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1. Welcome to the latest edition of Connect, the RDJ newsletter.



With the ongoing severe correction which has caused such difficult conditions for the Irish economy, it is important to remember that business continues to be done. In this regard, we should celebrate the positive developments that are taking place.

One such development has been the recent completion of Opera Lane. This development, located in Cork City Centre, is one of the most significant urban renewal projects ever undertaken in the country. Opera Lane, developed by O'Callaghan Properties, was unveiled earlier this month when H&M were first to open its doors. Other well known retail names like Topshop, Gap, Next, New Look and River Island will all be trading before Christmas in the development.

The team here at RDJ worked alongside OCP in advising on the various legal issues for the €100m development and we wish to congratulate all involved on the opening of Opera Lane which will be a significant part of the landscape of Cork City centre for many years to come.

Finally, as Christmas is fast approaching, I would like to wish all our clients and business colleagues a happy Christmas and a prosperous (if challenging) New Year.

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Owen O'Callaghan of O'Callaghan Properties overlooking the new Opera Lane Development

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2. Civil Partnership Bill 2009.

By Peter Groarke, Solicitor, Family Law.

The Civil Partnership Bill 2009 will bring Ireland in line with other European Countries by providing an 'institution' for same sex couples who want to make a lifelong commitment to one another.

The Civil Partnership Bill also introduces structure and rules around Cohabitation Agreements for both same sex and opposite sex couples. It also introduces a Redress Scheme for same sex and opposite sex couples.

The Civil Registration Scheme

Civil Partners must go through a defined process to acquire what may be described as 'largely the same rights as a married couple'. Once a civil partnership is registered, it is intended that the couple will be dealt with in the same way as a married couple by the Revenue Commissioners. This requires a number of amendments to existing legislation. Statistical information from the United Kingdom highlights the fact that 50% of the couples who registered there in the first year after civil partnership was introduced were aged over 50 and only 12% under 35. It would seem therefore that Civil Registration was attractive to the 'silver' generation for practical reasons as much as romantic ones. Tax planning will now be possible for Civil Partners.

As with marriage however, the institution of civil partnership carries onerous responsibilities. Civil Partners will have obligations of mutual financial support and shared home protection. On the breakdown of the relationship there will be the spectre of financial awards that can be made on dissolution. A Decree of Dissolution is effectively the same as a

Decree of Divorce and the Court can make a Decree on the application of one Civil Partner if the relationship has irretrievably broken down and the couple have lived apart from one another for at least **two years**. The Court can make financial provision for the Civil Partners on Dissolution by way of orders for maintenance, lump sums, property adjustment, pension adjustment and Succession Act rights and so on.

Cohabitation

Those who neither want to occupy the institution of marriage nor civil partnership but yet enjoy living as a couple may no longer do so with impunity. The Bill distinguishes between 'cohabitants' and 'qualified cohabitants'. Effectively a cohabitant means an adult (of either sex) living 'as a couple' with another adult (of either sex) in an intimate and committed relationship. The definition excludes couples who are married, civil partners or related to one another within a prohibited degree of relationship. A "*qualified cohabitant*" will mean a person who has been in an intimate and committed relationship for at least **three years** or for at least **two years if there is a child**. Periods of cohabitation during which one of the couple was still married and not separated for four out of the preceding five years cannot be counted.

Mere cohabitants are to be given only a rather narrow band of shallow entitlements as such, survival rights to residential tenancies, the protection of *s. 47 of the Civil Liability Act 1961*, *Powers of Attorney Act 1996*, and the *Domestic Violence Act 1996*.

Redress

A "qualified cohabitant" can institute proceedings for redress at the end of the relationship. Proceedings must be instituted within 2 years of the ending of the relationship. Qualified Applicants will have to prove that they are "financially dependent" on the other cohabitant before they can apply for Property Adjustment Orders, Compensatory Maintenance Orders or Pension Adjustment Orders. Application for provision from the estate of a deceased cohabitant will not depend on "financial dependency" and such applications will not be limited to two years from the ending of the relationship. The Redress Scheme is essentially a 'safety net' provision. Notice must be given to any *other person* specified by the Court. The Court may not make an order in favour of a qualified cohabitant at the expense of a spouse or former spouse of the Respondent cohabitant.

Opt Out Cohabitation Agreements

Cohabitants can contract out of the redress provisions of the Bill. Cohabitation Agreements must pass certain tests however and each party must be independently advised. Agreements that pass the test are binding even if it was entered into before the cohabitation commenced. The Court retains power to set aside an agreement in exceptional cases. It is important to ensure that each party is independently advised.

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3. Hard Times - Harder to get your money?

By James O'Sullivan, Partner, Litigation.

Times are tough and indeed many are experiencing difficulty in recovering monies that are due to them by debtors.

In this article we take a brief look at the fall out from the McCann case. As many will know Mrs McCann tested constitutionally certain provisions of the Enforcement of Court Orders Act 1940 which provided for the committal of defaulting debtors. The High Court found that the section which permitted this committal was struck down as it infringed a number of constitutional rights. It also confirmed that a Judge had to be satisfied that a debtor was "wilfully" refusing to pay the debt and it acknowledged that where someone simply just could not afford to pay, that they should not be jailed.

In response the Government introduced the Enforcement of Court Orders (Amendment) Act 2009. The Act came into force in July but as yet no new District Court Rules have been enacted to set out the procedures that creditors will be required to follow to bring a committal application against a debtor.

The new Act will make it more difficult for a creditor to obtain a committal order. It is likely to make the cost of obtaining one more expensive because of the cumbersome procedures and court attendances that will be required.

As a result of the new Act, it will now be necessary to apply for a summons to have the debtor to appear before the Court when it can examine the debtor to satisfy itself of the debtors capacity to pay the instalments. Should a debtor not respond to that summons a warrant will be issued to arrest the person to bring them before the Court to be examined. Once brought before the Court on the warrant, another date will be fixed for the hearing of the summons. Provision has also been made for the provision of legal aid to a debtor who is at risk of imprisonment. Since the Act provides that a court must be satisfied there is a wilful refusal to pay we anticipate that there will be a comprehensive examination of the debtor as to their means. Additionally, prior to making an order the court can request the parties to seek resolution by means of mediation. In our view these are all likely to give rise to adjournments.

A Judge is only entitled to make an order for imprisonment if he or she is satisfied, beyond reasonable doubt, on the evidence presented, that the creditor has established that the failure of the debtor to pay is not due to their mere inability to pay but due to their wilful refusal or culpable neglect AND that the debtor has no goods against which execution (by way of execution order lodged with the Sheriff) could be levied. This in our view gives rise to a further delay in that the wording of the section in the Act suggests that the obtaining of a Nulla Bona (no goods) Order from the Sheriff is a pre-requisite to taking the committal order

application. Regretfully, neither "wilful refusal" nor "culpable neglect" have been defined and one would have to suspect that this is likely to give rise to further challenge in the Court once the Act comes into full operation.

The amendments to the legislation will require the formulation of new District Court Rules and new District Court forms. It is anticipated that this will involve all procedures from the summons for an instalment order through to the Committal Warrant and probably for legal aid as well. To date none have been published. Confusion reigns as between differing District Court offices on whether enforcement proceedings can be issued or not. Hard pressed creditors are in a difficult enough position without having to suffer these delays. Once the new procedures are published we will issue an update.

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4. Fixed Term Workers and Redundancy.

By Jennifer Cashman, Partner, Employment.

There has been a lot of activity before Rights Commissioners and the Employment Appeals Tribunal (“EAT”) over the past twelve months in relation to fixed term workers. What is becoming clear is that even employers who strictly adhere to the requirements of Protection of Employees (Fixed Term Work) Act, 2003 (“the 2003 Act”) may find themselves paying over compensation to fixed term workers under the Unfair Dismissals legislation; the Redundancy Payments legislation and/or the Equality legislation. Therefore, fixed term contracts of employment, while a very useful tool in recessionary times for those employers who do not wish to commit themselves to permanent employees, must be carefully administered.

A very important issue of which many employers are not aware is the fact that a fixed term employee whose fixed term contract expires without being renewed may be entitled to a redundancy payment.

Given the current economic climate and the increased redundancies affecting Irish businesses, it is worthwhile to examine the issues relating to fixed term workers in a redundancy context.

Section 9(1)(b) of the Redundancy Payments Acts 1967 - 2003 states that where a fixed-term contract expires or, where the specific purpose for which the contract was created ceases without the contract being renewed, a redundancy situation can arise (provided that the other requirements under the Redundancy Payments Acts are met).

Therefore, if the employer does not intend to renew a fixed-term contract, the employer must consider whether a redundancy situation arises and whether the employee is entitled to a redundancy payment. The definition of redundancy in the legislation is extremely broad. For example, where the employer decides to carry on the business with fewer/no employees or where work will be done by other employees who can also carry out other work for which the employee is not sufficiently trained/qualified, a redundancy situation arises.

The fixed term employee may then be entitled to a statutory redundancy payment, and possibly an enhanced redundancy package if one is available for permanent employees of the same employer.

In the recent Labour Court case of St Catherine’s College for Home Economics/Minister for Education and Science and Maloney/Moran (2008), the Labour Court ruled that fixed-term employees had been treated less favourably, because they had not been paid the same ex gratia package that was available to permanent employees.

Fixed-term employees should not be selected for redundancy purely because they are on fixed-term contracts. The employer must have objective grounds for such selection, for example level of experience, qualifications or length of service. However, where fixed-term employees have been brought in specifically to complete particular tasks or to cover for a specifically busy period, it is likely that an employer could

objectively justify selecting them for redundancy. Each case, however, must be looked at on its own particular facts.

Section 13 of the 2003 Act prohibits penalisation of an employee for asserting their rights under that Act and specifically sets out that selection for redundancy can constitute penalisation.

Where length of service is the main criterion for redundancy selection, the same criteria should apply to fixed term as to permanent employees, unless differences are objectively justified. It is immaterial if the effect of a “last in, first out” policy is that more fixed term than permanent employees are made redundant. Parity of treatment must be foremost in the mind of the employer.

Along with redundancy packages, employers also need to consider whether fixed term employees are being treated fairly in relation to other elements of the redundancy package. For example, do all employees have the same access to special job search services?

One clear result of the current recession is that the employment model is changing. The focus is now less on hiring full time permanent staff and more on hiring temporary workers and finding more flexible solutions for project driven work. Make sure you are clear about the potential issues from the outset in order to avoid any unwelcome surprises on the termination of the employment relationship.

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5. Private Equity Investments in Start-Up and Early Stage Technology Companies.

By JP Gilmartin, Solicitor, Commercial.

Irish entrepreneurs involved in the development of high potential start up technology companies start with a vision to build successful and scaleable companies. In tandem with this vision there must be a plan to finance the considerable development and growth costs associated with that vision.

Financing a new venture with debt finance through a bank is usually a non-runner due to the inability of the company to provide collateral in order to secure repayment of the business loans. Quite often banks will require the entrepreneur to personally guarantee the loans to the company and many entrepreneurs are reluctant to assume that level of personal exposure. For this reason, private equity financing (the exchange of ownership in return for capital) is often the only viable means to finance early stage technology companies.

The introduction of outside capital can often be the stimulus necessary to drive the growth and potential of the business. In order to fund the initial early stages of development and growth, the entrepreneur will often source capital from family and friends in addition to investing his own personal resources. Beyond family and friends entrepreneurs may look to wealthy 'business angels' as a source of equity finance. Business angels invest primarily for financial returns but many angels are also interested in taking an active role in the business and thereby giving the company the opportunity to benefit from the valuable business expertise that angels can bring to early stage companies.

Companies with the potential to achieve high growth and thereby deliver high returns for investors may be the focus of attention by venture capitalists who typically invest capital on behalf of institutional investors. It is worth noting that not every company will raise capital from each type of investor and there is no set order in which companies will raise such capital.

Raising private equity finance can be an attractive proposition for start-up and early stage technology companies for a number of reasons. Unlike debt finance, equity financing is free from the burden of fixed repayment schedules and therefore the cash flow of the company is preserved pending the achievement of an exit whereby the proceeds and returns from an investment are shared by the shareholders. In the majority of cases, business angels and venture capitalists contribute, in addition to the capital investment, invaluable industry knowledge and expertise and can give early stage companies access to a broad contact base. The ability of an early stage company to attract private equity investment can in itself raise the profile of the business and greatly enhance its reputation and status in the eyes of customers and future investors.

For those entrepreneurs reluctant to relinquish control over certain key decisions in relation to their business private equity finance may not be the preferred funding route. Even the sale of a minority shareholding in an early stage company will result in reduced control and decision making for entrepreneurs.

Professional advisers play an important role in private equity financings. Both the investor and the start-up business will need to retain the services of competent legal advisers with experience in conducting private equity financings in order to glean a full understanding of key issues affecting them. The Corporate and Commercial department team at RDJ has extensive experience in private equity finance transactions and we regularly advise investors and early stage companies in structuring and negotiating private equity transactions.

Over recent months we have seen a notable pick up in the levels of private equity investment in early stage companies, particularly in the medical technology sector. It is likely that this trend will continue as a result of the continuing difficulty for businesses in accessing capital from traditional sources. Increased activity in this sector is also a testament to the quality of 'investor ready' early stage companies being developed by indigenous Irish entrepreneurs.

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6. Land Law Update.

By Patrick Ahern, Partner, Commercial Property.

The past few months have seen many changes to the framework of Irish Property Law. The focus of our interest in these changes is the advice we can give our clients, whether the changes make life easier or not, the opportunities arising and so forth.

The Land and Conveyancing Law Reform Act 2009 comes into effect on 1 December 2009, save for the section preventing the use of upwards only rent reviews (ironically the section which generated the most media coverage when the legislation was being finalised during the Summer).

As regards mortgages, aside from technical amendments, changes are made by the Act to the way in which financial institutions can enforce their security, especially against owner/occupiers of residential property. These include Statutory Notices and Court Orders. Another practical change reduces the ability of financial institutions to set aside leases on mortgaged properties, as long as these have been let on commercial terms at the best available rent.

Some of the literally medieval concepts which survived into the 21st century regarding ownership of land have been abolished such as "leases for lives" (yes, just what they seem) and "fee tails" (where only descendants can succeed to property).

Another oddity in land law is clearly demonstrated by the surge of apartment developments over the last 15 years,

where units have been "sold" by way of a long, say 900 year, lease rather than freehold sale. The main reason for this was the limited enforceability until now of covenants in the sale of freehold land, as opposed to the manner in which they can be enforced in leases. This system is remedied under the Act, and will lead to different structures for (any!) such developments in future.

Many properties in Ireland have the benefit of, or are subject to, easements, among which are rights of way, wayleaves (i.e. the running of pipes and services over, through or under land) or even rights to light. Very often, these rights will be specified in the title to property, but sometimes they are acquired on the basis of long usage without the permission of the owner of the land over whom the rights are claimed. The Act makes considerable changes, amongst which are the shortening from 20 - 12 years of the length of time needed for the unauthorised use of a right to constitute an easement, and also (beyond transitional arrangements) a requirement that anyone claiming an easement based on long usage must apply for a Court Order, as opposed to the current practice of simply invoking the easement if the land owner seeks to prevent its use. Anyone claiming an easement, or feeling that their property might be subject to an easement, should take detailed legal advice without delay, or the consequences could be serious.

The repair and maintenance of party structures (meaning walls or other

structures on/near property boundaries) also needed updating. The Act now sets out details of works which an owner can carry out, by gaining access to a neighbour's land if needs be. Safeguards for the neighbour include an obligation on the owner to make good any damage caused, and indeed a possible liability for professional fees incurred by the neighbour. If there is disagreement or stalemate, the owner can apply to the District Court for a Works Order. It is hoped that the new provisions will work to everyone's advantage.

A separate development is the introduction in the New Year by the Revenue of the e-stamping of documents. This is designed both to hugely speed up the stamping of documents (currently in Cork, there is a 4/6 week turnaround from submission of documents to the Revenue) and also to remove uncertainty as to the duty (and any penalties payable on late stamping). E-stamping does not change the rate of stamp duty payable.

Ronan Daly Jermyn will be monitoring closely the implications of the new provisions and will issue further client updates in the New Year.

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Firm News

7. RDJ Partner a Guest Speaker at Legal-Island Annual Reviews.

Jennifer Cashman of our Employment Unit was a guest speaker at the Legal-Island Annual Reviews, which took place in three Dublin venues during November.

The Annual Reviews are the biggest employment law events in Ireland, featuring 18 sessions delivered by Ireland's leading employment lawyers and HR specialists. Jennifer is the only employment specialist from a firm outside of Dublin invited to speak at these events each year.

This year, Jennifer was invited to address delegates, of which there were well over 300 at the combined sessions, on the very relevant topic of "Responses to the Recession - Flexible Workers, Legal Issues and Practical Advice". In her presentation, Jennifer addressed the use by employers of fixed term, agency workers and the self-employed as a means of addressing headcount issues in these recessionary times. Some of the issues raised by Jennifer in her presentation are addressed in Jennifer's article in this issue. The Annual Reviews were, as always, a huge success for Legal-Island, with all presentations very well received by the delegates who described the events as the right mix of legislative developments over the past 12 months and practical advice on how HR practitioners can deal with current employment law difficulties. Definitely an event for all HR practitioners to place in their diary for 2010.



8. John Jermyn Jr. wins 100th cap.

John Jermyn Jr. (RDJ Trainee Solicitor) being presented with his 100th cap in Banbridge Hockey Club by the President of the IHA, Doreen Howe, on the 3rd of October 2009.

John won his 100th cap against Russia in the EuroHockey Nations Trophy on the 4th of August, a tournament which Ireland went on to win. John has just returned with his team mates from the World Cup Qualifier in Buenos Aires, Argentina in which they finished in 3rd place.

9. Upcoming Conference on the challenges in adoption procedures in Europe.

Our Family Law Partner, Rosemary Horgan, will chair and moderate the first session of the Conference on Adoption organised in Strasbourg on 30 November and 1 December 2009.

The Council of Europe and the European Commission will urge European countries to take steps to ensure the best interests of the child in adoption procedures. The Conference will bring together law practitioners and institutions or associations concerned with the adoption of children and coincides with the Irish Adoption Bill 2009 currently being debated in the Dail.

Rosemary has also been appointed as the General Rapporteur of the Conference which was webcast live at: <http://tv.coe.int/webcast>.

This Christmas, instead of sending cards we are making a contribution to a number of Irish charities.

We wish all our clients and friends a very Happy Christmas and a Prosperous New Year.

Firm News

10. Charity Work - Trainee Solicitors abroad.



Pictured on the front left of the photo, Richard McNamara from RDJ who worked for 2 weeks on a house-building mission in Zambia. The houses built by the Habitat for Humanity/Blackhall Builders team were handed over to families affected by HIV/Aids.



Pictured above: Children from Gisimba Orphanage, Rwanda with Emma Weld-Moore who brought money raised through RDJ and functions held in Cork, to the orphanage in Christmas 2008. The money has provided fuel for cooking and food for over 200 children for the past year.

11. Samaritan's Purse - Operation Christmas Child.



Pictured are some of the RDJ Staff who got involved this year in "Operation Christmas Child" by organising Christmas gift boxes for needy children in developing countries.

12. Recent Conferings.



At the conferral of Diplomas in Trust and Estate Planning in Cork recently were: James O'Sullivan, Chairman Education Committee and Molly Moloney, Legal Executive, Ronan Daly Jermyn

We would like to wish you all a very Happy Christmas and a Peaceful & Prosperous New Year.

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