.

How do I create an EPA?

There are a number of strict procedural rules that must be adhered to in drafting an EPA under the Act. Both the instructing solicitor and a doctor must certify that the Donor is of full mental capacity at the time of execution of the EPA. The decision to create the EPA must be of the Donor's own free will and no undue influence or pressure must be brought to bear on the Donor. The scope of the EPA can vary, depending on whether you choose to create a general or a limited power. The Power of Attorney can apply to certain assets only, as outlined by you in your instructions. Importantly if the Power is restricted, it must be borne in mind that should the Donor subsequently lose mental capacity it may be necessary to make the Donor a Ward of Court. This could occur in order to make a decision for which authority is not given in the EPA.

A Donor is obliged to give notice that an EPA has been created. If he is married and living with his spouse, one of the two parties to be given notice must be his spouse. Otherwise one party must be a child of the Donor or other relative as specified in the Act.

How will an EPA safeguard my interests?

An EPA will allow the selected competent Attorney to deal with the relevant property, business and financial affairs 'in the best interests of the Donor'. There is also an

obligation to keep accounts should the Courts wish to review these at any stage.

Another beneficial aspect of the EPA is that it can also allow for what are known as 'personal care' decisions to be made on behalf of the Donor. An example of one such decision is where the Donor will live. In making these sensitive decisions, the Attorney must have regard to what the Donor would have been likely to do and is under an obligation to consult the Donor's family. It is important to state that an EPA can never govern health care decisions of/for the Donor, such as whether or not to undergo medical treatment. As the Attorney/Donor relationship is of a fiduciary nature, the Attorney must act in the best interests of the Donor at all times. Furthermore, any interested party may apply to the High Court after registration of the EPA for an order to direct the Attorney in how he should manage or dispose of the assets of the Donor should this become necessary.

When does an EPA cease to operate?

An EPA will cease to have effect on the death of the Donor and his assets will pass by the instructions laid down in his will or on intestacy.

Under the Act the High Court can revoke an EPA, if the Court believes that the Power of Attorney is not being exercised in the best interests of the Donor. This supervisory role is crucial to the protection of the Donor's interests. A Donor may also apply to the Court for an order cancelling the registration of the EPA if he has recovered his full mental capacity. The Donor's recovery must be certified by a qualified medical practitioner in order to cancel the EPA.

All adult persons with dependants and/or assets are strongly encouraged to put in place an EPA to protect his interests should they become mentally incapable of managing their own affairs.

Dublin office

Pepper Canister House,
Mount Street Crescent, Dublin 2
Telephone 00 353 1 240 1200
Facsimile 00 353 1 240 1210
DX number 109025
Email lex@orourkereid.com
Web www.orourkereid.com

Leeds office

17-19 York Place, Leeds,
LS1 2EX, England
Telephone 00 44 113 245 7811
Facsimile 00 44 113 245 7879
DX number 26450 Leeds Park Sq
Email lex@orourkereid.co.uk
Web www.orourkereid.com

Belfast office

33 Clarendon Dock,
Laganside,
Belfast BT1 3BG
Telephone 00 44 28 90 511 281
Facsimile 00 44 28 90 511 201
Email lex@orourkereid.com
Web www.orourkereid.com