issue 22

connect

SUMMER 10

RDJ SOLICITORS
CORK & GALWAY

RDJ Wins Chambers Europe Award

1. Welcome to the Summer 2010 edition of Connect, the RDJ newsletter.

Some good to news to report at the outset. We here at RDJ were delighted to be recently awarded the Chambers Europe Client Service Award for Ireland.

The annual award, presented at the Chambers Europe Awards 2010 in London, recognises the outstanding law firm for client service in each country in Europe. The awarding of the Client Service accolade is based on feedback received by a team of researchers from clients of the law firms in each country.

It is the first time the honour has been given to an Irish regional law firm. In being presented with the award, RDJ was cited as receiving resounding client praise with comments such as this one, helping Chambers to make their decision –

"the firm gives us a 27/7 service. All the work is on time and all the staff are efficient. We get high quality advice no matter who we are dealing with. Professional, approachable and down to earth, I can't praise them enough".

Winning the award is a great tribute to the superb team here at RDJ and it recognises the importance we place on providing the best possible service to our clients.

I hope you will find the newsletter interesting and as always, we would very much welcome any comments or feedback you have.

Finally, thank you for your continued support for RDJ.

John Dwyer
Managing Partner
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Ronan Daly Jermyn (RDJ) managing partner, John Dwyer (centre) receiving the Client Service Award for Ireland at the Chambers Europe Awards for Excellence 2010 in London with the legendary British advocate Michael Beloff QC and Joanna Thomas, Co-Editor of Chambers Europe guide.

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2. Personal Injury Litigation - Recent Developments

By Carrie McDermott - Solicitor, Litigation Department

Over the last 18 months, we have seen some interesting decisions from the Courts in relation to the Statute of Limitations, the implications of accepting a lift from a drunk driver in terms of contributory negligence and the effect of giving false or misleading evidence in a personal injury action.

Murphy –v- Grealish 2009 IESC 9

The Plaintiff was involved in a road traffic accident on 12th May 2000. The defendant's insurers, Quinn Direct wrote an open letter on 1st August 2000 offering to pay the costs for the material damage to his motor vehicle. The letter stated that payment would be made "on full and final settlement of his claim".

The Plaintiff attended his solicitor in respect of personal injuries he had sustained as a result of the accident. On 5th December 2002 Quinn Direct wrote to the Plaintiff's solicitor indicating that "liability was not in issue", and asking the Plaintiff's solicitors if they would forward their medical reports and agree to attending settlement talks.

On the 4th May 2004, Quinn Direct wrote to the Plaintiff's solicitor indicating that they would not communicate further as the Plaintiff's claim was statute barred.

The High Court, was asked to consider where the Statute of Limitations would apply in such a case. The Court held where there is a clear admission of liability, and where the Plaintiff is lulled into a false sense of security by the Defendant that the claim will be settled, an equitable estoppel arises in favour of the Plaintiff and the claim will not be statute barred. This view was upheld by the Supreme Court on appeal.

Hussey –v- Twomey, Courtney and the MIBI 2009 IESC

These proceedings arose as a result of a road traffic incident that occurred in Cork City in July 1999.
The Plaintiff was travelling as a passenger in a motor vehicle which was being driven by the second named defendant. The vehicle was in a collision and while liability was admitted, a plea of contributory negligence was made on the basis that she knew or ought to have known that the driver was incapable of driving or had a reduced capacity for doing so.

The High Court found that the Plaintiff was guilty of contributory negligence and the damages awarded were reduced by 40%. The Court held the Plaintiff ought to have known or at least suspected the Defendant may have consumed alcohol during the evening. This view was endorsed by the Supreme Court on appeal.

Carmello –v- Casey 2007 IEHC 362

The Plaintiff suffered personal injuries as a result of a Road Traffic incident that occurred in October 2002. Liability was conceded and the matter proceeded as an assessment. The Defendants argued that the facial numbness, which the Plaintiff alleged, was as a result of a subsequent accident.

Under cross examination, the Plaintiff stated that he could "not recall" any subsequent incident and maintained that the facial numbness was caused by the accident, the subject matter of the proceedings. It was held by the High Court that the Plaintiff had given false and misleading evidence in a material respect. Peart J dismissed the Plaintiff's claim under Section 26 of the Civil Liability Act 2004 noting that he falsely and deliberately misled the Court.

Conclusion

These cases are an important indication of the current trends in personal injury litigation. The extension of the Statute of Limitations in cases where an equitable estoppel arises, based on the Defendants own actions, means that Defendants must now be aware that where they seek to rely on the limitation period, they must act carefully.

The Courts are not prepared to allow Plaintiffs to litigate and ignore their own negligence. The Plaintiff is penalised by way of a percentage reduction in the compensation awarded to take account of that negligence. Where a Plaintiff accepts a lift from someone he/she knows or ought to have known had consumed alcohol, the Plaintiff's damages may be reduced by 40%.

Where a Plaintiff gives false and misleading evidence, which is material to his/her claim, the Court may dismiss the claim, where no injustice will result. Section 26 of the Civil Liability Act 2004 and its anti-fraudulent provisions should be used by Defendants where the Plaintiff is being dishonest.

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3. Annual Leave - The Issues

By David McCarroll - Solicitor, Employment Department

As we move into the summer, we examine the various issues regarding annual leave that employers regularly have to deal with at this time of year.

The whole issue of annual leave is governed by two areas – the Organisation of Working Time Act, 1997 and the employee's Contract of Employment. The 1997 Act sets out the threshold of minimum leave entitlements. An employee's statutory entitlement to paid annual leave is based on the number of hours they actually work. Broadly, a regular full time employee, who works five days a week, must receive at least 20 paid days annual leave. Beyond that there is nothing to prevent an employer and employee agreeing to additional leave, either from the outset or often as a form of long-service benefit. As with any contractual term, terms regarding holidays should be clear and unambiguous.

When leave can be taken

The 1997 Act provides that it is the employer who determines the times at which annual leave is granted but they must have regard to:-

- the need for the employee to reconcile work and any family responsibilities and
- the opportunities for rest and recreation available to the employee.

Employers can refuse a request for a particular period of annual leave if, for example, the leave requested is during a busy working period or if granting the leave would mean lower than required staffing levels. However, they should not unreasonably deny a genuine request for leave.

Sick Leave and Annual Leave

The 1997 Act provides that where an employee is ill during a period of annual leave and furnishes a medical certificate in respect of the illness, those days will not be deemed annual leave. They would be deemed sick leave and, given there is no statutory right to paid sick leave, payment would very much depend on any contractual sick leave entitlements.

If an employee is denied annual leave and then calls in sick during the period in question, the company should look to utilise its sick leave policy which may require the furnishing of a medical certificate and may allow for a referral to the Company doctor. Failure to adhere to the policy may then be a disciplinary matter.

Unforeseen events

What can an employer do when an employee can't make it back from their holidays, either for reasons outside their control (such as a strike or the volcano ash) or for simply missing a flight home? Are employers entitled to refuse to pay an employee who is after all absent from work? Well, unless an employee's contract provides otherwise, there is no obligation for the employer to pay for such an absence. As a result, an employer can require an employee to take unpaid leave or use up any remaining annual leave or indeed reach some agreement that all or some of the time absent from work will be made up at a later time.

What if the employee delayed was abroad in the course of their employment? If the employee is still working whilst delayed abroad (using a laptop or phone) they would be entitled to be paid. If they are not able to make themselves available for work they are not entitled to be paid. However, notwithstanding that, one could easily see an employee garnering considerable sympathy for their predicament before a Rights Commissioner or the E.A.T. and thus it would be prudent for employers to demonstrate some flexibility in such situations by, for example, allowing for remaining paid annual leave to be used or for un-worked hours to be worked back at another time.

It is important to point out that the European Court of Justice has stated that the purpose of the Working Time Directive (which underpins the 1997 Act) is principally the protection of health and safety of workers. Therefore, annual leave entitlements are viewed through a prism of health and safety and thus, in practice, the burden on ensuring leave entitlements are taken essentially falls on the employer, not the employee.

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4. Supreme Court Declines to Approve Fleming Schemes

By Emma Crowley - Consultant, Insolvency & Restructuring Department

In a unanimous decision delivered by Ms. Justice Denham on 4 March 2010, the Supreme Court allowed ACC Bank's appeal against the earlier order of the High Court which had confirmed the Fleming schemes of arrangement. A liquidator was subsequently appointed to John J. Fleming Construction Company ("Construction"), J.J. Fleming Holdings ("Holdings") and Tivway Limited ("Tivway"). Anglo, AIB and KBC have since appointed receivers pursuant to their security held.

The Construction scheme involved the sale of the profitable third party contracting trade and assets to an investor for a sum of €3.6m, with the majority of Construction's employees transferring to Donban. The property development arm of the business (described as the "legacy" development) was to remain in Construction with a view to it being developed over a ten year period with bank support, once market conditions improved. The examiner estimated that it would take this length of time for the orderly development of the properties. All banks (and all other creditors) supported the schemes, with the exception of ACC Bank.

The Supreme Court was not satisfied that the schemes provided a reasonable prospect of survival for the companies. The court referred to section 2(2) of the Companies (Amendment) Act, 1990 whereby for the court to appoint an examiner in the first instance, it must be satisfied that there is a reasonable prospect that the company and the whole or any part of its undertaking will survive as a going concern. The court held that the schemes did not fulfil the legislature's object for the survival of the companies as a going concern. The sale of the viable undertaking (described as the "engine of the group") of Construction did not secure the survival of the company as a going concern. The remaining undertaking was described by Denham J. as "moribund", as a consequence of the property crash. The examiner had submitted that the companies would survive as a going concern in that the companies would be involved in the sale of completed units, the receipt of rental income and the maintenance and care of existing (undeveloped) properties. The court described such "so called business activities of the companies" as "essentially passive".

The court noted that any future business in Construction and Tivway would be entirely dependent on future decisions of the banks. The court did not view the 15 jobs being saved in Construction as a significant factor.

In relation to Holdings (non trading), the court did clarify that it had jurisdiction to admit the holding company to the process for the purposes of companies in a group obtaining the protection of the court. However, as the position of a holding company was dependent upon whether there is a reasonable prospect of survival of the related companies as a going concern, the scheme for Holdings was not approved.

The Supreme Court decision is a blow to the examinership process, certainly with respect to property development companies in the current market. The Fleming companies ultimately fell at the final hurdle on the basis of the statutory provisions which had been applied and considered to be satisfied by the High Court at the outset upon the appointment of an examiner. It could ultimately come down to quite a subjective analysis on the part of the court in any given case as to what amounts to a sufficient going concern for the purpose of the legislation. The outcome in this case may impact on the banking community's willingness or otherwise to fund further examinerships of this nature, which bank support was very significant in the Fleming case. A careful examination of the likely business and trading position of a company coming out of examinership will need to be made before embarking on the process at all. It could be quite a fine line as to what will constitute a sufficient level of activity in any given case. Clearly the costs arising in the context of this significant examinership ultimately failing are another blow for the general body of creditors of the companies concerned.

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5. Growth of Mediation as a Dispute Resolution Tool

By Ronan Geary - Partner, Commercial Litigation Department

Mediation has been described as "a flexible process conducted confidentially in which a neutral person actively assists parties in working towards a negotiated agreement of a dispute or a difference, with the parties in the ultimate control of the decision to settle and the terms of the resolution". In other words a Mediator is a neutral facilitator who tries to bring disputing parties together to an agreed settlement. The process is completely without prejudice and therefore if no resolution occurs then, aside from the costs of the day itself, there are no downsides for the two protagonists. No settlement is reached until both parties are happy with it and sign up to a written settlement agreement.

Historically, Mediation came about either through the invocation of a mandatory dispute resolution clause in any contract between disputing parties (e.g. a Lease or a Shareholder's Agreement) or through the voluntary agreement of such parties to submit their dispute to Mediation (either prior to, or in the course of, litigation). As set out below however, increasingly the Judiciary are prompting litigating parties to explore Mediation.

To compare it with other forms of Alternative Dispute Resolution (ADR), Mediation is entirely different to Arbitration which is essentially an adversarial process virtually identical to court which concludes with a binding adjudication by the arbitrator. Mediation differs from Conciliation in that the Mediator will not give his own determination at the conclusion if the parties fail to reach a negotiated settlement. Of course this means the parties feel freer to engage openly with the Mediator (knowing he will not ultimately be standing in judgement against them) which in turn heightens the prospect of a consensual resolution being reached.

Mediation first obtained formal recognition in Ireland in the Commercial Court Rules some six years ago. To date Mediation has been the most utilised and popular ADR process in that Court. Such has been the success of Mediation in that Court, that similar provisions are now being introduced throughout the entire Irish Court System.

In this regard on 17 December 2009 Minister Dermot Ahern signed into law the Circuit Court Rules (Case Progression (General)) 2009. These provide that a Judge may, of his initiative or upon request, invite opposing parties to use Mediation or other ADR processes to settle the proceedings at issue.

The introduction of Mediation as a Court endorsed ADR process in the Circuit Court is a welcome development. The fact that mediation is now endorsed in both the Commercial and Circuit Courts of course leaves a glaring anomaly in that the High Court has no such provision. It is inevitable however that this will shortly be rectified.

The new Circuit Court rules are not the only recent development in relation to the growing acceptance of mediation as a preferred ADR tool. The Multi-Units Development Bill 2009 - which is the proposed new apartment management company bill - endeavours to make mediation the preferred dispute resolution mechanism of disputes between management companies, investors and tenants. Moreover the Law Reform Commission will shortly be publishing its report on ADR and a new mediation/ADR bill is expected to follow. It is likely to be enacted before May 2011 in order for the government to comply with its obligations pursuant to the European Directive on Mediation.

Not every case is suitable for Mediation. Many cases however can be settled quickly and in a lasting way through mediation. A settlement agreed to by all protagonists has considerably more chance of being successfully implemented than a Court imposed solution after all.

All of the Solicitors in Ronan Daly Jermyn's Litigation & Dispute Resolution Department are fully conversant in the workings of Mediation and are at all times conscious of using Mediation at an early stage, in appropriate cases, so as to provide a prompt, successful and cost effective outcome for our clients.

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6. Family Law Issues Arising in the Recession

By Rosemary Horgan - Partner, Family Law Department

It is not uncommon for the family home, and potentially other assets to be registered in joint names. On judicial separation or divorce the Court has discretionary power to adjust property assets between spouses despite the title registration of the property.

What about Judgment Mortgages?

Carefully drafted matrimonial proceedings can operate as a "lis pendens" warning all parties that a claim has been made by one spouse against another. This warning binds a purchaser or mortgagee for value. However, A Decree of separation or divorce does not protect the spouse from creditors pursuing a joint 'family' debt. Equally, a personal indemnity given by one spouse to the other under the terms of an Agreement or Court Ruled Consent will not bind a creditor who can rely on joint and several liability obligations undertaken when the debt was incurred.

What about bankruptcy?

It is very often quoted that “Bankruptcy is a law for the benefit and the relief of creditors and their debtors, in cases in which the latter are unable and unwilling to pay their debts.”.

The personal guarantee of business loans is not uncommon. Unfortunately, in some instances the jointly owned family home may also have been used as collateral. All the debtor's assets and property vest automatically in the Official Assignee in Bankruptcy. Any payment or transfer of property by the bankrupt in favour of any creditor, with a view to giving such creditor preference over the other creditors, in the preceding six-month period are deemed to have been fraudulently done. The transaction may be undone by the Court (subject to certain exceptions for bona fide recipients or transferees).

A transfer of property, not made for good faith and for valuable consideration, within the two years prior to the date of bankruptcy is automatically void. A transfer made five years before bankruptcy is also void - unless the debtor can show that at the time of transfer he/she could pay all of his/her debts without the aid of the property comprised in the transfer. If the property is the family home, and is jointly owned, the Official Assignee must apply to Court for an Order for sale. In this instance the High Court must apply statutory, constitutional and ECHR principals in determining the application. Property Adjustment Orders made by a Court in matrimonial proceedings before bankruptcy are unlikely to be challenged, unless there is dishonest collusion.

The Supreme Court has ruled that a bankruptcy petition can be brought by a creditor without first having to obtain and execute a judgment. In practice however, applications for bankruptcy have been few as bankruptcy under the current regime lasts for 12 years before the bankrupt can be discharged. There has however been a two-fold increase in bankruptcy orders made in 2009 compared with the previous year. A defaulting spouse who has been ordered to but won’t (as opposed to can’t) pay an award due to the other spouse may be made subject to bankruptcy proceedings by the disappointed spouse.

What about NAMA?

The National Asset Management Agency Act, 2009 provides that where NAMA has acquired a bank asset no lis pendens, caution or inhibition registered after 30th July 2009 shall have effect against NAMA or any person who acquires that asset from NAMA. It is silent however on the question of family law proceedings which claim an interest in the property. It remains to be seen how the High Court will address this question when it arises as it will be obliged to apply the legal, constitutional and ECHR principles in determining the application. There will inevitably be legal developments prompted by Court decisions. In the meantime this will remain a problematical area of risk and opportunity for creditors, debtors and their spouses alike.

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Firm News

7. Michael MacNamara Scholarship

RDJ Glynn Solicitors established the Michael MacNamara Scholarship which is awarded on the basis of a competition open to all applicants for the LL.M. in Law, Technology and Governance in NUI Galway. The award is named in memory of the late Michael MacNamara.

Pictured above receiving the Michael MacNamara Scholarship, sponsored by RDJ Glynn Solicitors, from NUI Galway President, Dr James J. Browne, is Peter Mannion, from Tuam, Co. Galway. Also pictured is (left) Pádraic Brennan, Partner and Head of the Galway Office, RDJ Glynn Solicitors and (right) Professor William Golden, Dean, The College of Business, Public Policy and Law, NUI Galway.

8. U.C.C. Award

We were very pleased recently to act as inaugural sponsor to UCC's Research Commercialisation Awards. The awards ceremony took place on 27 April 2010 in the presence of UCC President, Dr Michael Murphy.

Pictured left is Mr Alan Holland of award-winner Keelvar (on right) with Dr. Murphy, President of UCC (left) and Garvan Corkery, RDJ.

Firm News

9. Law & Environment Conference 2010

Pictured recently at the Law and Environment Conference 2010 held in UCC, Cork, were conference speakers Dr Duncan Laurence, Environmental Consultant, Ms Finola McCarthy, Ronan Daly Jermyn Solicitors, Ms Aoife Shields, Ronan Daly Jermyn Solicitors, Cork / EPA Scholar, Faculty of Law, University College Cork and Dr Ronan Long, National University of Ireland Galway.

10. The Glynn Cup

JP Gilmartin of RDJ Glynn presents the Under-19 Tribes Tens trophy to Darragh O'Brien captain of the Garryowen winning team. RDJ Glynn recently sponsored the inaugural Tribes Tens tournament which took place at Crowley Park in Galway.

11. Recent Transactions Where We Acted

€25 million primary care health centre for Mallow

- The Examiner, April 2010 -
re: newly opened Mallow PCC

Two founders share €1lm in sale of Irish bio company

- Irish Times, April 2010 -
re: Sale of Stokes Bio

€9m assures bright future for Cork firm

- The Examiner, May 2010 -
re: Fundraising for Nualight

Planning go-ahead for €80m Cork clinic

- The Examiner, May 2010 -
re: Lancaster Quay Medical Centre for OCP

Even in these challenging times, the RDJ team has been kept busy as can be seen from the headlines above which highlight a number of recent transactions on which the firm advised. Some green shoots perhaps !

This newsletter is intended for general interest and guidance only and should not be used as a basis for decisions. Whilst every effort has been made to ensure the accuracy of the content, no liability can be taken for any omissions or errors.