



RONAN DALY JERMYN

S O L I C I T O R S

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1. Stage Payments - a thing of the past?



Stage payments have NOT been abolished. However, a recent High Court decision has placed restrictions on their use. Although stage payments are becoming increasingly unpopular they are commonly imposed in the Cork area on purchasers of new houses. Their use is a cause of concern for many purchasers as they are required to pay money to the Builder at the various stages of construction which are released directly to it.

This method of purchase has two disadvantages for the Purchaser:-

1. A Purchaser draws down from their Bank loan incurring interest payments before getting possession of the property. Thus, during the course of the purchase a Purchaser is paying not only mortgage repayments on the new house but also rent/mortgage repayments on the property in which they currently reside.
2. Considerable sums of money are paid over to the Builder before the building is complete. If the Builder becomes insolvent, or for some other reason goes out of business, a Purchaser may have nothing to show for all their payments.

Builders maintain that the system of stage payments allows them to maintain a positive cashflow and that this lessens the danger for purchasers of builders "going broke" or of delays in construction should the Builder find it difficult to obtain labour and materials without access to periodic payments to fund these.

In an attempt to limit the Purchasers exposure, it is now common practice to buy the site from the Builder at the time of payment of the first stage payment, which means that if the Builder subsequently goes out of business, at least the Purchaser has a site which is fully paid for and owned by him/her. In fact, all Building Societies and Banks require a Purchaser to purchase the site at the earliest possible opportunity.

The High Court proceedings referred to above were brought by the Director of Consumer Affairs in relation to not only stage payments but also certain terms which were being used in Building Agreements and which were felt to be unfair to purchasers.

The decision of the High Court in relation to Stage Payments was as follows:-

"...Without prejudice to the issue of the propriety or impropriety of stage payments or interim payments in any such contract, no such building contract providing for such stage or interim payment shall provide for any interim payment such as will exceed the percentages specified in the Irish Home Builder's Association code of practice, being the percentages set out in the second schedule hereto, or which exceed the extent and value of works carried out at the date specified for such payment....."

Although the IHBA percentage guide is useful, it is submitted by the Conveyancing Committee of the Law Society that the percentage may have a built-in element of profit for the Builder which, according to the High Court decision, the Purchaser should not have to pay until completion. This office recommends that a Purchaser have an Engineer/Architect certify the works completed at each stage to ensure that the monies sought by the Builder

accurately reflect the value of the works at that stage and nothing else thus providing the Purchaser with additional protection.

Although stage payments have not been outlawed the High Court decision is more than likely their “swan song”. During the High Court proceedings submissions were made by the Department of the Environment whereby they confirmed that they advocate the abolition of Stage Payments for other than “once off” houses and legislation to provide for this is being drafted at present. The Law Society are also proponents of the abolition of stage payments. We will keep you informed of any further developments in this area as soon as they occur.

For further information please contact: (for Purchasers) John L. Jermyn, Deirdre Wilson, Brian O'Halloran or Zelda O'Callaghan; (for Builders), John Dwyer, Finola McCarthy or Pat Ahern.

Deirdre Wilson

2. Family Business Seminar

In conjunction with PriceWaterhouse Coopers, RDJ recently hosted a Breakfast Seminar at Maryborough House Hotel on the legal and other issues that arise in respect of Family Businesses. The Seminar was chaired by Alan Crosbie, the Chairman of Thomas Crosbie Holdings Limited and of Examiner Publications and included a presentation by RDJ Partner Tom Fox on the Legal Aspect of family businesses. A copy of the paper which Tom presented is available on our website www.rdj.ie



Pictured above are (L-R): Joe O'Shea, Managing Partner, PWC, Alan Crosbie, Chairman Thomas Crosbie Holdings Ltd and John Dwyer RDJ Managing Partner

3. New additions to the Firm

We are delighted to welcome the following Solicitors to the RDJ Team.



Jennifer Cashman has rejoined RDJ after spending some years with A & L Goodbody in Dublin. Jennifer will practice in the areas of Employment Law and Family Law and brings considerable expertise to her new position.

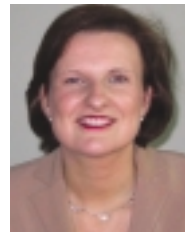


Zelda O'Callaghan, who was apprenticed with the Firm qualified as a Solicitor in September 2001 and is working in the Private Client Department of the Firm where she is involved primarily in residential conveyancing work.



Eoin Tobin, who was apprenticed with the Firm has just qualified as a Solicitor and is continuing with the Firm working in the Private Client Department looking after property transactions.

4. Part Time Employees



The Protection of Employees (Part Time Work) Act, 2001, (“the Act”), came into force on the 20th of December, 2001, and gave effect to EU Directive 97/81/EC on the Framework Agreement on Part Time Work adopted in 1997.

The Act states that a part-time employee cannot be treated in a less favourable manner than a comparable full time employee in respect of their remuneration and conditions of employment. In that regard, conditions of employment include both statutory and contractual employment benefits, such as sick pay policies and share option schemes.

Under the Act, part-time employees are defined as employees whose normal hours of work are less than the normal hours of work of an employee who is a comparable employee in relation to him/her.

The Act does make provision for exceptions and states that a part-time employee, in respect of his specific condition of employment, may be treated in a less favourable manner than a full time employee if such treatment is based on objective grounds. In this regard, the fact of being a part-time worker in itself is not sufficient to constitute an objective ground.

The Act also provides that less favourable treatment of casual part-time workers in relation to a specific condition of employment, if same can be justified on objective grounds, is permissible.

The Act prohibits employers from penalising employees for:

- invoking rights in accordance with the Act;
- opposing by lawful means an employer's actions which are unlawful under the Act; giving evidence in any proceedings under the Act, (or giving notice of his/her intention to do so);
- refusing to accede to a request to transfer from full time work to part-time work, or vice versa.

An employer will be considered to have penalised an employee if they have dismissed the employee, subjected the employee to any changes in their conditions of employment or any unfair treatment (including selection for redundancy), or have subjected the employee to any other action prejudicial to his/her employment.

Disputes under the Act are to be referred in writing to a Rights Commissioner. Disputes concerning the dismissal of an employee can be dealt with either under this Act or the Unfair Dismissals Act, 1977-2001, although redress can only be granted under one piece of legislation.

Either party may appeal a decision of the Rights Commissioner to the Labour Court and such appeals must be made in writing within six weeks of the Rights Commissioners decision. Either party to proceedings in the Labour Court may appeal the decision to the High Court but on a point of law only.

Jennifer Cashman

5. New Rules for International Data Transfer



All organisations holding personal data should be aware of new rules relating to the transfer of personal data outside the EEA. Most organisations hold personal data (which may be as basic as just a name and address) of one kind or another; it could be personnel data or indeed information about customers who are individuals. The new rules only apply to computerised data

but will, in the near future, also be extended to manual data kept as part of a structured filing system.

Many Irish companies have a requirement to regularly transfer data overseas - for example, multinationals with Irish operations may require access to personnel data relating to Irish employees.

The Irish Data Protection Commissioner has always had the ability, under the Data Protection Act 1988, to prohibit transfers of data outside of Ireland. The existing legislation has now been supplemented by detailed new provisions, the effect of which is to prohibit the transfer of personal data outside the EEA unless the country concerned ensures an adequate level of protection. There are certain exceptions which may be availed of, the most important being where the individual to whom the data relates has consented to the transfer.

The new provisions came into force on 1 April, 2002. Failure by Irish organisations to comply with the new rules exposes them to liability under Irish data protection laws.

So far the EU has only approved Hungary and Switzerland as countries outside the EEA which provide an adequate level of protection. It is unlikely that many other countries (including the US) will be approved. This means that transfer of personal data to these countries is fraught with difficulty.

The EU has, however, put in place particular arrangements with the US to facilitate transatlantic data transfer. This involves the US data importer publicly certifying its compliance with certain privacy rules, known as the "Safe Harbour Principles" - see www.export.gov/safeharbor. While Safe Harbour has not proven popular to date, Microsoft and Hewlett Packard have recently joined and this is seen as encouraging.

In the case of other countries outside the EEA, the only realistic option is to put in place a data transfer agreement containing EU approved "model clauses" which provide

significant protection to individuals whose data is being transferred outside the EEA.

Adrian Wall

6. Disqualification order Pursuant to section 160 of the Companies Act 1990



On the 20th July 2001 in the case of C.B. Readymix Limited (In Liquidation), Edmond P. Cahill, Official Liquidator v Grimes, Justice Thomas Smyth ordered that Dr. Michael Grimes be disqualified from acting as liquidator, receiver or examiner of any company for a period of 7 years and imposed conditions limiting the right of Dr. Grimes to act as auditor, director or secretary of any company during the same period. Dr. Grimes appealed the High Court Order to the Supreme Court and the appeal was heard on the 18th February 2002 and Judgment given by the Supreme Court on the 1st March 2002.

The principal argument made by Dr. Grimes in the Supreme Court was that the Judge in the High Court had no jurisdiction to make an Order with restrictions; he either had to disqualify or not. During the course of the hearing in the High Court, evidence was given, and admitted on Affidavit, that Dr. Grimes had dumped the books and record of the Company and intended, in flowery language, to disrupt the liquidator and the Revenue, which was a creditor. The Supreme Court held that "the appropriateness of the sanction imposed by the learned trial Judge must be considered in the light of the conduct of the Respondent and the purpose for which the section was enacted" (P.14). Further, the Court quoted with approval the statement in *Lo-Line Electric Motors Limited* (1988) 2 All E.R. 692, that "the primary purpose of the section (in the U.K. Companies Act 1985 which was similar to Section 160) is not to punish the individual but to protect the public against the future conduct of companies by persons whose past record as directors of insolvent companies has shown them to be a danger to creditors and others" (at P. 696).

Applying both tests, the Supreme Court dismissed the appeal of Dr. Grimes holding that the dumping of the company books and records "underscores the gravity of the misconduct of Dr. Grimes" (P.16) and that the conditions imposed were entirely appropriate and, further, that the Court had power pursuant to sub-section 8 of Section 160 to impose such conditions.

This firm acted for the Official Liquidator in the first judicial interpretation by the Supreme Court of Section 160.

If you have any enquiries, please contact Nicholas Comyn.

7. "Chamber after Dark"

RDJ hosted a Business after Hours event with Cork Chamber of Commerce at our offices on 22nd January. This was the first Business after Hours to be held in a legal office and was a very successful evening with over 90 attendees. Two of our Partners Garvan Corkery and Rosemary Horgan gave presentations on e-mail usage in the workplace. The evening provided an excellent networking opportunity for Chamber members.



Pictured above are some of the attendees at the Chamber after Dark event.

8. First reported contested divorce case



The recent case of McA -v- McA came before the High Court in January 2000. The Applicant wife and Respondent husband had married in 1968 and had two children both of whom were adults when the case came before the Court. Both accepted that the marriage had irretrievably broken down. The husband left the family home for a while but then returned although the marriage never became reconciled. The couple lived separately in the house although they went on family holidays together and behaved in a cordial manner for the sake of the children. The husband was a successful businessman owning 85% of a holding company. The wife held the remaining 15% of the company. The wife brought proceedings seeking a legal separation and the husband counterclaimed seeking a divorce. A Divorce is only available where three conditions have been satisfied

1. The parties have lived apart for four out of the previous five years
2. There is no prospect of reconciliation, and
3. Proper provision has been made for the spouses and dependent children

The Judge had to decide whether the couple had lived apart for four out of the previous five years in order to determine the husband's application for divorce. The wife was content to seek a separation and opposed the divorce. The Court held that "living apart" for the purpose of the Family Law (Divorce) Act 1996 means more than physical separation and encompasses a mental attitude and intention. In this case the couple had no interaction while living together and had in fact lived apart since 1997. This was enough to amount to a "termination of the marriage relationship" and satisfy the constitutional and legislative requirement. The Judge granted a decree of divorce rather than a separation. The second matter which the Court had to determine was what "proper provision" should be made for the dependent wife. The Court valued the wife's 15% of the business at €1.2m, and this was hers as of right. In determining the amount of periodic maintenance it would have to be borne in mind that the wife would now be separately assessed for tax and this and the fact

that she would have a large income from her shares was factored into the assessment of the amount. The Judge awarded periodical maintenance of €4,500 per month. The Judge also awarded a lump sum of €300,000.

This case is important in establishing what is meant by "living apart". Given that four of the previous five years is a very long period before you can present your divorce application, many people want to bring proceedings as soon as possible. The danger of commencing divorce proceedings too early is that you might have to start again if the Court decides that you have not satisfied the constitutional and statutory time period requirement. The Court's decision on the financial aspects of the case is also important to solicitors as an affirmation of the kind of settlement often pursued in cases concerning wealthy couples. Divorce does not end the financial obligations of the financially stronger Spouse.

Rosemary Horgan

9. Cora's retirement

Cora Corcoran, who many of our clients will be familiar with from her work in the Company Secretarial area, retired from



Pictured above are (L-R) RDJ Managing Partner John Dwyer, Nicholas Comyn, Cora Corcoran, Frank Daly, John Jermyn

the Firm at the end of February. Cora had spent over 40 years with the Firm. A very enjoyable party to celebrate Cora's retirement was held in the Firm and we wish her a long and happy retirement.

10. Website - Articles

The following recent articles are also available on our Website:

The Co-Habitation Death Trap - Deirdre O'Riordan
E-Business - Garvan Corkery
New Mobile Phone Regulations - James O'Sullivan

We are constantly updating our Website - www.rdj.ie with Articles which we feel are of interest to our clients so keep a watchful eye!

For further information on any matter in this newsletter please contact: Fergal Dennehy telephone 021-480 2700 or email fergal.dennehy@rdj.ie

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