

# In Brief

Issue 19  
Winter 2010

 **Hayes**  
solicitors

Incorporating Fawsitt Solicitors  
& Eugene Davy Solicitors

## Life goes on

The last couple of years have been extremely difficult for many, in particular those facing the continuing effects of the economic downturn. 2011 will undoubtedly bring further challenges but as Robert Frost once said “ In three words I can sum up everything I’ve learned about life. It goes on.” At Hayes, we will continue to go on and assist you, our most valued clients, with loyalty, efficiency and professionalism.

There are many aspects of our lives; whether in sport - our golfers and rugby stars; the environment - our initiatives on the smoking ban and the levy on plastic bags which were inspirational and groundbreaking; business - despite the recession our unemployment figures have

fallen in each of the last three months and culture - as we go to print we still have a contestant on the X Factor... which give us reason to be cheerful and proud of our country on the World’s stage.

As 2010 nears an end we would like to thank each one of you for your continued support during the year and wish you a most 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, including the Down Syndrome Centre and the Irish Cancer Society.

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# Eugene Davy

## PRE-NUPTIAL AGREEMENTS

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There has been quite an amount of discussion recently about pre-nuptial Agreements as a consequence of an important Judgment delivered by the Supreme Court of England and Wales in the case of Radmacher V Granatino.

A pre-nuptial Agreement is an Agreement by which a couple, who are intending to marry, stipulate how their assets should be divided in the event of the breakdown of their marriage. In essence such an Agreement is designed to enable the couple “opt out” of their rights and obligations under the relevant family law legislation.

In the 1970s when I was a law student pre-nuptial Agreements were unenforceable contracts on the grounds that they contravened public policy. Common law considered that marriage was for life and that any agreement which envisaged a breakdown or the dissolution of that contract was contrary to the common good.

Family law in Ireland has changed dramatically over the last couple of decades particularly with the amendment of the Constitution in 1995 which enabled our Divorce legislation to be enacted in 1996. The removal of the Constitutional prohibition on Divorce certainly weakens, but does not negate, the argument that a contract made in contemplation of a separation or a divorce which may occur at some future date is unenforceable for reasons of public policy.

In the Radmacher V Granatino case the Supreme Court in England and Wales held that a pre-nuptial Agreement was binding. The traditional view that pre-nuptial Agreements are contrary to public policy was found to be obsolete and should be discarded. The Court held that whilst the Courts should not always be bound to give effect to all pre-nuptial Agreements, many such Agreements, in appropriate cases, should have a decisive or a compelling weight.

So what is the present position in Ireland with regard to pre-nuptial Agreements in the light of the case of Radmacher V Granatino? It

must be emphasised that the Judgment in Radmacher V Granatino was the Judgment of a foreign Court and consequently our Courts here in Ireland are not in any way bound to follow it. It is this Practitioner’s view that the Judgment in Radmacher will not have a very significant impact on our Courts’ view of pre-nuptial Agreements. Undoubtedly the situation is uncertain at present and will continue to be uncertain until we obtain an authoritative Judgment on the matter from the High Court or Supreme Court or until some legislative change is introduced.

While it might be right to say that pre-nuptial Agreements have little or no effect in Irish law today, it must be appreciated that the situation might be quite different in the not too distant future. Consequently the provisions of a pre-nuptial Agreement which is entered into in 2010 could dictate the outcome of a separation or divorce at some future date.

The reality with any couple seeking advice on a pre-nuptial Agreement is that the wealthier partner is likely to be advised that any such Agreement can only be to his or her benefit whereas the other partner is likely to obtain the opposite advice. Obtaining independent legal advice by each partner from separate Solicitors and negotiating the terms of a pre-nuptial Agreement would be anathema for most couples who at the same time are planning a wedding and a life together. Indeed it is the unromantic nature of any pre-nuptial Agreement, rather than the uncertain legal position, which understandably deters couples from entering into such Agreements.

In the context of pre-nuptial Agreements it is important to emphasise that Section 113 of the Succession Act 1965 specifically enables couples who are married or who are contemplating marriage, to renounce their respective rights to inherit from one another’s estates. Any person with children who is planning to get married for a second time should always consider entering into a mutual renunciation of Succession Act rights with his or her partner.

# Marie O’Riordan

## THE CASE OF THE PURCHASER WHO CAN’T COMPLETE - RECENT DEVELOPMENTS IN THE AREA OF SPECIFIC PERFORMANCE

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In July of this year the High Court refused to grant an order requiring three couples to complete the purchase of investment properties in Citywest, Co. Dublin. However, the decision should not be viewed as an easy solution to people seeking to get out of contracts to purchase properties entered into during boom times, as an award of damages against the three couples is pending.

In the case of Aranbel v Darcy & Others, Mr Justice Clarke encountered three couples who, in the height of the property boom in 2006, had entered into contracts to purchase apartments in the development known as Fortune Lawn in Citywest. The apartments were being acquired by the couples as investments. However, when construction of the apartments completed in 2008, their values had crashed and the financial position of the three couples had changed dramatically. When the couples claimed they were financially unable to complete the purchases, the developer sought a court order for specific performance of each contract.

In the High Court, Mr Justice Clarke assessed the financial position of each couple and determined that if it can be demonstrated that “the purchaser concerned does not have the assets or borrowing capacity sufficient to allow them to purchase the property concerned at the contracted price, then a court should not make an order for specific performance for such an order would be in vain”.

In this case Mr Justice Clarke was satisfied that an order for specific performance would be in vain due to the financial position of each couple. However, he added that the onus of proving financial impossibility rests on the purchasers and went on to suggest that the possibility of selling a family home to raise funds to complete the purchase of an investment property might be looked at by the Court in similar cases. Mr Justice Clarke also indicated that the developer is entitled to damages in lieu of an order for specific performance. These damages have not yet been assessed.

The Aranbel case can be contrasted with earlier cases involving Treasury Holdings in relation to its development at Spencer Dock in Dublin. In one such case a purchaser who refused to complete the purchase of an apartment originally priced at €525,000 and now thought to be worth less than €300,000, had a judgment made against her for €505,000. However it is likely that case can be distinguished from the Aranbel case in that the purchaser would have been unable to establish that it was financially impossible for her to complete the purchase.

The approach of the Courts to such cases is likely to become more established as more developers seek to force purchasers to complete contracts entered into in better days. Whilst the Aranbel decision is of some comfort to purchasers in similar situations, it should be noted that it is a High Court decision and a developer could seek to appeal such a decision to the Supreme Court. In addition an award of damages in favour of the developer in such cases is likely. Finally, in all cases where a binding contract is in place, developers are entitled to seek specific performance and/or damages and it appears that nowadays this is an option more developers are considering rather than simply forfeiting the purchaser’s deposit and allowing that purchaser walk away from the transaction.



# A word of caution on speed camera detector devices this Christmas

## THE NEW 'GO-SAFE' CAMERAS ARE LAUNCHED

The mass exodus of southern Irish consumers to Northern Ireland at Christmas appears to become an annual event in the current climate as we venture north to purchase our festive turkey, ham and Christmas tipples, Nintendo Wii's and the latest in high street retail fashion. Shoppers have been given another reason to shop in the North this Christmas as a certain piece of electronic equipment seems certain to appear on some people's Christmas wish list...speed camera detection devices This follows an almost inevitable attempt to overcome the watchful eye of the new safety cameras unveiled in Ireland on the 15th November 2010. However, we urge extreme caution.

The new "Go- Safe" cameras were launched in a bid to combat dangerous driving, especially in the run up to Christmas, which is a period that road safety campaign organisers have traditionally targeted in the past. The onus of discharging prima facie proof of an offence may be discharged by tendering evidence from an electronic apparatus like a speed camera, and it is not necessary to prove that the electronics or other apparatus was accurate or in good working order. This is a good thing I hear you say, a foolproof system designed to

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The sale of speed camera detection devices is *illegal* in Ireland  
”



combat excessive speed and dangerous driving, what more could the law-abiding citizen of Ireland want?

The old proverb of where there's a will there's a way unfortunately raises its ugly head here. A Northern Irish based company has recently reported a huge increase in sales of speed camera detection equipment by shoppers from the South. The intricate designs of the more sophisticated equipment, priced accordingly, make it notoriously difficult for Gardaí to detect as the device can be integrated into the car's bumper, as opposed to the more cumbersome detectors which needed to be affixed to the dashboard.

Please beware, while the sale of the equipment is legal in the North it is prohibited under Irish legislation. 1991 regulations prohibit the importation and supplying of a speed meter detector or indeed offering to supply such a device. The legislation relates not just to the sale and supply of the detector but also to a

private person's use of a detector. It is an offence to use a speed meter detector on a mechanically propelled vehicle in a public place.

If one is caught in possession of a speed meter detector by the Gardaí, the device will be confiscated and the possessor heavily fined. A first offence will attract a fine not exceeding €1,000 but a person convicted of a third such offence or subsequent within 12 consecutive months, could be punished by a €2,000 fine and/or imprisonment not exceeding 3 months.

Can the law further counteract these speed detection devices? Cross-boarder co-operation between the two legislatures appears the most favourable solution but as of now, this remains a pipe dream. So this Christmas, when you are sitting in hour long tailbacks of traffic trying to escape from Newry or Belfast with your car full of Christmas goodies, cast your mind to what the driver in the car in front is REALLY asking Santa Claus for this Christmas....and realise the consequences.

# Matthew Austin

## MAKING A MOVE – BANKRUPTCY TOURISTS

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Bankruptcy has featured heavily in the Irish media over recent months as a number of prominent figures in Irish business deal with the distressed state of their personal finances. The antiquity of Irish bankruptcy laws has come under the spotlight amid much criticism that they are outdated, outmoded and unfit for their modern day purpose. The bankruptcy laws which apply in Ireland stem mainly from the Bankruptcy Act 1988. For twenty years those laws lay, for the most part, unused and untested. Almost overnight, bankruptcy law became a hot topic and much more frequently used and tested in the courts.

When a person is adjudicated bankrupt by the High Court their personal, business and monetary affairs are no longer their own. All assets vest automatically with a court official known as the official assignee. The bankrupt can no longer operate a bank account. He can't act as a director of a company, take part in the management of a company or hold elected office. This state of affairs can and usually will last twelve years and can even last much longer while debts remain undischarged.

This can be contrasted with the position in the UK where a bankruptcy can end after only twelve months. It would cause an insolvent individual to look jealously across the water at the more forgiving regime. However, EC Regulation 1346/2000 ("the Regulation") which came into force in 2002 may be

an interesting option for an insolvent individual who is happy to up sticks and establish themselves in the UK.

Essentially Article 3 of the Regulation provides that the state within which an individual (or other entity) has established his Centre of Main Interest ("COMI") is the appropriate venue for insolvency court proceedings i.e. bankruptcy. Other member states must respect and uphold the bankruptcy laws applicable in the state where the COMI has been established. Therefore, if an individual declares himself bankrupt in the UK and effectively "whitewashes" himself of his personal debts within the shorter bankruptcy period, the Irish courts are obliged to recognise that process.

While several cases have debated what is required to establish a COMI in a particular member state the Regulation provides that the COMI should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is

therefore ascertainable to third parties. Furthermore, there is no minimum period that a person must spend in an EU member state before it becomes their COMI.

Initially the Regulation was designed to avoid "forum shopping" for insolvency proceedings but has in fact created a system that makes "forum shopping" easier. That being said, the decision to move one's COMI cannot be taken lightly and should only be taken following professional advice. Furthermore, it should not be mistaken as an easy way to avoid one's personal debtors as a newly established COMI must be clearly ascertainable by third parties. In other words, if all of your debtors are Irish and are legitimately under the impression that you are established in Ireland then a swift move eastward will not automatically give you the shelter of more forgiving bankruptcy laws allowing you to return with a clean slate in a year's time.



# Grainne Macdougald

## NEW GUIDELINES ON CERTIFICATES OF COMPLIANCE

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Whether you have decided to extend or renovate your home or buy a new home, you should bear in mind the recent guidelines issued by the Law Society in relation to acceptable forms of certificates of compliance with planning legislation and building regulations.

When you engage an architect, engineer or building surveyor in connection with carrying out an extension or works to your home which come under the planning laws, you should always ensure that person has the necessary qualification to furnish you with a certificate on completion confirming the works are in compliance with (a) the planning laws and (b) the building regulations (if applicable). This is extremely important in the event that you decide to sell your home in the future because you will have to produce the certificates to potential buyers and they will want to satisfy themselves that the certificates offered were given by a suitably qualified person.

Similarly, if you are buying a home, you will need to ensure the certificates offered by the seller were furnished by a person meeting the criteria set out below and will be acceptable to your lender if you are taking out a mortgage and to a buyer in a future sale of the property. In such a case your solicitor will review the certificates offered and advise you on whether or not they are in an acceptable form.

The Law Society guidelines issued in 2010 recommend that certificates of compliance from the following persons should be acceptable:

1. Persons who are on the register of architects,
2. Persons who have been in practice as architects or engineers on their own account for ten years,
3. Qualified engineers practising in the construction industry,



4. Qualified building surveyors practising in the construction industry,
5. Persons from another jurisdiction in the European Union whose qualification is entitled to recognition in Ireland under the Architects' Directive.

If you require more information on this subject please contact Gráinne Macdougald gmacdougald@hayes-solicitors.ie or any member of our Property and Private Client Department.



## Carol Fawsitt

### EMPLOYMENT LAW ASSOCIATION OF IRELAND

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A new organisation for employment law practitioners held an inaugural meeting attended by over 100 people in Newman House, Dublin in November. The meeting was organised by Carol Fawsitt.

The Association will be a forum for those who practice in or have a professional interest in employment law. The first

Committee, being chaired by Carol, comprises representatives from the legal profession both North and South, Department of Enterprise Trade and Innovation, academia, IBEC, and the trade unions.

Watch this space!

# Laura Fannin

## EMI V UPC – THE LOWDOWN ON DOWNLOADING MUSIC

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In October this year, five Irish record companies failed in their bid to require UPC, the broadband provider, to put in place measures to prevent its customers illegally downloading music files across its network. While the High Court was sympathetic to the music companies, it held that it had no jurisdiction to require UPC put in place the measures sought by the record companies.

In this case, five Irish record companies sought an injunction requiring UPC to introduce measures to stop its customers infringing copyright and to block access to the well known website, The Pirate Bay. The measures suggested by the record companies included filtering, blocking and a “three strikes rule”. The record companies had previously agreed a three strikes rule with Eircom, whereby users were given two warnings of their illegal behaviour and then cut off on the third infringement.

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Five Irish record companies failed in their bid to require UPC to prevent its customers illegally downloading music across its network  
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The record companies sought to rely on Section 40(4) of the Copyright and Related Rights Act 2000, which provides that where a person facilitates the making of a copyright work available to the public, that person



is liable for infringement if it fails to stop the availability of the copyright work when requested to do so by the copyright owner.

In its defence, UPC argued that it was a “mere conduit” within the meaning of the E-Commerce Directive (2000/31/EC) and it could not, acting in that capacity, be found liable for copyright infringement.

The High Court accepted that UPC customers were using its broadband facilities to steal copyright material and that such activity was detrimental to the Irish music industry. The Court also accepted that, while UPC’s customer usage policy prohibited illegal downloading, this was not enforced by UPC. However the Court found that the section of the Act relied upon did not provide a basis for the relief sought. The Court held that Section 40(4) of the Copyright and Related Rights Act is limited to “removal” of material and does not enable the Court to require UPC to implement a graduated response system removing infringers from the internet. The filtering and blocking solutions proposed by the record companies also did not amount to “removal”

of material within the meaning of Section 40(4) of the Act. The Court therefore could not grant the injunction compelling UPC to introduce measures to prevent its customers from downloading illegal music through its network.

The Court noted that legislative developments in other jurisdictions such as UK, France and Belgium specifically provided for a remedy against hosting by allowing the blocking of transmissions involving copyright theft over the internet. The Court stated that, in failing to provide legislative provisions for blocking, diverting and interrupting internet copyright theft, Ireland was not yet fully compliant with its obligations under the E-Commerce Directive.

On the basis of this decision, a legislative solution is now required to deal with the issue of illegal file sharing which would require internet service providers to introduce measures to actively prevent the transmission of illegally downloaded files.



# Anne Lyne

## THE FIXED-TERM WORKER – A FLEXIBLE SOLUTION FOR EMPLOYERS?

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With little sign of “green shoots” emerging in the economy employers who are keen to maintain a varied skill-set in their workforce should consider the benefits of engaging workers on fixed-term contracts. If managed correctly, fixed-term contracts can be a flexible way for employers to enhance the knowledge base in their workforce without having to commit to permanent employment. We set out below our top 10 tips for an employer to consider when engaging a fixed-term worker.

### Top 10 tips when engaging a fixed-term worker:

- 1.** A fixed-term employee is defined under the Protection of Employees (Fixed-Term Work) Act 2003 as one whose contract of employment is determined by an objective condition such as (a) arriving at a specific date i.e. 2 years, (b) completing a specific task (upgrading the IT system) or (c) the occurrence of a specific event (covering maternity leave). Often employers focus on a time based contract when this may not be as relevant to their needs. A prudent employer should consider the nature of the work and the other options available.
- 2.** Fixed-term employees have the same rights as other employees such as entitlements to a statement of terms and conditions, pay slips, holidays, maternity leave etc. They cannot be discriminated against based on their fixed-term status.
- 3.** An exception to the rule at tip 2 above is in relation to access to the employer’s pension scheme. If an employee’s normal hours of work constitute less than 20% of the normal hours of work of a comparable permanent employee then they may be lawfully excluded from the scheme.
- 4.** Fixed-term employees must be given a written statement of their terms of employment as soon as is practicable after starting employment detailing the objective condition which determines their contract (see tip 1 above).
- 5.** Employers need to ensure a notice clause is included in the contract where either party can terminate on notice. If no notice clause is included in the fixed-term contract there is a risk that if the contract terminates early that an employee will pursue the employer to pay the remainder of the contract. A provision for early termination does not detract from the fixed-term nature of the contract.

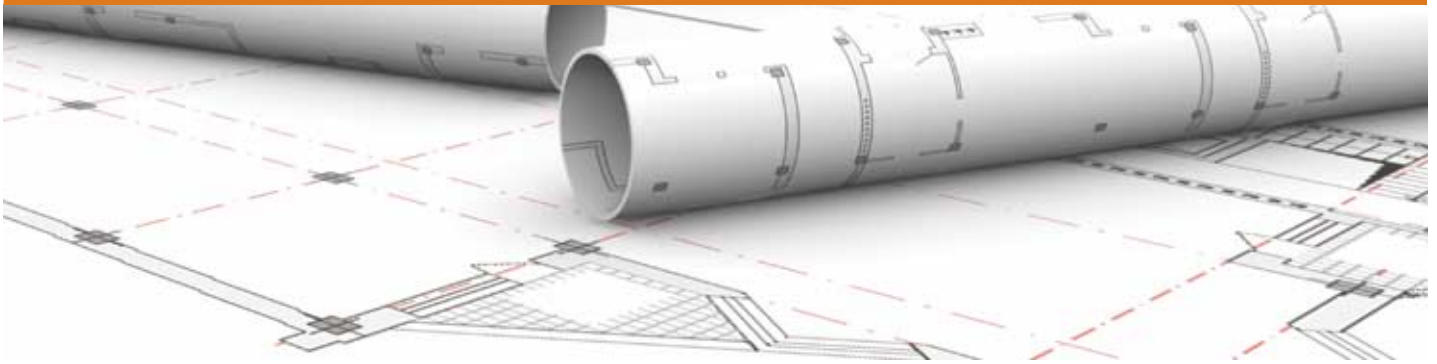


- 6.** The Unfair Dismissals Acts 1977-2007 do not apply where a fixed-term contract naturally expires and is not renewed provided that the following conditions are met:
  - the fixed-term contract must be in writing,
  - it must be signed by both parties, and
  - contain a specific clause stating that the Unfair Dismissals Acts shall not apply to a dismissal consisting only of the expiry of the fixed-term.
- 7.** If following the completion of a fixed-term contract, a renewal is contemplated it is necessary to specify in writing the objective reason justifying the renewal of each fixed-term contract. Best practice suggests, avoiding having to renew a fixed-term contract if at all possible. In this respect serious consideration should be given at the outset of the relationship to the type of fixed-term contract that best suits the employers needs (see tip 1 above).
- 8.** Employees cannot remain on a series of fixed-term contracts for longer than four years. It is important to note here that it is the renewal of the contract which triggers the provision under the Act. For example, an employer can give a 4 year fixed-term contract at the beginning of the contact and this will not breach the Act.
- 9.** Employers must inform fixed-term employees of vacancies for permanent positions. They must be afforded the same opportunities to compete for any permanent job as other employees.
- 10.** A fixed-term worker may qualify for a redundancy payment if he/she has worked continuously for at least 2 years and the contract expires without being renewed due to a shortage of work.

If you have any queries in relation to the above, or for further information, please contact Anne Lyne, Solicitor at [alyne@hayes-solicitors.ie](mailto:alyne@hayes-solicitors.ie)

# Grainne Macdougald

## A SUMMARY OF SOME OF THE CHANGES INTRODUCED BY THE PLANNING AND DEVELOPMENT (AMENDMENT) ACT 2010



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### Did you know that...

The Planning and Development (Amendment) Act 2010 ("the Act") was signed into law on the 26th July this year. The Act seeks to support economic renewal and promote sustainable development by ensuring that the provisions of development plans and local area plans are streamlined with national and regional development objectives as set out in the National Spatial Strategy and in the Regional Planning Guidelines. We outline below some of the changes which might be of interest to you.

### Did you know that...

Under the Act, you can now get an extension of planning permission for up to five years where the development has

not gone ahead because of "commercial, economic or technical" issues beyond the control of the applicant. This provision will be extremely important to developers in the current economic climate where many developments have come to a standstill or work has not even commenced due to lack of funding. You can only get an extension once and cannot apply for a second extension.

### Did you know that...

The Act empowers planning authorities to refuse permission where the applicant has previously carried out a substantial unauthorised development or has been convicted of an offence under the Planning Acts. This power is in addition to the

existing power of the local authority to refuse planning permission where the applicant has previously failed to comply with a planning permission or a condition in a planning permission. The Act imposes an obligation on the local authority to notify the applicant in writing of the intention to refuse permission so the applicant has an opportunity to make submissions as to why permission should not be refused.

For more information on the provisions of the Act please contact Grainne Macdougald ([gmacdougald@hayes-solicitors.ie](mailto:gmacdougald@hayes-solicitors.ie)) or a member of our Property and Private Client Department.

# Joseph O Malley

## HAYES SOLICITORS ACTED IN THE LANDMARK JURY AWARD AGAINST KENMARE RESOURCES PLC.

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Joseph O Malley of Hayes solicitors represented Donal Kinsella in his recent landmark jury award against Kenmare Resources plc. and its chairman. The award was made after a six day High Court Trial and standing at €10 million it exceeds the previous record jury award in this jurisdiction by more than 5 times.



# Rachel Rodgers

## RECENT DEMOLITION ORDER PROVES THAT NO ONE IS ABOVE THE LAW

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“

No one is above the planning laws...

”

In June 2010, Judge John Edwards in the High Court ordered that a family home be demolished because it had been built without planning permission. The family constructed the 588sq metre house in 2006 despite the fact that Meath County Council had previously refused permission to build a house half that size.

Any person who has any experience of the planning process, whether in carrying out a house extension, or in building a larger development, is no doubt aware of the long and arduous process that goes hand in hand with a planning application. It can take months and months to prepare the plans, to satisfy the requests for further information, to deal with objectors, and at the end of it all, the application for permission may be refused. If your application is refused, your options are, to abandon the development, appeal the refusal to An Bord Plenala, or submit a revised application for approval. The recent case on the subject sends out a clear message that if you decide to go ahead and build something without planning permission, you do so at your own peril.

Newspaper reports about this case state that the couple, who must now demolish their substantial family home, told the judge that they had become “totally frustrated” with the planning process, having been refused permission to build on a number of previous sites. The couple said that they simply wanted to provide a family home for themselves and their three children and it was out of “desperation” that they went ahead and built the house.

The couple first applied for planning permission in June 2006 and were refused. In February 2007, following a complaint, the Council were made aware that a house had been constructed on the site and, in March 2007, wrote to the couple saying that the house had

no planning permission and should be demolished. That month, the couple applied for retention permission. In May 2007, the permission for retention was refused and the subsequent appeal to An Bord Plenala in June of that year was unsuccessful. The permission was refused because it would result in excessive density of development in a rural area, the area was unserved and this would put undue pressure on wastewater treatment systems, and it visually, did not fit in with the surrounding environment.

Judge Edwards, with “great regret”, ordered that the stone clad house with sweeping driveway and extensive lawns, be demolished in the absence of planning permission. He said that the couple had sought to “drive a coach and four” through the planning laws, and that could not be permitted. He said that their breach of the law was not accidental or minor but was rather a flagrant breach of the planning laws and was completely unjustified. In light of the downturn in the economy generally, the Judge placed a stay on the order for 24 months.

The case sends out a clear message that no one is above the law. It is never a good idea to break any law, and this case is indicative of the dire consequences that can result.

Planning Authorities have 7 years to take Enforcement Proceedings against people for breach of planning legislation. The coast still isn't clear after the 7 years expire though. If you subsequently make a planning application, your initial breach will be a ground for the planning authority to refuse a subsequent application. It is a huge risk to construct something without the appropriate approval and this case should give food for thought as to whether you should ever take that risk in the future.

# Jackie Buckley

## RENT REVIEWS- REFORM OR RESISTANCE FOLLOWING ON FROM THE REPORT OF THE WORKING GROUP ON TRANSPARENCY IN COMMERCIAL RENT REVIEWS?

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Are you thinking of entering in to a new lease for business premises or is your rent due to be reviewed? If so, then read on as you should be aware of changes that have happened recently in the area of rent reviews.

If you are negotiating a new Lease, did you know that Section 132 of the Land and Conveyancing Law Reform Act 2009 introduced provisions which may be of assistance? This section provides that any rent review clause in a Lease created after 28 February 2010 will be construed as providing that the rent payable following a review shall be an amount which is less than, greater than or the same as the existing rent. In other words, irrespective of what is included in the clause the reviewed rent can be equal to, lower than or higher than the existing rent. This is a very valuable provision for future tenants. However, our experience to date is that landlords are reluctant to agree to anything other than an upwards only rent review clause in the hope that this legislation will be amended in the future and that the law will revert back to that which was in place pre February 2010. In our view, any attempt by a Landlord to include such a clause should be resisted in order to try and maintain the status quo for the duration of the lease.

If you are in the situation where your rent is due to be reviewed shortly and you do not have a post February 2010 lease then there still may be a glimmer of hope. There has always been a perception

that the rent review process is biased in favour of landlords. Following on from that, A Working Group on Transparency in Commercial Rent Reviews was established by the Minister for Justice and Law Reform on 4 March 2010. Its terms of reference were to consider the operation of the current system for determining the rent payable on foot of a rent review clause, with particular emphasis on the arbitration process and the adequacy of the information available to all parties. It was asked if necessary to make such recommendations for change as it thought was appropriate. The main reason behind the establishment of the working group was due to the difficulties expressed by tenants. For many tenants, rents were remaining at levels exceeding the rent at which these properties would let on the open market.

They were also asked to look at the perceived gaps of inaccuracy of information available in relation to commercial rent reviews and were asked to address concerns about a perceived lack of confidence on the part of tenants in both the arbitration process and in arbitrators.

The main recommendations made by the working group are summarised below:

- It recommended the adoption of an industry wide acceptance of a code of practice called the Rent Review Arbitration Code 2010. This code was attached to the report and they asked for all stakeholders to commit to their

willingness to adhere to the code.

- It recommended that this code be reviewed no later than July 2013.
- Having regard to the difficulties in obtaining reliable information about rent review transactions, it recommended the establishment of a public database. This would contain details of letting agreements and rent reviews in the market.

It will be interesting to see over the next few years whether or not this code is adopted by stakeholders. Furthermore, will it be of any assistance to tenants who are in the unfortunate situation of being tied in to leases that contain upwards only rent review clauses and which were in place before Section 132 came in to effect.

Will these new provisions lead to tenants trying to exercise break options in their leases with a view to negotiating better terms with their landlords or with someone else? And will they prove a disincentive for Landlords who may otherwise have been inclined to give concessions to particular tenants. All this remains to be seen. The only certainty is that Landlords will not give up on their upwards only rent review clauses without a fight!

# Davnet O' Driscoll

## WHO OWNS YOUR SOCIAL NETWORK CONTACTS?

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What happens when an employee decides to move on to a competitor or to set up on his/her own in business where the employee has developed his/her business contacts through LinkedIn, other social networking fora or blogging while employed by you?

In the English case of Pennwell Publishing (UK) Limited v Ornstein 2007, the Court looked at a situation where a journalist (Mr. Isles) was appointed as publisher and editorial Director of the Company and brought a list of personal contacts with him into this position. His personal list of contacts then became merged with the database of contacts he created and developed while in his position as publisher and editorial Director. Mr. Isles claimed the entire contact list were personal contacts and that he was entitled to this list which he took with him when he left to join a competitor. There was an email policy in the Company but Mr. Isles had never been made aware of this.

The law in relation to confidential information held by an employer is very clear. Taking a list of customers or other contacts from one employment to another is a breach of the employee's duty of fidelity dating back to the 19th century. A list of contacts developed by the employee himself as part of his duties is the property of his employer and he is not entitled to use it as he pleases. It is always advisable to set out the duties of confidentiality of an employee in a written contract of employment.

The Court found that although Mr. Isles' personal contact list had been joined with the database while at the Company, the Company was entitled to retain use of the entire database including Mr. Isles' personal contacts. The Court restrained Mr. Isles from using the database created while he was in employment with Pennwell Publishing



(UK) Limited, but allowed him to retain use of personal contacts developed before he joined the business.

In another English case involving LinkedIn, Hays Specialist Recruitment (Holdings) Ltd & another v Ions and Exclusive Human Resources Limited [2008 EWHC745ch] the Court found that use of the LinkedIn website by Mr Ions and his transferring information on clients and uploading it to LinkedIn while still with Hays (after he had handed in his notice) did give Hays reasonable grounds for considering a claim against him as the evidence suggested it was not for the benefit of his employer but his future business.

It is important to clarify for both employers and employees the terms of use of and access to the internet and social media networks permitted for staff, due to the potential impact this may have on the Company's business and reputation. See the recent debacle at PwC over the transmission of internal emails concerning new trainees which found its way into the public domain. Clarification is essential in businesses where it is in a Company's interest to encourage staff to network to increase their profile and customer base, through the use of professional for a such as LinkedIn, other professional network for a and interest groups.

Should a Company seek to control what is said by staff in these for a by making sure staff check in advance what they can say, or should this be addressed by training staff and setting guidelines for their conduct on these professional websites to act in a responsible way? Businesses may differ but the general view is that staff should be trained and encouraged to act responsibly without direct supervision. Guidelines are there to give direction on issues such as duties of confidentiality and the importance of not commenting on colleagues or clients. So when in doubt an employee can check with a Manager to ensure that any actions taken are in the Company's best interest.

Thus employers should consider carefully the impact of professional and social networking for their staff and organisation, and how it may affect the business in the longer-term. Employment contracts and policies should be updated to reflect these developments. As professional and social networking is becoming increasingly popular, it raises interesting questions for the future.

This is a summary of recent legal developments, and specific advice should be sought in each case. Please contact Davnet O' Driscoll, Associate Solicitor.



# Ciarán O'Rorke

## PERIODICAL PAYMENTS – A BETTER WAY OF COMPENSATION?

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Every year victims of personal injuries such as medical negligence, road accidents and work injuries in Ireland are compensated by way of a “once off” lump sum payment. Is there a better way? Could this be a system of periodic payments as has been permitted in English Courts since 1995?

Under the current system of awarding lump sums, calculating the cost of future care, medical expenses, aids and appliances and estimating longevity can often involve an enormous amount of difficult “guess work” on the part of actuaries and medical experts.

It is unsurprising that there remains a real risk with the current approach that a Plaintiff may end up with insufficient funds to cover the cost of their care in later life in the event that the calculations made fall short.

There is also a problem with over-compensation. With the current system, in the unfortunate event where the victim of an accident passes away earlier than anticipated, the award may constitute an unintended windfall for his/her heirs. This defeats the purpose of an award structure to provide care for those who require it.

One particularly tragic case was that of a driver who had a very serious crash while drunk, causing catastrophic injuries to his wife who was in the passenger seat at the time. She was rendered paraplegic and sued the driver, her husband who was insured. She received a very large award in compensation for her injuries and died weeks later. The defendant in the action, her husband inherited the award. Often victims may die earlier than expected and it is unfair that relatives should receive a sum of money allocated solely for their care of the injured party. The reality for some is that a large lump sum can attract unwanted attention

from family members and place undue pressure on victims. Mr Justice Quirke has recognised that this is not a satisfactory situation saying “You also see people in wheelchairs, seriously incapacitated, who receive an award of €3 to €4 million, being besieged by relatives offering advice on investing the money. Their misery is increased by the award”.

In February of this year the President of the High Court Mr Justice Kearns set up a working group under Chairman Mr Justice Quirke to consider whether large awards in catastrophic injury cases should be paid by way of periodic payment orders throughout the injured party's life.

It now seems imminent that periodic payments will be introduced in Ireland in view of the recent Report of the Working Group on Medical Negligence and Periodic Payments released on 15 November this year. Mr Justice Kearns in launching the report said that “The scale of award actually required to compensate for projected future care is set to rise exponentially because of the spiralling costs associated with medical treatment and care”.

The report contains proposals for the enactment of new legislation to empower the Courts make periodic payments as well as interim and provisional awards of damages.

These periodic payments will ensure the provision of care and other expenditure for the duration of the person's actual, rather than estimated life-span. They would be awarded to victims left with permanent catastrophic injuries which would require ongoing care and treatment.

The report recommended the Court will decide what form of awards that best meets the Plaintiff's needs but stresses that

the changes would not affect the right of the Plaintiff to be paid damages for pain and suffering in the form of a lump sum.

Certain safeguards for those compensated under such a system have been recommended by the Group

- Payments would be made at the approximate time the care, treatment and/or equipment is actually required ensuring the injured parties needs are continually looked after. This system would alleviate burden of investment of a lump sum for victims or carers.
- The periodic payments would be exempt from taxation and would not be available to pay off creditors in the event of a bankruptcy.
- In addition, an award of periodic payments should only be sanctioned if the Court can be satisfied that the Defendant is in a position to provide these payments into the future.
- The periodic payments will be index linked to the levels of earnings of nurses and carers and the changes in costs of medical and assistive aids and appliances, which will allow the Plaintiff to afford the cost of treatment and case in the future.

Mr Justice Quirke has described the current system of lump sum payments as requiring the “looking into a crystal ball” to anticipate the future needs of a Plaintiff.

The introduction of periodic payment orders in Ireland will go along way to mitigate that problem.



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## TRANSFER UNDERTAKING SEMINAR

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On 20 October last, Hayes solicitors co-hosted with UK law firm Short Richardson Forth a practically focussed seminar on the theme of Transfer Regulations and related legal developments, at the Westbury Hotel, Dublin. The seminar was very well attended we were delighted with the feedback from delegates.

Our partners, David Phelan and Breda O'Malley, presented on legal developments and their practical implications in the Transfer Regulations from an Irish and EU perspective, focussing particularly on

the more contentious issues which arise concerning outsourcing, injunction risks, consultation with staff and indemnity cover.

Prof John McMullen a partner in Short Richardson Forth, the leading international guru on Transfer Regulations and Author of the legal reference guide *Business Transfers and Employee Rights* gave a detailed presentation on the impact of Transfer Regulations from an Irish and UK perspective.

At the seminar, while David, Breda and John answered many questions, due to

time constraints, some questions were left unanswered. Each of the speakers subsequently provided written replies to the many varied questions raised by the delegates at the seminar. These are available in the News and Events section of the Hayes solicitors website at [www.hayes-solicitors.ie](http://www.hayes-solicitors.ie).

We have invited Prof McMullen to contribute to this newsletter and you will see his informative and practical contribution.

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## John McMullen

### GUEST CONTRIBUTOR. TRANSFER OF UNDERTAKINGS AND SERVICE PROVISION CHANGE

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This note seeks to summarise when the legislation protecting employee rights on transfers of undertakings applies to outsourcing.

In Ireland of course the relevant legislation is the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 (SI 131 of 2003) and in Britain it is the Transfer of Undertakings (Protection of Employment) Regulations 2006. Both instruments must be

interpreted in the light of EC Directive 2001/23/EC of 12 March 2001 on the Acquired Rights of Employees. However it is clear that UK law goes further than is required by the Directive by protecting employees in the context of outsourcing in a wider set of circumstances than contemplated by the Directive.

In Ireland the key test of whether the Regulations (and the Directive) apply is as follows. A mere changeover of contractors is not a transfer. What is required is a concomitant transfer of assets or, absent that, the taking over of a major part of the workforce in terms of numbers and skills. This was established by the seminal ECJ case of *Ayse Süzen* (1997). In applying this test regard has to be had to the nature of the function itself. Some functions are labour intensive - in which case the importance to attach is whether there is a transfer of the workforce. On the other hand, some kinds of operation can be asset reliant (where the determining factor may be whether the assets have transferred). This causes much uncertainty in practice. And employees' rights to transfer under the

*Ayse Süzen* test (especially in lower paid sectors such as cleaning and domestic services which are characterised as labour intensive) may be determined by a circular and unpredictable test of whether the transferee is prepared to take the employees on. The Employment Appeals Tribunal in Ireland has found this unsatisfactory but feels bound by the *Ayse Süzen* case (see *Canon v Noonan Cleaning Limited* and *CPS Cleaning Services Limited* [1998] ELR 153). But in Britain the law changed in 2006 and Regulation 3 (1) (b) of the TUPE Regulations 2006 now effectively provides for a transfer on the changeover of service provider itself (provided that there is prior to the changeover an organised grouping of employees the purpose of which is to service the client concerned).

In essence, then, the Regulations are more likely to apply in Britain than in Ireland and it follows that in Ireland the client may still have some choice in determining the identity of the new contractor and its employees.

# Caroline Crowley



## MEDIATION - A NEW IMPETUS

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### “Mediation-A New Impetus”

Proceedings in the High Court look set to see a dramatic change from this month onwards, with the terms “mediation” and “alternative dispute resolution” becoming commonplace in the course of proceedings. On 16 November 2010 a new Order 56A came into effect which updates the Rules of the Superior Courts. On the same day the Law Reform Commission launched their final report on Alternative Dispute Resolution which includes a proposed new draft Mediation and Conciliation Bill.

Order 56A gives effect to SI 502/2010 (Mediation and Conciliation). This legislation provides for a mechanism whereby a Judge can effectively order the parties to an action to engage in a form of alternative dispute resolution (ADR). ADR is defined as “mediation, conciliation or another dispute resolution process approved by the Court”. However, it expressly excludes arbitration. ADR is used extensively in the Commercial Court.

### What is Mediation?

Mediation is a process whereby an independent, neutral Mediator assists the parties to come to agreement through a collaborative process. The Mediator’s role is non-judgmental and non-directive. The Mediator does not adjudicate or give decisions. The Mediator supports the parties in identifying their issues and needs and how they might come to agreement. Mediation is confidential and without prejudice (so nothing said in the mediation is admissible in the Court process). It is quick, cost effective and flexible in that a wide variety of settlement options can be achieved in mediation over and above monetary settlements.

### Order 56A:

Under the new Rules, the Court may, on the application of any of the parties to the action or of its own initiative, order that proceedings be adjourned for such time as the Court considers just and convenient to invite the parties to use an ADR process to settle the matter. Where the parties consent, the Court can refer the proceedings to an ADR process and invite the parties to attend an information session on the use of mediation.

Where the parties have decided to use an ADR process, Order 56A provides that the Court may extend the time for compliance with any provision of the Rules of the Superior Courts, or any Orders made in the proceedings. Further the Court may make any orders or directions that it considers necessary to facilitate the effective use of the ADR process. This provision appears to give a significant degree of discretion to Judges in facilitating the use of ADR.

### Law Reform Commission Report:

In November 2010 the Law Reform Commission published its report on Alternative Dispute Resolution-Mediation and Conciliation. The Report contains a recommendation that the Government should make an “ADR pledge,” under which Government Departments and State bodies would be required to consider and attempt mediation or conciliation in appropriate cases before initiating court proceedings. The Commission recommended that parties should share the cost of mediation or conciliation equally and that there should be a statutory Code of Practice for Mediators and Conciliators. The Report also recommended reform for disputes arising in cases of alleged medical negligence, whereby health care professionals would be able to make an apology without this being an admission of legal liability.

### Incentive to Mediate:

The parties to litigation proceedings, both Plaintiffs and Defendants, are advised to give strong consideration to using mediation as a form of resolving disputes, given the potential cost implications of failing to do so. Order 99 of the Rules of the Superior Courts is also being amended with effect from 16 November 2010. This amendment stipulates that both the High Court and Supreme Court, in considering whether to award costs in an action, may have regard to the refusal or failure, without good reason, of any party to proceedings to participate in any ADR process, where the Judge had made an Order requiring them to participate in mediation.

The President of the Mediators Institute of Ireland, Karen Erwin, recently stated that litigation costs could be drastically reduced by the use of mediation. Ms Erwin expressed the view that the new Rules are likely to lead to more cases being mediated, as Judges can now take an active step in encouraging parties to try to resolve their issues through mediation. The current straightened economic situation is sure to be an incentive for parties to give serious consideration to mediation of disputes, as a means of reducing costs and possibly reducing the length of time traditionally spent on conducting adversarial litigation.

This firm has been involved in several successful mediations of medical negligence actions. We believe that in cases where the issues between the parties are clearly defined, mediation can operate as a successful, cost effective and confidential dispute resolution mechanism.

For further information on the above, please contact Caroline Crowley on 01-6624747 or by email on ccrowley@hayes-solicitors.ie.

# Firm News

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## DECEMBER

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This Christmas will witness the patter of tiny feet in the Phelan household for the first time. Congratulations to David Phelan and his wife Neasa on the birth of their daughter Isabel. Where once Man United jerseys and footballs in various states of inflation cluttered the back seat of David's car there now sits a baby seat and an assortment of soothers and bibs.

Martha Wilson is also the bearer of good news this holiday season as she and David O'Dwyer announced their engagement. Preliminary plans are for a wedding in August 2011.

Karen O'Connor recently celebrated twenty five years with the firm. It's a testament to Karen's popularity within the firm that the boardroom was packed for the celebration drinks. Here's to the next twenty five Karen!

After a stellar start to the season the firm football team had a heart-breaking denouement to their season when they lost out on a place in the knock out stages on goal difference. Better luck next year.

We recently held a coffee morning in aid of the Harold's Cross Hospice where the office canteen resembled Willy Wonka's factory such was the supply of assorted treats on offer.

We also held "Pink Friday" in aid of the Irish Cancer Society's Action Breast Cancer appeal. Congratulations to Sean Neville who was deemed to be the "Prettiest in Pink" with his daring pink shirt and pink tie combo.

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## Disclaimer

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The contents of In Brief 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

Editor of In Brief: Ruth Shipsey

# Hayes

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## OUT AND ABOUT

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Solicitors from Hayes have been busy over the last number of months speaking at conferences, seminars and training sessions for clients on matters ranging from the Transfer Regulations to significant changes for public sector employees under the Croke Park Agreement, to mediation, to regulation of cosmetic surgery, to living wills and enduring powers of attorney, to conducting workplace investigations to the many changes arising from new developments in defamation and privacy law.

If you would like to attend forthcoming events, please e-mail

### Ruth Shipsey

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and we will ensure that you are notified otherwise, please visit our website [www.hayes-solicitors.ie/news](http://www.hayes-solicitors.ie/news).

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## The Firm

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