

# Property & Litigation Client Seminar

## Key Takeaways



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### GROUND RENTS

- » **Acquiring the freehold:** Where certain statutory criteria are satisfied, tenants of long leases have a right to acquire the freehold. The tenant can seek to agree the terms for the acquisition with the freehold owner, failing which it can use the procedure set out by statute. The first step in the statutory procedure is for the tenant to serve a Notice of Intention to Acquire the Fee Simple on the landlord.
- » **Contested applications:** The matter is heard in the first instance by the County Registrar. The decision of the County Registrar can be appealed to the Circuit Court, with a further right to appeal to the High Court. An appeal to the Circuit Court/High Court is a *de novo* appeal (i.e. effectively a new hearing). The tenant has to prove title at every hearing, and new evidence can be introduced at every hearing.
- » **Key date:** The County Registrar/Court will assess the tenant's right to acquire as of the date on which the Notice of Intention to Acquire is served. If the tenant has contemporaneous evidence of the use of the land on this date, the application is more likely to be successful. This evidence might include photographs/video footage/usage reports/maps/valuations.
- » **Subsidiary and Ancillary:** The tenant must show that there are permanent buildings on the land which it is seeking to acquire and any land not covered by buildings must be subsidiary and ancillary to the buildings. The County Registrar/Court will consider both whether the unbuilt-on land is inferior/subservient/subordinate to the built-on portion, and whether it serves to assist/supplement/benefit the built-on portion. The County Registrar/Court will be primarily concerned with use of the land as at the date of service of the Notice of Intention to Acquire. Evidence prior to the date of service may be relevant and admissible; evidence after the date of service will be more heavily scrutinised.
- » **Tip:** If purchasing a leasehold interest, consider asking the freehold owner to give a statement of the previous use of the land. This might help avoid lengthy and protracted disputes should you seek to acquire the freehold interest at a later stage.



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### NEGOTIATING BCAR CLAUSES

- » **Building Control (Amendment) Regulations 2014 (BCAR):** These regulations introduced a new process around compliance with the building regulations. The BCAR regime creates new duty holders, imposes obligations in relation to the lodgement and validation of compliance documents with the local building control authority (BCA) and introduces a system of mandatory inspections during construction. On the completion of a project, a certificate of compliance on completion (CCC) must be registered with and validated by the BCA before the premises can be "opened, occupied or used."
- » **Issues arising in practice:** Many of the issues encountered in practice relate to how the legal documents

should cater for the different arrangements for the carrying out of the works e.g. tenants seeking early access to carry out fit-out works, landlords carrying out tenants' works (and vice versa) and tenants requesting the omission of certain works from the shell and core design with the omitted works to be carried out by the tenant later. These arrangements impact on (i) practical completion (under the building contract and also under the agreement for lease/development agreement) and (ii) the landlord's ability to achieve BCAR compliance for the landlord's works and/or the timing of the same.

- » **Impact of the above arrangements on the lease/rent/rent-free commencement dates:** Where works are omitted at the tenant's request, a mechanism that works

well is the concept of "deemed practical completion" of the landlord's works and associated rent commencement (and the start of any rent-free period).

- » **Separate opinions on compliance with building regulations:** There is value in obtaining separate opinions on compliance as they serve a different purpose to the CCC and can be relied upon.
- » **Key BCAR strategies:** Whatever arrangements are put in place to achieve BCAR compliance, co-operation, co-ordination and communication between the parties and their assigned certifiers is key. Communication with the BCA is also critical. The BCA should be brought in at the outset and kept advised throughout the process so that they understand the BCAR compliance strategy.



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#### VACANT SITE LEVY

- » **Designation Criteria:** The criteria for the designation of a site as a residential or regeneration vacant site are set out in the [Urban Regeneration and Housing Act 2015](#). On receipt of a notice of intention to enter a site on the vacant site register, it is essential that the notice is reviewed against every element of the mandatory criteria set out in the Act to confirm whether the site was validly designated by the relevant local authority.
- » **Calculation of the levy:** The levy is payable in January 2019 for the year 2018 (3% of the market value) and in January 2020 for the year 2019 (current proposals are to raise the levy to 7% of the market value). The levy is reduced to zero for the year of and year prior to a sale of the land (to an unconnected third party) and there is relief from the levy for lands which are the subject of a site loan in certain circumstances i.e. acquisition finance. Finance put in place after the acquisition of the site or development finance does not qualify for relief from the levy.

- » **Key questions to be answered on receipt of a vacant site notice:** Is the site on the register on the relevant date (1 January)? Did you receive a notice by the relevant date (1 June)? Does the site meet the criteria for the levy? Do any of the reliefs apply? Do you accept the market value attributed to the site?
- » **What to do if you receive a notice:** Receipt of a notice from a local authority of its intention to enter a site on the vacant site register is only the start of a process. Arthur Cox can advise and assist you at all stages of the process in your dealings with a local authority, an appeal to An Bord Pleanála and/or the Valuation Tribunal and a judicial review of any decision by the Board to place a site on the vacant sites register.



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## LANDLORD & TENANT ISSUES

### Statutory tenancies

- » **Impact on landlord:** Potentially very significant. The tenant can remain in occupation of the premises until the claim is determined at the rent payable under the existing lease, which may be less than the market rent payable. The landlord cannot later recover the 'lost opportunity' rent.
- » **Defeating a claim:** A landlord can defeat a statutory tenancy claim where he intends to rebuild/reconstruct the building and has planning permission, or where he requires vacant possession for a scheme of development and has planning permission. However, the landlord must pay compensation to the tenant for the loss, damage or expense sustained, which might include, for example, removal and relocation expenses, advertising and legal costs. This can be a significant amount, particularly in cases where the tenant has sophisticated IT systems or plant and machinery that need to be moved. The landlord may also be liable for any difference in the new rent payable by the tenant. It may be possible to offset the compensation payable against the tenant's liability for dilapidations. If the intended works are not carried out in a reasonable time, the landlord may also be liable for punitive damages.
- » **Avoiding a claim:** A landlord can avoid a statutory tenancy claim by

entering into a deed of renunciation with the tenant. This can be done before or during the tenancy. To be enforceable, the deed must be in writing, the terms must be clear and precise and the tenant must have obtained independent legal on the deed of renunciation specifically (not just on the lease generally). An argument that a tenant renounced their right to a statutory tenancy by implication (e.g. by agreeing to a break option) is unlikely to succeed.

### Avoiding dilapidations disputes

- » Be aware of the extent of repair obligations in the lease and who is responsible for what.
- » Ensure consistency across the various covenants in the lease, e.g. repair, redecorate, yield up covenants.
- » Agree a condition report at the outset and append this to the lease.
- » Consider both bases of assessment: cost of repairs vs diminution in value, and get valuation evidence. The tenant might favour the diminution in value basis. For example, where the cost of repairs is €1m, but the difference in the value of the property in disrepair and the value of the property in repair is €500k, the tenant might argue that their liability is €500k only.
- » Address dilapidations at the end of the lease before entering into a new lease with the existing tenant.