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Are you LinkedIn to Facebook at work?



Multi-Unit Developments Act 2011

# HOMS News

ISSUE 2 2011



## New Rules on Cookies

## Priority of Claims in Liquidation: The Outcome of the Belgard Motors Case



## Repossessions by Lenders Put on Hold

Welcome to the latest edition of HOMS News.

This edition contains lots of good news for the firm, our clients and associates, as well as dealing with some of the most recent topical legal issues. We also outline other business news and events which have taken place recently.

Two of our articles focus on some highly topical legal technology issues. Michelle O'Riordan, a solicitor in our Employment and Pensions Unit, outlines the legal issues involved for employers in respect of employee's personal use of social networking websites. This article is a must read for all employers in light of the explosion of social networking website use through computers, netbooks and mobile telephones. Siobhán Buckley, a Partner in our Corporate and Commercial Department, brings us the low down on the new laws and implications in respect of

cookie use on websites. Cookie use is necessary, for instance, in respect of monitoring traffic to a website or taking online orders and payment. This article is vital reading for all businesses with a website.

Major new legislation in the form of the Multi-Unit Developments Act 2011 has been enacted and Audrey Healy, a partner in our Property Department, guides us through the many provisions and the implications for developers, landlords and tenants.

Joe O'Meara, a partner in our Insolvency and Corporate Recovery Unit, outlines the latest important cases in this area. He takes us through the implications of the Belgard Motors case in respect of determining the priority of floating charges in liquidations. Joe also highlights the cases recently determined in respect of lenders and repossessions.

As always I take this opportunity to thank all of our clients for their continued support and feedback. If you require any further information or advice on any of the articles in this edition please do not hesitate to contact me.

Kind regards,

**Harry Fehily,**  
Managing Partner.



If you wish to subscribe to or unsubscribe from our newsletter, or alternatively request an email only or hardcopy only, please contact Alice Steen, Knowledge Manager at our Limerick office with your instructions. Email: [alice.steen@homs.ie](mailto:alice.steen@homs.ie)

# Are you LinkedIn to Facebook at Work?

By Michelle O’Riordan, Solicitor, **Employment and Pensions Unit**

Even a cursory glance at the headlines in a newspaper on any given day will prove just how topical social media sites are. Just a few short years ago the words Facebook, Bebo and LinkedIn were not even in our vocabulary, now they are in everyday use. Social networking sites (“SNS”) are a valuable marketing tool, however personal use by employees poses a number of challenges. A survey carried out by Irishjobs.ie in 2010 revealed that over half of Irish workers accessed SNS while at work. Yet “cyberslacking”, as it has become known, is only one of the many challenges faced by employers.

In fact, employers may not be aware how easy it is for employees to post messages about employers, colleagues or customers on SNS or that employees may also share photos and videos. Employees themselves may not be aware of how far reaching their actions are or that their comments, photos or videos may become viral in a short space



of time. There have been many cases in the UK involving employees’ use of SNS impacting the workplace and it is only a matter of time before such cases become more frequent here. Some of the issues that have arisen in these cases are (i) a bar manager making derogatory comments about customers and, (ii) an employee comparing a superior’s wage to his own.

Specific employment issues that may arise include:

- The potential for employees to make derogatory comments about employers on SNS
- Employee’s private use of SNS impacting the workplace
- On-line bullying and harassment.

Each of these employment issues merits further discussion.

## The Potential for Employees to Make Derogatory Comments About an Employer on SNS

In *Emma Kiernan v A-wear Limited*, an employee, who had called in sick to work, made disparaging remarks about her manager on a Bebo web page. A customer saw the comments and complained to the employer. After an investigation, disciplinary hearing and appeal, the employee was dismissed. The Employment Appeals Tribunal found that while A-wear’s disciplinary procedures were fair its sanction was not. The Tribunal found that the comments deserved censure and

possibly disciplinary sanction but that they did not constitute gross misconduct. The Tribunal also found that the comments were disrespectful, inappropriate and damaging to the employment relationship and that the employee had contributed to her dismissal. She was awarded €4,000.

## Employee’s Private use of SNS Impacting the Workplace

Employees often use SNS outside working hours and from private computers and mobile telephones. To what extent can an employer discipline an employee for use of SNS outside the workplace and with private IT systems? In the above case the Tribunal appeared to reach the conclusion that an employee’s activities outside employment could warrant censure and possible disciplinary sanction. The English case of *Gosden v Lifeline Project Limited*, while not binding here, provides an illustration of private use of email impacting the work place. Mr. Gosden was employed by Lifeline Project Limited at Lindholme prison to work with drug users. He forwarded an email from his home computer which had racist and sexist content to a colleague who worked in Moorland prison, resulting in the email entering the prison system. It was headed with the words “It is your duty to pass this on”. Mr. Gosden was found guilty of gross misconduct and was dismissed. The UK Tribunal found the dismissal was fair. The Tribunal placed significance on the heading of the email “It is your duty to pass this on” and concluded that the email was not intended to be private. Although this is a UK case, it is illustrative of the issues that can arise. A clear comparison could be drawn with comments posted on a SNS. As these comments can be read by a large group of people, it may be concluded that they are not intended to be private. Although employees are entitled to a private life an employer will be entitled to

balance this against its need to protect its legitimate business interests.

## On-Line Bullying and Harassment

What should an employer do in circumstances where an employee bullies or harasses a colleague on SNS? The employer should deal with the matter as if the circumstances giving rise to the complaint had occurred in the normal course and investigate the issue in accordance with its bullying and harassment policy.

## Social Networking Policy

An employer may be aware of the challenges SNS pose but what can an employer do to deal with issues that arise? An employer could ban the use of SNS at work, however, this will be impractical for employees who require access to SNS in their employment. It will also not deal with the situation where employee’s use of SNS from their own IT systems (such as through mobile phones or personal computers) causes issues for an employer. All employers should ensure that they have a robust social networking policy. This is advisable even if an employer has banned the use of SNS at work. In those circumstances the policy can be adapted accordingly. The policy could be a separate social networking

policy or could be incorporated into an employer’s email and internet policy. The following issues should be addressed in any relevant policy:-

- Restrictions on employees accessing SNS through the employer’s IT systems and during office hours
- Confirmation that disclosure of confidential information is not permitted, including on SNS
- A direction not to make any derogatory comments about the employer, its business, colleagues, customers, clients or suppliers on SNS
- Confirmation that on-line bullying and harassment will not be tolerated and a reminder that any incidences of such bullying and harassment will be dealt with in accordance with the employer’s bullying and harassment policy
- Information in relation to the level of monitoring which the employer will undertake in relation to employees’ use of SNS
- A clear and unequivocal statement confirming the consequences for breaching the policy i.e. that breach could result in disciplinary sanction up to and including dismissal
- Guidance for employees who use SNS to

market the employer’s business.

## To Conclude

Employers need to be aware of the potential issues that may arise from employee’s personal use of SNS. Employers should ensure that they equip themselves to deal with any of the issues that may arise by having a social networking policy in place which encompasses the elements outlined above.

For further information please contact Michelle O’Riordan in our Employment and Pensions Unit.

## Summary

Employers should be aware of the employment challenges posed by SNS.

Issues that arise include the potential for employees to make derogatory comments about the employer on SNS, an employee’s private use of SNS impacting the work place and on line bullying and harassment.

Employers should put a social networking policy in place to deal with any issues that may arise.

# Presentation to FAST Programme, National Franchise Centre at Limerick Institute of Technology

Our Corporate and Commercial Department was invited to make presentations to the Franchise Acceleration Start Up Training (FAST) Programme, National Franchise Centre at Limerick Institute of Technology, O’Connell Street Campus on 11th and 16th May 2010.

We presented on a number of issues including

consumer law and key issues arising in franchise agreements.

George Kennedy, a solicitor in our Corporate and Commercial Department, is to present to the current year’s FAST programme on 12th December 2011 and 16th January 2012.

The National Franchise Centre is Europe’s

first centre of excellence for franchise development. Six month training programmes are provided on franchise opportunities in Ireland and elsewhere by the National Franchise Centre. The FAST Programme was launched by Limerick Institute of Technology in partnership with Limerick Chamber of Commerce.

# New Rules on Cookies

By Siobhán Buckley, Partner, **Intellectual Property and Technology Unit**

The new European Communities (Electronic Communications Networks and Services) (Privacy and Electronic Communications) Regulations 2011 came into force in Ireland on 1st July 2011. The regulations implement a European Directive and bring in new rules on cookies in respect of websites.

## What are Cookies?

Cookies are classed as a means of storing information on a website user's computer, or a means of gaining access to information already stored on a user's computer.

A common cookie which businesses use on their websites is for visitor tracking to enable them to analyse visitor's behaviour on their website. Other websites need to use cookies for online shopping to proceed to use 'baskets' and to 'checkout'.

## What are the Implications of the New Regulations?

For websites to use cookies legally under the

new regulations the website owner must now ensure:-

- The user has given consent to that use
- Information on the purposes of processing such information is provided and all such consent provisions and information is prominently displayed and easily accessible.

There is an exception in respect of when a service is explicitly requested by a user to which the new rules do not apply. For example this allows online shopping to proceed without express consent for cookie use.

When the regulations first came out there was no definitive guidance in respect of how such consent should be obtained in practice.

For instance it was not clear whether an 'I accept' button has to be displayed by the website and then clicked by the user prior to cookies being used. Alternative suggestions in the debate on compliance included the previously compliant way of providing information in the website's privacy policy or terms and conditions on how to block cookies through the user's own internet browser options. Consent is then presumed to be given if the user continues to use the site without blocking such cookies. That would be the less onerous option for businesses to employ. The Data Protection Commissioner has issued guidelines on the regulations but they are not explicit on what type of practical options will be compliant with the regulations. They do make clear the previous way to comply regarding browser settings and website policy information is no longer sufficient due to not all browser's being sophisticated enough to block all cookies.

A European Working Party was set up to address the issue of consent and the opinion was adopted on the 13th July 2011.

The Working Party recommends that consent must be specific, freely given and informed. This suggests that in practice consent must be explicitly obtained prior to any information being used or stored, and that information in privacy policies or terms and conditions (detailing how to block cookies and informing the user about which cookies are used by the website) is not sufficient.

The Information Commissioner's Office in the UK has a website which has a prominently displayed banner and information on cookies on the website. Only if a user clicks 'I accept' will the website then go on to use cookies such as Google Analytics, a visitor tracking device. Users can still use the site if they do not click 'I accept' and no cookies will be used by the website. Perhaps this is what the EU aspires to in terms of the implementation of the new rules on cookies. However there may be problems in implementation, firstly due to a lack of business awareness and understanding of the new regulations and their interpretation, and secondly in terms of the time and cost involved in implementing such a scheme or removing any cookies from business websites.

## To Conclude

At the moment we are waiting to see how the EU and Ireland will interpret and enforce the regulations. Businesses need to review their cookie use and website privacy policies in light of the new regulations and make decisions on how they wish to proceed pending further guidance and decisions by the Data Protection Commissioner.

The regulations also brought in additional requirements in respect of marketing

obligations for electronic marketing and phone calls.

For further information on the new regulation and how it affects your business please contact Siobhán Buckley, Partner, Intellectual Property and Technology Unit.

## Summary

New regulations on the use of cookies on websites.

Businesses should review their cookie use and website privacy policies.

It remains to be seen how the regulations will be interpreted and enforced by the Data Protection Commissioner.

# Legal Advisors to IDA Ireland

We were delighted to win the tender to become one of the eleven firms of solicitors on the panel of advisors to IDA Ireland. The three year contract commenced in June 2011. The contract is for the provision of legal services in respect of general legal advice, litigation and judicial review, competition law, public procurement, venture capital funds and debt collection.

For more information on foreign direct investment, please contact Siobhán Buckley, Partner, Corporate and Commercial Department.

# Legal 500 again ranks HOMS amongst the top legal firms in Ireland

Legal 500, the esteemed legal directory of top ranking legal firms, published the latest 2011 EMEA edition in May 2011. Our submissions were once again successful due to our client's continued support and we continue to rank amongst the top legal

firms in Ireland. Many thanks to all of our clients who have acted as referees for us.

You can view Legal 500's comments in respect of HOMS on their website [www.legal500.com](http://www.legal500.com).

# New HOMS Website



Our website has a new look. Check it out at [www.homs.ie](http://www.homs.ie). You can also view past editions of HOMS News and other legal articles in What's New on our website. You can now subscribe to receive an emailed version of HOMS News as soon as it is published. An RSS feed is also available so that you do not miss any of our latest legal articles and news pieces on What's New.

# Multi-Unit Developments Act 2011

By Audrey Healy, Partner, Property Department

## Introduction

The Multi-Unit Developments Act 2011 was signed into law on 24th January 2011 and became fully operational on 1st April 2011. The Act provides a statutory framework for the operation and governance of multi-unit developments and addresses problematic issues between developers and home owners, such as transferring common areas, completion of developments, duties of home owners and developers, service charges and dispute resolution.

## What is a Multi-Unit Development?

Under the Act “Multi-unit development” means a development being land on which there stands a building or buildings comprising units where it is intended that the units share amenities, facilities and services and where the development contains not less than five units intended for residential use.

The Act applies to a building or part of a building which contains at least five residential units with shared amenities, facilities and services. A child care facility may be included in the multi-unit development. Mixed-use multi-unit developments are also covered by the Act which include a commercial unit in addition to at least five residential units. Some provision is also made in the Act for small developments which contain between two and five residential units.

## New Developments

### 1. Transfer of Common Areas

For all new developments, section 3 prevents a developer from transferring an interest in a

residential unit unless:-

- A management company has been established at the expense of the developer
- The common areas and the reversion in the residential unit have been transferred by deed to the management company
- A certificate is issued from a qualified person to the management company to the effect that the relevant parts of the multi-unit development are in compliance with the Building Controls Act 1990, and
- The developer and the management company, prior to the transfer, have entered into a written contract setting out their rights and obligations in relation to things such as statutory requirements, completion of works and dispute resolution, amongst others. Both parties must seek independent legal advice in respect of this procedure at the reasonable cost of the developer.

### 2. Beneficial Interest

In the transfer of the common areas and the reversion, the developer shall retain the beneficial interest therein in order to facilitate the completion of the development. Under section 11 of the Act, upon completion, the developer is obliged to swear a statutory declaration, the effect of which is that the beneficial interest and legal interest stand merged.

### 3. Voting Rights

Section 14 of the Act has introduced an important rule in relation to the voting

rights of unit owners in new developments. One vote of equal value shall attach to each residential unit in a multi-unit development to which the owner’s management company relates and that no other person is to have voting rights. This welcome provision will prevent the past practice of developers attempting to distort voting rights in the management company in their favour.

## Existing Developments

A number of significant provisions have also been introduced by the Act seeking to improve the position of unit owners of existing developments.

### 1. Transfer of Common Areas

Where, prior to the enactment of the Act, the ownership of a residential unit in a multi-unit development has been transferred to a purchaser but the ownership of the common areas has not, or where a multi-unit development has been substantially completed (if the sales of 80% or more of the residential units have been closed), the developer shall arrange for the transfer of the common areas to the management company before 1 October 2011.

### 2. Beneficial Interest

In the case of substantially completed multi-unit developments, the beneficial interest is reserved to the developer. On completion of the development, the developer is obliged to swear a statutory declaration that the beneficial interest has transferred to the management company.

### 3. Voting Rights

Section 15 of the Act provides that where the allocation of the votes is not one vote of equal value per unit, any person seeking to exercise those rights must be granted an authorisation from the Circuit Court in order to do so.

## Developers Duties

### 1. Completion works

Section 7 of the Act clearly states that the transfer of ownership of the common areas of a multi-unit development does not relieve the developer from “the duty, obligation or responsibility to ensure completion of the development” in compliance with planning and other legislation.

Section 9 ensures that developers retain such access rights as are reasonably necessary to complete the works. Developers are required to indemnify the management company in respect of all claims arising from the completion of works and carry adequate insurance.

### 2. Sinking Fund

Section 19 of the Act requires all management companies to establish and maintain a building investment fund, referred to as a “sinking fund”, with a payment of €200 per unit per annum, unless otherwise agreed by the members. The sinking fund must be established within certain time periods.

The purpose of the fund shall be to discharge expenditure reasonably incurred on various items such as refurbishment and improvement.

All contributions made to the sinking fund must be held in a separate account which clearly identifies the sinking fund and such contributions should only be used for certain expenditure specified in the Act.

### 3. Service Charges

Section 18 of the Act requires the management company to establish and maintain a scheme in respect of annual service charges (for discharging such specified items such as insurance, maintenance and repair).

The annual service charge can only be levied after approval by 75% of members present at a general meeting of members.

Section 18(10) is a significant provision which obliges developers to pay service charges in respect of unsold units which will relieve unit owners of having to bear the cost.

## Dispute Resolution

In the event of disputes arising in relation to the multi-unit developments, section 24 of the Act provides for a dispute resolution process on application to the Circuit Court.

The court may, at any stage in the proceedings, upon its own motion or upon request, direct the parties to meet to discuss and attempt to settle the matter at a mediation conference. Cost sanctions can be imposed where it is found that a party’s conduct is “substantially the cause of the failure to reach a settlement”.

## Restoration to the Register of Companies

The Act addresses the problem of management companies being struck off the Companies Register for non-compliance with reporting requirements. Generally, a company that has been struck off for a period of more than one year (extended to six years in certain circumstances) can only be restored by a costly application to the High Court.

## To Conclude

The Multi-Unit Developments Act 2011 will be welcomed by those buying or living in residential developments as it imposes greater legal obligations on developers and provides a sensible framework for management practices. These radical provisions will eliminate many of the problems being faced by new and existing developments and will improve the transparency and security of the development process.

## Summary

An owner management company must be established for all multi-unit developments at the expense of the developer.

Developers must transfer legal ownership of the common areas and reversion to the owner management company prior to the sale of any units within the development or by 1st October 2011 if units have already been sold.

Developers must complete development and transfer beneficial ownership as soon as practicable after completion.

One vote is attached to each residential unit.

A scheme of annual service charges must be established on approval of members at a general meeting. Developers are obliged to pay service charges in respect of unsold units.

A sinking fund must be established by 1st October 2012.

Dispute resolution and mediation sections are in place.

# Priority of Claims in Liquidation: The Outcome of the Belgard Motors Case

By Joe O'Meara, Partner, **Insolvency and Corporate Recovery Unit**

The High Court judgment and supplementary judgment of Ms Justice Finlay Geoghegan in the J.D.Brian Limited (In Liquidation) case (also referred to as the Belgard Motors case) has brought the issue of priority of claims in liquidation into the spotlight in Irish law. It will be a cause of some concern for the holders of floating charges, primarily financial institutions.

## Priority of Claims in Liquidation

Under Irish law when a company is wound up by reason of insolvency, a ranking system for creditors exists which provides that secured creditors, such as a bank with a fixed legal charge, rank first, then a class known as preferential creditors (which includes creditors such as unpaid employees and the Revenue Commissioners), then creditors holding a floating charge and, finally, unsecured creditors.

Section 285 (7) of the Companies Act 1963 (as amended) provides that preferential creditors have "priority over the claims of holders of debentures under any floating charge created by the company and be paid accordingly out of any property comprised in or subject to that charge".

A floating charge is a type of security provided by companies to a lender which "hovers" over the assets of the company

until a crystallising event occurs at which point the floating charge crystallises and becomes fixed.

## Priority of Floating Charges

The Belgard Motor case has now thrown a question mark over the status of a floating charge and indeed the crystallisation of a floating charge. Belgard Motors went into liquidation on the 7th December 2009 with estimated debts of €7 million. The High Court appointed Tom Kavanagh as liquidator of the company. Bank of Ireland had previously served a notice of crystallisation of its floating charge on the company on the 28th October 2009, in accordance with the terms of its debenture. The liquidator sought directions from the court and submitted that the floating charge had been validly crystallised and that Bank of Ireland should be paid in priority to any preferential creditor. The Revenue Commissioners however contested this claim and argued that their claim as a preferential creditor took precedence over the floating charge, crystallised or not.

On the 25th March 2011 Justice Finlay Geoghegan ruled that the correct interpretation of Section 285 (7) of the Companies Act 1963 is that the priority given to preferential creditors applies even where the floating charge crystallised prior

to the commencement of the liquidation. In making this order Justice Geoghegan departed from the persuasive UK decision of *In re Griffin Hotel Company Limited*. Instead the court adopted the approach of a dissenting Australian Judge Barwick CJ in the High Court of Australia case *Stein-v- Saywell* and the arguments raised in the 1982 Cork Report of Insolvency in the United Kingdom.

In a supplementary decision delivered on the 11th July 2011, the judge dealt with the effect of the notice served on foot of a clause in the debenture which provided that the bank could by notice in writing convert its floating charge to a fixed charge over company assets where the bank considered those assets in jeopardy. She held that the notice was not effective to convert the floating charge to a fixed charge as the debenture was silent as to any rights of the bank with reference to the assets after service of the notice and, more importantly, as to any restrictions on the company with reference to those assets. The judge found that the company was still at liberty to deal freely with the assets. Therefore the conversion to a fixed charge did not happen as it is a central characteristic of a fixed charge that the company should be restricted from dealing with the assets save with the consent of the bank.

## To Conclude

The decisions are landmark precedent judgments in the area of law determining priority of floating charges. The impact of the decisions will be significant and far reaching and will lead to far greater concentration by financial institutions on the ongoing status of preferential creditors' balances.

The judgments are currently the subject of appeal to the Supreme Court. Until the

issue of priority of floating charges is decided upon by the Supreme Court it will not be possible to finalise liquidations and receiverships involving such charges.

For further information or advice please contact Joe O'Meara, a partner in our Insolvency and Corporate Recovery Unit.

## Summary

Landmark precedent judgments in the area of law determining priority of floating charges have been decided in the High Court.

The judgments are currently the subject of appeal to the Supreme Court. Until the issue of priority of floating charges is decided upon by the Supreme Court it will not be possible to finalise liquidations and receiverships involving such charges.

## Derek Walsh Completes 42km Midnight Sun Marathon in Norway for St Gabriel's, Dooradoyle, Limerick.

Congratulations to Derek Walsh, HOMS Legal Assistant, for completing a 42km marathon in just over four hours for St. Gabriel's Dooradoyle, Limerick. The marathon was run in the midnight sun of Norway after Derek had undergone months of intensive training. Derek raised approximately €1,500 for a local cause which provides support for children with sensory and physical disabilities, such as providing a therapeutic hydrotherapy.

Further congratulations also to go to Derek for recently qualifying as a solicitor.



## HOMS sponsors the Limerick Chamber Presidents Dinner

HOMS were delighted to be one of the sponsors to the Limerick Chamber Presidents Dinner, which incorporated the Limerick Region Business Awards 2011, on Friday 21st October 2011.

Richard Bruton TD, Minister for Jobs, Enterprise and Innovation, was the guest speaker at the black tie dinner and awards which were held at the Limerick Strand Hotel. Congratulations go to the winners of the Limerick Region Business Awards (further details of the winners can be found on [www.limerickchamber.ie](http://www.limerickchamber.ie)).

Harry Fehily, our Managing Partner, past president of the Limerick Chamber Presidents Dinner, and acting member of the Chamber, was pleased to present the 2011 Best Large Indigenous Company Award to Bolgers, an engineering company.



Kieran McSweeney, President of Limerick Chamber of Commerce, Dr. Maria G. Hinfelaar, President of Limerick Institute of Technology, Siobhán Buckley, Partner, and Harry Fehily, Managing Partner at the Limerick Chamber Presidents Dinner and Limerick Region Business Awards 2011.

# Repossessions by Lenders Put on Hold

By Joe O'Meara, Partner, **Insolvency and Corporate Recovery Unit**

A recent decision of Ms. Justice Dunne delivered in respect of four separate actions taken by lenders to recover possession of registered land has resulted in such repossessions coming to a standstill. The cases were heard by Justice Dunne at the same time as the issues arising for consideration in each of the cases related to the repeal of Section 62 (7) of the Registration of Title Act, 1964 (hereinafter referred to as "Section 62 (7)") by Section 8 of the Land and Conveyancing Law Reform Act, 2009, (hereinafter referred to as "the 2009 Act") which came into operation on 1st December, 2009.

In these cases the lender sought to recover possession of registered land pursuant to the provisions of Section 62 (7). In each case, and prior to the 1st December 2009, a charge in favour of the lender was created on foot of the mortgage issued by the lender to the borrowers concerned and such charge was registered in the Land Registry.

## The Law

Section 62 (1) of the Registration of Title Act, 1964 provided that a registered owner of land could "...charge the land with a payment of money...and the owner of the charge shall be registered as such". Section 62 (7) further provided that "When repayment of the principal money secured by the ...charge has become due, the registered owner of the charge...may apply to the court... "for possession of the land or any part of the land...".

Section 8 of the 2009 Act repealed Section 62 (7) as and from 1st December, 2009.

## Submissions by the Lenders

The lenders sought inter alia to rely upon Section 27 (2) of the Interpretation Act, 2005 which provides "...where an enactment is repealed, any legal proceedings in respect of a right, privilege, obligation or liability acquired, accrued or incurred...may be imposed and carried out as if the enactment had not been repealed". The lenders argued that in circumstances where the new remedies provided for in the 2009 Act did not apply to mortgages or charges created prior to the commencement of that Act, it must have been the intention of the Oireachtas to rely upon the provisions of Section 27 of the Interpretation Act, 2005.

In deciding each of the cases, Justice Dunne held as follows:-

Proceedings for repossession of registered land commenced prior to 1st December, 2009 can be continued after that date. Such proceedings can be instituted after 1st December, 2009 provided that the lender had acquired the right to apply for an order pursuant to Section 62 (7) by the 1st December, 2009.

In order for a lender to have acquired the right to apply for such an order the principal monies secured by the mortgage must have become due and owing to it. The principal monies only become due and owing to a lender after a default or a certain other event has occurred, usually a demand for repayment of the principal monies having been made by the lender.

A lender has not acquired or accrued a right to apply for an order pursuant to Section 62 (7) where a demand for repayment of the principal sums is made after the 1st December,

2009 and that in those circumstances the provisions of Section 27 of the 2005 Act will not assist the lender.

## To Conclude

The effect of this decision for lenders is that in the case of any mortgage/charge entered into before 1st December, 2009 if:-

- the borrower defaulted prior to that date but no demand letter was issued by the lender;
- the borrower defaulted after 1st December, 2009

the lender cannot apply to the court for an order for possession of the property.

This decision is currently under appeal to the Supreme Court.

For further information or advice please contact Joe O'Meara, a partner in our Insolvency and Corporate Recovery Unit.

## Summary

Important judgments have been issued by the High Court in respect of repossessions pertaining to mortgages/charges entered into before 1st December 2009.

The decision is currently under appeal to the Supreme Court.

# HOMS Welcome New Solicitor to Our Corporate and Commercial Department

We are pleased to welcome and introduce to you George Kennedy, who recently joined our Corporate and Commercial Department in October 2011 from A&L Goodbody Solicitors, where he worked since 2005. George is a solicitor and registered tax consultant and has particular expertise in corporate acquisitions and disposals, corporate restructuring, corporate investments (including venture capital funding), corporate governance,

commercial agreements (including terms of sale and purchase and distribution and warehousing agreements) and general commercial law advices (including website terms and conditions, data protection, advertising, consumer protection and food and beverage labelling advices). The firm's Corporate and Commercial Department is headed by Siobhán Buckley. Siobhán and George's contact details can be obtained on our website at [www.homs.ie](http://www.homs.ie).



New solicitor George Kennedy pictured with Siobhán Buckley, Partner in our Corporate and Commercial Department

# HOMS Provide Legal Consultancy Prize to LIT's LEAP Programme Business Awards

The winners of Limerick Institute of Technology's Limerick Enterprise Acceleration Platform (LEAP) Programme Business Awards were announced on 20th June 2011 at the awards ceremony attended by Minister Brian Hayes TD.

Prizes to the value of €100,000 were awarded to start up businesses who won LIT's LEAP business awards.

Holmes O'Malley Sexton were pleased to provide three days legal consultancy as part of the first prize, two days as part of the second prize and one day as part of the third prize. We are looking forward to supporting the winners in their new businesses with legal help, advice and assistance.

The other prizes consist of equity investment from AIB Seed Capital Fund Investment, financial consultancy from Horwarth Bastow Charlton, a year's membership of Limerick Chamber of Commerce, mentoring from the Discovery Partnership and cash prizes from LIT, Deloitte and Cruickshank.

If you require information, help or assistance in respect of the legal aspects of your business please contact Siobhán Buckley, Partner in our Corporate and Commercial Department.



## Holmes O'Malley Sexton Scholarship

We were delighted to award this year's Holmes O'Malley Sexton Scholarship to University of Limerick law student Susan Rohan. The scholarship is awarded every year to the University of Limerick final year law student who achieves the highest grades. Susan is pictured here with the Hon Mr Justice George Birmingham, Harry Fehily, Managing Partner, and the Hon Ms Justice Mary Finlay Geoghegan.

## New HOMS website dedicated to Wills

We have a new website [www.homswills.ie](http://www.homswills.ie) dedicated to providing information on making and changing a will, extracting a grant, inheritance tax, creating a trust, enduring powers of attorney and challenging a will.

You can follow us on Twitter and Facebook and subscribe to our email newsletter.



### LIMERICK

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