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## *Season's Greetings*

Greetings from all of us at Hayes solicitors and Best Wishes for Christmas and the New Year.

The last couple of years have been particularly difficult and we hope that we have helped ease some of your legal burdens in these challenging times. I am pleased to say that we have been able to retain our solicitors and staff without any reductions in numbers. This is a tribute to our excellent staff, but it is also a tribute to you, our loyal clients, so our sincere thanks.

As ever, this newsletter contains a mixed bag of topics, which I hope you find interesting. Please let us know if you would like further information on any of the topics raised.

We have a number of seminars planned for early in the New Year. In January we are hosting a major conference on Media in Ireland and Defamation Law in the light of the recent legislation with a number of high profile speakers. We also have planned a seminar on wills, estate planning and enduring powers of attorney for February which we find is always of interest to clients to ensure they have their personal affairs in order.

As always in December we thank you for your support during the year and wish you, as valued clients and readers, a peaceful Christmas and Happy New Year. We trust you will accept these good wishes in lieu of Christmas cards. As in the past we are making a contribution to a number of charities, this year to Down Syndrome Centre and the Irish Cancer Society.

We hope we can continue to serve your needs in an efficient, professional and cost effective manner in 2010.

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# Make your own decision



Louise O'Rourke

**Buzzwords in some circles at the moment are advance care directives also known as living wills.** The Law Reform Commission recently made recommendations in relation to advance care directives and it is hoped that these will be dealt with in the Mental Capacity Bill.

In brief, an advance care directive is a document prepared by a person of full capacity, intended to be activated in the event of future incapacity. It leaves instructions as to how they are to be treated in certain defined situations. As there is no right to dictate treatment decisions, instructions tend to be expressed in terms of what

treatment may **not** be given. Any such advance directive is overridden by a later competent contemporaneous decision. The idea of an advance care directive is generally associated with decisions concerning end-of-life care and particularly withdrawal of life-sustaining treatment, but applies equally to other situations, for example, blood transfusions and organ donation.

At the moment, the options available when a person has lost mental capacity are to make them a Ward of Court or to register an Enduring Power of Attorney (EPA). Both mechanisms have their uses, but are limited in that neither procedure allows either the court in Wardship proceedings, or an appointed attorney (EPA), to make healthcare decisions.

Making someone a Ward of Court is an unwieldy, expensive procedure in the High Court. If a family member is made a Ward of Court, the family must go to the Office of the Wards of Court in order to make almost any decision about an individual.

An Enduring Power of Attorney is preferable ideally. An EPA is a document, which is signed by someone when of full capacity. It allows the person (the Donor) to appoint chosen individuals as attorneys. These attorneys will ultimately have authority to make decisions in relation to the donor's property, financial, business affairs and can also make personal care decisions, in the event that the person loses their decision-making capacity. An EPA must be registered in the Office of the Wards of Court.

The Law Reform Commission has prepared a draft Bill on advance care directives in the hope that it will be easily incorporated into the existing Mental Capacity Bill. As stated, the current legislative framework of the EPA or Wardship does not allow for another person to make healthcare decisions for an individual. The Mental Capacity Bill envisages extending powers so that such decisions can be made by way of a living will but will specifically exclude decisions involving refusal to consent to artificial life-extending treatment or consent to organ donation or to non-therapeutic sterilisation.

In part the purpose of the Mental Capacity Bill is to create a new substitute decision-making process for protecting vulnerable adults, involving a new Court for Care and Protection and the appointment of a Personal Guardian.

People are increasingly enquiring about making advance care directives when they come into solicitor's offices to prepare wills—often at the same time as execution of an EPA—due to a wider awareness about end of life care and planning for the unknown.

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## The Coroner – a Layman's Guide



Lisa Timmons

The Coroner is an independent person with responsibility to investigate sudden and unexplained deaths. If a person dies a sudden, unexplained, violent or unnatural death, the Coroner will arrange a post-mortem examination which will determine whether or not a death is due to natural causes. The post-mortem is carried out by a Pathologist who is appointed by the Coroner. After the post-mortem the Coroner may decide to hold an Inquest.

At an Inquest, it is the Coroner's principal role to establish when, where and how the death occurred. It is not the Coroner's role to determine who

is responsible for the death and any criminal or civil liability cannot be considered or investigated. An Inquest is not a Trial but rather an inquiry into the facts that surround the sudden and unexplained death. The Coroner is independent of the Garda Síochána, Medical Services, State Agencies or anyone who may have an interest in the outcome of the death investigation.

The Coroner's Act 1962 is the legislation that covers the work of a Coroner and Inquests. The Coroner's Amendment Act 2005 abolished the restriction on the number of medical witnesses from whom a Coroner could hear evidence at an Inquest. It also increases the sanctions for

both jurors and witnesses who do not co-operate with the Coroner. The Coroners' Bill 2007 reforms the legislation and structures and establishes a New Coroners Service. However, this Bill is still at Committee stage and is unlikely to be in force for some time yet.

An Inquest is always held in public and the Coroner will decide whether or not a jury will hear the case. In advance of the Inquest, the Coroner will receive depositions from the relevant people involved, post mortem reports and medical records, if relevant. The Coroner may call medical or expert witnesses. The purpose of this is not to establish blame but rather to establish the circumstances surrounding the death. Evidence is heard in a logical sequence in relation to the circumstances surrounding the death. The Coroner has the sole responsibility to determine which witnesses should be called.

At the conclusion of an Inquest, a verdict will be returned by the Coroner in relation to how, when and where the death occurred. The type of verdicts which can be returned include open verdict, misadventure, natural causes, accidental death or in some cases, unlawful killing.

The types of cases dealt with by Inquest involve road accidents, accidents at work and unexpected deaths in a hospital. Juries at an Inquest may also make recommendations which ensure a safer environment for the public.

In 2008 there were a total of 12,860 deaths which were reported in to the Coroner in Ireland. Of this number 5,693 proceeded to a post-mortem examination and 2,274 proceeded to an Inquest.

If you are called to give evidence at an Inquest and have any concerns, feel free to contact Hilary Muldowney for advice.

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# Media



Geraldine Kennedy, Andrew O'Rorke and Colm Keena outside the Supreme Court

## Winning On The Principles

The Supreme Court gave judgment on 31 July in the appeal brought by our clients Geraldine Kennedy and Colm Keena of The Irish Times against a High Court Order made in 2007. The High Court had ordered that the Appellants attend before the

Mahon Tribunal to answer all questions to which the Tribunal might require answers in relation to the source of documents (subsequently destroyed in the face of a Tribunal Order) which resulted in a story appearing in the Irish Times on 21 September 2006 concerning payments made to Bertie Ahern in December 1993 when he was Minister for Finance.

A five judge court, presided over by Chief Justice John Murray, heard the appeal in December 2008. In probably the most expansive legal argument yet heard by the court on media rights in the context of Articles 40 of the Irish Constitution and Articles 8 and 10 of the European Convention on Human Rights, detailed submissions were considered on the integrity of Tribunals, the rights and privacy of those being investigated, freedom of expression, freedom of the press, protection of sources and the role of journalism in contemporary society.

The unanimous judgment of the court given by Mr. Justice Fennelly held that the appeal turned entirely on the balance struck by the High Court

between the power of the tribunal to investigate and the right of the Appellants to refuse to disclose any information about their sources. He found that the information in question, relating as it did, to allegations of the payment of monies to an important political figure, was a matter of public interest, which a newspaper would, in the ordinary way be entitled to print. This is notwithstanding the fact that certain document(s) the source of the story were destroyed having been sought by the Tribunal.

## Losing On The Costs!

On 26 November the same Court found that given the particular circumstances of the case, resurrecting the elephant in the room – the destruction of documents, the Tribunal was entitled to recover the costs of the High Court and Supreme Court hearings from The Irish Times notwithstanding the Supreme Court's earlier specific finding that the Order of the High Court was not justified and the issue was (not) to be determined "...by the need to mark disapproval of the unquestionably 'reprehensible conduct' of the appellants." The Court had also said that it did not think "...the High Court was correct in reaching the conclusion that the 'destruction of these documents by the defendant is a relevant consideration to which great weight must be given in striking the correct balance between the rights and interests at issue on the application".

The Court in its ground breaking decision on costs, having referred to an earlier decision on "discretion", failed to cite any precedent where the costs of the High Court and Supreme Court were awarded against a successful appellant, appears to have found a way to severely penalise The Irish Times and to resile from its own finding that the Order being made had "to be justified by the situation as it now exists and not by the need to mark disapproval ..."

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## "Media and Irish Society post Defamation Act 2009"

On 21st January 2010 we are hosting a major seminar on the relationship between the media and Irish society following the passage of the Defamation Act 2009. The seminar will be chaired by Mr. Justice Peter Kelly and among the contributors will be Professor Tom Mitchell, Chairman of the Press Council, Mr. Martin Cullen TD, Minister for Arts, Tourism & Sport, Ms. Geraldine Kennedy, Editor of The Irish Times and John O'Sullivan, journalist with The Irish Times. Andrew O'Rorke and David Phelan of Hayes will recall the history of the reform of our defamation legislation and the likely effect of the new proposals. If you are interested in attending, please contact us at [koconnor@hayes-solicitors.ie](mailto:koconnor@hayes-solicitors.ie)

## Defamation Act 2009

Probably the longest running saga concerning legislative reform finally came to an end during the summer when the President signed the Defamation Bill 2006 into law (although its commencement date is still awaited!). The impetus to reform the law on defamation originated in 1987 and following numerous reviews, reports, consultations, discussions and beseechings the end product resulted in a mild non controversial Act – excepting the provisions on blasphemy which have no bearing on defamation.

The Act will come into force as soon as appropriate rules have been adopted for the Superior and Circuit Courts. It modernises the law and puts it on a par with other civil legislation governing the rights of citizens in the conduct of litigation. Proceedings will have to be instituted within one year of the defamation; an apology will not be regarded as an admission of liability, the lodging of a sum of money in satisfaction of the plaintiff's claim will not be accompanied by an admission of liability; Juries can be addressed on the nature of damages and comparative awards; an aggrieved party can now apply speedily to the Circuit Court for vindication of his/her good name without seeking damages. The case to be made for the complainant and the intended nature of the defence must be shown in advance of the trial by the exchange of appropriate Affidavits. Courts can direct the publication of apologies subsequent to a hearing. None of these changes are revolutionary in their content or application but should lead to more efficient, sensible and timesaving procedures.

Hayes were heavily involved in the promotion of the legislation as advisors to the National Newspapers of Ireland who in the person of Frank Cullen led the movement for change over the past 20 years. Parallel to the legislation has been the creation of the Press Council in operation now for almost 2 years, in which we were again involved as solicitors to the Steering Committee which drew up the proposals for its creation and which led to the establishment of the Offices of the Press Council and Press Ombudsman for whom we also act. Complainants who previously did not wish to go to Court, or who had no right to do so under existing law, can now avail of a quick, effective and free service to seek a remedy for their complaint from the new offices.



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# Does Dickins Open The Flood Gates?



Carol Fawsitt

In the Winter 2007 issue 13 of our Newsletter I commented on a UK decision in *Daw V Intel Corporation* which involved an employee who had drawn her employer's attention to her stress in a series of memoranda. Ultimately the employee had attempted suicide. In that case the employer had provided for counselling services and because it had done so believed it had no further responsibility to the employee. However,

the Court decided that the provision of counselling services did not alleviate the employer's liability for the damage caused to the employee's health.

In the UK case of *Dickins V O2* the employee had made her employer aware over a period of many months that she was under "palpable stress" and was "about to crack up". The employee had a clerical role that included a quarterly audit which she found very stressful. As a consequence she began coming into work late on a regular basis. She complained about the stress of her job and asked if she could be moved to a less stressful position, but as there were no vacancies immediately available she was told that this would be reviewed in 3 months time. Some time later the employee told her line manager that she did not know how long she could keep going because she would become ill and requested a 6 month sabbatical. Her employer however did not accede to her request and advised her to contact the O2 confidential helpline. A month later the employee repeated her concerns in her Personal Development Review and at that stage the employer referred her for assessment to Occupational Health. However, before the Occupational Health appointment took place the employee suffered a breakdown. The Court of Appeal decided that the employer was liable for the stress related personal injury suffered by the employee.

In Ireland for an employee to succeed in a stress at work claim for damages for personal injury there are a number of hurdles to be overcome. Firstly, the injury must be of such a nature as to give rise to a psychological/psychiatric disorder or illness. Ordinary stress will not suffice as most people suffer stress to some degree in their workplace. Secondly, the injury must have been caused by the workplace. If an employee has a genetic predisposition to a psychological or psychiatric condition, which is unrelated to the workplace, the employer may not be held fully responsible for the damage to the employee's health. Thirdly, the injury sustained by the employee must be reasonably foreseeable by the employer for the employer to be held fully liable. As a consequence of the Supreme Court decision in *Berber V Dunnes Stores* it is a defence if the employer can demonstrate that it acted reasonably in all the circumstances of the case.

Whilst the decision of the Court of Appeal in the *Dickins* case is a UK decision it may have persuasive value in Ireland and consequently it is arguable that the hurdles to be overcome by an employee in

these types of cases have been somewhat lowered with the result that more stress at work claims may now succeed.

In *Dickins* the Court of Appeal decided that the claimant's psychiatric injury was held to be reasonably foreseeable from the point at which she requested a sabbatical as her breakdown had not "come out of the blue" and there was sufficient warning of the risk of harm to her health. Although O2 referred Ms. Dickins to their helpline for confidential counselling this was not regarded by the Court of Appeal as adequate to discharge their duty of care. Indeed the Court went further and said that because Ms. Dickins was complaining of severe stress, O2 should have used "managerial intervention" to send Ms. Dickins home pending an urgent investigation by Occupational Health, even though she had not been signed off sick by her own GP. Accordingly, as a consequence of this decision employers could well find themselves under a duty to use some "managerial intervention" and to do more than simply refer their employees to a helpline when they are notified of an employee's suffering severe stress. Proactive intervention may now be required.

This decision in *Dickins* may have significant impact as previously the burden of proof was on the employee to establish that the employer's breach of their duty of care was one of the potential causes for the damage to their health. But in *Dickins* the Court accepted an "obvious inference" that O2 failed to recognise Ms. Dickins need for a rest, change her work or address her problems. This failure made a "material contribution" to Ms. Dickins breakdown and effectively tipped her over the edge. The Court's drawing of an "obvious inference" means that employees will not have such a difficult hurdle to overcome in terms of proving causation in the future with the result that more claims for psychiatric injuries caused by occupational stress will be brought against employers and may well be successful.

For employees suffering stress and contemplating making a claim against their employer they would be well advised to notify their employer of their problems as soon as they arise in order to demonstrate that any future injuries they suffer could have been anticipated.

As for employers they would be well advised to review their policies (including processes and procedures) in relation to referring employees to confidential counselling, helplines or for occupational health assessments when they are notified that an employee is suffering from stress. If an employee indicates that he/she is suffering from severe stress, employers would be well advised to consider further managerial intervention by proactively referring the employee urgently to an Occupational Health Specialist, including following up on that referral or making the employee stop working altogether until further investigations have been completed.

Could the *Dickins* outcome arise in Ireland? The consequences for employers in not reviewing their policies and taking prudent and effective steps in relation to their employee's health is to run the gauntlet of substantial damages being paid to a successful claimant. In *Dickins* the employee received over Stg£100,000.00 — an expensive lesson indeed and one to be avoided by proactive intervention.

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# Divorce in a Cold Climate



Justin Spain

The recession is well and truly upon us and its effect is being felt in every aspect of life in Ireland. Its impact is also being felt in a very significant way in the family law courts where the dramatic downturn in the economy and in asset values has resulted in an increasing number of people turning to the courts for assistance when they cannot meet their financial obligations arising from a separation or divorce. This has created a new set of problems for the courts to deal with because since the introduction of the judicial separation legislation in 1989 and divorce

in 1997 the Courts for the first time have to grapple with family law in the context of a severe recession.

So under what circumstances do the courts have the jurisdiction to deal with such situations? If the parties have resolved matters in the context of a separation, whether by Deed of Separation or by judicial separation, then there is a forum available to them to revisit matters at divorce. In other words, it is open to the parties to issue divorce proceedings after they have been living apart for four years and in the context of those proceedings the parties can ask the court to revisit any previous separation agreement or court order.

However, what options are available if a divorce has already been granted to the parties? Unlike a separation, a divorce can only be granted by a court. A court will grant a divorce either based on the terms of the settlement agreed between the parties or, if no agreement can be reached, by imposing orders on the parties after a full hearing of the case. The question then arises as to whether the courts are entitled to review a divorce order at a later date if the financial circumstances of one of the parties has deteriorated.

The answer is that section 22 of the Family Law (Divorce) Act 1996 entitles the court to vary certain types of orders granted at divorce but not all types of orders. Orders relating to maintenance, lump sums payable by instalments (where certain instalments remain unpaid) and certain types of property adjustment orders can be varied by the court if the court "considers it proper to do so having regard to any change in circumstances of the case and to any new evidence".

However there are other kinds of orders that cannot be varied under section 22. For example, a simple lump sum order (i.e. a once off lump sum payment rather than a payment by instalments) cannot be varied. Further, the wording of section 22 does not give a court the jurisdiction

to vary a simple property adjustment order, for example the transfer by one spouse of his or her interest in a property to the other spouse.

So is there anything that a party to a divorce can do to vary an order granted at divorce that does not fall within the ambit of section 22? In the recent case of *O'C v O'C* the High Court had to deal with such a situation. In this case the financial circumstances of the husband had deteriorated significantly since the conclusion of the case to the extent that he was now unable to comply with his obligations under the order, in particular the transfer of certain properties to the wife. The husband sought to reopen the whole case and sought from the court new orders to reflect the current financial circumstances of the parties. Ms Justice Dunne refused to do so. However, Ms Justice Dunne did make a further property adjustment order on the family home and instead of the family home being transferred to the husband (as per the original order) a new order was made under which it was transferred to the wife.

In refusing to reopen the case Ms Justice Dunne upheld the general rule that the courts will not revisit court orders, especially orders formalising terms of settlement negotiated between the parties where such terms of settlement were freely entered into at arms length by parties who had received proper legal advice. However, Dunne J said that applications to vary or to set aside terms of settlement would be entertained in certain circumstances. In this regard she stated that in order for an application to vary to be successful new unforeseen events must have occurred since the making of the order that invalidated the basis on which the order had been made so that an appeal would be certain or very likely to proceed if an appeal had been made at the time the order was granted. Further, the Judge stated that the new events should have occurred within a relatively short time after the making of the order. The husband failed in his application to set aside the settlement. The case seems to suggest that where financial difficulties were not wholly unforeseeable at the time of a settlement, particularly a recent one, it will be difficult to succeed with an application to vary based on those financial difficulties.

This begs the obvious question of where this leaves the spouse who was to receive, for example, a lump sum, which cannot now be paid. In other words what happens if, for example, a husband cannot comply with an order to pay a lump sum to his former wife but yet does not meet the criteria set out above to allow him to request the court to vary the order? Such a situation leaves the wife in a very unsatisfactory position. Her husband may genuinely not have the money to pay the lump sum but there may not be any point in bringing him back to court to have the order enforced. The order will remain in place in any event and it may be that in such circumstances the wife may have to bide her time until the husband's financial position recovers, if at all.

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## Mediation

Eugene Davy is a CEDR (Centre for Effective Dispute Resolution) accredited Mediator. Over recent months Eugene has established a small group of very experienced Family Law Practitioners who are also CEDR accredited Mediators. One of the main features of the CEDR model of Mediation is that it is Lawyer Assisted i.e. the parties attend Mediation with their legal advisers. Eugene's group is developing a particular form of Lawyer Assisted Mediation which will be particularly appropriate for addressing and resolving family law

disputes. One great feature and advantage of Mediation is that it looks forward, encouraging the parties to turn from the history and look to the future. In contrast to litigation and arbitration, Mediation provides an opportunity for parties to control the outcome of their dispute, even when direct negotiations have failed. With Mediation needs – whatever they are – are more important than legal rights and obligations. [edavy@hayes-solicitors.ie](mailto:edavy@hayes-solicitors.ie)

# Everyone Needs Good Neighbours



Jackie Buckley

Most of us dread that knock on the door when our neighbours pop in to share their excitement at carrying out building works to enhance their property. We often find ourselves asking questions such as will the noise keep me awake and will the works have any negative impact on my own property? Or perhaps it is you that wants to do works on your property.

The Land and Conveyancing Law Reform Act 2009 has introduced specific provisions dealing with party structures. The Act came in to force on 1 December 2009. Now, if you own a property or land you can carry out works to

a party structure in order to comply with a notice or order served on you, to carry out development which is exempted development or development for which planning permission has been granted, to preserve a party structure or to carry out other works which will not cause substantial damage or inconvenience to your neighbour.

What exactly is a "party structure"? It means any arch, ceiling, ditch, fence, floor, hedge, partition, shrub, tree, wall or other structure which divides properties. It includes structures which are on your neighbour's property or those which straddle the boundary line. "Works" are also widely defined and include amongst other things maintaining, repairing, replacing, strengthening, taking down, cutting hedges and trees, clearing ditches and carrying out inspections and drawing up plans.

The new laws do not give you the absolute right to do whatever you want. If you cause damage when you are carrying out the works you must make good this damage or reimburse your neighbour in order to allow them to do so. You must also pay your neighbour the reasonable costs of them obtaining professional advice to advise them on the consequences of the works which you propose carrying out along with reasonable compensation for the inconvenience caused by the works. You should bear in mind that if the works that you are carrying out will be of benefit to your neighbour you may in certain cases be able to claim a contribution from them. If you fail to make good the damage within a reasonable time, you fail to reimburse costs or your neighbour fails to meet your claim for contribution then an application can be made to court.

If you simply cannot agree with your neighbour then you can apply to court for an order authorising the carrying out of the works and this is called a "Works Order". The court can order the carrying out of the works on such conditions as it thinks is necessary. These conditions may be such as to allow you to enter on to your neighbour's land to carry out the works and the order may require you to either indemnify your neighbour for any damage you may cause or give security to your neighbours. The works order cannot authorise a permanent interference with or loss of any right which your neighbour may have in relation to the party structure such as the right to light.

In spite of this new piece of legislation, the best way to live harmoniously with your neighbours is to discuss any development plans with them and carry out any works with their full understanding and consent. This legislation will be very useful as a last resort if this is not possible but there is no guarantee that your relationship with your neighbour will be any better in the long run if you avail of it.

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## Examinership



Laura Fannin

Given the major slowdown in economic activity in Ireland many companies are now facing financial difficulties and this has led to a significant increase in the number of troubled companies seeking to enter the examinership process. The process of examinership has received considerable media attention in recent months due to a number of high profile companies such as O'Brien's Sandwich Bars, the Zoe Group, the Lynch Hotel Group and Smart Telecoms applying to the High Court to be placed in examinership.

Examinership is a process whereby the protection of the

Court is obtained to assist the survival of a company. Essentially the process gives a company breathing space to deal with its debts and restructure its business. Once a company is placed in examinership, creditors cannot seek repayment of outstanding debts for a period up to 100 days.

The company's directors, creditors or shareholders can apply to the Court to place the company in examinership. Typically it is the directors of the company who will make the application.

In order to obtain the protection of the Court, a company must illustrate, through an independent accountant's report, that it has a reasonable prospect of survival as a going concern. Both the High Court and Supreme Court recently rejected the application by the Zoe Group, on the basis that the group did not illustrate that if it was placed in examinership it would have a reasonable prospect of survival.

If the Court is satisfied that a company has a reasonable prospect of survival it may appoint an examiner to that company and the period

of Court protection will begin.

Once appointed, the examiner's function is to literally "examine" the company and to formulate a new financial plan to secure the financial future of the company, known as a scheme of arrangement. Under the scheme of arrangement the examiner will seek to significantly write down the debts due to creditors. The level of the write down will vary from company to company.

The examiner usually tries to save the company by obtaining new investment in the company, selling a certain number of core assets of the company or attracting fresh borrowing. Given the current difficulties in obtaining funding from banks, most successful examinerships are due to investment by third parties.

The examiner must put the scheme of arrangements before a meeting of the creditors of the company for approval. The scheme of arrangement is approved by the creditors if the majority in number and value vote in favour of it. The Court must then ultimately approve the scheme of arrangements in order for it to become binding.

If the Court does not approve the scheme of arrangement or it is not successfully implemented, the protection of the Court is withdrawn and liquidation and/or receivership follows.

During the Celtic Tiger this process was seldom used, but since the deterioration in the economy the number of companies seeking to appoint an examiner has increased substantially.

While examinership can enable the survival of companies for the benefit of its employees and the economy as a whole, not all examinerships will be successful. Recent figures indicate that for every three companies which enter examinership only one will survive and the other two will go into liquidation. This marks a dramatic change in previous success rates. Between 2002 and 2006 approximately 95% of companies entering into examinership survived as viable entities.

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# Will you move in?



Rachel Rodgers

## When the Civil Partnership Bill is passed, will it be too dangerous to ask?

We have previously updated you on the Civil Partnership Bill and the imminent recognition of same-sex partnerships. A less publicised aspect of the Civil Partnership Bill deals with co-habiting couples. The Bill provides that once qualifying criteria are met, the more vulnerable in the relationship will be able to make an application to court for provision from the co-habiting partner. In light of these changes, people might be less inclined to ask the big question – “Will you move in?”

The Bill affects anyone who is cohabiting. Cohabitants are defined as opposite sex or same sex couples who “live together as a couple in an intimate and committed relationship and who are not related to each other within the prohibited degrees of relationship or married to each other or civil partners of each other”.

If cohabitants have been living together for more than 3 years, or for 2 years if they have a child together, at the end of the relationship, the more financially vulnerable in the relationship can apply to court for relief from their partner. At present, the Bill provides that time spent living together before the commencement of the Act can be taken into account in establishing whether or not a couple have lived together for the required 2 or 3 years. An action must be taken within 2 years of the end of the relationship and the case may be heard “in camera”, that is, in private.

The kind of relief a cohabitant can seek is similar, though not as comprehensive, as that sought by a spouse on judicial separation or divorce and includes Property Adjustment Orders, Maintenance Orders, Attachment of Earnings Orders, Pension Adjustment Orders, and Application for Provision from the estate of the cohabitant.

Living with someone for the required period and being the more economically vulnerable does not per se mean that you will be entitled to compensation on the break up of the relationship. The court can only grant relief where it is “just and equitable to do so” – that is, where in all the circumstances it appears to the Judge to be the right thing to do

In deciding whether an application for relief can be made, the court will take into account the duration of the relationship, the nature and extent of common residence, the degree of financial dependence or independence, the degree to which the cohabitants present themselves as a couple and whether there are any dependent children.

The question then arises, is there a way to avoid unwittingly falling within the ambit of this legislation? The answer is yes.

The Bill recognises the validity of Co-habitation Agreements. It provides that an agreement between two people, which addresses financial arrangements either during or at the end of their relationship, will be valid if each party has either received independent legal advice, or waived this opportunity in writing, the agreement is in writing and signed by both parties.

In an agreement, a couple can decide to opt out of the provisions of the Civil Partnership Bill referred to above. Such an agreement could only be set aside in very “exceptional circumstances”. What exactly they are remains to be seen.

It appears that co-habitation or co-ownership agreements in force prior to the commencement of the Act will be enforceable and it is recommended that if you wish to avoid any doubt, you discuss these matters with your partner now.

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# The importance of small print



Matthew Austin

## It may be time to check your website terms and conditions

A recent English case has re-opened the debate on the law of negligent misstatement on a website. The Court decided that the owners of a website were not liable for damages, even where a consumer took information from their website and acted on it to his detriment. The case highlights the importance of having usage terms and conditions on a website, and more particularly, the importance of having a disclaimer.

Mr Patchett (the Plaintiff) had sought the name of a reliable contractor for the installation of a new swimming pool in his garden. He selected Crown Pools Limited (Crown) from the website of the Swimming Pool and Allied Trade Association (SPATA), relying on a statement made on the website that “pool installer members [of SPATA] are fully vetted before being admitted to membership with checks on their financial record, their experience in the trade and inspections of their work”. Unfortunately for Mr Patchett, Crown was only an affiliate of SPATA, rather than a full member. To have learned this, Mr Patchett would have had to have made further independent investigation and obtained the information pack advertised on the website, a step which he did not take.

Crown subsequently ceased trading during the course of the build and Mr Patchett lost the staged payments he had made and had to engage another contractor to finish the job.

The majority of the Court decided that Mr Patchett had not taken all the steps required of him to satisfy himself of the soundness of the contractor. SPATA were not held liable for the loss incurred by the Patchetts.

In light of this case you might consider looking again at your website terms and conditions.

The prudent website proprietor should include carefully drafted terms and conditions of use on their website. A link to these terms and conditions should be easily identifiable to the user when accessing the home page.

All terms and conditions of use should include a privacy policy, which outlines how any personal information provided by the user will be processed by the website.

The law requires that certain information is provided on your website. For instance, all limited liability companies must provide the name of the company, the address of the registered office, the company number and its place of registration on the website.

A comprehensive set of terms and conditions of use will address more than the basic elements discussed here. It is important that your website is adequately protected by appropriate terms and conditions of use.

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# Do what your Business does Best: Outsource the Rest



Breda O'Malley

Outsourcing is an important aspect of the business strategy of many Irish businesses. Outsourcing can exist in a myriad of ways, extending from quite basic arrangements (e.g. outsourcing payroll services, archive storage etc.) to sophisticated business operations (e.g. outsourcing manufacturing and distribution functions).

## What is Outsourcing?:

Outsourcing is an arrangement whereby one party (the "Contractor") disposes of a non-core part of its business to another party (the "Supplier"), and the Supplier then integrates that transferred business, together with its own resources,

to provide services to the Contractor.

**The Rationale:** The Supplier achieves economies of scale by combining the outsourced business unit into the Supplier's business as a specialist provider of the relevant services. Those economies of scale translate into reduced costs for the Contractor. Outsourcing provides the Contractor with a predictable stream of service charges.

The Supplier's business provides greater expertise and better quality services to the Contractor, than the Contractor could provide for itself.

**The Contract:** Outsourcing arrangements involve detailed and complicated documentation that must by its nature clearly allocate risk and responsibility between the Contractor and Supplier, while retaining flexibility to allow for an ever-changing relationship over the course of the agreement (which can last from anywhere between 2-10 years typically).

The principle concerns when outsourcing include:

- the transfer of assets (and often personnel) from the Contractor to the Supplier be managed effectively without disruption to on-going services;
- that the services are performed to an acceptable standard by the Supplier, measured by reference to specified performance criteria and service levels;
- that charges for the services are controlled, typically based on pricing models;
- the services are updated and adapted to meet the Contractor's changing requirements;

- that the Contractor may resume provision of the services, or transfer the responsibility to another supplier, if the agreement is terminated.

Particular legal issues arise in outsourcing in relation to staff and data protection.

**Staff Issues:** Staff issues play a vital role in any significant outsourcing arrangement. Communication with employees is vital. Under the Transfer of Undertaking Regulations, employees of the Contractor assigned to the activity that is to be outsourced may have the right to transfer to the employment of the Supplier, with their then current terms and conditions and prior service period maintained by the Supplier. Similar employee rights may also arise upon the termination of an outsourcing arrangement, for example, where a new supplier is appointed for further outsourcing of the business activity concerned or where the service is reintegrated within the Contractor's own business operations.

The Contractor or new Supplier may be reluctant to take on some or any of the staff concerned. In certain circumstances it can be controversial and unclear as to whether the Transfer Regulations apply. It depends on whether there is a transfer of a part of a business. One must consider:-

- the type of business being outsourced;
- what assets (if any) transfer from the Contractor to the Supplier, whether tangible or intangible (example premises, equipment, facilities, trucks);
- whether some or all of the employees who worked in the business being outsourced are transferring with the outsourced business. This is particularly significant in labour intensive businesses such as cleaning, security, maintenance etc where the core attribute of the outsourced business is its people;
- whether the outsourced business will be organised in a similar manner to how it was organised before being outsourced.

**Data Protection:** Data Protection issues must also be considered carefully to ensure that the transfer of personal data from the Contractor to the Supplier is compatible with Data Protection Legislation. The Contractor is required to ensure that a written contract exists between it and the Supplier whereby the Supplier agrees to process the data solely in accordance with the instructions of the Contractor and to comply with the data security obligations under data protection legislation.

**Is it Worth Outsourcing?:** The legal obligations may appear to be rather onerous, causing businesses to wonder if outsourcing is really worthwhile. However, when one thinks of the irresistible benefits that outsourcing may bring, the legal hurdles can easily be surmounted.

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## Firm News

As always, we like to give you an update on what is going in the lives of the people that make up the firm here in Hayes.

Congratulations to Gráinne MacDougald and her husband Ian on the birth of their first child. Kate is a beautiful baby girl and we wish her Mum and Dad all the very best.

We welcome Judy O'Kane back from her travels. It's hard to believe that eighteen months have passed since Judy waved a temporary goodbye as she headed off around the world.

Trainee, Zoe Richardson travelled to Zambia recently with "Habitat for Humanity" where she and her team built two houses during their two week stay.

Rachel Rodgers was awarded a Commendation in her Family Law Diploma, being presented with her scroll from our own Eugene Davy, one of the contributors to the Diploma Course.

We also extend our congratulations to Ciara Deasy, Neasa Seoighe, Yvonne Joyce, Jonah Keatinge and Conor O'Dwyer who have completed their traineeship with Hayes and will become qualified solicitors this Christmas. Ciara was also awarded a Diploma in Employment Law in the Law Society. Yvonne was awarded the Overall Prize in Dublin for coming first in Law Society Class and successfully completed her tax exams, passing with flying colours.

## ... The Firm ...

**Partners:** Andrew O'Rorke (Chairman), Terence Moran (Managing), Ciarán O'Rorke, Caroline Crowley, Carol Fausitt, David Phelan, Eugene Davy, Hilary Muldowney, Judy O'Kane, Jackie Buckley, Joseph O'Malley, Breda O'Malley

**Associates:** Deirdre McCarthy, Gráinne Macdougald, Davnet O'Driscoll, Louise O'Rourke, Justin Spain, Margaret McGinley, Sabrina Burke, Anne Lyne, Kevin Dunne

**Solicitors:** Rachel Rodgers, Marie O'Riordan, Laura Fannin, Aoife Nally, Martha Wilson, Matthew Austin

**Consultants:** Peter S. Harrison, Ruth Shipsey

## ... Disclaimer ...

The contents of InBrief do not constitute legal or commercial advice but are merely indicative of current developments in the law. Readers should seek specific advice, preferably from Hayes solicitors (!) before making any decisions.

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