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Gazumping and Gazundering in Northern Ireland

This briefing note explains the concepts of Gazumping and Gazundering (G&G), in the context of the Northern Ireland (NI) property market. It also discusses measures to reduce the incidence of G&G and offers key considerations when seeking to protect potential buyers and sellers from both practices.

Introduction

Section 1 defines the terms and gives some examples of real life instances of both practices. Section 2 lays out key points about the legal context of Northern Ireland; (NI) and highlights some possible economic implications for potential buyers and sellers. Section 3 gives a comparative perspective of regulatory attempts in the United Kingdom (UK) and other jurisdictions to reduce the prevalence of G&G. Section 4 outlines key considerations when seeking to protect potential buyers and sellers from both practices. In conclusion, Section 5 summarises the main points of the briefing note.

1. G&G

This section begins with attempts to define G&G, and continues with some real life examples of each practice in NI's property market.

1.1 Definitions

Gazumping is defined as:

The withdrawal, often at the last minute, by a vendor from a sale of land to which he has agreed "subject to contract," in order to obtain a higher price from another purchaser.¹

And...

The situation where a potential purchaser of a property has had their offer accepted by the vendor only to have it subsequently rejected in favour of a higher offer from another bidder.²

Gazundering is defined as:

The practice whereby a purchaser strategically demands a reduction in price to secure the sale of a property on more favourable terms. This takes place during contract negotiation: the demand is timed so as to prevent the vendor from rejecting the lower price, owing to the likelihood the sale would collapse if he did.³

And perhaps more simply stated:

¹Jowitt's Dictionary of English Law. 3rd edition, (2010).

²Department of Enterprise Trade and Investment. Paper submitted to the Committee for Finance and Personnel on 24 January 2013.

³Jowitt's Dictionary of English Law. 3rd edition, (2010).

Where the buyer waits until everybody is poised to exchange contracts and then lowers their offer on the property. If the seller refuses the whole chain might collapse.⁴

1.2 Market conditions

G&G should always be viewed within the context of property market conditions. In NI between 2007 and 2008 property transactions fell by 61%.⁵ Pre 2007 in a rising market where property prices were steadily increasing, tales of gazumping seemed universal. In 2007 when the property market first saw a significant drop, anecdotal reports of gazundering first started to appear. In November 2007 the *Belfast Telegraph* ran a story detailing a mortgage advisor's first-hand experience of falling house prices. The article stated:

We had a property agreed for £535,000 and two days before completion it was dropped to £495,000 and the vendor didn't bat an eyelid or try to negotiate.⁶

This seems to be a clear example of gazundering. The fear of a break in the chain and a subsequent further drop in price, forced the seller's hand. In the ROI the *Sunday Business Post* reported on a similar case in Dublin during 2008.⁷ A property owner was preparing to sign a contract on a 1 million euro sale, the price had been agreed and a booking deposit paid. Just before signing the contract the buyers sought a discount of €50,000 on threat of refusing to sign. After a swift negotiation, a €25,000 discount was agreed. The seller was glad to make the sale, as accepting the revised price was seen as a better option than putting the property back on the market.

2. Legal context and economic implications

This section highlights key points about G&G in the NI legal context. It also highlights some potential economic repercussions arising from a break in the property chain caused by G&G.

2.1 Legal context in NI

In NI both practices are not illegal, because all contracts for the sale of property must be evidenced in writing.⁸ The contract for the sale of property is not made until a written contract is signed by both parties; so either party may legally withdraw up to the point of signing.⁹ This requirement was originally codified in section 2 of the *Statute of*

⁴ 'Gazumping and Gazundering'. *Guardian*. 13 September 2001.

<http://www.guardian.co.uk/money/2001/sep/13/factsheetsonmovinghome.movinghouse>

⁵ 'Home Buying and Selling'. Office of Fair Trading (2010). http://www.offt.gov.uk/shared_offt/reports/property/OFT1186.pdf

⁶ 'Price wars, gazumping...the Real Home Truths'. *Belfast Telegraph*, 13 November 2007.

⁷ 'The growth of gazundering'. *Sunday Business Post*, 8 June 2008.

⁸ Department of Finance and Personnel. Paper submitted the Committee for Finance and Personnel on 29 March 2013.

⁹ Department of Enterprise Trade and Investment. Paper submitted the Committee for Finance and Personnel on 24 January 2013.

Frauds (Ireland) 1695.¹⁰ Consequently any action by sellers or buyers before contracts are signed, however misleading or even dishonest, are entirely within the law at present.

Land Law in NI has been reviewed recently by the Northern Ireland Law Commission. A *Consultation Paper* in 2009¹¹ was followed by a *Land Law Report* in 2010.¹² The recommendations of the report stated that section 2 of the 1695 statute should be recast in more modern language. The report did not recommend that oral contracts for the sale of land should be binding.¹³

2.2 Economic repercussions

Buying a house is often the single most expensive purchase in an individual's lifetime. In the fourth quarter of 2012, the average price of a house in NI was £138,966.¹⁴ Even before an offer is made on a property, the potential buyer will have already spent a considerable sum of money.

2.2.1 Valuation Reports and Surveys

For example, mortgage lenders require potential lenders to pay for a valuation to check that the price is reasonable; and will not issue a formal mortgage offer until after such a valuation. The fees can vary between £225 and £1,150, depending on the type of mortgage and the value of the property.¹⁵

It is important to note that valuations assess the value of a property, not the condition it is in. After the mortgage valuation, it is good practice to have the property inspected before agreeing to purchase. Two types of inspections are most common, homebuyer reports and surveys. Homebuyer reports are less detailed than surveys and are used when purchasing newer houses. They are also cheaper than surveys, averaging from £350-£500.¹⁶ Surveys are more detailed inspections that check for subsidence, dry rot and other hidden structural problems. Surveys can be expensive (from £600 to £1000),¹⁷ but identifying major problems potentially saves money in the long run.

Perhaps the worst case scenario for a potential buyer is to have a homebuyer report commissioned, which highlights some problems. If the buyer is still intent on going

¹⁰ Department of Finance and Personnel. Paper submitted the Committee for Finance and Personnel on 29 March 2013.

¹¹ Northern Ireland Law Commission *Land Law Consultation Paper*.

http://www.nilawcommission.gov.uk/consultation_paper_land_law_-_nilc_2_2009_.pdf

¹² Northern Ireland Law Commission. *Report Land Law*. 2010

¹³ Department of Finance and Personnel. Paper submitted the Committee for Finance and Personnel on 29 March 2013.

¹⁴ University of Ulster Northern Ireland, *Quarterly House Price Index* (2012): <http://rpp.ulster.ac.uk/research/housing-index/q4-2012.pdf>

¹⁵ Mortgage fees and charges' *Cheltenham & Gloucester Building Society*: <http://www.cheltglos.co.uk/mortgages/fees-and-charges.html>

¹⁶ Housing Advice NI: <http://www.housingadviceni.org/paying-for-a-home/buying-a-selling-costs/valuation-and-survey-fees.html#wiplive-11037-2>

¹⁷ Housing Advice NI: <http://www.housingadviceni.org/paying-for-a-home/buying-a-selling-costs/valuation-and-survey-fees.html#wiplive-11037-2>

ahead with the purchase, they then may initiate a full structural survey. After paying for the mortgage valuation, a homebuyer report and the survey, they have no legal right to any refunds if their offer is gazumped.

2.2.2 Solicitors' fees

Solicitors' fees are another potential cost for buyers. Fees can vary from £300-£3000 per transaction, plus VAT.¹⁸ They can be calculated as a percentage of the sale price (such as ½ to 1%) or a fixed amount.¹⁹

2.2.3 Total potential outlay

The potential outlay for the above worst-case scenario is shown in the table below:

Solicitor's Fees	Mortgage Valuation	Homebuyer Report	Structural Survey	Total Expenditure
£1,000	£250	£350	£750	£2,250

3. Attempts at Regulating G&G

This section highlights attempts to protect parties from the negative effects of both practices. It outlines legislation enacted throughout the UK and other jurisdictions, to reduce the incidence of G&G.

3.1 UK

3.11 England and Wales

During 2009 the Office of Fair Trading (OFT) estimated that 20% of property transactions failed between the offer and exchange of contract stages.²⁰ It appears that a major factor contributing to this is the length of time between agreeing a price and the signing of the contract. Consequently it seems that the quicker the buyer receives all the information on the property, the quicker an offer is made. The introduction of Home Information Packs (HIPs) in the UK was an attempt to provide relevant information for potential purchasers at an early stage in negotiations, and consequentially speed up the entire process.

The packs included the following documentation:

- Evidence of title;
- A home condition report; and

¹⁸Propertynews Advice: <http://www.propertynews.com/advice/buying-a-property/your-solicitor-s-role/#Expenses>

¹⁹Housing Advice NI: <http://www.housingadviceni.org/paying-for-a-home/buying-a-selling-costs/buying-costs.html#wipLive-11053-1>

²⁰Home Buying and Selling'. Office of Fair Trading (2010): http://www.offt.gov.uk/shared_offt/reports/property/OFT1186.pdf

- An energy certificate.

HIPs were introduced in 2004, but were not fully implemented until 2009.²¹ HIPs were to have a phased introduction, affording professionals time to train in the required energy assessments.²² As part of the phased in approach, between August 2007 and April 2009, a concession allowed sellers to put their homes up for sale as long as they had commissioned a HIP. There was no obligation for them to have completed one before putting the property on the market. The removal of this concession on 6 April 2009 marked full implementation of the scheme.

HIPs did not succeed in curing the ills of G&G. They were abolished in 2010 by the Coalition Government; however sellers are still required to have an energy performance certificate. The packs were seen as expensive, ranging from £200-£400.²³ They were also blamed for over-regulating the house buying process, as the following excerpt from a 2010 Department for Communities and Local Government press release illustrates:

*Suspending HIPs will reduce the cost of selling a home, remove a layer of regulation from the process and provide a welcome help to the housing market during the recovery. It will also mean a saving for consumers to the tune of £870m over ten years, giving sellers more money in their pocket to spend in the wider economy.*²⁴

3.2 Scotland

3.2.1 Scottish System

Scotland has its own legal system and laws governing the sale of land and property. The system involves letters, known as ‘missives’, to be exchanged between buyers’ and sellers’ solicitors. The missives clarify the details and conditions of the buyer’s offer and note the seller’s acceptance. Both parties have a binding contract when the details are agreed and the missives are signed.

Nonetheless, **in Scotland G&G is still possible. There is nothing to stop a seller accepting another bid before the missives are concluded.** However, there seems to be strong social pressures not to renege on deals without good reason.²⁵ This is perhaps best demonstrated by the Law Society in Scotland’s published rules and guidelines instructing solicitors not to accept ‘subsequent instruction’ from a seller or

²¹ The *Housing Act 2004* implemented the introduction of the Home Information Pack in England and Wales.

²² ‘Home Information Packs: a Short History’. *House of Commons Library Research Paper*, (2010):

<http://www.parliament.uk/Templates/BriefingPapers/Pages/BPPdfDownload.aspx?bp-id=rp10-69>

²³ ‘Home Information Packs Scrapped’. *Guardian*, 20 May 2010: <http://www.guardian.co.uk/money/2010/may/20/home-information-packs-scrapped-hips>

²⁴ Department for Communities and Local Government press release *HIPs are History* (2010):

<https://www.gov.uk/government/news/hips-are-history-pickles-suspends-home-information-packs-with-immediate-effect>

²⁵ ‘Home Buying and Selling’. Office of Fair Trading (2010): http://www.of.gov.uk/shared_of/reports/property/OFT1186.pdf

purchaser engaging in G&G.²⁶ If the seller accepts a newer, more profitable bid, the solicitor can refuse to act for them on the grounds of professional misconduct.

3.2.2 Home Reports

When selling a property in Scotland, before the house is put on the market, the seller must possess a Home Report (HR). This is a pack of documents, similar to the HIPs mentioned above.²⁷

The HR consists of the following 3 elements:

- A Single Survey and Valuation Report;
- A Property Questionnaire; and,
- An Energy Report.

When buying a home in Scotland the seller asks for offers over or around the valuation in the HR. This indicates the minimum price. The property is sold through a system of 'blind bidding'. Buyers use sealed bids to offer how much they think will secure the property at the current market prices. Bidders may pay more than necessary as they are not informed of the amounts of other bidders' offers. Sellers must give potential buyers the HR within 9 calendar days of asking for it.²⁸ The HR reduces the likelihood of problems emerging after the bid has been made. It should also accelerate the exchange and conclusion of missives, and reduce the need for multiple and expensive surveys.²⁹

3.2 Other Jurisdictions

This section outlines regulatory attempts in ROI and Australia to reduce the prevalence of G&G.

3.2.1 ROI

The practice of gazumping emerged in the ROI with the growth of the Celtic Tiger economy and the property boom of the start of the 21st century.³⁰ The following excerpt from the *Irish Times* in 1998 echoed many a homebuyer's experience:

A young County Kildare couple have called for new legislation to prevent builders from raising the price of houses after deposits are paid. The call

²⁶ 'Gazumping, Gazundering and Closing Dates'. The Law Society of Scotland (2013) : <http://www.lawscot.org.uk/rules-and-guidance/section-f/division-c-conveyancing/guidance/gazumping,-gazundering-and-closing-dates>

²⁷ Housing is a devolved issue. Scotland has had its own system of Home Reports since December, 2008, there is no compulsory requirement for such a pack in Northern Ireland.

²⁸ 'Buying and selling a Home in Scotland'. *Consumer Focus Scotland*, (2009): <http://www.consumerfocus.org.uk/assets/3/files/2009/11/MovingHome.pdf>

²⁹ Home Buying and Selling'. Office of Fair Trading (2010): http://www.offt.gov.uk/shared_offt/reports/property/OFT1186.pdf

³⁰ Note: Anecdotal evidence of *gazundering* in ROI is highlighted in Section 1.2.

*follows a Circuit Court ruling that a developer had not acted illegally when he increased the price of a house by £20,000 after accepting a deposit.*³¹

As a response to this and other incidents, the *Home Purchasers (Anti-Gazumping) Bill 1998* (the 1998 Bill) was brought to the Irish Parliament with the intention of introducing real consumer protection into house purchasing.³² But the 1998 Bill failed, if successful it would have placed a legal obligation on the vendor to sell at the agreed price if a booking deposit from the purchaser was received. The total length of time for the contract to be signed was 34 days.

A breakdown of the proposed contract stages is listed below:

- 14 days to deliver the contract to the purchaser on receipt of booking deposit;
- 14 days for the purchaser to agree the contract; and;
- 7 days for the vendor to sign.

The 1998 Bill also proposed to make gazumping a criminal offence, punishable by a fine of up to £5000 (ROI pounds) and a prison term for second offences. Compensation was also to be awarded to a gazumped purchaser. However in October the 1998 Bill failed at the second reading stage amid accusations of constitutional and practical difficulties. The then Minister of State for the Environment described the 1998 Bill as:

*seriously defective from a legal standpoint and not capable of being amended to provide a sensible solution.*³³

A subsequent report on gazumping by the Law Reform Commission in 1999 recommended the retention of booking deposits, which should be refundable in full in the event that the parties do not enter into any contract.³⁴ The most recent land law legislation in ROI is the *Land and Conveyancing Law Reform Act 2009*.³⁵ Therein section 51 re-enforces the written element of contracts first included in the *Statute of Frauds (Ireland) 1695* (see section 2.1).

3.2.2 Australia

The New South Wales Legislative Assembly attempted to limit gazumping with the introduction of *The Conveyancing (Sale of Land) Amendment Act 1987 (NSW)* (the 1987 Act). The 1987 Act required that a contract be prepared and made available before the property was offered for sale. It also introduced a preliminary agreement that every purchaser had to sign in conjunction with the contract for sale. If the offer was accepted the vendor also signed the agreement, which then made the deal legally

³¹ 'Couple Lose House "gazumping" case'. *Irish Times* October 1998: <http://www.irishtimes.com/news/couple-lose-house-gazumping-case-1.206046>

³² Hayes, Brian 'The Home Purchasers (Anti-Gazumping) Bill 1998' *Conveyancing and Property Law Journal* (1998) 3: 3

³³ 'New Bill would make house price gazumping illegal'. *Irish Times* 7 October 1998

³⁴ The Law Reform Commission. *Report on Gazumping* (1999): <http://www.lawreform.ie/fileupload/Reports/rGazumping.htm>

³⁵ Land and Conveyancing Law Reform Act 2009: <http://www.irishstatutebook.ie/pdf/2009/en.act.2009.0027.pdf>

binding. At the same time the purchaser had to pay a 0.1 % deposit of the asking price. They then had 5 working days to exchange contracts or lose their deposit.

Once again this did not stop G&G. The time the vendor took to sign the preliminary agreement was not specified; this opened the window of opportunity for G&G. The preliminary agreement only became binding when it was signed by the vendor. Up until that point G&G was still possible. The compulsory step of entering into a preliminary agreement meant that conveyancing was further complicated with a greater opportunity for delay.³⁶ In 1989 the NSW Supreme Court rendered the legislation ineffective and inoperative, the preliminary agreement was declared invalid.

4. Key Considerations

At present G&G is not illegal in NI. One of the major problems associated with these practices is the length of time between the acceptance of a verbal offer and the signing of a written contract by both parties; thus opening a window of opportunity for G&G. Highlighted below are some key considerations that seek to speed up the process, and thereby avoid the pitfalls set out earlier in this briefing note.³⁷

To avoid gazumping, consider:

- Speed up the process by using electronic conveyancing;³⁸
- Have a mortgage agreement in place;
- Appoint a solicitor before making an offer;
- Look for an estate agent who has a policy on gazumping;
- Check that the agent adheres to the Property Ombudsmen's Code of Practice;³⁹
- Keep in regular contact with the seller and the estate agent;
- Consider a lock-out agreement;⁴⁰
- Offer a booking deposit to exclude other interested parties;
- Insist that the house be taken off the market if your offer has been accepted; and,
- If you are gazumped, ask the agent to contact you if the new buyer pulls out.

To avoid gazundering, consider:

- Once the offer has been made, move quickly to accommodate the buyer;
- Set a realistic asking price;

³⁶ 'Legislation will not end Gazumping' *Law Society Journal* (NSW)(1988) 26: 19

³⁷ Considerations are drawn from, Potential Pitfalls: Gazumping, Gazundering and Gazanging: <http://www.in-deed.net/conveyancing/conveyancing-articles/gazumping-gazundering-gazanging> and, A to Z guide to property: gazumping: <http://www.telegraph.co.uk/property/propertyadvice/3290840/A-to-Z-guide-to-property-gazumping.html>

³⁸ Note: Electronic Conveyancing is a form of land registration where each stage of the process can be completed electronically as opposed to paper-based.

³⁹ Property Ombudsmen. *Code of Practice For Residential Estate Agents*. Effective from 1 August 2011: <http://www.tpos.co.uk/downloads/TPOE27%20Code%20of%20Practice.pdf>

⁴⁰ Note: This is an agreement whereby a vendor agrees for a fixed period not to negotiate with anyone else.

- Be honest about any structural problems or defects; and,
- If Gazundered make a counter-offer, as there are two sides to negotiating.

5.0 Conclusion

Any analysis of G&G in NI should be based on an understanding of NI's prevailing market conditions. In a buoyant property market with seemingly never-ending house price increases, a buyer needs to be mindful of estate agents, keen to maximise their sales, and an over-zealous seller, gazumping him by rejecting his offer in favour of a higher offer. In a stagnant and even falling market, a seller needs to be mindful of a buyer gazundering him by taking advantage of falling prices and demanding a reduction in the property price at a critical point in the sale.

Both practices remain legal in NI. The interval between parties verbally accepting an offer and signing a legally binding contract opens a window of opportunity for potential G&G practices. So far, regulatory attempts in the UK and further afield seemed to have had limited success in speeding up the process and reducing the incidence of G&G. It seems simple steps taken by buyers and sellers, such as fostering good relationships with estate agents, and seeking realistic prices, may help reduce G&G.