

## Your New Year's Resolution: Make a Will!

Simon Rea,  
Dept Head,  
Investment Property

They say that procrastination is the thief of time; procrastination may also be the thief of your assets and estate if you have put off making a Will or reviewing your existing arrangements. There is no time like the present to act. We are now in a New Year and a new decade and it should be the time to put into action all the things you have been putting off.

It is a fact that 3 out of 5 people in Britain do not have a Will!

### Reasons to act

The new rules of intestacy are complex. The rules of intestacy are different in Great Britain from Ireland and Scotland. Broadly speaking if you die without a Will this is what will happen:

- If you are married or civil-partnered with children -

The surviving partner can only receive a maximum of £250,000 and that includes the value of your home. Any sums above that are split in two, with the children entitled to one half of the money. The other half is put in trust, from which the surviving spouse, or civil partner can draw interest.

If the home is owned as what is legally called 'beneficial joint tenants' (i.e. it is owned jointly by the husband and wife or civil partners), it passes to the survivor automatically and intestacy rules do not apply.

- If you are married or civil partnered and have no children -

The surviving partner can get a maximum of £450,000.

- If you are unmarried but living with a partner -

He or she gets nothing! Although there is something called the Inheritance (Provision for Family and Dependents) Act 1975 through which you can contest a Will, it only provides a limited amount of help and is only applicable in certain circumstances, for

example, if you have dependant children. Instead, there is a legal pecking order where parents come first, followed by brothers and sisters ('of the whole blood'), the half-siblings then grandparents, then aunts and uncles. If there are none of these around, everything goes to the *Crown bona vacantia*. Your partner will not see a penny.

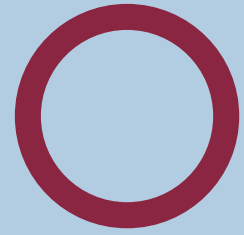
What is more, without a Will you will have no say over such matters as guardians for your children or be able to take steps to estate plan to minimise any inheritance tax impact.

It is therefore imperative that you take action before it is too late. We can assist you at every step of the way in advising you as to planning your estate and tax affairs and drafting a legally binding Will to ensure that your wishes are carried out with full effect.

### There are no shortcuts!!

There are many cheap alternatives to having a qualified solicitor advise you and prepare a Will for you. Many stationery shops and the Internet provide Wills kits at a cut price cost. New research amongst Law Society members specialising in Will writing, Trust and Probate has found that home made Wills and those prepared by non-qualified 'will writers' are often badly drafted resulting in the deceased's estate being wholly or partially invalid, poor tax planning and Wills that simply cannot be located. This review also highlighted that these 'will writers' often have hidden charges which inflate the initial advertised price of the Will. The Law Society's findings for the recent Hunt Review into the Regulation of Legal Services raise concerns about the unregulated 'fringe legal market' in Will writing and probate services. If a non-qualified person wishes to create their own Will and lasting Power of Attorney then they would have to be very familiar with the provisions of the Wills Act 1837 and subsequent legislation.

If you have any concerns over your Will or you do not have a Will in the UK then contact us to discuss your concerns and receive professional advice on estate planning and the drafting of your Will.



**orourke  
reid**

LAW FIRM

DUBLIN  
LEEDS

[www.orourkeid.com](http://www.orourkeid.com)

NEWSLETTER



quality  
people  
service  
clients

SEE INSIDE FOR ARTICLES ON...

Foul Play	Page 2
Fast Track Claims	Page 2
Supreme Court Ruling on Bank Charges	Page 3
Closing the Loophole	Page 3
Who will win out in the end?	Page 4

ISSUE No. 3  
FEBRUARY 2010

## orourke reid bookmark...

### Supreme Court Ruling on Bank Charges

Joanne Hicks,  
Investment Property

Since the article *Refund of unauthorised overdraft charges – Don't Bank on it!* was published in our February 2009 Newsletter, the Supreme Court has ruled unanimously in favour of the banks, overturning the decisions of the lower Courts. Previously, both the High Court and the Court of Appeal had ruled that unauthorised overdraft charges could be investigated.

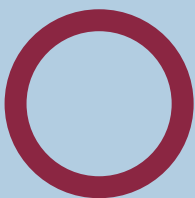
The legal issue before the Supreme Court was whether the overdraft charges could be tested under the Unfair Terms in Consumer Contracts Regulations 1999.

In simple terms, the Supreme Court ruled in favour of the banks, on the basis that the banks' customers agreed to pay overdraft charges as part of the price of having a current account.

Though many campaigners were outraged by the Court's decision, perversely, the majority of bank customers could in fact benefit from the ruling. If the Courts had favoured bank customers, there was widespread speculation that the banks would have been forced to introduce fees for simple banking services, such as online banking or having an overdraft. It remains the case that the majority of bank customers either stay in credit or never exceed their overdraft limits, so avoiding these hefty charges.

However, the Office for Fair Trading (OFT) may still scrutinise the banks' charges under other parts of the Regulations.

ISSUE No. 3  
FEBRUARY 2010



**orourke  
reid**  
LAWFIRM

**DUBLIN  
LEEDS**

[www.orourkeid.com](http://www.orourkeid.com)

## Foul Play!

Sarah Bhamra,  
Defendant Litigation

### The Case

During a game of five-a-side football played on an indoor pitch, Mr. Kerr suffered a catastrophic spinal injury and sued Mr. Willis, a player on the opposing team. All the players were friends and policed the game themselves. They had devised some local rules and there was no referee. The boundary lines of the pitch were approximately one metre from the wall. The layout of the pitch was unmarked, with the goals at the centre of each end of the hall.

On 4th November 2009, an appeal was made arising from a claim of damages for a personal injury brought by the claimant, Andrew Kerr, against the defendant, Gerard Willis. The appeal was heard before Lord Neuberger of Abbotsbury, Lady Justice Smith and Lord Justice Toulson. The appeal was brought on the issue of liability only. At trial, His Honour Judge Holman dismissed the claim for damages for personal injuries brought by the claimant.

The claimant gave two reasons why he believed his appeal should be granted. He first alleged that a late tackle from behind amounted to a foul and therefore the defendant had breached his duty of care during the football match. Second the claimant Mr. Kerr claimed that Mr. Willis had barged or pushed him from behind, thus causing his injury.

Counsel for Mr. Kerr suggested the defendant had conducted 'himself as to be in breach of his duty of care to the claimant and expose the claimant to a reasonably foreseeable risk of injury'. Counsel for Mr. Willis denied liability, alleging that his actions had been within the rules and that the injury was the result of an accident. He also contended that the tackle had not taken place near the wall but an appreciable distance from it. The defendant had also raised the point that football is a competitive contact sport played at speed.

### The Appeal

Hearing the case, the Appeal Judges were concerned because of the lack of clarity in the claimant's evidence. When Lady Justice Smith checked the accuracy of Mr. Kerr's

evidence, she found no support for his account. No one else present at the game described a push from behind while others described side-by-side contact at shoulder level or possibly at hip level. The Court took into account the fact that no one, not even the claimant's best friend, said that the defendant had committed a foul and described the incident as a pure accident.

When reviewing the evidence, the Court found that the witnesses all described the two men chasing for the ball with the claimant having a head start but the defendant was the faster of the two players. Their impression was that the two players reached the ball at almost the same moment and so the tackle could not be deemed to be late.

The Court found inconsistencies in Kerr's evidence regarding to the allegation of a barge or push from behind. First, when Mr. Kerr had spoken to his medico-legal adviser, he had not described the incident as a barge but had spoken of a tackle or a challenge. It was only in the witness box that the claimant had used the term 'barge'. In the judgement, Lady Justice Smith relied on the evidence of the witnesses present who indicated that both players reached the ball at the same time and their failure to describe a barge or push.

In rejecting both aspects of Mr. Kerr's claim, the Judge held that the claimant had not been barged from behind. She reached this decision due to a lack of supporting evidence for the claimant's version of events and stated that the defendant had therefore not breached his duty of care while making the tackle. All three Judges dismissed the appeal and no award of damages was made.

Contact sports such as football are played at speed and in a competitive manner. Players have a duty of care to the other players and must not expose them to a reasonably foreseeable risk of injury. However, accidents do happen and in this case, the Court held that this was a tragic accident and found no support for the claimant's case.

Please tear along perforated line & keep

## Closing the loophole on Lenders repossessing homes

Rehana Bakhat,  
Solicitor,  
Investment Property

The Government has announced plans to close the legal loophole that allowed lenders to repossess borrowers' property without going to Court. This has been hailed as a victory for those homeowners struggling to meet their monthly repayments and a further blow to the banks.

A campaign by debt charities began after a ruling was made in favour of lender GMAC-RFC in a repossession case. This loophole had left homeowners who missed two repayments vulnerable to immediate repossession. It was felt that the law was antiquated as it dated from 1925. After many months of campaigning, an eight week consultation period was launched by the Ministry of Justice.

### Facts of the GMAC Case

The issue came to light in 2008 in the case of *Horsham Properties Limited v Clark and Beech* when GMAC-RFC repossessed a property after the borrower got into arrears. The borrower had been living in a Buy-to-Let property contrary to their mortgage terms. The lender sold the property under their right to repossession. The borrower was then evicted by the new owner on the grounds of trespassing, even though GMAC-RFC had never obtained a repossession order from the Courts.

The Judge, Mr Justice Briggs ruled against the borrowers' claim that the repossession violated their human rights. This decision prompted fears that other lenders would use the loophole to sidestep Government rules designed to contain the sharp increase in repossessions during the recession.

### Sub Prime Lenders

Main high street banks, particularly those in receipt of Government bailout funds, have been subject to close scrutiny over their treatment of borrowers and have been forced to adopt a more tolerant approach to customers in arrears.

The majority of people who had their homes repossessed are thought to be borrowers with sub-prime mortgages from a non-mainstream lender. In October 2009 GMAC-RFC was fined £10.8 million by the Financial Services Authority (FSA) for their treatment of borrowers who fell in arrears. In its role as the City's watchdog, the FSA deemed that the lender levied unfair charges on borrowers who fell into arrears and was too hasty in repossessing their properties.

Figures from the FSA showed that 13,987 homes were repossessed by lenders

between July and September 2009. This was 3% more than the previous quarter but 6% lower than the first three months of the year.

### Mortgage Rescue

The Government has launched a number of schemes to help struggling homeowners, including the Mortgage Rescue Scheme. Under this scheme homeowners can sell some or all of their home to a social landlord and then rent it back. Another idea is the Homeowner Mortgage Support scheme which enables people to defer paying interest on up to 70% of their mortgage for up to two years.

These schemes, combined with lender forbearance and low interest rates, have caused a reduction in the Council of Mortgage Lenders prediction for the number of people who would lose their homes throughout 2009. This was reduced by a third to 48,000, but still remained the highest figure since 1995. The trade body estimated that the number of borrowers in arrears is currently 195,000, a figure that is expected to rise to 205,000 in 2010.

### The Future

Before the decision to close the loophole was made, Justice Minister Bridget Prentice MP confirmed that under the current law, lenders have the right to repossess and sell properties without seeking the owners or the Courts' agreement. Though there was no evidence that owner-occupiers were being treated in this manner, the Government proposals would close this loophole and prevent any future instances of 'rogue lenders' behaving in such a manner.

The Minister stated that 'losing your home is one of the most traumatic events anyone can face' and assured people that the Government was working hard to ensure that this would not happen before borrowers have received all the help available to them, including financial assistance and debt advice.

The Government also stated that more than 33,000 people in England had been assisted by a scheme whereby homeowners facing court repossession hearings were given free advice. Resulting from this scheme, 76% of those were able to return home immediately following the hearing. This has made a dramatic and real difference in preventing repossessions and evictions for both mortgagees and tenants.

## Fast Track Claims Procedure

### Defendant Litigation

In October 2009, the latest reforms to alter the process of personal injury claims were published. The aim is to streamline cases between £1,000 and £10,000 and provide fixed costs at various stages. The proposals will introduce tight timescales and will involve 3 stages.

**Stage 1** - the claimant must electronically send a completed claim form to the defendant's insurers. The insurers have 15 business days in which to respond. The only extension to this period is in cases involving the Motor Insurance Bureau.

If the insurer denies liability, fails to respond or alleges contributory negligence, the claim is excluded from the fast-track system.

**Stage 2** - the claimant's solicitor obtains a medical report and completes a settlement pack. This is sent electronically to the insurers together with any evidence of any special damages and the offer to settle. The insurer will have 15 business days to either accept the claimant's offer or make a counter offer. Where a counter offer is made, there is a further 20 business days for consideration and negotiation.

**Stage 3** - settlement is not reached. The insurer must pay, as an interim payment, the full amount of their offer (less any payments to the Compensation Recovery Unit) to the claimant together with the fixed costs of Stage 2.

The claimant will then prepare a settlement pack detailing the offers to the insurer. After 10 days, the claimant's solicitor can apply to the Court to determine quantum.

At each stage there will be a tariff in respect of the fixed costs. The new process is expected to commence by April 2010. It will be of interest to see how the Insurance industry will handle cases involving suspected fraud and what deterrents will be imposed in order that fraud is kept to a minimum.

A new wave of recent case law dealing with the problems faced by both sellers and buyers unable to complete property contracts due to the financial downturn has emerged.

Buyers who purchased properties during the property boom now find themselves struggling to obtain finance, as lenders and financial institutions continue to limit lending. This has led to a rise in buyers seeking to 'wriggle out' of legally binding contracts. Some buyers unable to borrow are being forced, if they are able to do so, to dig deeper into their own pockets to deal with the lending shortfall.

As a result of this, sellers are now being forced to review their position on those properties contracted to be sold on which buyers simply cannot now complete. One option for sellers is to take proceedings against those buyers who have failed to perform their side of an agreed and legally binding contract.

### Strict Interpretation

It will be interesting to see how the Courts will interpret the contract conditions in favour of each party. The Courts are likely to consider the efforts of either party in endeavouring to perform the contract, particularly the buyer's efforts to secure finance and likewise the seller's efforts to mitigate his loss.

Previously, the Courts leant heavily towards a strict and literal meaning of contractual clauses. In the 19th century, Lord Cranworth held in *Grey v Pearson 1857, HL* that words should be interpreted strictly in accordance with their literal meaning and the ruling influenced case law for the next 100 years.

However this position changed in the 1970's with a move away from the literal meaning approach to a more modern interpretation of the contract. This was expressed by Lord Diplock in the case of *Photo Production Ltd*

*v Securicor Transport Ltd 1980*. In this decision, the Courts took a more commercial view of the contracts and looked at what was intended by 'like minded businessmen'. It was felt that it was inappropriate for the Courts to impose a restricted view of the contract.

The most recent case law highlights the Courts' current position in dealing with sale and development situations.

### Recent Cases

*Aribisala v. St James Homes (Grosvenor Dock) Ltd (No. 2) [2008]* concerned a contract for sale, between the claimant and the defendant. A 10% deposit was paid and the completion date was set for 8 September 2006.

Aribisala did not complete on 8 September 2006 and the defendant gave notice to complete under Standard Condition 6.8. The effect of this was to require the purchaser/claimant to complete the contract within ten working days. The claimant did not complete the purchase within that time as he had been unable to obtain finance. The defendant then elected to rescind the contracts and forfeit the deposits, as they were entitled to do under Standard Conditions of Sale (4th edition) 7.5.2; the Court upheld this action.

In another recent case *North Eastern Properties v Coleman and Quinn [2009]*, the buyers of eleven flats in a development sought to extricate themselves from the contracts because of a substantial delay in the construction of the properties.

The buyers were led to believe the flats would be finished by the end of 2007 but the flats were not completed until the end of June 2008. On 23 May 2008, the purchasers purported to serve a notice to complete that required the properties to be completed by 9 June 2008, failing which they could terminate all the contracts. The seller argued

that the contract gave no right to serve any such notice.

On 1 July 2008, the vendor served notices confirming the flats were built and that they required completion of the purchases within 10 days. The buyers refused to complete and the vendor served final notices to complete on 16 July and later started proceedings to require completion.

The Court made it clear that the breach of the terms to build the flats on time could have allowed the buyers to terminate if the breach were serious enough to amount to repudiation by the seller of its obligations under the contracts. However, the Court noted that the buyers had not claimed repudiation and as they had made no complaint about the delay until 21 May 2008, it did not consider the delay serious enough to have been repudiatory. The Court held that the purchasers were bound to complete.

The recent case law suggests that the Courts are enforcing contracts that are freely entered into by the parties. However, they also gave hope to buyers who seek to extricate themselves from unprofitable contracts where there have been substantial construction delays if there is an ongoing complaint with the sellers and the correct procedures are followed. Another factor to consider is whether the purchasers will actually benefit from the delays in construction.

In the current financial market, it is proving difficult for purchasers to obtain finance and if the developments were not delayed, they may be in a position where they would have to complete on properties without having funds in place. Recently there has been very little precedent law in this area. It will be interesting to see the result in future cases and as to whether the financial markets will give buyers the excuse to walk away from legally binding contracts.

#### 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@ourkereid.co.uk](mailto:lex@ourkereid.co.uk)  
Web [www.ourkereid.com](http://www.ourkereid.com)

#### 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@ourkereid.com](mailto:lex@ourkereid.com)  
Web [www.ourkereid.com](http://www.ourkereid.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@ourkereid.com](mailto:lex@ourkereid.com)  
Web [www.ourkereid.com](http://www.ourkereid.com)