

in this  
issue...

- 1 Welcome
- 2 Sick Pay and the Employment Relationship
- 3 Can you sue the directors of a company for a debt incurred while the company was struck off?
- 4 Move-Away Applications
- 5 Tribunal case a victory for Press Freedom
- 6 Private Security Services Act 2004
- 7 Succession Planning for Individuals

FIRM NEWS

- 8 A snippet of some of the recent tax work RDJ has been involved in.
- 9 Ronan Daly Jermyn is Graphite HRM's new legal editor.
- 10 RDJ/Recruit Ireland Breakfast Briefing.
- 11 Corporate and Commercial Department In-house Seminar.
- 12 New Recruits in RDJ.
- 13 Family Law Conference.

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RDJ New Partners



**Welcome** to the winter 05/06 edition of our newsletter. In the past six months we have continued to address the needs of our clients by expanding our team with the recruitment of a number of key people throughout the firm.

Jennifer Maher has joined our Corporate and Commercial team from Kerry Group PLC where she led the in-house banking team. Evin McCarthy has joined our Commercial Property team and Adrian Godwin has joined our Tax team as a consultant.

I would also like to take this opportunity to congratulate one of our partners, James O'Sullivan, on his election to the Council of the Law Society. James is continuing RDJ's long tradition of involvement with the Society.



Pictured from left to right: John Dwyer, Managing Partner, Deirdre Wilson, Partner, John Cuddigan, Partner.

Also, we are delighted to announce the appointment of two new Partners, John Cuddigan and Deirdre Wilson. John Cuddigan heads up our Tax Unit, which offers a comprehensive range of tax planning services to corporate and individuals. Deirdre Wilson specialises in the area of property transactions and banking law.

As ever, thank you for your continued support of RDJ, which is much appreciated.

John Dwyer



## Sick Pay and the Employment Relationship

By Jennifer Cashman, Partner, Employment Law Unit.

The recent Irish case in the European Court of Justice of the North Western Health Board -v- McKenna has highlighted issues of pregnancy-related discrimination in the workplace and particularly issues surrounding employers' legal obligations with regard to Sick Pay Schemes in the workplace. It is therefore opportune to review the law relating to sick leave and sick pay in the workplace.

So what is the law relating to employers' obligations with regard to sick leave and sick pay in Ireland?

There is no legal obligation on employers to pay employees while they are on sick leave. However, most employers have in place some form of Sick Pay Scheme, either in writing or otherwise, that allows for some payments to be made.

The benefits offered in written Sick Pay Schemes vary, with some companies paying for certified sick leave for periods from one week up to one year.

Where employers have a written scheme in place, the situation is fairly straightforward, provided that the employer is consistent in the application of the scheme and applies the same terms to all employees across the board. In the last number of years, various pieces of legislation have been implemented dealing with part time and fixed term workers which oblige employers to apply the same benefits to such workers as to their full time permanent comparators. Furthermore, Employment Equality

legislation prohibits discrimination in the application of terms and conditions of employment, which includes the application of Sick Pay Schemes. Failure to apply the terms of Sick Pay Schemes consistently may result in a claim under the relevant legislation.

If an employer has no written policy in place with regard to sick pay entitlements, the situation is a little more complicated. Employers will often argue that as they have no such written policy in place, there is no obligation to pay an employee who is out on sick leave. However, custom and practice may have been established in the organisation over time, which may place a legal obligation on employers to pay for sick leave. If employees have, in the past, been paid in full while out on sick leave, then custom and practice has been developed in the organisation and a failure to pay a particular employee may lead to legal action against the employer. There have already been a number of interesting cases in relation to this issue.

For example, In the case of Charlton V Aga Khan Stud (1999), an employee who had been with her employer for 27 years

became the subject of internal disciplinary proceedings. She was requested to attend a disciplinary meeting but was unable to attend due to sickness and the meeting was adjourned until such time as she could attend. In advance of the meeting, she went to the High Court seeking interlocutory relief restraining the disciplinary enquiry and also requiring her employer to pay her sick pay. The High Court granted her an injunction and also granted an Order that the employer pay her a weekly sum equivalent to her net salary less any disability benefit, provided the employee furnished medical certificates on a weekly basis to her employer. One of the main reasons why the Court decided that the employee was entitled to continuing sick pay was that she could point to other employees who had been absent from the same employment while ill and had been paid in full during their absence.

The effect of the McKenna decision is that employers are entitled to treat pregnancy-related illness in the same manner as other illnesses under the terms of Sick Pay Schemes. If an employer has no Sick Pay Scheme in existence, then the employer must consider whether or not custom and practice has been established in the employment which would entitle an individual employee to sick pay. Provisions relating to sick pay should be applied consistently by the employer to avoid claims for discrimination under employment equality legislation or other relevant legislation relating to part time/fixed term workers.

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## Can you sue the directors of a company for a debt incurred while the company was struck off?

By Nicholas Comyn, Partner, Corporate & Commercial Dept.



This has been a question riddled with difficulty since the inception of Section 41 of the Companies Amendment (No. 2) Act 1999 (the “1999 Act”) which envisages two ways of restoring a company which has been struck off the register:

- (a) an application to the Registrar of Companies within 12 months of the striking off; or
- (b) an application to the court (a creditor can apply to the Circuit Court). In either case, the 1999 Act provides “that the restoration of the Company does not affect the rights or liabilities of the Company between the date of dissolution and the date of such restoration”.

So what is the liability of the directors to a creditor whose debt was incurred while the company was struck off?

The issue was dealt with clearly by Finnegan J. in *Richmond Building Products Limited and Soundgables Limited t/a Munster Radon Protection, James Butler, John O’Keeffe and Gerry Spillane* (unreported High Court 11/11/2004).

In simple terms, Finnegan J. held that once a company was restored to the register, it had the effect of “enabling the company to sue and be sued on any contract entered into by it or on its behalf. It has nothing to say as to the position of those purporting to act on the company’s behalf” (p.3). In other words the directors were not personally liable and it is as you were. The company might subsequently be wound up and the directors found guilty of reckless trading etc. but that is a different issue.

There is one other situation not dealt with in this judgement. If the company is struck off and *not* restored and the directors incur a liability, can the directors be sued? Unfortunately, this may yet need to be litigated but Section 12(B)(1) does provide some solace in stating “The liability, if any, of every director, officer, member of a company, the name of which has been struck off the register... shall continue and may be enforced as if the company had not been dissolved”. It may need a “test case”!

Other than a winding up of the defaulting company or registering a judgement as a mortgage on tangible assets of that company, the creditors’ powers are quite limited.

A creditor can:

- (i) where there are certain statutory defaults by the officers (directors) of the company and after 14 days notice, apply to the High Court to have the default remedied (normally at the cost of the company) e.g. failing to make returns (Section 371 of the Companies Act 1963).
- (ii) seek the appointment of an inspector by the Court to investigate and report on the affairs of a company, but this is rarely done except in a high profile case e.g. the National Irish Bank (Section 7 of the Companies Act 1990).
- (iii) A creditor who has obtained a judgement and where it is proved the company is insolvent can apply to the High Court for various reliefs such as liability for reckless trading, return of assets improperly disposed of etc. but any such application will be subject to the normal proofs required in such an action (Section 251 of the Companies Act 1990).

The answer to the question posed in the heading is that you can, of course, sue the directors but once the company is restored the directors will not incur a personal liability to the creditor so there is no point in doing so.

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visit our website  
[www.rdj.ie](http://www.rdj.ie)



## Move-Away Applications

By Deirdre O'Riordan, Family Law Unit.

Relocation and move-away cases are becoming more common. It is never easy when a relationship comes to an end but this is magnified when the parties disagree over where and with whom the children shall reside. In most cases, if one parent leaves the jurisdiction without the consent or knowledge of the other, they will face a Child Abduction application and be forced to return. Aside from the legal consequences, Child Abduction can leave a legacy of bitterness and mistrust between parents which will have an adverse affect on their children.

In the event of a dispute over whether one can leave the country with the children attempts should always be made to negotiate and/or mediate an agreed solution. If this fails then either parent can seek to have the Court determine the issue. There is no specific legislation in Ireland dealing with these applications and it has become the practice to apply to the District/Circuit Court pursuant to the Guardianship of Infants Act 1964 for permission to leave the jurisdiction and/or to dispense with the consent of the other parent.

There is a great deal at stake for both parents in these cases. One parent may be planning a new life in a new country and possibly with a new partner, while the other faces the prospect of being separated a great distance from his/her child. Mr. Justice Flood in the High Court case of *EM v. AM* (16th June 1992) set out the principles which he felt a Court should address when faced with move-away applications. He held that "the Court must have regard to:

- (1) Which of the two will provide the greater stability of lifestyle,
- (2) The contribution to such stability that will be provided by the environment in

which [the child] will reside, with a particular regard to the influence of his extended family,

- (3) The professional advice tendered,
- (4) The capacity for, and frequency of, access by the non-custodial parent,
- (5) The past record of each parent, in their relationship with [the child], insofar as it impinges on the welfare of [the child],
- (6) The respect, in terms of the future, of the parties, to orders and directions of this Court".

The categories of parents who may face such a scenario include:

- (A) married couples who are automatically joint guardians and custodians of their children, and
- (B) unmarried parents, where the natural father has been appointed guardian to act jointly with the mother, either by Court Order or by Statutory Declaration.

In both of these cases, the parent seeking to relocate with the child will require the consent of the other parent and in the absence of that consent must bring the aforementioned 'move-away application' before going anywhere. In other situations, for example where a father is

not joint guardian, he may well be exercising access pursuant to a Court Order and the mother should be mindful not to breach the terms of that Court Order.

There is a high onus on the Applicant parent to show why he/she should be permitted to leave with the child. The proposed move must be well planned with accommodation, schooling and job prospects in the new country thoroughly researched and if possible confirmed. The move will have to reflect the best interests of the child and not only the parent's desire to move, as children have a right to the contact and company of both parents. The Applicants in move-away cases are predominantly mothers but the success of the application is by no means guaranteed.

In the *EM v. AM* case the applicant mother was permitted to return to America with the child but the Judge made the order quite specific to ensure that access with the child's father in Ireland would be facilitated. He stated that the child's father "should have maximum access that he can have having regard to the physical distance involved". He directed that the mother should not leave the town in which she proposed to live without advising the father and the High Court. He directed the mother to give an undertaking to the Court to ensure frequent telephone and written contact between father and child and that the father should continue to be consulted on all major decisions in the child's life.

In short, the general rule of thumb to a parent hoping to move should be 'apply – don't fly'.

This article is a summary of Deirdre's article which is currently in the Winter 2005 edition of the Thomson Round Hall - Irish Journal of Family Law.

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## Tribunal case a victory for Press Freedom

By Richard Martin, Partner, Commercial Litigation Unit.

The High Court (4th October 2005) has rejected a claim by the Mahon Tribunal for a permanent injunction against the Sunday Business Post newspaper restraining them from publishing or reproducing documents which the Tribunal has determined to be confidential until such time as the information or documentation has been opened at a public hearing of the Tribunal.

The Planning Tribunal was established in October 1997 to inquire into alleged corruption in the planning process. That Tribunal is still running, eight years on. On the 17th December 2004, the President of the High Court granted an interim injunction restraining the Sunday Business Post from publishing information or documentation determined by the Tribunal to be confidential. At the trial in March, the Sunday Business Post argued that the injunction sought constituted an excessive and disproportionate restraint on press freedom, that the claim constituted a restraint based not on any true quality of confidentiality but on the Tribunal's own determination of what was and what was not confidential, that the claim covered an excessively wide range of material, that the documents concerned are not specific, detailed or readily identifiable, that information in the public domain cannot be confidential, that such restraint is contrary to the public interest and that only the person who is owed the duty of confidence can seek to protect it.

The proceedings came about as a result of the refusal of the Sunday Business Post to furnish undertakings to the Planning Tribunal in relation to the future publication of Tribunal documentation following the publication of certain information in October 2004 which the Tribunal deemed to be confidential. Separate proceedings were also issued against the journalist concerned

seeking the disclosure of the source of the information. These separate proceedings are currently adjourned pending final orders in the injunction proceedings.

In his lengthy judgment in the High Court, Mr. Justice Peter Kelly, having reviewed decisions of the Superior Courts in Ireland, England and in Strasbourg (the European Court of Human Rights) refused the application sought and ordered the Tribunal to pay the Business Post costs. He said that the injunctions sought went much too far in seeking to enforce a species of confidentiality created unilaterally by the Tribunal. He said that the injunction sought to extend to information already in the public domain and the court could not contemplate granting an injunction of the type sought. He said that what was required in any such application to the Court was a weapon

of precision which would protect that deserving protection whilst inflicting minimal collateral restrictions on the defendant's rights. However, he said that in this case the Tribunal had taken a blunderbuss as its weapon of choice.

Judge Kelly said that the right of the press to report is not an unfettered one but if it is to be curtailed by court order, there must be a sound legal basis for so doing. Having considered the jurisprudence which has developed in relation to Article 10(2) of the European Convention on Human Rights, he said that he could find no sound legal basis for the wide ranging form of order sought in these proceedings.

Richard Martin acted on behalf of the Sunday Business Post in these proceedings. Richard can be contacted at [richard.martin@rdj.ie](mailto:richard.martin@rdj.ie)

“ Judge Kelly said that the right of the press to report is not an unfettered one but if it is to be curtailed by court order, there must be a sound legal basis for so doing. ”



## Private Security Services Act 2004

By Audrey O'Connor, Solicitor, Litigation Dept.

The Private Security Authority, the Statutory Body responsible for the regulation of the private security services industry, launched its licencing programme on the 1st October, 2005. The programme is due to conclude by the end of 2006.

It is understood that the PSA has written to over 1,000 private companies personnel/procurement officers warning them of impending critical dates.

### The PSA will issue two types of licences:

1. The Private Security Services Contractor Licence. (Applies to Companies, Partnerships and Sole Traders providing security services).
2. Private Security Service Employee Licence (Applies to all employees across all sectors in the industry).

The PSA, at its discretion, will decide if an applicant is a fit and proper person to work in the industry. Each of the principals of a company is subject to the vetting procedure. Towards this end the PSA will conduct criminality checks in liaison with the Gardai and where the applicant is a non-national, by the requirement of a criminal records certificate from the applicant's country of origin.

### Services in the industry subject to licencing are:

- Door supervisor (bouncer) including event security
- Supplier or installer of security equipment e.g. CCTV
- Private investigator

- Security consultant
- Security guard
- Provider of protected forms of transport, e.g. cash in transit
- Locksmith
- Safe supplier and installer

It will be obligatory for licencees to carry an identity card and certain licencees will have to wear an identity badge.

**First on the schedule** are contractors providing door supervisor and security guarding services who must be licenced by the 1st April, 2006. Licencing of Intruder Alarm Installer and Alarm Receiving Centres commenced on the 1st November 2005 while licencing of cash-in-transit companies commenced on the 1st December 2005.

**The first of the** employee licences are due to roll-out from 1st April 2006 and will apply to a person who wishes to work as a door supervisor, bouncer or security guard. The critical date after which it will be an offence to act without a licence or indeed to employ an unlicenced person is the 1st April 2007.

### Licencing Fees

Contractor licence fees are based on turnover of the contractor's company in the relevant sector plus a processing fee of €1,000. However, it should be noted that a 12½% discount is available on the sector fee on

applications received by the PSA before the 31/12/05 and 7% discount where applications are received after 1/1/06 but before close of business on the 31/1/06. Employee applicants will pay a processing set fee and a sector fee as prescribed.

### Offences

It will be an offence for a contractor or an individual to provide a security service without a licence after the relevant critical dates have passed. Furthermore, it will be an offence to engage an unlicenced contractor or employ an unlicenced individual after those dates pursuant to Section 38 of the Act.

Summary conviction for contravention of Section 38 will result in a fine of up to €3,000.00 and/or imprisonment and on conviction on indictment to a fine or imprisonment for a term not exceeding 5 years or both.

**Employers in the food and drink/entertainment sector** should pay particular attention to the Act's provisions. There has already been an indication from the bench in open court that consideration will be given to the Act in every application to extend opening hours in Cork city. No doubt this consideration of the Act will extend to many other licencing applications and it may be incumbent on an applicant to show that he/she has inspected its security services providers licence(s) and that all is in order.

In fact, the only defence provided in the Act to Section 38 proceedings is where a defendant can show that the person providing the security service produced an identity card or a licence.

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## Succession Planning for Individuals

By John Cuddigan, Partner, Tax Unit.

Over the course of the past 10 years, there has been a significant degree of wealth creation in Ireland as the Government constantly remind us. The result of this is that individuals have accumulated wealth personally, within businesses they own and within pension schemes, particularly of the self-administered variety.

### Passing of Assets Generally

The first issue is of course whether and to what extent assets should be passed to children. No parent wishes to ruin his or her child's life by giving too much too early. However, the passing of some assets to allow a child to have his or her own investments can imbue a certain discipline from an early age.

For young children, the use of trusts can achieve tax efficiency and provide a means by which the wealth can be passed in a prudent manner.

Any successful strategy requires in-depth legal and taxation advice and sufficient advance planning.

### Shares in Companies/ Business Assets

There are significant tax reliefs available to both a person disposing and a person receiving business assets. These reliefs can, in many cases, reduce or eliminate large liabilities to capital gains tax, gift or inheritance tax and indeed stamp duty.

Arising from recent changes in legislation, property owned personally by the directors/shareholders of a company, used for the purpose of a trade carried on by that company, can also qualify for both Retirement Relief and Business Property Relief in addition to the shares in the company itself. Advance planning is required to ensure these reliefs can be claimed.

Additionally, with some planning, it is possible to have a company fund the cost of acquiring the shares of a departing shareholder. This has the advantage of eliminating the need for other shareholders to fund the purchase from net income on which they have paid income tax.

Certain tax free payments can also be made to retiring directors which can in some cases be significant. Such payments would form part of an overall structured package.

### Pensions

Pensions are important in any business succession. They enable a departing director to have an income source following retirement. In a family situation, this ensures the departing director does not become a drain on the future business.

Self-administered pension schemes have recently developed into the pension vehicle of choice for director owners of trading companies. Under such schemes, it is possible to make direct property and share investments. This, together with the ability to borrow funds and the ability to retain the funds on retirement (through AMRF/ARF vehicles), makes them attractive. Recent legislation now however prohibits self-administered funds with more than one member from borrowing. The restriction does not extend to 'one member' schemes.

An issue which members of schemes should be aware of is that the ARF/AMRF route will, under Revenue practice, not be available to next of kin where the member dies prior to electing for the new option and transferring funds to an AMRF/ARF. In this case, only the old pension annuity and death in service provisions would be available.

Members of self-administered schemes should consider putting in place some planning to minimise this risk.

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“ There are significant tax reliefs available to both a person disposing and a person receiving business assets. ”

## Firm News

### 8. A snippet of some recent tax work RDJ has been involved in...

- We have acted, on the instruction of Warren Private Client, for the investor consortium who have acquired the capital allowances in respect of the Radisson SAS Hotel at Little Island in Cork, which opened in June 2005.
- We have acted, on the instruction of BDO Simpson Xavier, for the investor consortium who acquired the capital allowances in the development of the Clarion Hotel at Lapps Quay, which was completed in December 2004.
- We have acted for Bon Secours Health Systems in the development of tax designated consultant suites in Galway.
- We are acting, on the instruction of Goodbody Stockbrokers, on a mixed use development at Killorglen, Co Kerry due to complete during 2006.

### 10. RDJ/Recruit Ireland Breakfast Briefing.

Almost 200 delegates from the Irish HR and recruitment sector attended an employment equality seminar jointly hosted by RecruitIreland.com and Ronan Daly Jermyn.



Pictured from left to right are key note speakers Jennifer Cashman, Partner, Ronan Daly Jermyn and Melanie Pine, Director, The Equality Tribunal with Tom Crosbie of RecruitIreland.com.

### 9. Ronan Daly Jermyn is Graphite HRM's new legal editor.

Graphite HRM and Ronan Daly Jermyn Solicitors have announced a new relationship designed to support organisations throughout Ireland in the application of Employment Law. "Personnel Policies and Procedures – The Law in Perspective" is up-dated twice annually and allows organisations understand the changing labour law landscape, recommends how to implement the legislation and provides sample policies and procedures to support compliance. Ronan Daly Jermyn as legal editors will utilise their in-house Employment Law experience and expertise.

### 11. Corporate and Commercial Department In-house seminar.

'Insufficient funding arrangements and their cost implications'



Pictured from left to right: Speaker John Finn, Managing Director, Treasury Solutions and Garvan Corkery, Partner, RDJ.

### 12. New recruits in Ronan Daly Jermyn.



Adrian Godwin  
Consultant  
Tax



Evin McCarthy  
Solicitor  
Commercial Property



Jennifer Maher  
Solicitor  
Corporate and Commercial

### 13. Family Law Conference.

Rosemary Horgan, Partner, Family Law was a key note speaker at the 3rd Annual Sweet and Maxwell Family Law Conference held in Dublin on the 26th of November. Rosemary spoke on domestic violence and the need for lawyers practising in the area to understand the dynamics of domestic abuse as well as a thorough knowledge of the law.



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.