

August 2013

Welcome

Welcome to the August issue of Legal News. For further information on any of the topics covered in this month's issue, please call or email any of the lawyers listed in our Legal News or your usual William Fry contact.

Ken Casey
Partner

Directors encouraged to "do the right thing"

Recent comments by Chief Justice Susan Denham have highlighted the need for directors to act ethically and to do the right thing in managing their companies.

Speaking at the launch of the Courts Service annual report for 2012, the Chief Justice said the financial crisis had uncovered malpractice in business as figures for 2012 revealed a 50% increase in the number of orders to restrict company directors and a 350% increase in the number of company directors disqualified as compared with 2011. She emphasised that Ireland's boardrooms must be mindful of ethics rather than keeping a "a constant eye on the needs of shareholders" if trust in the economy is to be rebuilt.

The Chief Justice said that boards of directors hold a privileged position of trust, "they are relied upon, primarily by the company and shareholders, but also employees, customers, suppliers and the public at large," she said, adding that we rely on boards to "do the right thing". She also said that "knowing what the right thing to do in a situation, and then doing it, comes from exercising no small amount of courage".

The increase in restriction and disqualification figures is a useful reminder to directors to take steps to understand their role, perform it effectively and thereby reduce their exposure to personal liability.

Tips for Non-Executive Directors – Managing Personal Liability

On a related note, earlier this year, the UK Institute of Chartered Secretaries and Administrators (ICSA) issued guidance for non-executive directors (NEDS) suggesting ways in which they can take action to demonstrate to a regulator or the courts that appropriate steps have been taken in exercising care, skill and diligence in their roles, thereby reducing their exposure to personal liability. The guidance highlights areas of best practice before and after-appointment as a director.

Before joining a board, NEDs should:

- Carry out due diligence to satisfy themselves that the company is one in which they can have confidence and to which they can make a strong and value-added contribution
- Ascertain the culture, value and behaviours associated with the particular board in order to satisfy themselves that they can uphold standards of integrity and probity
- Understand that more is expected from a director with a specific skill or specific experience and devote time to refreshing these specific skills
- Review their letter of appointment, in particular the minimum and additional time commitments, and raise any concerns before signing
- Understand company law requirements in relation to conflicts of interest, and gifts and hospitality
- Once appointed to a board, NEDs should make sure that they:
- Contribute to the planning of their induction programme and take responsibility for their on-going training and continuous development
- Ensure that they receive a schedule of future board and committee meetings and high-quality information sufficiently in advance of meetings
- Provide independence, oversight and constructive challenge to the board
- Make decisions objectively and in the interests of the company
- Raise any concerns with the company's executives at any time and take independent professional advice at the company's expense, if they consider it necessary

In the context of Irish court decisions and changes in Irish company law signalled in the Companies Bill 2012 which require non-executive directors to exercise high standards of skill, care and diligence, this recent guidance is highly recommended reading for all directors.

To read a more detailed article on this topic, [please click here](#).

Contributed by [Susanne McMenamin](#).

High Court Grants Disqualification Orders against Directors

The High Court has made an order disqualifying the two directors of *Mossway Limited (In Liquidation)* for a period of 12 months.

Background

The principal business of the company had been the provision of haulage services with a warehousing and distribution facility. On 3 June 2011, the Revenue Commissioners presented a petition to wind up the company on the basis that it was unable to pay its debts as they fell due. The Court made the order sought and appointed an Official Liquidator.

Due to the manner in which the directors had conducted the company's business together with their failure to cooperate with the liquidation process, the Official Liquidator sought to have the directors restricted or disqualified.

The Official Liquidator referred to the following as evidencing a lack of commercial probity by both directors:

- Non-payment of revenue debt (while this is not of itself an automatic ground for disqualification, it is a factor to be taken into consideration by the Court in determining whether or not a director may be deemed to be "unfit")
- Failing to keep adequate books and records and to deliver up books and records making it extremely difficult for the Official Liquidator to ascertain the underlying reasons for the company's insolvency

- Use of company funds for director's personal expenditure
- Engagement by the directors of a self-administered wind down whereby payments were made in disregard of statutory obligations and obligations to the Revenue Commissioners
- The transfer of assets, employees and customers out of the company after it ceased to trade, to another company of which one of the company's directors was a director together with his wife

Decision

The Court was satisfied from the evidence provided that the conduct of both directors was of such a serious nature as to deem them both unfit to be concerned in the management of the company. Disqualification orders were made against both directors. One of the directors argued that he had left much of the running of the business of the company to the other director and had not been actively involved in the company's affairs. However, the judge decided that this, of itself did not detract from the responsibilities which he ought to personally have been exercising as a director in any event. Having satisfied itself as to the appropriateness of granting disqualification orders, the Court then had to consider the appropriate duration of such disqualification orders. The judge concluded that a disqualification period of 12 months was appropriate for both directors. The Order against one of the directors was postponed for two weeks to afford him time to resign as a director of the other company to which the company's assets and employees had been transferred.

William Fry acted for the Official Liquidator, Myles Kirby.

Contributed by [Delia McMahon](#).

Covert Surveillance of Employee did not Make Dismissal Unfair

The UK Employment Appeal Tribunal (EAT) recently decided that an employer's use of covert video surveillance in its investigation into an employee's alleged misconduct and his subsequent dismissal, was not unreasonable.

An employee was dismissed after his employer discovered he was playing squash when he claimed to be at work. The employee was seen playing squash by a colleague on two occasions during work hours and the colleague reported this to the employer. The employer engaged a private investigator to investigate the issue. The private investigator took video footage of the employee outside the sports centre on a number of occasions when he should have been at work.

The UK Employment Tribunal decided that the dismissal was unfair due to the employer's use of covert surveillance which was "distasteful". It noted that the employer's use of covert surveillance was unreasonable as it already had sufficient evidence of the employee's misconduct. It also considered that the employer's use of covert surveillance was a breach of the employee's right to privacy and demonstrated an inexcusable ignorance of its obligations under the UK's data protection legislation. The Tribunal's finding was appealed to the EAT.

The EAT overturned the Tribunal's decision and decided that the employer's use of covert surveillance did not render the dismissal unfair. The EAT rejected the finding of a breach of the employee's right to privacy on the basis that an employee has no right to privacy when defrauding his/her employer. It further stated that the employee had no reasonable prospect of privacy, in any event, as the footage was taken in a public place. It also

noted that the employer's behaviour in conducting the dismissal could only be taken into account to the extent that that it impacted on the fairness of the dismissal. In this instance, the covert surveillance was not relevant to the dismissal (because the employer already had sufficient evidence of the employee's misconduct) and accordingly it could not be used as a basis for holding the dismissal as unfair.

Recent media reports of conversation recorded between bank employees highlight that many employers have facilities in place to monitor employee conduct/behaviour and may wish to use such information as part of an investigation process. In order for employers to legitimately rely on such information, it is essential that any monitoring of staff is done in a fair and reasonable manner and in accordance with employment law and data protection legislation. The most effective way of achieving this is by implementing an appropriate policy which employees are made aware of. As these UK decisions dictate, there are a number of potential pitfalls which need careful guidance on if they are to be avoided.

Contributed by [Catherine O'Flynn](#) and Ciara Ruane.

Dell Workers Lose Redundancy High Court Battle

Former Dell workers recently lost their High Court action alleging they were not properly informed and consulted regarding the collective redundancies in Dell's plant in Limerick.

The employees were first informed about the proposed redundancies in writing and were provided with details of provisional leaving dates and proposed severance packages. On the same day as they received these details, the employees were briefed by senior management about the proposed redundancies. Dell subsequently engaged in a consultation and discussion process with its employees as required by legislation.

The employees brought a claim to the Employment Appeals Tribunal (EAT) alleging that the letter and meeting constituted a notice of dismissal and that any subsequent consultations were too late to be effective.

Dell contended that the consultations with employees subsequent to the letter were meaningful, worthwhile and effective. This was highlighted by the fact that a number of amendments were made to the proposals outlined in the letter as a result of the consultations, including a significant improvement to the severance packages at an additional cost to Dell of approximately €9 million.

The EAT decided that the letter was only an indication to the employees of the terms that would apply if they were made redundant and, accordingly, did not constitute a notice of dismissal. Therefore, the subsequent consultations were in compliance with Dell's legal obligations.

The EAT's decision was appealed to the High Court on a point of law. The High Court dismissed the appeal on the grounds that no point of law had been identified which would provide a basis for overturning the EAT's decision.

On examination of the facts, the High Court listed a number of reasons which supported the finding that the letter was not a communication of a final decision. These included:

- A number of amendments were made to the letter's content after it was first issued.
- The letter provided that its contents were for information purposes only and did not constitute contractual terms or conditions.

The High Court acknowledged that on the one hand, the letter contained a significant amount of detail which did not suggest that Dell had an open mind about the collective redundancy proposals. However, on the other hand, it noted that if the letter was couched in generalities, it would be of little assistance to the employees and would not be well received.

This decision highlights the legal obligation of employers to engage in meaningful consultation with employees regarding proposed collective redundancies. Redundancies and, in particular, collective redundancies need to be undertaken very carefully in light of recent decisions and any discussions or correspondence issued during such consultations should be open to amendments and should not pre-determine any issues.

Contributed by [Catherine O'Flynn](#) and Ciara Ruane.

Recent Court Decisions Cast Doubt on Upward-only Rent Review Provisions

Legislation has prohibited upward-only rent review clauses in all leases or agreements for lease entered into from 28 February 2010. The prohibition does not apply where a lease is granted on foot of an agreement for lease entered into before 28 February 2010. The application of the prohibition on upwards-only rent reviews to new leases arising on foot of pre-February 2010 agreements was considered in two recent High Court cases. The Court had to decide in both cases whether the pre- February 2010 agreement could be deemed to be an agreement for lease.

In the first case, a guarantee attached to the pre-February 2010 lease, required the guarantors, on the happening of certain circumstances, to accept a new lease at the same rents as were contained in the original lease (including the provision for upward-only rent reviews). On the happening of those specific circumstances, the guarantor did not take a new lease.

In attempting to quantify the landlord's loss, the Court considered whether the guarantee amounted to an agreement for lease which was entered into prior to February 2010, in which case the prohibition on upward-only rent reviews would not apply. The Court decided that no agreement for lease existed as an agreement for lease involves not only an obligation on the part of the prospective tenant to take the lease but an obligation on the prospective landlord to grant the lease. In this case it was open to the landlord not to require the guarantor to take a new lease. The decision endorsed the approach taken in the Reox case (on which we reported in [our September bulletin](#)).



The second case concerned an option agreement entered into prior to February 2010 under which the landlord or tenant could call upon the other to enter into a 20-year lease on the expiration of an initial 5-year lease. The landlord exercised this option after February 2010. The Court considered all of the transaction documents which included a tenant option to acquire shares in the company which owned the property. The Court concluded that from the outset there was a contractual pathway leading to the tenant continuing to possess the property after the 5-year lease. This made it virtually impossible to deny that the option agreement was anything other than an agreement for lease. As the option agreement was entered into prior to February 2010, the prohibition on upwards-only rent review provisions did not apply.

In order to safeguard upward-only rent review provisions, landlords will naturally be keen to construe their pre-2010 agreements as agreements for lease. Courts will examine all transaction documents in connection with the lease closely to determine whether an agreement for lease can be deemed to exist. It would appear, however, that Courts will not construe the standard guarantee lease provisions, requiring a guarantor to take a lease on the occurrence of specified circumstances, as an agreement for lease.

[Click here](#) for another article on upward-only rent reviews, the Bewley's rent review case, in which the Court decided that 'upward-only' rent review provisions in the lease allowed the rent to fall to open market value as long as it didn't fall to below the initial rent agreed.

Contributed by [Tara Rush](#).

Improving Your Corporate Governance Reporting

A representative from the Irish Stock Exchange (ISE) recently addressed a conference about an independent review, commissioned by the ISE, of disclosures in companies' annual reports for 2010 as compared with 2011 (the first full financial year that companies had to apply the Irish Corporate Governance Annex).

The review assessed:

- The level of compliance with the Irish Annex
- Whether the Irish Annex was making any impact on the type of disclosures made in annual reports

The review found that there was a high level of compliance with the Irish Corporate Governance Annex with 65% of companies claiming full compliance and 35% claiming partial compliance. Generally there was also an overall improvement in disclosures as to how companies were achieving best practice in corporate governance. Specific improvements were observed in areas such as:

- Board evaluation
- Independence
- Risk oversight
- Remuneration

Whilst noting these specific improvements, the ISE concluded that there is further room for improvement particularly in the following areas:

Board composition: Reporting in this area could be improved by providing a rationale for the size and structure of the board, information on the skills and expertise of board members and information on the processes around individual board appointments.

Audit Committee: Disclosures in this area could be improved by reporting on the work undertaken by the committee throughout the year.

Contributed by [Susanne McMenamin](#).

Government Moves to Reform Pensions Regulation

Recent social welfare and pensions legislation introduces a number of important pensions reforms, including:

- **Restructuring of the Pensions Board**

The existing Pensions Board will be renamed as the Pension Authority. The new Pensions Authority will have two distinct arms – a three-person Pensions Commission with an independent chair to provide oversight on pensions regulation and a separate unpaid Pensions Council, comprised of members representing various consumer interests, which will advise the Minister for Social Protection on pensions policy. As part of this restructuring, the current Chief Executive of the Pensions Board will be known as the Pensions Regulator.

The restructuring of the Pension Board will not begin until the Minister for Social Protection passes the relevant commencement order.

- **Additional Pensions Board Powers**

With effect from 28 June 2013, the Pensions Board has the power to wind up a pension scheme in circumstances where a scheme is underfunded and the trustees and the employer are not in a position to adopt a funding proposal or where the trustees of a scheme fail to comply with a Pensions Board direction to restructure scheme benefits.

In addition to the changes effected by the Act, the Government has also recently announced the amalgamation of the offices of the Pensions Ombudsman and the Financial Services Ombudsman. It is clear that the landscape of pensions governance and regulation in Ireland is changing significantly. It is intended that these changes will strengthen the governance and regulation of occupational pension schemes, ensuring greater public awareness of pensions oversight and increase consumer trust in the pensions system.

Contributed by Lorna Osborne & Mary Greaney.

The Impact of Lookalikes - UK Report

The UK Intellectual Property Office recently published a report entitled 'Impact of Lookalikes: Similar Packaging and Fast-Moving Consumer Goods'. The report examines the area of lookalike consumer goods and attempts to

provide a working definition of a 'lookalike' while examining the impact of such goods on consumers, retailers and brand owners.

The report adopts the definition for a lookalike as *"a product sold by a third party which looks similar to a manufacturer brand owner's product and, by reason of that similarity, consumers perceive the lookalike to share a greater number of features with the manufacturer brand owner than would be expected simply because the products are in the same product category"*. A lookalike is often an own brand product that is packaged or presented in a similar way as a branded product.

In an attempt to understand the 'lookalike effect' and the impact it can have on the sale of fast moving consumer goods, the UK Intellectual Property Office conducted consumer surveys and analyses of sales figures and stakeholder opinions.

The report concluded that almost as many consumers felt that they had benefitted from the lookalike effect as had been disadvantaged. However, the brand owners interviewed felt that lookalikes can have a negative effect in that sales may be lost to retailers selling own-brand products. The brand owners also generally considered that the law of passing-off provides insufficient protection as lookalikes do not typically generate confusion as to origin, a prerequisite to grounding a claim in passing-off.

The report considered that it is probable that the prevention of lookalikes is within the scope of the Unfair Commercial Practices Directive. It is therefore arguable that the right to an injunction under the Irish legislation, which implements the Unfair Commercial Practices Directive, could provide brand owners with the means to defend themselves from the negative effects of lookalike goods. The corresponding UK legislation does not provide a private right of action due to a fear that any such right might result in the opening of floodgates. However, the report suggests that this should not be a concern, referring to the fact that there has been very little use of the remedy in Ireland.

Contributed by [Brian McElligott](#) & [Leo Moore](#).

In Short: Putting a Stop to the Start Mortgages Decision

The Land and Conveyancing Law Reform Act 2013 was signed into law on 24 July 2013 and finally draws an end to the uncertainty created by the decision reached in the controversial Start Mortgages case. The passing of the Act will now allow banks (in respect of mortgages created prior to 1 December 2009) to continue to rely on repealed statutory powers to obtain an order for possession of registered land, to appoint a receiver, to sell and to overreach junior encumbrances on a sale.

[View an earlier article on the Bill here.](#)

Contributed by [Eibhlín O'Donnell](#).

In Short: Budget and Finance Bill 2014

The Government has announced a new timeframe for the Budget and Finance Bill for 2014 and subsequent years.

Under new EU requirements, all countries must publish a draft budget for central government by 15 October each year, with final publication to occur by 31 December each year. In light of these requirements, Budget Day has been brought forward and Budget 2014 will now be announced on Tuesday 15 October 2013.

The Government has also decided to change the timeline of the Finance Bill 2014. While the date of publication is not yet known, it has been confirmed by the Minister for Finance that the Finance Bill should complete its passage through the Oireachtas (Irish Parliament) by 31 December each year. At present, the requirement is that the Finance Bill must be enacted within 120 days of the Budget. Under the new regime, the Finance Bill will have to be passed 65 to 70 days after the Budget.

Contributed by [Aoife Garry](#).

In Short: Personal Insolvency Act 2012 - Commencement Update

An order providing for the commencement of certain provisions of the Personal Insolvency Act 2012 brings the following three new debt settlement arrangements into operation with effect from 31 July 2013:

- Debt Relief Notices: permitting write-offs of qualifying unsecured debts up to €20,000 subject to a three-year supervision period
- Debt Settlement Arrangements: permitting settlement of unlimited unsecured debts over five years
- Personal Insolvency Arrangements: permitting settlement of unlimited unsecured debts and secured debts up to €3 million (or unlimited with creditor's agreement) over six years

These arrangements offer both debtors and creditors alternative methods of tackling problem debts without resorting to bankruptcy.

Contributed by [Delia McMahon](#).

In Short: Report on Cyberbullying Highlights the Importance of Social Media Policies at Work

An Oireachtas (Irish Parliament) Joint Committee on Transport and Communications recently published a Report: Addressing the Growth of Social Media and Tackling Cyberbullying, following a period of research and consultation.

Amongst eight key recommendations, the Report emphasises that employers should be made aware of just how important it is to have a social media policy in place. Specifically, the Committee recommends that such a policy

should define cyberbullying and set out the consequences of a policy breach - cognisant of the fact that some forms of cyberbullying fall under the criminal offence of harassment.

This is a further reminder that employers can no longer view social media policies as dispensable, a point we emphasised in [our recent Report on Social Media](#).

Contributed by [Catherine O'Flynn](#).

In Short: Enhanced Central Bank Supervisory and Enforcement Powers

The Central Bank (Supervision and Enforcement) Act 2013 was signed into law by the President on 11 July 2013. The Act is an important step forward in enhancing the Central Bank's supervisory powers over financial service providers and its power to enforce financial services legislation. The adoption of the Act is a welcome development given that it was first proposed as a Bill back in July 2011.

The main change since the Act was first published as a Bill in July 2011 is the inclusion of a new provision to allow credit institutions or banks with a head office outside the EEA, to apply to set up a branch in Ireland.

A more in-depth article on the Act will be included in the September issue of Legal News.

Contributed by Michelle McGrath.