

## **From *Caveat Emptor* towards Full Disclosure - Developments in Ireland**

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### **KEY WORDS**

adverse possession, cadastre, caveat emptor, compulsory first registration, eConveyancing, eRegistration, vendor disclosure.

### **SOME PRINCIPLES OF COMMON LAW SYSTEMS OF CONVEYANCING**

A key distinguishing feature between common law and civil law jurisdictions is an adversarial as opposed to an inquisitorial system of jurisprudence. Underpinning the adversarial system in property law is the principle of *caveat emptor* or Buyer Beware. *Caveat emptor* operates on the basis that it is the responsibility of the purchaser of property to make appropriate enquiries, while the duty of disclosure of the vendor is limited to responding to those enquiries. The doctrine of *caveat emptor* has been modified to a significant extent in commercial law in Ireland as a result of the enactment of extensive legislation. Statutory protections afforded to purchasers, such as those provided by the sale of goods legislation, have eroded and virtually eliminated the application of *caveat emptor* for the purchase of most goods and services. However, in the main, *caveat emptor* still governs the manner in which real estate purchase (conveyancing) is conducted in Ireland.

*Caveat emptor* fixes the purchaser with the risk of acquiring a defective title and, consequentially, obliges the purchaser to make appropriate enquiries and searches. Another relevant feature of the common law is the principle of equity and, in particular, the doctrine of notice. Here again, *caveat emptor* comes into play in that a bona fide purchaser for value is deemed to be on constructive notice of certain matters. A purchaser is deemed to be on notice of matters which would have been ascertainable from inspections and enquiries that ought reasonably to have been made. This also fixes the purchaser with notice of aspects of title and planning that appear in statutory registers, such as those of the Land Registry, the Registry of Deeds and the planning registers.

The origin of the principle of *caveat emptor* probably stems from the early feudal period when there were no public registers and it was imperative for a purchaser to check what he was purchasing before parting with the purchase money. Defenders of the system might contend that it is a matter for a purchaser to make his own bargain and that a vendor cannot be expected to know what matters are of relevance to that decision.

### **eCONVEYANCING**

In recent years the view has been evolving that *caveat emptor* may be an anachronism and is an obstacle to electronic conveyancing. This view appears to have gained currency in other common law jurisdictions where efforts have been made to reform

conveyancing law. In England and Wales, the Home Information Packs (HIPS) was one such initiative. In Ireland, in a recently published eConveyancing Vision by the Law Society, a key recommendation and a stated pre-requisite to developing an effective eConveyancing was a change from *caveat emptor* to vendor disclosure.

eConveyancing is a driver of change and also creates a dynamic for reform and re-engineering of processes. In April 2006, the Law Reform Commission presented a report to Government on the need to reform and modernise land law and conveyancing. This report, titled *eConveyancing: Modelling of the Irish Conveyancing System*, was a key milestone in a major national eConveyancing initiative dealing with legal, administrative and technical matters. Reform of Land and Conveyancing Law and repeal of over 150 pieces of legislation, some dating back to 1285, is now contained in legislation that is before the Irish Parliament. As part of this programme, a roadmap for eConveyancing dealing also with administrative and technical issues was developed and the ensuing vision is contained in the Law Reform Commission Report. Although the Law Reform Commission did not specifically address the area of *caveat emptor* in its recommendations, it is clear that *caveat emptor* complicates the development of an eConveyancing model.

## ENQUIRIES AND SEARCHES

In Ireland, the vendor and the purchaser are each represented by different solicitors who deal with the formation of contract, requisitions, searches drawing up the title deeds and registration requirements. The process of enquiry and reply is structured and tends to be formulaic. In a sense, it could often be compared to a game of chess. The purchaser raises extensive standard requisitions and enquiries and the vendor generally provides stock replies disclosing the minimum of information possible. A typical reply might be “*Not to the Vendor’s knowledge but searches will reveal*”. Much of the process undertaken at pre-contract stage is repeated again at investigation of title stage; this gives rise to delay and additional cost. It must be questioned if the process lends itself to transparency and whether a system of vendor disclosure would add more to the process with less effort and cost for all parties.

Conveyancing enquiries can be divided into three phases, namely:

- pre-contract enquiries,
- post-contract enquiries,
- closing and post-closing enquiries.

The purpose of pre-contract enquiries is to ensure that the purchaser avoids contracting to purchase a property with defects or difficulties that are not apparent. A common example would be a planning search to include zoning issues such as motorway development. At one time, pre-contract enquiries were limited in scope. However, it has become common in recent years to have extensive pre-contract enquiries across a range of issues to include planning and building condition surveys and extending out to include title matters.

Post-contract enquiries are set out in a structured Law Society document of “*Objections and Requisitions on Title*” covering over 100 separate enquiries dealing with issues such as occupation, boundaries, tenancies, taxation, easements, family



law, planning, multi-storey and condominium conditions.

Closing and post-closing enquiries generally relate to searches of public registers and obtaining explanations from the vendor for any acts that appear on searches.

### **CERTAIN LIMITATIONS WITH CONVEYANCING IN IRELAND**

Conveyancing in its purest form typically relates to the transfer of ownership of one or a number of parcels from one owner to another. Over the years, a raft of legislation has been enacted to introduce controls over the disposal of property. These include areas such as taxation, family law, planning, heritage sites, etc. The problem with many of these controls is that they operate without registration, while in other cases new registers are developed by the relevant agencies. This adds to the cost and complexity of conveyancing. It also compounds the problem of developing a national spatial data infrastructure and a multi-purpose register supported by a homogenous or unified cadastre for Ireland.

Conveyancing in Ireland has a number of limitations. In other common law jurisdictions these limitations may not arise or others may exist.

- Not all rights are capable of registration in the Land Registry. Those dealing with registered land must make enquiries and searches to ascertain if any interests affect the land without registration or if they appear in records maintained by many government agencies. The solution required to simplify the system, to eliminate *caveat emptor* and to support eConveyancing would be to introduce a multi-purpose register/cadastre. All interests affecting land would be made registrable in a unified multi-purpose register. This could be a single register maintained by one agency or a virtual register created by joining a number of registers maintained by different agencies. Only those rights appearing in the register would create interests that attached to the land. This would also apply to public bodies and statutory rights.
- Land law in Ireland is constructed more around the person rather than the property as the key entity and this has percolated into many areas of conveyancing. This has a bearing on the manner in which registers and indexes are maintained and how rights attach to property. A practical example of this is that the Land Registry register shows ownership rather than possession. A person may acquire a statutory title through adverse possession without the knowledge of the registered owner. If the focus moved towards property, it should be incumbent on a person seeking to establish adverse possession to register notice of their possession in the Land Registry before time would begin to run to bar the interests of the true owner. This would prevent claimants from surreptitiously establishing title to registered land by adverse possession without the knowledge of the registered owner.
- Planning laws fall within the remit of local authorities and each local authority maintains its own records. Because there is no national register, it is necessary to make enquiries in the particular local planning office in order to conduct a search. In this regard it is worth reflecting on the observations of Sir Robert Torrens, the architect of the registration of title system used throughout Australia, New Zealand and several Canadian provinces. When writing in the

1880s advocating the introduction of his system of registration of title, he dismissed the objections then put forward to having a central registry office. He went on to say that “*The electric wire and the penny post solve all the difficulties, rendering the saving of a few hours the only advantage which parties at the place of registration have over parties at a distance*”.

Today, with the internet and advanced electronic systems, the arguments for having a national register for planning are even more compelling. A change in the mechanism of planning or the powers of local authorities is not an essential pre-requisite to the establishment of a national planning register. Enforcement and control could still be reserved for local government. The purpose of the register would be to create a single, transparent, consistent and reliable record of those decisions which would be readily accessible to all interested parties.

- Another problem with planning is that it operates akin to a record of deeds system. Each time the property is transferred, the planning must be investigated *de novo*. A planning register could be developed on registration of title principles. For instance, planning could be deemed to be final and absolute after the filing of a statutory declaration of compliance on the register and the expiry of a statutory notice period of objection or enforcement by the local authority. This would confer certainty for purchasers, provide notice to the public and provide a secondary mechanism for local authorities in regard to enforcement for non-compliance. It would also avoid unnecessary repetitious expense in dealing with planning during conveyancing. Such a system would also support eConveyancing and, indeed, without it or alternative radical measures eConveyancing as regards planning would not appear to be feasible.
- Common law jurisdictions do not tend to have a unified cadastre, as such. In Ireland, the Ordnance Survey provides high quality national mapping in the latest digital formats and this is used by all State agencies for their mapping systems. A problem is that the agencies operate as separate information silos and have mapping systems based on different standards, sometimes using different map projections and scales and, perhaps, different editions of the same maps, some of which are in paper based formats, some in raster and some in digital. This is an area that needs to be addressed in relation to the INSPIRE Directive, in particular. From studies conducted, including those for the EULIS project, it is clear that the only single effective reference point for all land based enquiries is the parcel identifier. A prerequisite to the development of a unified multi-purpose register and unified cadastre and the implementation of a full eConveyancing system for Ireland would be the establishment of a spatial data infrastructure. This would also support the objectives of INSPIRE and generate substantial savings at government agency level where there is significant overlap of effort in mapping and recording data in relation to the same parcels and with little or no capacity to combine and share information.



## **INITIATIVES BY PROPERTY REGISTRATION AUTHORITY IN SUPPORTING TITLE DISCLOSURE AND ADVANCING eCONVEYANCING**

The Property Registration Authority, which controls the Land Registry, has initiated a range of measures that contribute towards eConveyancing, the elimination of paper-based records, the establishment of a spatial data infrastructure for Ireland, the development of parcel based identifiers and the availability of title information to eliminate the risks associated with *caveat emptor*.

### **➤ Digital Mapping System**

The Property Registration Authority is well advanced in its five year digital mapping programme that is due to finish in 2010. This project involved the conversion the legal boundaries on all existing paper-based maps for Ireland using the latest Ordnance Survey digital map, itself based on a new map projection, as the topographic and geodetic backdrop. The project should generate momentum for all other government agencies to adopt the same Ordnance Survey digital map. As such, this could be the genesis of a spatial data infrastructure for Ireland and the Land Registry digital mapping project is well positioned to support any such initiatives. Digital mapping also provides the ideal framework for establishing a unified multi-purpose register.

### **➤ eLodgement of Applications for Registration**

The Property Registration Authority has developed an eLodgement system, which is interactive with its extensive databases. The system enables professional customers to pay fees on-line, build and track applications. It also validates key data on-line and pre-populates the register with drafts of the appropriate registrations. This is the precursor to full eRegistration and, other than electronic supporting documents, it contains most of the elements of full eRegistration. Customer sentiment towards the system has been very positive with almost 50% of customers using eLodgement, even in advance of the introduction of any incentives.

### **➤ eRegistration**

eDischarges will be, essentially, the first “live” eConveyancing project in Ireland with a project implementation date of March 2009. The Property Registration Authority intends to follow eDischarges with an eCharges project and, later, with eRegistration for remaining transactions including, specifically, transfers of ownership. eDischarges has been developed within the Property Registration Authority to provide an electronic system to discharge charges on registered land. Through a number of security features, the eDischarges model also provides a significantly enhanced level of security against fraud for lenders and registered owners. The new system will also reduce the workload for the Property Registration Authority through automated registration procedures.

The project objectives are to:

- Develop a secure system for releasing registered charges where no paper is lodged, issued or stored.

- Place the Property Registration Authority in a position to develop a system of eRegistration for other types of registrations
- Bring about operational efficiencies by increasing productivity and improving turnaround times for Discharges
- Introduce improvements and efficiencies to the current process between the financial institution and solicitors, including reduction or near elimination of paper, reduction of costs and the elimination of inherent delays.

➤ **Internet Access for Information**

For several years now, customers of the Property Registration Authority may conduct all of their searches and enquiries on-line via the landdirect.ie service. Over 95% of all searches and applications for certified copy documents are now conducted on-line through landdirect.ie. The latest addition to this service is full access on landdirect.ie to all title and index maps and the Ordnance Survey backdrop map.

This information is available to customers free of charge, which should provide an impetus to the sharing of information in support of the principles of INSPIRE and the development of a spatial data infrastructure.

➤ **Compulsory First Registration (CFR)**

By international standards, Ireland enjoys a high incidence of property ownership and approximately 1.8 million registered titles covering about 2.5 million land parcels are now catered for in the land register, which was established in 1891. In overall terms, this represents about 85% of all legal titles within the national boundaries with the remaining titles registered in the Registry of Deeds, which system dates from 1707. However, it is notable that over 98% of titles are registered in the Land Registry in fifteen of the twenty six counties in the State while in the remaining counties, other than Dublin and Cork, over 96% are registered. Accordingly, while unregistered titles are very rare over large stretches of the country, many of the titles that remain unregistered do relate to particularly valuable commercial and residential properties located in the inner-urban areas of the two largest centres of population.

One of the main priorities for the Property Registration Authority is to complete the register and to close the Registry of Deeds system. There is general agreement that this is a pre-requisite to the full implementation of a system of eConveyancing in Ireland. Currently, compulsory registration provisions extend to 12 of the 26 counties of Ireland and the objective of the Property Registration Authority is to introduce universal compulsory registration on an accelerated basis.

The registration of title system has a number of advantages over the deeds system:

- State guarantee of title
- Elimination of repetitious and time-consuming investigations of title



- Transparent register showing property, ownership and interests
- Curative effect on minor defects in title or descriptions
- Accurate and up-to-date digital map
- Advanced searching and indexing facilities
- Supports eConveyancing.

➤ **New Legislation**

New primary legislation to establish the Property Registration Authority and reform land registration was introduced in 2006 and, subsequently, a number of pieces of amending secondary legislation were passed into law. This introduced dematerialisation initiatives and reformed several areas with a view to introducing eRegistration and positioning the Property Registration Authority for eConveyancing.

**CONCLUSION**

The role of lawyers, other professions and government bodies dealing with land should shift from one of checking title for compliance on behalf of purchasers to that of perfecting title for owners. There can only be one vendor of property whereas there may be several potential purchasers and it is the vendor rather than the purchaser who determines when a property will be put up for sale. It is logical, therefore, for the vendor to prepare the documentation for sale in advance and to move away from *caveat emptor* towards vendor disclosure in that this:

- Speeds up conveyancing
- Provides transparency
- Eliminates unnecessary duplication of costs for prospective purchasers
- Gives certainty to prospective purchasers
- Supports eConveyancing
- Reduces overall conveyancing costs
- Leads to greater convergence with other EU systems of registration
- Eliminates barriers to investment in land transactions and encourages economic activity.

Barriers to trading in land are excessive relative to other areas of investment and this discourages investment in property to the detriment of economic activity and tax receipts. There is a need to simplify the process to make it as easy to deal in land as in other areas of trade. This was the rationale advocated by Sir Robert Torrens and underpinned the establishment of the Land Registry in 1891.

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## BIOGRAPHICAL NOTES

Diarmuid Clancy is a Deputy Registrar in the Property Registration Authority, Ireland. He has been head of operations in the Land Registry and Registry of Deeds since 1994. Diarmuid is a solicitor and worked as a lawyer in the Land Registry prior to 1994. He is chairperson of the executive boards of a number of major projects currently underway in the Property Registration Authority. These include the digital mapping project, the electronic registration project and the decentralisation of part of the Land Registry.

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