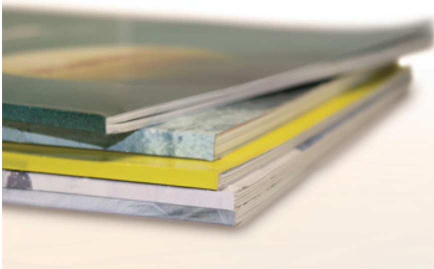
New Residential Tenancies Law



BY GEORGINA COOK

Over one-third of Jersey's population lives in rental accommodation.[1] It is therefore surprising that there is little law relating to residential tenancies. What statutes dates back to 1919 and 1946, are written in French and is not easily digestible to the non-lawyer.

In July 2009, the States of Jersey sought to redress the lack of clarity and public understanding surrounding the rights and obligations of landlords and tenants, by approving the Residential Tenancy (Jersey) Law 200- ("the Law"). The law which is designed to encourage the development of fair, transparent and well-regulated agreements between landlord and tenant will come in to force once it has been approved by the Privy Council. Everyone involved in renting property, whether as landlord or tenant, should familiarise themselves with the terms of the Law as failure to comply may constitute the committing of an offence.

Who does the Law apply to?

The Law will apply to all residential tenancy agreements (being agreements for the occupation of self-contained dwellings) for the exclusive occupation of a residential unit for value (i.e. for consideration or payment) and for a period of nine years or less, or for no specified term. For an agreement to constitute a residential tenancy agreement, the exclusive occupation must be by one or more natural persons who are party to the agreement. The Law would not therefore relate to leases for occupation by "J-Category" (essentially-employed) staff, which are usually entered into by the employee's employer, without the employee being party to the lease agreement.

A unit is only a 'self-contained dwelling' if it offers exclusive use to the occupier of a shower or bath; a washbasin; a kitchen; a sleeping space and a lavatory. Certain units within a residential home or premises registered under the Tourism Law may, on the face of it, satisfy this definition. However, the Law prescribes various exclusions, including the two aforementioned types of accommodation, together with holiday let's lasting less than three months and agreements under which the occupier is a boarder, lodger or other licensee. Licences to occupy non-qualified accommodation are not therefore subject to the Law.

The Law applies to all agreements made after the Law's implementation and include those which were made before such date that have been varied or renewed after the Law has come in to force. Whilst the Law requires residential tenancy agreements to be in writing, an agreement is still deemed to be subject to the Law if it is partly or wholly implied, or partly or wholly oral.

What must a tenancy agreement contain?

Residential tenancy agreements (and any variations or renewals) must be in writing and signed by, or on behalf of, the parties to the agreement. The tenant must be given at least one working day to read the agreement before having to sign it. A copy of the agreement must be given to the tenant as soon as reasonably practicable after it has been signed by the

[1] Jersey in Figures, 2007 p.33, States Statistics Unit

parties. The Law then provides that all residential tenancy agreements must contain the following:

- A description sufficient to identify the residential unit that is the subject of the agreement;
- The date that the tenancy commences;
- The date (if any) when the tenancy will come to an end, or the term (if any) at the end of which the tenancy comes to an end, or the condition (if any) on the fulfilment of which the tenancy comes to an end;
- Name of the landlord;
- If there is a managing agent involved, his name and business address, or if there is no such agent, the business address of the landlord;
- The rent payable and its frequency of payment;
- The name of to whom the rent is to be paid;
- How the rent is to be paid;
- The amount of any deposit or guarantee payable and how and when any such money is to be repaid;
- When the rent is to be reviewed (if at all) and the basis of review;
- An inventory of the landlord's movables situated in the accommodation.

Residential tenancy agreements must also contain provisions which:

- Allow for a tenant to remove his own fixtures subject to making good any damage caused in so doing;
- Allow for the landlord's consent not to be unreasonably withheld in circumstances where it is required;
- State that the tenant is not to be required to purchase any fixtures or fittings or pay any premium or key money in respect of the residential unit.

Even if these matters are not written in to the tenancy agreement, they shall be deemed to form part thereof. Furthermore, it is an offence to purport to include any provision which seeks to make void any contractual provisions which are inconsistent with the Law, or which seek to contract out of the Law's requirements.

What if the dwelling becomes uninhabitable?

If a dwelling which is the subject of a residential tenancy agreement becomes uninhabitable (other than through the malicious act of the tenant) rent and other payments due under the agreement shall cease to be payable whilst the dwelling remains uninhabitable. Furthermore, a landlord cannot, without lawful reason, prevent the tenant from occupying and enjoying the dwelling or any part thereof.

Terminating a tenancy agreement

The Law replaces the provisions of the 1919 statute mentioned above with respect to the termination of periodic tenancies. A periodic tenancy is one which is for an indefinite period but can be terminated by a period of notice. Under the Law, such a tenancy may be terminated by the landlord on giving no less than three months' written notice of termination and by the tenant on giving no less than one month's written notice.

If a tenant breaches the terms of the residential tenancy agreement, under the Law, the landlord must serve notice of the breach on the tenant requiring the cessation within seven days of the offending conduct and/or the taking of reasonable measures to rectify the breach. If the tenant fails to comply with the notice, the landlord may apply to the Court (being the Petty Debts Court) for an order terminating the agreement and evicting the tenant.

The Law clarifies the procedure for the eviction of tenants by the Viscount (a court officer). The above-mentioned 1946 statute gives the Court power to grant stays of execution of eviction orders. The Law expands this and sets out matters that the Court must consider, being:

- Whether any rent is outstanding;
- Whether either party has breached the tenancy agreement;
- Whether the party who committed the breach continued or repeated it, or took reasonable steps to remedy it; and

- If a stay were ordered, where the balance of hardship would lies between the landlord and tenant.

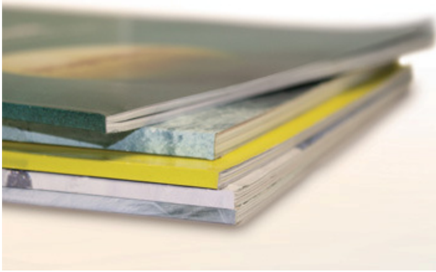
The Court may also consider various factors relating to the history of the tenancy and the parties' circumstances, including the availability of other accommodation for the tenant.

It is hoped that, once coming in o force, the Law will encourage landlords and tenants to focus on the terms of their residential tenancy agreement so that each party has a good understanding of their rights and obligations thereunder. If successful, the standard of such agreements should rise, thus reducing the uncertainty and dispute which both landlords and tenants can face under the existing regime.

Author: GEORGINA COOK
Partner
gcook@applebyglobal.com

This publication is intended only to provide a summary of the subject mattered covered. It does not purport to be comprehensive or to provide legal advice. No person should act in reliance on any statement contained in this publication without first obtaining specific professional advice.
April 2010
© Appleby

Buying 'Off-plan' Going According to Plan?



BY GEORGINA COOK

Developers often market properties for sale before they have been built or when they are in the course of construction. A purchaser cannot physically view the finished property before having to commit to the purchase, so care must be taken to ensure that the legal commitments that are made are clearly defined and understood so that the purchaser can know, with sufficient certainty, what it is he is contracting to buy, and how he will complete the purchase process.

Once a purchaser has agreed which unit he is to acquire, the seller's lawyer will issue a package of legal paperwork to the purchaser's lawyer. This will typically consist of: a sale agreement, development plans (for larger developments, the purchaser is usually invited to view these at the developer's office), a specification detailing the materials to be used in the build, title documentation and estimated service charge figures (where the development includes communal elements).

The binding sale agreement

The sale agreement is a document signed by the seller and the purchaser which creates a legally binding obligation on both parties to complete the sale and purchase of the property. In the event that either party fails to complete the purchase on the due date, the defaulting party will be liable to pay damages, often totalling up to one-third of the purchase price. It is therefore imperative that the parties understand the obligations they are committing to before executing the sale agreement as there is no right to withdraw after the agreement has been entered in to. Employing a lawyer to review the agreement is recommended as she will seek to amend any unduly onerous clauses before advising the purchaser on the terms thereof, at which point a purchaser should raise any concerns, or any clauses he does not understand. A lawyer will also carry out a title check to ensure that the title to the property is sound.

Plans and specifications

As a purchaser cannot view the finished product, it is important that he is satisfied as to the plans showing how the property is to be built. A careful examination of such plans should be carried out and any queries arising as a result thereof should be put to the developer for clarification. Similarly, the specification should be carefully reviewed as this details the quality of the materials that will be used in the build and the fit-out of the property. If you think you are getting a certain quality of kitchen or bathroom, for example, the specification should reflect that to ensure that there is no misunderstanding as to what is expected to be fitted in the finished product.

Management and service charges

Where a new development comprises some communal areas, such as communal hallways (in apartment blocks) or play or 'green' areas in housing estates, the purchaser will need to understand how the costs of maintaining such areas are to be dealt with. The estimated service charge budget should be obtained and the calculations as to how the figures have been reached, scrutinised. Just because the

budget says the service charge for a property will be £x, if the budget has not been prepared on a proper basis, the actual costs payable by the purchaser may turn out to be much higher. A purchaser must be comfortable both that the service charge figures put before him have been calculated on a proper basis and that he can afford to make such payments (which are often due monthly or quarterly) when demanded. A purchaser must be satisfied on both matters before he signs the sale agreement.

Payment of a deposit

On signing the sale agreement, a purchaser will be expected to pay a proportion of the purchase price, often five or ten per cent, to the developer. This money may be held 'in escrow', usually by the developer's lawyer, pending completion, in which case the developer cannot use those funds until they are released to him upon completion.

Sometimes, the developer wishes to make use of the deposit straight away. If so, a purchaser should ensure that proper protection is offered in case the developer fails to complete the development, in which event, the purchaser would wish to see his deposit returned. In this situation, a purchaser should insist that the developer takes out a specific form of insurance under which the insurer will refund the deposit to the purchaser in the event that the developer fails to do so. The purchaser's lawyer would review the terms of such insurance to ensure that sufficient levels of cover are afforded to the purchaser.

Changes during the build

The sale agreement will refer to the plans by which the property is to be constructed. It is also likely to permit the developer to make immaterial changes to those plans which may be necessary as the build progresses. However, if the developer wishes to make material changes to the plans (which are not required by an authority such as the Planning Department), he cannot usually do so without the prior consent of the purchaser. This protects against the purchaser signing-up to buy one thing and finding that, at completion, the property bears little resemblance to what was originally proposed.

Funding generally

As previously mentioned, once the sale agreement has been signed, neither party can withdraw or fail to complete the purchase without exposing themselves to paying substantial damages. It is therefore important for a purchaser to be sure that he will have sufficient funds available at the completion date. Before signing the sale agreement, it is sensible to secure 'in principle' funding from a bank if a mortgage is to be obtained to fund the purchase. Sometimes, given the long delay between signing agreements and completion (delays of two years or more are not uncommon), a bank will not be prepared to confirm that it will lend as a purchaser's financial situation or, indeed the bank's financial situation, may be quite different in a few years' time from that at the date of signing agreements. A purchaser therefore needs to be comfortable that it is likely to be able to secure whatever funding it will need to complete the purchase and be alive to the possibility that either his circumstances (both personal and financial) or the bank's (will the bank still be lending on similar terms?) may be quite different at completion.

Completion

Practical completion of the property is usually the trigger for completion of the sale and purchase. A good sale agreement will set out the mechanism for triggering completion and should offer the purchaser the chance to inspect the property before completion to be satisfied that it is, indeed, practically complete. If the purchaser considers that it is not so complete, he should immediately raise this with his lawyer and/or the developer. If the developer disputes the purchaser's claim that the property is not complete, the sale agreement usually prescribes that the matter is determined by an independent arbitrator.

Defects

Any new-build will naturally have a number of 'snagging' items, that is, defects or incomplete matters which are of a minor nature. The sale agreement should prescribe the way in which such matters are to be dealt with and will usually involve the purchaser meeting with a representative of the developer to agree what constitutes a 'snagging' matter and what does not, and settling a programme

for putting those agreed matters right. It is sensible for a purchaser to keep a record (photographic or written) of snagging matters as and when they arise so that they may then be put to the developer together, rather than on a piecemeal basis.

One would expect to see specific warranties on the part of the seller in respect of the build-quality of the property generally. If the finished property has defects which fall beyond 'snagging' matters, these matters should be put to the developer for rectification, subject to the terms of the sale agreement. Sometimes, the developer's obligations in this regard are supplemented by latent defects insurance whereby new developments are insured (often for ten years) against major defects in their structural integrity, design or workmanship. Again, the purchaser's lawyer should make enquiry of the vendor's lawyer as to whether such insurance will be provided.

The above matters are the basic elements that should be considered when buying 'off plan'. Of perhaps equal importance is who the developer is – does it have a good reputation for delivering quality products, is its Customer Care Team able to provide the assistance a purchaser needs, both before and after committing to the purchase, have you seen examples of other developments this developer has completed?

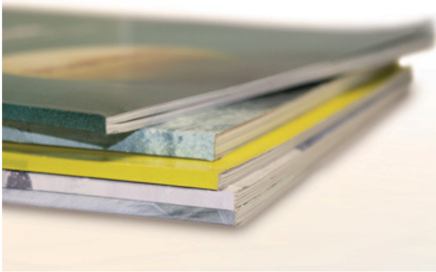
Buying 'off plan' can be an exciting opportunity to acquire precisely the property that you want, at a pre-agreed price. If the issues discussed here are properly considered, buying 'off plan' will hopefully go according to plan!

Author: GEORGINA COOK
Partner
gcook@applebyglobal.com

This publication is intended only to provide a summary of the subject mattered covered. It does not purport to be comprehensive or to provide legal advice. No person should act in reliance on any statement contained in this publication without first obtaining specific professional advice.
April 2010
© Appleby

APPLEBY

Third Party Planning Appeals



BY TIM HART

Perhaps the most controversial aspect of the Planning and Building (Jersey) Law 2002, ("the Law") was its introduction of provision for third party planning appeals. Indeed, there was a debate on this topic, which was one of the main reasons why the Law was amended twice before finally being brought into force several years after its initial enactment.

When a planning permission is granted, the Law gives a right of appeal to any person (not just individuals, but companies and other corporate bodies) who has an interest in the land, is resident on land or any part of land that is located within 50 metres of the site to which the planning permission relates. The right only arises, however, if that person has made a written submission to the Planning Minister, objecting to the proposed development prior to the permission being granted. Any such appeal must be made within 28 days of the planning permission being granted. Accordingly, the Law provides that no permission shall take effect during this 28 day period. If a third party appeal is brought, the permission continues in this suspended state until the appeal is withdrawn or determined.

The third party appeal procedure has not produced a flood of appeals but has been invoked in some cases. Cases that have resulted in judgments of the Royal Court provide useful guidance as to the court's approach.

In both of the third party appeal judgments handed down by the court in 2009, the court emphasised that "*…to interfere with a decision of the Minister, the court has to be satisfied the decision was both mistaken and unreasonable…*" It is not enough for the court to decide that the decision made by the Minister would have been preferable. The Minister's decision has to be considered to be positively unreasonable with a "margin of appreciation" before a decision is considered to be wrong or unreasonable. It should be noted, the same test is applied when an applicant for planning permission brings an appeal against the Minister challenging a refusal of permission or the attaching of particular conditions.

Factors leading to the court declaring the Minister's decision unreasonable will be varied and each case will have its own distinctive facts. However, it is worth noting that in both the 2009 judgments, the court based its decision on a failure by the Minister or his Department to make sufficient enquiries in a particular direction.

In the case **Smith v.The Minister for Planning & Environment** concerning proposed extensions to a substantial house in Park Estate. The Assistant Director of Planning Development Control failed to go out on site, which proved fatal, since the court was clear that the impact on the neighbouring property (owned by the appellants) could not be properly assessed without a site visit.

In the case **Dunn v. The Minister for Planning & Environment and Dandara Jersey Limited** relating to Dandara's proposed development at Westmount. The appellant, who owned an apartment at Park Heights, objected to planning on the basis that the proposed new blocks would have an adverse effect on the enjoyment of his apartment.

Here, the Minister himself had visited the appellant's apartment but the court revoked the planning permission on the basis that it was not reasonable for the Minister to have made his decision without having obtained perspective drawings and expert advice in relation to deprivation of daylight and sunlight.

The third party appeal legislation is bound not to be universally popular. Whilst those living or owning property close to proposed development sites have a useful tool to seek to prevent unreasonable development 'in their back yard'. Those seeking planning permission (for everything from a small domestic extension to a multi-million pound project) may well consider this to be at best a further bureaucratic hurdle and at worst an opportunity for important, often socially desirable, developments to be held up despite having been exposed to lengthy and careful deliberation in the Planning Department. With the prospect of challenge by both unsuccessful applicants and aggrieved third parties, the Minister may be tempted to feel that he risks being damned if he does and damned if he doesn't!

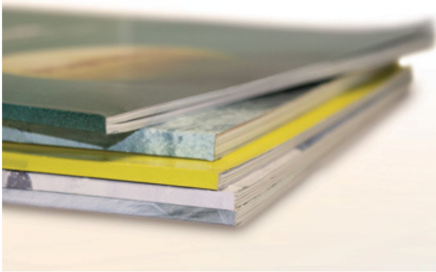
However, if the procedure is not abused and the Royal Court's judgments are able to assist the Minister and his Department to further improve the difficult process by which decisions on planning applications are taken, then perhaps all can agree that third party appeals have their benefits.

Author: TIM HART
Partner, Practice Group Head
thart@applebyglobal.com

This publication is intended only to provide a summary of the subject mattered covered. It does not purport to be comprehensive or to provide legal advice. No person should act in reliance on any statement contained in this publication without first obtaining specific professional advice.
April 2010
© Appleby

APPLEBY

Jersey Property Market



BY ANDREW PIM

The near systemic failure of the global retail banking system followed by the current recession has, inevitably, had a dampening effect upon the Jersey residential property market.

This effect has been felt most keenly by the first-time buyer. The absence of a formerly active local lender and the tightening of loan to property value ratios offered by mortgage providers, has left many purchasers struggling to qualify for a mortgage. Those who do will usually be required to contribute between 15%- 20% of the purchase price of their property.

Far fewer property transactions have been completed this year compared to the first three quarters of last year. Fear of redundancy and a general lack of confidence have unsurprisingly encouraged many potential purchasers to opt for staying at home. This has contributed to a notable increase in home improvement and extension loans.

It is difficult to establish with any certainty the degree to which property prices have been affected by prevailing market forces. Estate agents report that vendors are now more realistic in determining their sale price than they were eighteen months ago. It is likely that most, if not all, vendors are as much guided by their agent in formulating their sale price as they ever were.

Some vendors will doubtless consider they have let their property go too cheaply and as many purchasers probably feel that in the current climate, they should have struck a better deal. In all probability, property prices have remained largely static and, if they have fallen back a little since the giddy days of 2007 and early 2008, then that is perhaps no bad thing.

The level of activity in the local property market can be gauged by the number of sales of apartments in non-purpose-built buildings. For much of this year, sales of this type of property have fallen off although there is evidence that the market is still active.

A significant volume of property transactions this year has involved the sale and acquisition of share transfer apartments. A number of buyers have committed to purchases in the new waterfront development at Castle Quay. These purchasers include investors anxious to procure a better return than can be offered by their savings account, parents purchasing for their children's future and first-time buyers.

It is undoubtedly the case that the majority of flats are conveyed by share transfer rather than by flying freehold. Flats that are purchased by share transfer are not noted on any public record, unlike contracts passed before the Royal Court (which include flying freehold flat purchases). The reference to the average price of a one or two bedroom flat, as reported from time to time, cannot be based on much more than an "educated guess".

In the context of shared global problems and anxieties, no island, for all that it may be surrounded by water, is truly an island and Jersey is no exception. And yet, in these uncertain times, the loveliness of Jersey is not wholly diminished; it remains a wonderful place in which to live, to establish a home and raise a family. It is perhaps ultimately for this

reason that our sleepy property market remains resolutely afloat.

Author: ANDREW PIM
Partner
apim@applebyglobal.com

This publication is intended only to provide a summary of the subject mattered covered. It does not purport to be comprehensive or to provide legal advice. No person should act in reliance on any statement contained in this publication without first obtaining specific professional advice.
April 2010
© Appleby