



**RDJ**  
SOLICITORS  
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## 1. Welcome to the Winter 2010 edition of Connect, the RDJ newsletter.

As the country continues to struggle through the worst recession in its history, it is a time to be positive but realistic. Here at RDJ, our lawyers are working with businesses and firms across the country. What we see is an economy which is resilient and hard working and coping remarkably well with a hugely challenging environment. As confidence creeps back, this will lead to increased business activity in the months ahead. It will be slow, but it will happen.

As always, we have a range of interesting articles on legal subjects together with some news about various RDJ activities. We also introduce our Tax Investigations and Disputes Team. This is an exciting new concept bringing together RDJ legal and tax expertise to offer an innovative

service for our clients.

I do hope you find this newsletter interesting and do feel free to let us have your feedback on any aspect of the publication.

Finally, with Christmas fast approaching, I would like to wish all our clients and business colleagues a merry Christmas and a happy New Year.



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RDJ's new Tax Investigations and Disputes Team:  
(left to right) Jamie Olden, Richard Martin, Eoin Tobin and John Cuddigan.

## In this issue...

- 1 Welcome note.
- 2 Companies Consolidation and - Reform Bill.
- 3 Employment Injunctions - The Giblin Case.
- 4 New Code of Practice for Revenue Audit.
- 5 HSE Primary Care Centres - Operate and Maintain? A Warning for Developers.
- 6 Noah's Ark.

### FIRM NEWS

- 7 New Southern Law Association President.
- 8 Recent Transactions Where We Acted.
- 9 Representing Ireland.
- 10 Recent RDJ Staff Outing.
- 11 IRFU Appointment.

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## 2. Companies Consolidation and Reform Bill

By Sinead Corcoran, Solicitor, Corporate & Commercial

The company law code currently consists of fifteen Acts spanning a period from 1963 to 2009. The Company Law Review Group (CLRG) (a statutory advisory Group) was established, amongst other things, to assist with simplifying and codifying the existing company law code. The CLRG has prepared a General Scheme (which is effectively legislative proposals) for a new Companies Consolidation and Reform Bill. The CLRG submitted its General Scheme to the Minister for Enterprise, Trade and Innovation in March 2007. The Office of the Parliamentary Counsel is currently in the process of drafting the Bill and it is currently envisaged that the Bill will be published by the end of 2011. Once enacted the Bill will involve a number of significant reforms and changes in the existing company law code. The full detail of the General Scheme and more information with respect to the CLRG's work can be viewed on the CLRG's website, [www.clrg.org](http://www.clrg.org).

The General Scheme of the Companies Bill contains more than 1,250 heads and is divided into two areas, Pillar A and Pillar B.

The existing company law code is very much modelled on the assumption that the most common type of company is the public company. Pillar A of the General Scheme will focus exclusively on private companies limited by shares and in so doing recognises the fact that this entity represents the majority of companies on the Company Register. Pillar B will apply to all other types of company.

Some points of interest that I would briefly highlight regarding the "new model" private company limited by shares under Pillar A are as follows:

*(a) the company will have full and unlimited capacity to carry on and undertake any business or activity. In other words, the private company will have the same capacity as a natural person and the long standing doctrine of ultra vires which requires a company to act within its stated objects as set out in the objects clause of its Memorandum of Association will no longer have application;*

*(b) the existing constitutional documents comprising a Memorandum of Association and Articles of Association will be replaced with a one document constitution;*

*(c) two directors will no longer be required and a sole director will suffice. A sole director cannot also act as company secretary;*

*(d) its member (or members, acting unanimously) can waive the requirement to hold an annual general meeting.*

Upon enactment of the Bill it is envisaged that there will be an eighteen month transition period during which all existing private companies limited by shares will have to decide whether to register as the "new model" private company limited by shares or to register as a "designated activity company" (which must have a Memorandum of Association setting out an objects clause within the confines of which the company must operate).

A default registration procedure will apply to convert existing private companies limited by shares to the "new model" private company limited by shares governed by Pillar A if the existing companies have not elected to register as "designated activity company" during the transition period.

Existing private companies will need to consider (depending on the activities of their company) whether it is more appropriate to register as the "new model" private company limited by shares or as a "designated activity company".

The above gives a very brief flavour of certain anticipated provisions. There is undoubtedly much food for thought for companies and their financial and legal advisers in connection with this company law development.

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### 3. Employment Injunctions - The Giblin Case

By Antoinette Vahey, Solicitor, Employment Law

*The recent case of Giblin –v- Irish Life and Permanent plc (2010) ELR173, has brought the employment injunction into sharp focus, once again. In recent times, the Courts have presided over a marked increase in the number of injunction applications being taken by employees against their employers.*

The Giblin case arose in the context of an investigation by Irish Life and Permanent into various accounts held by or associated with Mr Giblin, a Manager who was employed at the College Green branch. Mr Giblin was placed on special leave with full pay pending a full investigation of the matter.

Having taken issue with the manner in which the investigation was being carried out, Mr Giblin refused to attend an investigative meeting, which proceeded in his absence. Mr Giblin was then informed by email that the investigation team was of the view that his behaviour was a “gross breach that the Plaintiff, as an experienced Branch Manager, owed the Defendant as his employer” and that he should be dismissed”.

Mr Giblin secured an interim injunction, restraining his employer from summarily dismissing him. He then sought an interlocutory injunction restraining his employer from dismissing him or imposing any sanctions on him without observing fair procedures and the employer’s own disciplinary procedures. He further sought mandatory orders regarding his pay, pension and reinstatement.

In her judgement, Laffoy J. granted an order restraining the Defendant from dismissing the Plaintiff and ordered the continuation of the placement of the Plaintiff on special leave with full pay.

The learned Judge set out the following criteria to be considered prior to granting a mandatory injunction.

*1. Employers must act in accordance with the terms of their employees’ contracts of employment, particularly, the implied term of an entitlement to fair procedures. However, what fair procedures demands depends on the terms of the employment and the circumstances surrounding the proposed dismissal.*

*2. An employee seeking a mandatory injunction, which would have the effect of continuing his/her employment, must establish a strong case that he or she would be successful at the trial as is seen in Maha Lingham –v- The HSE (2006) ELR137 and Bergin –v- Galway Clinic Doughiska Limited (2008) 2IR2005.*

*3. Damages must not be an adequate remedy for the Plaintiff.*

*4. The balance of convenience favours the granting of the injunction.*

The Judge criticised the manner in which the investigation was conducted and the manner in which a decision to dismiss was reached. In particular, she determined that Mr Giblin had a strong case regarding the following;

- He was deprived of fair procedures
- A fair hearing was jeopardised by the conduct of the investigation team
- Due to the issues raised with the investigative process, the investigation team should not have made any decision on the allegations giving rise to serious misconduct so as to warrant dismissal.
- No decision should have been made in the absence of the Plaintiff or his representatives.

- There was a strong suggestion of pre-judgement on the part of the investigation team.

- Once the Plaintiff took issue with the investigation, the investigation team should have addressed the issues rather than proceeding to make the decision in his absence.

- He had not been afforded the type of appeal to which he was contractually entitled.

- That any actual and potential damage to his reputation and to his future career was not something that would necessarily be adequately compensated by damages.

This case serves as a timely reminder to employers that the principles of natural justice and fair procedures are extremely important and that a separate investigation and disciplinary process should be established, particularly where serious allegations, which may potentially lead to dismissal, are involved. Otherwise, an employer may find itself before the High Court defending a mandatory injunction application.

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## 4. New Code of Practice for Revenue Audit

By Eoin Tobin, Solicitor, Tax

*It is a fundamental principle of our self assessment tax system that returns filed by a taxpayer are accepted as the basis for calculating the amount of tax the taxpayer pays. At the same time one way in which Revenue seeks to promote compliance in the tax system is through the auditing of tax returns. In 2009 alone Revenue carried out 12,500 such audits.*

A new Code of Practice for Revenue Audit (the “Code”), which deals with the way in which audits are carried out, has recently been published. The Code applies to all new audits notified on or after 1 October 2010 and can also apply to audits outstanding at that date where the taxpayer opts for his or her case to be dealt with under it.

The Code replaces the previous Code of Practice for Revenue Auditors which had been in place since 2002 but which was effectively made redundant by the introduction of a statutory penalty regime back in 2008.

In addition to the new penalty regime, which is now enshrined in law, the following are some new items which are now dealt with in the Code:

- *The Code includes a section on “e-auditing” i.e. the use by Revenue of computer assisted audit techniques on a taxpayer’s data. This might involve the examination by Revenue of the electronic systems used in the taxpayer’s business and the electronic copying and*

*downloading of electronic data for analysis. Such an approach may raise particular issues in relation to data protection, confidentiality and legal privilege which a taxpayer should be aware of.*

- *Where a mistake has been made by a taxpayer but there has been “no loss of revenue” to the exchequer Revenue can, in certain circumstances, seek to impose a fixed penalty payment ranging from €5,000 up to €100,000, depending on the seriousness of the mistake. Under the old regime no such fixed penalties applied so a taxpayer could have been left faced with paying the tax, a penalty on the tax and interest, which together could work out very costly.*

- *Revenue must give a taxpayer a timeframe as to how long the audit should take to finalise.*

- *The Code allows, in appropriate cases, for taxpayers to seek an installment arrangement to meet liabilities arising from the audit.*

### New Mandatory Reporting Regime

Finance Act 2010 introduced a new disclosure regime for certain transactions. The legislation requires the promoters of tax schemes with certain hallmarks to disclose them to Revenue shortly after they are first marketed or made available for use. Revenue says that the new rules are intended to create an early warning system for tax schemes that may be potentially damaging to tax revenues.

The type of transactions which must be disclosed to Revenue are detailed in a draft set of regulations which were published by Revenue earlier this summer and which are currently undergoing a consultation process. It is anticipated that final regulations will be published shortly.

We are now in the unique position of operating a general anti-avoidance rule under section 811 TCA 1997, an optional notification procedure under section 811A TCA 1997 and a mandatory reporting regime, which are all in addition to the increasingly sophisticated techniques being employed by Revenue in carrying out targeted audits and investigations.

There is concern that over-regulation creates uncertainty for business and could have a negative impact when it comes to foreign direct investment in this country, which is more important now than ever. For taxpayers, in general, the direction being taken by Revenue makes it clear that the focus now, more than ever before, is on tax compliance so it is in the best interest of every taxpayer to ensure that their affairs are in order.

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## 5. HSE Primary Care Centres - Operate and Maintain? A Warning for Developers

By Evin McCarthy, Solicitor, Commercial Property.

*The HSE Primary Care strategy document "Primary Care: A New Direction" established a team-based collaborative approach to primary care in the community.*

Central to this approach is the establishment of Primary Care Centres within communities in which the HSE (as a tenant) and local G.P. practices, together with other health professionals (physiotherapists, occupational therapists, etc.) would be located within a single, state-of-the-art premises. This bi-location opens the possibility of real integration and support between the public and private health service providers to the benefit of the patient, whilst alleviating the over-dependence on hospitals.

The government covenant that the HSE provides as a tenant in a Primary Care Centre is understandably more attractive now than ever before. Included in the HSE standard form documentation for Primary Care Centres is a Service Level Agreement which contains a requirement on the developer to provide, not just the usual maintenance, cleaning and insurance services for common areas in multi-let buildings, but an extension of such services to the HSE area within the Primary Care Centre. This in effect replicates maintenance provisions in Public Private Partnership "Operate and Maintain" documentation.

As one would expect therefore the Service Level Agreement binds the developer to

commitments to maintain the building (including preventative maintenance) to defined standards of Good Industry Practice, with the performance routinely reviewed by the HSE.

As a note of caution to developers, the Service Level Agreement contains an indemnity clause requiring the developer to indemnify the HSE against:

"...all proceedings, actions, costs (including legal costs), charges, claims, expenses, damages, liabilities, losses and demands ("Liabilities") in respect of any disease or injury to or the death of any person whatsoever or in respect of any loss of or damages to any property or in respect of any other Liability caused by or arising from any act, neglect, default or omission of the Landlord, its officers, employees, sub-contractors or agents in connection with the performance of the Landlord's obligations under this Agreement". (emphasis added).

The extension of the services provided under the Service Level Agreement to the HSE premises and not just common areas within the Primary Care Centre increases the potential liability of the developer because the HSE is indemnified by the developer for personal injury claims made against the HSE for contraction of infectious diseases such as MRSA where it can be established that the cause of the infection (or a contributory cause) is attributable to the standard of cleaning/maintenance services provided under the service level agreement.

It is important therefore that a developer would seek, at a minimum, certain commitments from the HSE in relation to

the indemnity claim and in particular that the HSE would:

- give notice of claims as early as possible, allowing the developer/it's insurer to take a view on the course of defending the claim/settlement;
- take any action the developer/it's insurers may request to dispute the matter or enforce rights against any person;
- allow exclusive conduct of the proceedings by the developer (being the party giving the indemnity, or its insurers); and
- agree that there would be no admission of liability or settlement of the matter without the consent of the indemnifying party.

In addition the developer will need to ensure that adequate insurance cover is in place before agreeing to undertake such indemnity in order to avoid personal responsibility for anticipated claims.

Understandably, developers may not have the appetite to negotiate with a tenant providing government covenant in present market conditions (other than on commercial fundamentals). However it is essential that commitments undertaken against this negotiating position will not expose the developer to unacceptable levels of risk for the duration of a 20-25 year lease.

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## 6. Noah's Ark

By Finola McCarthy, Partner, Construction

*Under new Regulations which came into force on 25 March 2010 flood risk management is the responsibility of the Office of Public Works (OPW). The European Communities (Assessment and Management of Flood Risks) Regulations 2010 designate the OPW as the Competent Authority with various powers to combat the risk of flooding.*

The coordination of flood management arrangements follows the system already in place for water protection which is a management system based on river basins instead of administrative boundaries. A total of eight River Basin Districts (RBDs) have been identified on the whole island of Ireland as the "administrative areas" for co-ordinated management of water protection and now also flood management.

In addition to the carrying out of works for flood protection schemes, some of the key requirements of note under the Regulations (which implement the EU Directive 2007/60) and which will have significant implications for land owners, developers and purchasers of land are:

- *By 22 December 2011 preliminary flood risk assessments must be completed for each river basin district or in certain cases individual river basins or coastal areas. There is to be a two month period following publication of the assessments for relevant local authorities and the public to make observations on these. The assessments must be reviewed every six years.*

- *Based on the assessments, areas of*

*potential significant flood risks must be identified.*

- *By 22 December 2013 flood hazard maps and flood risk maps must be prepared to show areas with a low, medium and high probability of flooding. Land owners, occupiers or users of lands shown on the maps will be given a one month period from its publication to make objections and an appeal procedure is provided for.*

- *By 22 December 2015, flood risk management plans must be established on the basis of the maps setting out the objectives and measures for the management of flood risks in the identified areas. The objectives are to focus on the reduction of potential adverse consequences of flooding for human health, the environment, cultural heritage and economic activity, including on flood prevention, protection and preparedness and sustainable land use.*

The OPW's role and responsibility in relation to the maintenance of flood risk management works and drainage works is set out in detail including provisions enabling the exclusion of liability for alleged inadequate maintenance of such works.

At planning level, in November 2009 the OPW published planning guidelines on the Planning System and Flood Risk Management which are aimed at ensuring a more consistent and rigorous approach to incorporate flood risk assessment and management into the planning system. Essentially, the guidelines require the planning systems at national, regional and local levels to

avoid development in areas of flooding, such as floodplains, unless there are wider sustainability grounds that justify the development and where the flood risk can be reduced or managed to an acceptable level.

Given the growing risk of flooding due to climate change the guidelines are aimed at ensuring that development vulnerable to flooding will no longer be permitted by planning authorities in high risk areas unless it can meet the justification test. Similarly zoning and re-zoning decisions must also meet the requirements of the justification test.

The guidelines also require that a sequential approach to flood risk management be taken and that development should be guided away from high flood risk areas and that flood risk assessment should also be incorporated into the process of making decisions on planning applications and planning appeals.

Given the increased flooding events that many regions in Ireland have experienced over the last year, flood risk is an important enquiry to include in any due diligence for property valuation, transfer or development and the proposed assessments, maps and plans will facilitate access to official information on flood risk.

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## Firm News

### 7. New Southern Law Association President



Pictured: outgoing Southern Law Association President, Eamon Murray, handing over Chain of Office to incoming President Fergus Long of Ronan Daly Jermyn.

### 8. Recent Transactions Where We Acted

# PepsiCo buys Little Island plant for €3m

Irish Examiner – Monday 15<sup>th</sup> November 2010

## Chinese buy Cork fibre optic cables firm

€5m research investment to expand firm's workforce

Irish Times – Tuesday 23<sup>rd</sup> November 2010

## Bord Gáis buys 20% stake in wave farm business Tonn Energy

Irish Times – Wednesday 10<sup>th</sup> November 2010

## Firm News

### 9. Representing Ireland



Pictured above at the Special Olympics Ireland 2010 games held in Limerick in June was gold medal winner Clodagh Kilcullen of RDJ with Paul O'Connell of Munster Rugby. Clodagh has been chosen to represent Ireland in Soccer in the Summer Games Athens 2011.

### 10. Recent RDJ Staff Outing



Pictured at the annual Staff Outing held in October this year were some of the RDJ staff taking part in the fun games held at Garryduff Sports grounds. With the sun shining, a great day was had by all and the games were followed by a BBQ that evening.

### 11. IRFU Appointment



The IRFU has confirmed the appointment of William B. Glynn of RDJ Glynn as incoming Junior Vice President of the Union. Billy will take office as President in June 2012. Heartfelt congratulations to Billy from all at RDJ and we look forward to Billy having a very successful term of office. Pictured following confirmation of Billy's appointment are (from left to right): Padraic Brennan, Billy Glynn, John Dwyer and Nicholas Comyn.

"We would like to wish you all a very Happy Christmas and a Peaceful & Prosperous New Year". This Christmas, instead of sending cards we are making a contribution to a number of Irish charities.

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.