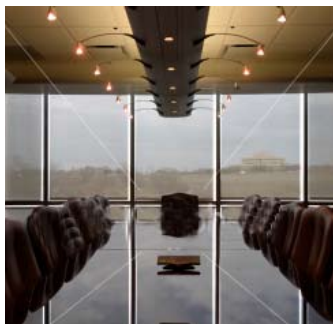




HOLMES O'MALLEY SEXTON
SOLICITORS

A Sea-change for Irish Company Law!

Irish Company law is
getting simpler!



Ode to the Mid West Wind

Mining the potential for wind power to
produce bright clean energy

HOMMS News

AUTUMN 2008

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Holmes O'Malley Sexton trainee solicitor wins 3rd place in prestigious international law competition



Over the last number of months we have witnessed quite a dramatic change in the environment in which we all work. This presents fresh challenges both to our clients and to ourselves. Wealth preservation has become particularly important. Many opportunities will present themselves to you, our clients, over the coming months. It is particularly important therefore,

In these more turbulent times our Commercial Litigation Department is growing with a new solicitor, Aoife Walsh, joining our team this month.

that we are in a position to assist you to take advantage of those opportunities. We would like to assist our clients in restructuring both their business and private finances, in conjunction with their own independent financial advisors, to ensure that they are in the

best position possible to take advantage of opportunities that the market will present. This is also an appropriate opportunity to introduce you to some of our new personnel. Aoife Walsh has joined our commercial litigation team, having heretofore practised in one of the large Dublin practices and she will add a new dimension and vision to this area. Alice Steen, Knowledge Management Solicitor, will provide us with the most up to date legal developments so that we can continue to present effective solutions to your legal problems. This is the first Newsletter which I will deliver to you in my capacity as Managing Partner. I would like to thank you all for your continued support and look forward to continuing our existing relationships and developing new ones.

Kind regards,
Harry Fehily
Managing Partner

A Sea-change for Irish Company Law!

By Selma Ryan, Solicitor, Business Department

Irish Company law is getting simpler. At least that is what is envisaged by the lawmakers of Ireland who have undertaken the mammoth task of consolidating the existing body of Irish company law into a new Companies Act. When enacted, the new Companies Act will repeal all previous company legislation in Ireland and will modernise Irish company law. The draft Companies Consolidation Bill 2007, published by the Company Law Review Group in May 2007, is currently being moulded into its final form in the Office of the Parliamentary Draftsman and is expected to be published in late 2008 / early 2009. The Bill will then go before the Oireachtas for approval. The proposed changes are significant and directors and company secretaries will need to engage in a suitable preparatory programme to ensure that their company is ready for the new regime.

Structural Reform - The New Companies Act will be divided into Pillar A and Pillar B

At present, Irish corporate legislation is structured to present the public limited company as the default company type in Ireland. The model Articles of Association for the public limited company are set out in Schedule 1, Part 1 Table A to the Companies Act 1963 and the other types of companies, including private limited companies, take their rules from the public model, amended as appropriate. The reality however is that the vast majority of Irish companies are private companies rather than public companies and the new legislation thankfully acknowledges this fact. The draft bill proposes to divide the law into two sections namely, Pillar A setting out the law for the private limited company and Pillar B setting out the law for all the other main company types, including the public limited company. Pillar B will also govern a new type of company to be created under the

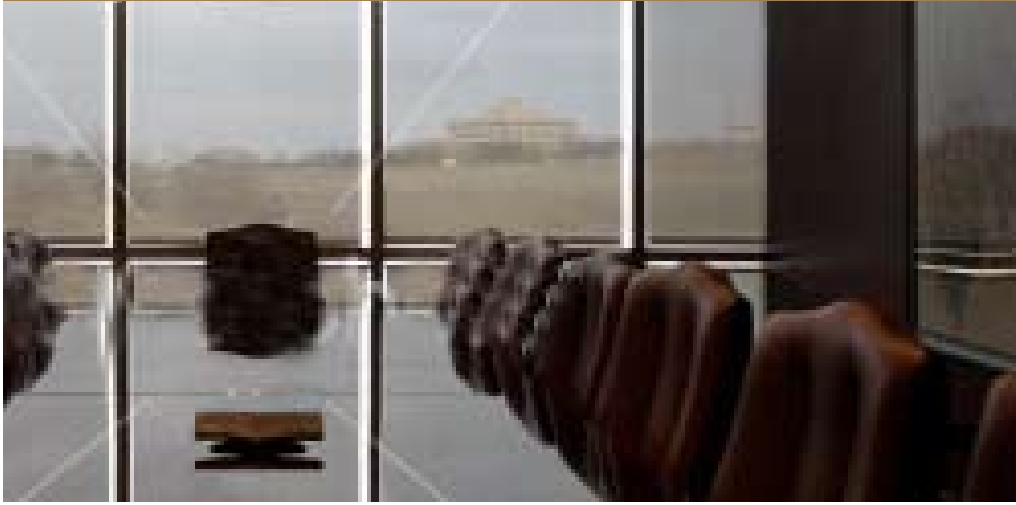
new Act to be known as a designated activity company (DAC). A DAC is in effect a private limited company with an objects clause.

Changes for Private Companies

The principal amendments that will be made by the draft bill to the private company limited by shares may be summarised as follows: -

- **The doctrine of ultra vires will no longer apply to the private limited company, i.e. a company will no longer have an objects clause. Therefore a private company will have the same capacity as a natural person.**
 - **As there will be no objects clause, the existing Memorandum and Articles of Association for a private company will be replaced by a one-document "constitution". A company will therefore be obliged to make the decision to either re-register as a private company without an objects clause or register as a Designated Activity Company (i.e. a private company with an objects clause). If, at the end of the transition period provided for in the draft bill the company has not re-registered, the company will automatically become a private company without an objects clause and will be governed by a default constitution currently referred to as a "deemed constitution". This document will be issued by the Registrar of Companies directly to the Company at that time. The possibility of an automatic conversion of the company structure is one of the most controversial**
- proposals of the draft bill. The Company Law Review Group have commented that in their view the "deemed constitution" is "on balance a proportional and reasonable measure given that the private company will be the preferable alternative for the large majority of existing private companies".
- **Interestingly, there are also proposals in the draft bill for aggrieved members and creditors to apply to court for relief in certain circumstances. Firstly, where a company fails to re-register as a DAC and is thereby automatically converted to a private company limited by shares, a member or shareholder will be able to apply to court for an order to have the company re-registered as a DAC. Secondly, where a constitution prejudices the interests of a member it is envisaged that the member can apply to court for an order for remedy in the case of oppression. In such circumstances, there is a presumption that the directors have exercised their powers in an oppressive manner or in disregard of the member's interests. Accordingly, company directors will have a positive obligation to take**





action to ensure that their company is well prepared for the new system, or risk potential court action by aggrieved members and/or creditors.

- **The private limited company will be able to have up to ninety-nine members rather than the current maximum of fifty.**
- **Offers to the public of shares or debentures in private limited companies in certain limited circumstances will be allowed where the publication of a prospectus is not required and the offer is confined to 99 people or less.**
- **A private limited company may have just one director and a company secretary who are not the same person rather than two directors as currently required.**
- **The fiduciary duties of directors have been encoded for the first time and also for the first time the duties of the secretary are set out in legislation.**
- **The rules relating to the maintenance and reduction of share capital will be relaxed.**

- **The private limited company will have the power to dispense with the requirement to hold an AGM.**
- **Majority written resolutions will now be possible (previously unanimous written resolutions only).**
- **New figures and thresholds will apply to eligibility for audit exemption.**
- **Creation of designated activity company type - this is a private company limited by shares or guarantee having a share capital and with an objects clause.**
- **Revision of offences – offences are to be categorised on a scale of 1 to 4 with the sanctions applicable to each category to be set out in the legislation.**

Changes for Public Limited Companies

The public limited company is currently the basic company and model company type under the Companies Act 1963 and its default articles of association are set out in Part 1, Table A of the First Schedule to the Companies Act 1963. Now, as discussed above, the company limited by shares will be the basic model company type and the rules relating to a public company will be set out in Pillar B of the new bill.

The proposed changes to private company

law discussed above will not apply to public limited companies.

The primary change for public limited companies is that most of the legislation relating to public limited companies has now been gathered into one place. Most of the plc-specific conditions relating to share capital from the 1983 Companies Amendment Act have been retained unchanged in the new bill. The full rules on public offer of securities will be incorporated into the Act as implemented by the Investment Funds Companies Miscellaneous Provisions Act 2005.

Likewise, the new transparency requirements flowing from the Transparency (Regulation of Markets) Directive will apply. Another change worth noting is that a public limited company will be able to avail of the validation procedure to permit financial assistance in connection with the purchase of its own shares provided it also follows the conditions set out in the draft bill.

Finally, a public limited company will be able to prepare a summary financial statement for shareholders instead of the full annual accounts, which could be an advantage for companies with a broad shareholder base.

Transition Period

The draft bill provides for a transition period of twelve months after the introduction of the new Act, albeit that the Minister will have limited power to extend any such transition period. It is expected that an eighteen month transition period is likely to apply.

Summary

The proposed new Companies Act will repeal all previous company legislation in Ireland and modernise Irish company law.

The Memorandum and Articles of Association for private limited companies are to be replaced by a single 'constitution' document.

The fiduciary duties of directors have been encoded for the first time.

Pre – Nuptial Agreements Enforceable in Ireland?

By Sarah Ryan, Solicitor, Family Law Unit

Prior to the introduction of divorce in Ireland in 1997, any contract which attempted to arrange an exit mechanism from a marriage was considered void and contrary to public policy in that it was seen to contemplate and perhaps facilitate a possible marriage breakdown.

However, after over ten years of divorce in this country, times and attitudes have drastically changed. Public policy may now encourage couples to decide in advance what is to happen in the event of the breakdown of their marriage allowing for a more orderly end to the relationship. This would undoubtedly ease the conflict between the parties at the time of separation. So are pre-nuptial agreements enforceable in Ireland? What are their advantages and is there need for reform in this area of family law?

What is a pre-nuptial agreement?

A pre nuptial agreement is a pre-marriage contract between the parties to the marriage. It attempts to re-write some or all of the rights and responsibilities of marriage and also sets out what is to happen in the event that the marriage breaks down. The usual terms of a pre-nuptial agreement deal with property and financial issues. The agreement would usually deal with how much a dependent spouse should get if the marriage breaks down. There may be timescales such as 3, 5 or 7 years. There may also be a provision for a fundamental review after a longer period such as 10 years or in the event that there are children.

Rare in practice

At present in Ireland, pre-nuptial agreements are rare in practice. They are however likely to arise in relationships characterised by one or more of the following:

- **People entering into a second marriage where one or both of the parties wish to protect the properties they owned before the wedding,**
- **An imbalance in the assets of the parties,**

A foreign national marrying an Irish person who wishes to protect property owned in his own country should the marriage breakdown,

- **A family business which one spouse wishes to protect.**

Enforceable in Ireland?

The enforceability of a pre-marriage contract in Ireland is still an issue. The separation and divorce legislation in this country allows the court to vary the terms of any ante-nuptial or post-nuptial settlement. A pre-marriage contract is an ante-nuptial settlement. A separation agreement is a post-nuptial settlement.

However, the separation and divorce legislation does not require the court to take into account a pre-nuptial agreement where one exists. A Judge may therefore take a pre-nuptial agreement into account in his determinations but is not obliged to do so under existing legislation. The law in this area is therefore uncertain.

Other Jurisdictions

In the USA, pre-nuptial agreements are recognised in more than half of the states. Several countries of the European Union also recognise pre-nuptial agreements. In particular, France, the Netherlands and Germany have all enacted specific provisions concerning pre-nuptial agreements. Like Ireland, the UK has not enacted specific legislation to permit recognition of pre-nuptial agreements and the position there remains uncertain.

The need for reform

On 25 April 2007, former Tanaiste and Minister for Finance Michael McDowell published the Report of an expert Study Group he had commissioned to examine the subject of pre-nuptial agreements with a view to recommending legislative reform in this area of family law.

The Study Group recommended that express statutory provision be made for pre-nuptial

agreements in separation and divorce legislation. The courts would be required to give "due consideration" to any pre-nuptial agreement negotiated by the parties, which would be "scrutinised by the court in the same way as separation agreements currently are".

It is thought however that even if express statutory provision was made for pre-nuptial agreements, it is unlikely that they would ever fully regulate the division of assets without a full examination being carried out by a Judge upon the date of making the separation or divorce order. In fact to prove this point, there has been no reported case in the UK in which a pre-nuptial agreement has been upheld in its entirety.

Steps to take to ensure enforceability

If the pre-nuptial agreement is to be recognised and enforced by the Courts, it is advisable and important that the following conditions are fulfilled:

- **the parties should each obtain independent legal advice;**
- **they should both make full disclosure of all their assets and property;**
- **and the agreement should be signed not less than 28 days prior to the wedding.**

In addition, it is thought that reasonable provision should be made for the dependent spouse if it is hoped that the Courts would enforce its terms or, at least have regard to the intention of the parties at the time they entered into the marriage.

In conclusion, there is no law providing for the enforcement and implementation of pre nuptial agreements in Ireland. At best it would seem that such an agreement would be one of the many factors to be taken into account by the separation/divorce Court in reaching a fair and just settlement. As time passes and the longer a couple remain married or indeed have children, it is more likely that the Court will give less effect to any pre-nuptial agreement entered into by the parties. However, for marriages of short duration, it would arguably assist the Court in making a fair distribution of the assets and demonstrate to the Court the intention of the parties at the time of marriage.

Ode to the Mid West Wind

By Aoife Garvey, Associate Solicitor, Business Department

The potential for wind power to produce bright clean energy in a world darkened by gloomy carbon footprints is increasingly being recognised. Wind energy brings with it many advantages; its primary raw material is free, it provides one of the safest and most economical ways of producing energy, and of course, it is a resource that we, in Ireland, have in abundance, recognised often in our folklore - "May the wind be always at your back".

Many will be surprised to hear that Ireland could soon have enough wind farms to meet almost all of current peak electricity demand on its system. Despite our relatively recent launch, as a nation, into wind energy, wind farms operating in Ireland already currently produce 807 mega watts ("MW") of electricity. The Commission for Energy Regulation ("CER") has already approved wind farms with the capacity to generate a total of 1,750 MW. It is expected that the next round of approvals from the CER will bring the capacity of the Republic's wind farms to 5,000 MW, which is in or around the level of peak demand, sourced currently from conventional sources such as oil and gas.

The East/West electricity connector which is to be constructed between Ireland and Wales will have the capacity to allow power to flow both ways between the two countries and will have the capacity to carry 500 MW. It is hoped that as wind energy expands in this country, that the inter-connector will permit the sale of wind energy to the UK market into the future, although its original provenance was to ensure security of supply for the Irish market! We understand that this project is already at tender stage and is being constructed on schedule. The prospects for Irish developers are considerable.

It is clear that developments in this area are evolving at a speed capable of generating many mega watts. Holmes O'Malley Sexton has already been involved in a significant number of wind projects and we are happy to assist in their continued growth over what we hope will be a windy (but bright) future ahead.



We can assist our clients with considered advice in respect of the following:-

- Land leases and property issues with adjoining landowners
- Planning and consent issues during the development stage
- Project Finance and BES Arrangements
- Joint Venture and other commercial arrangements including liaising with client banks
- Plant supply and maintenance/ turnkey agreements
- Energy Supply Agreements

Summary

The potential for wind power to produce bright clean energy is increasingly being recognised.

Developments in this area are evolving at a speed capable of generating many mega watts.

Ireland could soon have enough wind farms to meet almost all current peak electricity demands on its system.

Vat on Property – The New Regime

By Orla Begley, Solicitor, Property Department

On the 1st of July 2008, the Finance Act 2008 introduced a new VAT regime with respect to all property transactions. The changes are designed to "simplify" the rules for VAT and it is imperative that this new VAT regime is carefully considered by all clients prior to entering into an agreement for lease or contract for sale/purchase of a property.

The new rules will apply to both residential and commercial property and aim to rationalise the VAT treatment of property transactions.

Sale of property

The sale of residential property remains the same with VAT always chargeable on the supply of residential property by a builder/developer.

With respect to the sale of new commercial property the VAT rules are as follows:-

A sale of a new commercial freehold interest in a property or a freehold equivalent (e.g. lease for 99 years) is liable to VAT. Two rules, the two and five year rules, determine if a property is "new".

The first supply of a completed property within five years of its completion is considered to be the supply of new property and is subject to VAT; and

The second and subsequent supply of property is considered to be the supply of a new property and subject to VAT but only if it takes place within two years of occupation.

Accordingly, any commercial freehold interest which falls into either of the above two criteria will be liable to VAT.

Sale of property with contract to develop

The sale of undeveloped property in connection with an agreement to develop the property is vat-able.

Letting of commercial property

The letting of commercial property is now exempt from VAT irrespective of the term of the lease. However a landlord may opt to charge VAT at a rate of 21% on rents from a letting. It is important to note that a landlord may opt to charge VAT at any time during the lease and not just at the commencement of the term. From a tenants perspective this is potentially serious especially if the tenant is not VAT registered and the lease is free of VAT at the commencement of the term. Special attention needs to be given to VAT in negotiating the terms of the lease so that it is clear, from the outset, whether or not the rent is VAT inclusive. Unlike the old waiver of exemptions, these new options to tax can be made on a lease by lease basis.

A landlord's option to tax is curtailed in the following circumstances:-

A letting of a residential dwelling; and

A letting between connected persons. Connected persons has a wide interpretation and includes relatives, business partners and their spouses etc. There is one exception

to this second letting and where connected persons are entitled to an input deduction of 90% or more then the Landlord can opt to tax.

Capital Goods Scheme

Section 91 of the Finance Act 2008 introduces, for property, a new concept known as the Capital Goods Scheme (CGS). Essentially, the capital goods scheme provides for an adjustment of the VAT deductibility on the acquisition or development of a property over the VAT life of a property (usually 20 years).

When does CGS apply?

CGS applies to all freehold and to freehold equivalent interests; CGS applies to capital expenditure i.e. refurbishment; and CGS applies to old leases of 10 years or more which were capitalised under the old regime when they were granted.

When does CGS not apply?

CGS does not apply to any person acquiring property on which VAT is not chargeable; CGS does not apply to persons not engaged in economic activities; and CGS does not apply to taxable persons who acquires/develops property in a non-business capacity.

To summarise, the key implications of the CGS are:-

The VAT life of a property is generally 20 years but is reduced to 10 years with respect to refurbishments.

Under the CGS, a business will be required to review, on an annual basis, the amount of VAT they initially recovered on the acquisition of a property over a twenty year period. Under the scheme either additional VAT can be deducted or a clawback can occur during the 20 year adjustment period e.g. a clawback can occur where the option to tax a letting is terminated or where property

is sold and VAT is not charged/ paid in sale. Finally businesses are required to keep and maintain a "capital goods record" to account for the VAT history of a property.

Transitional Rules

Transitional rules apply to transactions involving commercial properties acquired or developed before 1 July 2008. In short, the transitional rules apply to freehold properties which are taxable under the old rules in Section 4 of the VAT Act 1972 (as amended) and which are supplied on or after 1 July 2008. These rules mirror the new rules for sale of freehold property i.e. the two and five year rules. With respect to leasehold properties, where an assignment or surrender of a leasehold interest occurs after 1 July 2008, it is subject to VAT on a reverse charge basis. The taxable amount is calculated by reference to the number of years remaining in the CGS life of the property.

Overall, the new VAT system aims to simplify and regularise our current Vat regime and it is hoped the new rules will move our system closer to the common system of VAT.

The new VAT regime opens the door to negotiation to both landlords/vendors and tenants/purchasers. Vendors and purchasers will have scope to negotiate different prices depending on whether the vendor chooses to charge VAT. Tenants will have opportunities to negotiate more favourable lease terms, in particular if non-vat registered.

Summary

The new rules on VAT were introduced on 1st July 2008 with respect to all property transactions.

Businesses are now required to keep and maintain a "capital goods record" to account for the vat history of a property



The Retention of Title Minefield – how to avoid potential disasters on insolvency

by Harry Fehily, *Managing Partner, Commercial Litigation Department*

An important task of a receiver or liquidator appointed to an insolvent company is to assess and deal with claims made by suppliers under retention of title ("ROT") clauses. This can be a difficult task. The complexity of ROT clauses often contained in perceived 'standard' terms and conditions in commercial contracts present a minefield in terms of the application of insolvency law and practice that need to be navigated with caution and no shortage of dexterity. A valid claim under a ROT clause allows the supplier to stand outside the liquidation or receivership and claim title over goods that would otherwise

be deemed assets of the company. A ROT clause, simply stated, is a clause that prevents ownership of goods passing to the customer until the supplier has been paid in full. Without a valid ROT clause, title in the goods will usually pass on delivery.

Why use a ROT clause?

The main attraction of ROT clauses is that they can provide suppliers with considerable protection in the event of a customer becoming insolvent before the goods supplied are paid for. A valid ROT clause may be relied upon against a liquidator in the course of the winding up of a company or a receiver attempting to realise security over assets subject to a floating charge. Where the company is insolvent and a valid ROT clause exists, the goods should be returned to the supplier or paid for, otherwise the receiver or liquidator runs the risk of a claim in conversion by the unpaid supplier. The supplier can also take steps to prevent any party dealing with the goods by way of injunction. In the absence of a valid and enforceable ROT clause, the supplier joins the list of unsecured creditors who invariably receive only a small proportion of the sum due, if even that.

Drafting a valid ROT clause

Care should be taken in drafting a ROT clause as the effectiveness of the clause can vary significantly according to what the clause is aiming to achieve. The ROT clause should reflect the supplier's individual circumstances

and also take into account the current law in this area. Typically, there are two main types of ROT clauses: a 'simple' clause, which simply purports to reserve title in specific goods supplied until those goods are paid for and an 'all sums due' clause, which usually provides that the supplier retains title to any and all goods supplied until all outstanding monies owed to the supplier has been discharged.

A 'simple' ROT clause poses little difficulty so long as the goods supplied and in the possession of the receiver or liquidator are readily identifiable and have not been mixed with or absorbed into other products, such as in the manufacturing process. The ROT clause is generally ineffective in such cases where goods have been mixed, as the goods are no longer capable of identification as originally supplied. Even where a ROT clause purports to create proprietary rights in the manufactured product or follow the proceeds of sale of the goods supplied difficulties may still arise, as the Courts have tended to view these clauses as ostensibly creating a charge over the goods. Where the customer is a limited company, such a charge should be registered pursuant to section 99 of the Companies Act 1963 to be effective. If it has not been registered as a charge, the clause or sub-clause, as the case may be, is void and cannot be relied upon on insolvency.

Incorporation of the ROT clause

It is vital, particularly in the context of insolvency, that the ROT clause forms part of the contract of supply. A receiver or liquidator may dispute the validity of the ROT clause where there appears to be any ambiguity. Crucially, the onus is on the party attempting to rely on the ROT clause to show that it had been effectively incorporated into the contract between the parties. In essence, there must be evidence that the terms and conditions of sale and any alterations in terms (including notice of new ROT clauses) had been brought to the attention of the other party during the contract or supply stage.

Thus, where possible, the supplier's standard terms and conditions should be set out and



incorporated in all order acknowledgements, delivery notes, invoices, credit notes and statements of account. If the standard terms and conditions are printed on the back of a document, there should be clear reference made on the front of the document to the effect that the supply of goods is subject to the conditions printed on the reverse. In short, the customer should be left in no doubt as to the terms and conditions of sale and supply.

Legal advice

The law on retention of title can be quite complex with serious financial consequences for the supplier if a ROT clause is incorrectly drafted and/or not properly incorporated into the contract of sale. Suppliers should regularly review their terms and conditions of sale to ensure adequate protections are in place if a customer becomes insolvent. Legal advice should always be sought when entering into new arrangements with customers to ensure that an appropriate ROT clause forms part of the terms of trade. Insolvency practitioners, whether acting as a receiver or liquidator, should be familiar with the law on ROT clauses and seek specialist legal advice when faced with claims made under complex clauses. Please contact our Business Department for further details of our corporate and insolvency advice services.

Summary

The effectiveness of a ROT clause can vary significantly according to what the clause is aiming to achieve

You may need to register the ROT clause as a charge pursuant to S. 99 of the CA 1963 when dealing with a private limited company

The ROT clause must form part of the contract of supply to be effective

Legal advice should be sought when dealing with complex ROT clauses



Holmes O'Malley Sexton trainee solicitor wins 3rd place in prestigious international law competition

Anthony Murphy, pictured with Robert Bourke (Partner, Litigation Department) and Siobhan Buckley (Partner, Business Department), participated recently in the International Contract Negotiations Competition for trainee lawyers held in London from the 7th - 11th July 2008. Anthony was part of the two-man team that represented the Law Society of Ireland finishing 3rd overall in the competition behind South Korea and Japan. The competition is in its 10th year and attracts the brightest and best law students and trainees from around the world. Trainees must firstly compete and win their national competition before progressing to the international

event. 16 countries participated in this prestigious international competition, including the US, Canada, England and Wales, Australia, New Zealand, Scotland, Denmark and Singapore. Anthony, from Ardnacrusha, graduated from the University of Limerick with a Law Degree (First Class Honours) and a Masters in European and Comparative Law (First Class Honours). He was also twice awarded a President's Letter in recognition of his academic achievements. Anthony is also actively involved in developing local rugby as an under-age coach with Shannon Rugby Club and is currently working in the Business Department of Holmes O'Malley Sexton.

A Reminder about Collective Redundancies

by Michelle O’Riordan, Solicitor, Employment and Pensions Unit

With all the recent discussion about recession, it is inevitable that some companies will unfortunately need to make redundancies over the coming months. This article highlights the law on collective redundancies which has been in existence since 1977 and which was changed by new legislation that came into force last year. The Protection of Employment Act, 1977 and the Protection of Employment (Exceptional Collective Redundancies and Related Matters) Act, 2007 (the “Acts”) govern collective redundancies. They apply only to cases where more than 20 persons are employed by a particular employer. The Acts govern situations where the following redundancy thresholds are reached over a thirty day period:

- (i) 5 redundancies in a workforce of 21-49;
- (ii) 10 redundancies in a workforce of 50-99;
- (iii) 10% of the workforce is made redundant in a workforce of 100-299; and
- (iv) 30 redundancies from a workforce of 300 or more.

Where the number of redundancies satisfy the above thresholds, the employer must consult with employee representatives about the redundancies with a view to reaching agreement. Employee representatives include trade unions or persons chosen by the employees to represent them. If there are no employee representatives, the employer must facilitate an election procedure.

The consultation must include the following:-

- (i) the possibility of avoiding redundancies or reducing their number;

- (ii) the possibility of reducing the consequences of the redundancies by, for example, redeploying or retraining the employees; and

- (iii) the basis on which the employees will be selected for redundancy.

The employer must supply the employee representatives with all relevant information relating to the proposed redundancy in writing, including the reasons for the proposed redundancies, the number and description of employees it is proposed to make redundant and the selection criteria. In addition, the Minister for Enterprise, Trade and Employment should be notified of the proposal to create collective redundancies at least 30 days before the first dismissal takes place and the Minister must be given copies of all information given to the employee representatives. The consultation process must occur as soon as possible and in any event at least 30 days before notice of dismissal is given to the first employee. It is important to stress that this time period refers to 30 days before the dismissal notice and not the termination of employment. If the termination date is used as the date of commencement of the 30 day period, the employer could be found to have entered into the consultation process with a pre-determined course of action in mind. As the consultation process must be with a view to reaching agreement, this is not permitted. The aim of the process should be to find alternatives to the redundancies. A Redundancy Panel was established under the 2007 Act. During the 30 day consultation process, collective redundancies may be referred to the Panel for consideration. The Panel will determine whether the redundancies are being carried out in order to replace employees with workers on lower pay

or on materially inferior terms and conditions (exceptional collective redundancies). The Panel may also seek the opinion of the Labour Court. If the redundancies are found by the court to be exceptional collective redundancies, the employer may not be entitled to get a rebate on the lump sum payable to the employees and the employees will be entitled to take a claim for unfair dismissal. In such cases certain employees could be entitled to up to five years remuneration as compensation. Unfortunately, some companies will be facing the unenviable task of making certain employees redundant during the tougher economic times ahead. As such companies should be aware of the provisions of the Acts in order to ensure compliance with their obligations in relation to collective redundancies.

Summary

The Acts governing collective redundancies apply to establishments with more than 20 employees.

Collective redundancies are made where a certain proportion of employees are made redundant.

Employers must enter into a consultation process with employee representatives with a view to reaching agreement, 30 days before notice of dismissal is given to the first employee.

During the consultation process, the redundancies may be referred to the Redundancy Panel to assess whether they are exceptional collective redundancies.

Effective Succession Planning – The Pros & Cons

by Harry Fehily (Managing Partner), Commercial Litigation Department

One of the most important and sensitive considerations facing individuals is how to pass on wealth to family, loved ones and charities in the most efficient manner. Individuals are increasingly moving from the traditional passive approach to succession to a very active one.

Early and thorough succession planning can ensure you:

put appropriate structures in place to control who manages and receives your assets;

minimise any taxes that could accrue to ensure a greater share of your assets passes to your heirs and chosen good causes;

ensure that your heirs are educated in financial matters and provide them with wealth management continuity and protection where required;

minimise administrative costs to your estate;

and

minimise the disruptions faced by company employees (family and outsiders) and business associates to ensure the longevity of your business.

Estate planning now reflects the fact that key succession issues require to be resolved or indeed planned for during an individual's lifetime, to provide for a smooth and efficient transfer of assets and management responsibilities

For Family Owned Businesses - A Useful Strategic Exercise

It is a proven fact that most family owned business do not survive the passing through the generations. This can arise for a number of reasons which include:-

- No clear successor;
- Diluted ownership resulting in disputes;

- Change in the business environment;
- The need for new ideas and new blood;
- Retaining key employees; and/or
- Tax liabilities eroding the value of the business and assets.

Dealing with these issues in a timely, controlled and effective manner can ensure that the business survives and can provide a living for the next generation and indeed the generation after that. Structures used to address these issues include shareholders agreements and executive pension planning.

Personal assets

It may seem obvious but any decision as to the transfer of personal assets to the next generation during a parent's life time will first require them to ensure that they have enough funds to satisfy their personal needs. Preparing an effective financial forecast can give you the information to allow you to plan effectively for your retirement and decide on the appropriate time to pass surplus assets / funds to the next generation.

Family Partnership

A family partnership is a simple structure that will allow assets to be transferred to your children now with the benefit that the future growth accrues in their names but where control of the partnership rests with the parent in their role as managing partner. The managing partner would generally decide on the investment strategy for the partnership, and the distribution policy of the partnership. This type of structure is most appropriate where the parent(s) want to gift assets to their children during their lifetime. In this way, the family partnership offers a means by which the family assets can be grown and accumulated for the children and free from inheritance tax whilst the children are young and indeed can extend beyond them reaching adulthood. It could be considered as a family trust to be managed and controlled over the respective family members' lifetimes.



There are two main benefits to setting up a family partnership;

- It enables a parent to gift assets to a child or children to be held in a partnership structure, where control of the partnership rests with the parents in their role of managing partner
- It creates a platform, in a controlled environment, whereby the children are educated in financial matters and are introduced to trusted advisers. In this way the knowledge and experience gained by the parents can be passed to the children.

In looking at a succession plan it is vital to start early and consider the funds that will be required for an individual's and their partner's needs, currently and into retirement. You should then establish the appropriate structure to hold your investments and indeed assets. Once you have done this you should then consider a suitable investment mandate that meets your requirements. Harry Fehily discussed the above mentioned topics with Davy and they stated that they are of the view that they favour a diversified portfolio that is spread across asset classes and jurisdictions. According to Davy, in this way, it is possible to build a robust portfolio capable of generating strong returns with a lower degree of overall risk. This strategy should allow you to achieve above average returns while reducing the risk to your portfolio.

The Liberalisation of the Business Tenancy Market

by Orla Begley, Solicitor, Property Department

The Civil Law (Miscellaneous Provisions) Act 2008 came into effect on the 20th day of July 2008 and introduces significant changes to landlord and tenant law. Under section 13 of the Landlord and Tenant (Amendment) Act 1980, a tenant acquires what is known as "business equity" in a tenement where a tenant is in continuous occupation of the tenement for a period of five years for the purpose of carrying on a business. Following this five year period, the tenant is entitled to a new tenancy in the tenement.

The Landlord and Tenant (Amendment) Act 1994 watered down the provisions of the 1980 Act by allowing a tenant, after taking legal advice, to opt out of their statutory entitlement to a further long term lease with respect to office premises.

The 2008 Act has now further extended the tenants right to opt out of their statutory entitlement to a long term lease with respect to all business tenements.

This important legislative change will ease the difficulties experienced by business tenants, who previously faced termination of their leases prior to the expiry of the five year term. In addition, landlords who were traditionally reluctant to enter into business leases lasting a full five years due the build up

of the tenant's business equity rights are now free to grant tenants longer tenancies without the fear of being indefinitely tied to a tenancy. Overall the legislation modernises landlord and tenant law and generally liberalises the business tenancy market.

Summary

The Civil Law (Miscellaneous Provisions) Act 2008 modernises Landlord and Tenant Legislation.

The Tenant can opt out of their statutory entitlement to a further long-term lease.



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