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New Developments in Irish Housing Rights

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Housing rights in Ireland remain very much underdeveloped, while the State suffers from a major property price hangover. While housing production boomed in the new century, waiting lists for social housing have grown over the decade with the category where access was blocked through affordability problems increasing to over half of those included. The State promoted home ownership and market provided housing for the past three decades, with the result that market values have pervaded all aspects of housing, including a redefinition of social housing. Housing market rescue measures and support for failed financial institutions have press-ganged social housing in Ireland to mop up the oversupply of houses built and repay the large developer loans through recycling State guaranteed rents to poor tenants. Indeed, a new scheme, known as “incremental ownership” promotes a new subsidised home ownership arrangement for what would have previously been rented accommodation. While, the practice of sub-prime lending to those with non-traditional working arrangements or low incomes was not prevalent in Ireland, in many ways the State is now acting as the ultimate sub-prime, encouraging those in need of social rented housing into home ownership. Significant numbers of homeowners who purchased their homes in the past three years are now in negative equity, and for those who become unemployed, the risk of losing their homes are very real. However, a number of developments have taken place which indirectly impact on housing rights in relation to public sector tenants, new forms of social housing and increased protection for private tenants and borrowers of home loans.

New forms of “social housing”

The collapse of the banking system in Ireland has resulted in a State body taking over many loans and unfinished housing projects, often described as “ghost estates” where a few houses are completed within a deserted building site.¹ With the collapse of the housing market in Ireland, these units are not marketable and plans are underway to involve housing associations to take long leases on this housing. Meanwhile waiting list for social housing remain high with some 56,249 recorded in the local authority

¹ In January 2010, there were some 621 “ghost estates,” defined as housing estates where more than half of the properties are empty or remain under development, in Ireland. The Maynooth-based National Institute of Regional and Spatial Analysis pointed out that some 86 of these estates had more than 50 properties. The study used the GeoDirectory, the 2006 Census and the Department of Environment figures based on ESB connections. See *The Irish Times*, January 27, 2010. This amounted to more than 300,000 homes which were unoccupied, with some counties such as Leitrim, Longford, Sligo, Roscommon having high levels of these estates. In relation to Leitrim, there was now an oversupply of 401% of anticipated annual demand.

assessments of housing need in 2008. This is facilitated under new tenancies to be known as “chapter 4” tenancies from the chapter of the Housing (Miscellaneous Provisions) Act 2009. It is envisaged that no new social housing will be developed for the foreseeable future (except a small number of special needs projects), and all new lettings for social housing applicants will be in these schemes. Lettings to tenants in these new schemes (who would previously have secured social housing) will be on renewable four years tenancies, under terms comparable to private sector tenants.²

The tenants will pay rent to the local authority, but otherwise the landlords will be either the owner/developer or selected housing association. Provisions in these chapter 4 tenancies require landlords to evict tenant in situations where the engage in “anti-social” behaviour, but tenants are also responsible for ensuring that even their visitors do not engage in such behaviour in the vicinity of their homes. These regulations apply to these “chapter 4” tenants, private and social tenants, but not to owner-occupiers, who may be engaging in exactly the same behaviour. This approach has been compared to a return of feudal incidents, where tenants of the local lord were subject to certain obligations which others were not.³

Impact of ECHR and social housing

Among the legal instruments developed by the Council of Europe, the European Convention on Human Rights, which relates primarily to civil and political rights, is becoming an important vehicle for the development of housing rights. Housing rights have been developed at Strasbourg level under Article 3, relating to the State obligation to prevent inhuman and degrading conditions, Article 6 in relation to fair procedures on evictions and Article 8 on respect for home.⁴ Since 2004, the Convention has been incorporated into Irish national law through the European Convention on Human Rights Act 2003. This requires that every organ of the State, which includes local authorities, must abide by the State’s ECHR obligations when carrying out its functions.⁵ Damages and/or a Declaration of Incompatibility can be awarded by courts where national law or practice diverges from Convention standards.

There has been a growing acceptance by the courts that local authority evictions procedures under the Housing Act 1966, where a tenant had no right to defend proceedings was contrary to the fair procedures principles of Article 6. Section 62 of the Act of 1966 provides for a summary procedure (a procedure before the District Court) for the recovery of possession of dwellings let by local authorities.⁶ A District Court Judge has no discretion but to issue a warrant once the formal proofs are in order.

² The terms are similar to those set out in the Residential Tenancies Act 2004.

³ See Paper presented by Cormac O’ Dulachain SC to the IHRC Conference – Economic, Social and Cultural Rights – making States Accountable, 21 November 2009.

⁴ Council of Europe, *The European Convention on Human Rights*, ROME 4th November 1950, available at <http://www.hri.org/docs/ECHR50.html> (visited 3rd June 2009). FEANTSA has compiled a database of housing related ECHR cases, available at >>>>>

⁵ See Kenna, “Local Authorities, the European Convention on Human Rights Act and Judicial Review Litigation” in *Irish Human Rights Law Review* (Dublin, Clarus Press, 2010).

⁶ For a more in depth look at the provisions of s 62, see Padraic Kenna, *Housing Law and Policy in Ireland* (Clarus Press, 2006), pp. 83-6.

However, in *O'Donnell v South Dublin County Council* the High Court considerably clarified the obligations on local authorities under the 2003 Act, pointing out that a gap in domestic law will not preclude ECHR obligations being imposed on State bodies.⁷ In *Donegan v Dublin City Council*,⁸ the plaintiff challenged a decision to end his tenancy because of his son's alleged anti-social behaviour. The court held that there was a breach of Article 8 as there was no real procedural safeguard to protect rights to a home. The court accepted the authority's legitimate aim of ensuring good estate management and preventing anti-social behaviour, but the decision-making process relating to the eviction was not fair or affording due respect to Article 8, and was not proportionate to housing management requirements. The court issued a Declaration of Incompatibility under s 5, stating that s 62 was incompatible with Art 8 of ECHR.⁹ In *Pullen v Dublin City Council*¹⁰ the court again found a breach of Articles 6 & 8 in relation to this process, issuing a Declaration of Incompatibility. However, despite this decision, the local authority successfully sought to proceed with the eviction, arguing that the only remedies under the ECHR Act were damages and a Declaration, but not an injunction preventing the action from taking place.¹¹ This now creates a major conflict between the Irish law and the Convention itself.

In *O'Donnell v. South Dublin City Council*¹² the High Court that the local authority provide a second wheelchair accessible and fully fitted mobile home for a Traveller family with three severely disabled children, to comply with Article 8 obligations. Thus, the Convention is being increasingly used to assert housing rights in areas which were not previously envisaged.

Mortgages and housing rights

Despite the fact that less than half of Irish homeowners have mortgages, Irish people have among the highest level of residential mortgage loans per capita in Europe. Hypostat figures for 2008 show that while the EU average is 50%, Irish residential mortgage loans as a percentage of GDP was 80%. This burden is borne disproportionately by those who purchased their homes in the past four years. Government measures and tax incentives further boosted these numbers, in the absence of sufficient social housing provision. In December 2009 some 3.6% of all mortgages were more than 3 months in arrears, while there some 5,000 formal demands for repossession.¹³

The law on home loans is intricately part of the law of mortgages and although Ireland has enacted better protection for consumers than that required under the European Union laws, there is still a huge injustice in treating home loans on the same basis as commercial mortgages. The Irish Law Reform Commission made recommendations that these should be treated differently by the courts in the event of

⁷ Unreported, 22nd May 2007, High Court, Laffoy J.

⁸ Unreported, High Court, 8th May 2008, Laffoy J.

⁹ The decision is being appealed to Supreme Court. For more on *Donegan*, see "*Donegan v DCC and the Attorney General: Summary of Judgment by Ms Justice Mary Laffoy*" (April-June 2008) 18(2) *Flac News* 4. See also *Dublin City Council v Gallagher*, Unreported, High Court, 11th November 2008, O'Neill J. See also *McCann v UK* //????????

¹⁰ Unreported, High Court, 13th December 2008, Irvine J.

¹¹ See *Pullen v Dublin City Council* [No. 2] Unreported, High Court, 28th May 2009, Irvine J.

¹² [2007] IEHC 204.

¹³ See Free Legal Advice Centres, <http://www.flac.ie/>

default, and these proposals have become law in 2009. The Land and Conveyancing Law Reform Act (LCLRA) 2009 defines a housing loan as an agreement for credit to a person on the security of a mortgage of an interest in land for the purpose of constructing, improving or purchasing a house.¹⁴ This covers almost all new mortgages created after 1st December 2009, when the legislation came into force.

Of course, Irish mortgage lenders have been bailed out or capitalised by the State since 2009, as their excessive and imprudent lending created huge losses. As a result of public and political pressure, they were forced to adopt a number of Codes of Practice. The State Financial Regulator introduced a *Code of Conduct on Mortgage Arrears* in February 2009 updated in February 2010, which applies to all mortgage lenders in the State. This requires that lenders undertake not to repossess homes for at least one year after arrears arise. These Codes have a statutory basis under the Central Bank and Financial Services Act 2003 which established the Office of the Financial Regulator.¹⁵

Under the LCLRA 2009, where a lender of a housing loan wishes to take possession of a mortgaged property, in the event of default or other reasons, a different process takes place to commercial mortgages and a lower court deals with the matter. In recent times, the Master of the High Court has struck out three cases where mortgage lenders sought orders for possession, on the basis that there was no evidence that the lenders had complied with the *Code of Conduct on Mortgage Arrears* 2009.¹⁶ He stated that the court ‘*must be satisfied each step in the code is complied with: it is not an option, it is mandatory. The code is not a hollow formula, you must verify it.*’ There is now likely to a significant melding of the law of mortgages with consumer law in relation to housing loans, which indirectly contribute to the development of housing rights.

Private sector tenants

Recent legislation in 2009 has raised the standards for private sector tenant, resulting in bedsit accommodation no longer suitable. Each residential units will have their own toilet bathroom and other facilities, such as individual heating systems, cooking and laundry facilities. There is a delay in the implementation of the standards for existing tenancies until 2013, and public sector tenants will not be able to benefit from all the changes.¹⁷ Further regulation on landlords in relation to enforcement procedures for failures to meet legal standards was also introduced in 2009. The Act of 2009 provides for improvement notices to be served on landlords for breaches, and where the landlord fails to comply, a prohibition notice can be issued. This public notice prevent the letting of the accommodation until the standards have been achieved. There

¹⁴ Section 96.

¹⁵ The Irish Banking Federation and the State Money Advice and Budgeting Service Operational Protocol: *Working Together to Manage Debt* (June 2009) was a voluntary agreement on dealing with mortgage arrears. The Financial regulator established a *Consumer Protection Code* in 2006 which applies to all lending, and places significant obligations on lenders to act with due skill, care and diligence in the best interests of its customers and not to recklessly, negligently or deliberately mislead a customer as to the real or perceived advantages or disadvantages of any product or service.

¹⁶ See *The Irish Times*, 21 November 2009.

¹⁷ The Housing (Standards for Rented Houses) Regulations 2008.

are criminal sanctions for breaches of these orders, up to 6 months in prison and fines up to €400 per day.¹⁸

Conclusion

There is a strong antipathy to the advancement of housing rights by the Irish government. This is evidenced by its refusal to accept Article 31 of the Revised European Social Charter, and indeed its refusal to complete its required monitoring report under the Charter obligations. However, there are many indirect developments taking place which are progressing housing rights, albeit in an indirect way. Some of these are presenting challenges to the methods used by the State to ratify the international human rights instruments, while others are gradually increasing the protection of people's rights to housing. As they say in *Desperate Housewives*, "not everything works out as people expect it."

¹⁸ Housing (Miscellaneous Provisions) Act 2009. Part 4.