



**RDJ**  
SOLICITORS  
CORK &  
GALWAY

## 1. Welcome to the Summer 2011 edition of Connect, the RDJ newsletter.

In keeping with our continuing commitment to providing an outstanding legal service to our clients, the firm has seen the appointment of a number of new Partners during the past few months.

All of our new Partners are highly talented lawyers who are set to make significant contributions to RDJ. They have all worked extremely hard to earn their promotions so well done to each of them. We also have two Partners who are moving on to different challenges within the legal system. Rosemary Horgan has been appointed a District Court Judge (our first RDJ Judge!) and Garvan Corkery is undertaking a new career as a Barrister.

Both Rosemary and Garvan will be sorely missed by all of

us at RDJ but I am confident both of these outstanding lawyers will enjoy great success in their new careers.

I do hope you enjoy our newsletter and thank you for your continued support for RDJ.



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NEW PARTNERS FOR RDJ SOLICITORS Pictured with RDJ Managing Partner, John Dwyer (centre), are: Jamie Olden, Sinead Corcoran, JP Gilmartin, Imelda Tierney and Diarmaid Gavin.

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## 2. Litigation - A Publican's Duty of Care What about the Customer's Responsibility?

By Sinead Carroll - Solicitor - Litigation Team

*Publicans have certain duties towards their customers but in recent times there have been cases which sought to change completely the relationship between publican and patron.*

In *Flanagan -v- Houlihan 2011* IEHC 105 Mr Justice Feeney considered whether or not publicans owed a duty of care to their customer and a crash victim Mary Flanagan. It was said that the publicans breached their duty of care by serving alcohol where the publicans knew or ought to have known the customer would then drive a car and therefore be a danger to other road users. The Court rejected that proposition and held there was no such duty of care to the customer or to the crash victim.

The vehicle being driven by Mary Flanagan was involved in a collision with a vehicle driven by the late John Connolly. The cause of the collision was that John Connolly's car crossed on to the incorrect side of the road and collided with Mary Flanagan's oncoming car resulting in the death of John Connolly and the passenger in the other car being driven by Mary Flanagan. Mary Flanagan initiated personal injury proceedings against the nominated representative of John Connolly. Her case settled but the Estate of John Connolly brought an application seeking to join Concepta and

Seamus Kelly as third parties to the proceedings seeking to recover that cost of the settlement.

The late John Connolly had been drinking at the Kellys' premises known as the Diamond bar before the collision. He had bought five or six pints of Guinness. The late John Connolly was a regular at the premises and his usual means of transport to and from the bar was to use his own car.

The Estate of John Connolly claimed that the publicans were negligent in serving alcohol to the late John Connolly prior to the collision. The claim was that the publicans should have desisted from serving Mr Connolly or ensured that he did not drive the car. Mr Justice Feeney accepted that there is generally no duty of care owed to the intoxicated, unless the publican assumes a responsibility for the customer or there are exceptional circumstances. The Judge refused to extend the duty of care owed by publicans as far as contended by the Defendant noting that such would be a matter for the legislature.

The claim that there was a breach of the publican's duty of care to the late John Connolly was rejected as was the claim that there was a breach of duty to Mary Flanagan.

The recent criminal prosecution following the death of Mr Graham Parish who died of acute alcohol poisoning was the first of its kind in Ireland.

Two barmen were accused and acquitted of the manslaughter of Mr Parish for giving Mr Parish an excessive amount of alcohol. Judge Teehan noted that the barmen had breached their duty of care to Mr Parish but that it was the decision of Mr Parish to have the drink that broke the chain of causation.

For now, Irish publicans can breathe a sigh of relief as the balance of responsibility seems to rest with the customer. However, in the Flanagan case, the Court noted that if there was to be an expansion of the duty on publicans, it would need to be imposed by Statute. Following the death of Mr Parish, there are calls for such provisions.

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### 3. Environmental Liability Directive

By Dr. Aoife Shields - Solicitor - Environmental Unit

#### *More Environmental Liability Exposure for Business? An Opportunity for Insurers?*

The European Environmental Liability Directive regime (“ELD”) aims to ensure that businesses take a proactive approach to prevent and remediate environmental damage. The EPA has extensive powers to enforce this. The regime came into force in Ireland on 1 April 2009. The EPA recently published draft Guidance on how this regime should work in practice.

No enforcement action has yet been taken under the regime, however in England there has been numerous successful enforcement cases taken, such as against a company for allowing storm water sewage discharge into surface water causing a 5,000 fish kill.

#### *What is covered?*

The regime covers environmental damage to water, protected species and natural habitat and land arising from activities, which took place on or after 30 April 2007 (though the EPA can only take enforcement action for events arising after 1 April 2009). It does not cover environmental damage caused by acts of armed conflict, exceptional natural phenomenon, nuclear risk, national defence and activities for the protection from natural disasters, nor damage caused by diffuse pollution such as air deposits where a clear causal connection between the damage and the activity cannot be clearly established.

#### *Who is liable?*

Basically most operators (public and private) of industrial and other commercial activities with the potential to cause damage to water, protected

species and natural habitat or land. For certain high-risk activities, (such as IPPC, waste activities, the transportation of dangerous goods and GMO activities to name but a few), the operator is strictly liable for environmental damage, regardless of fault. For other activities causing damage to protected species and natural habitats, any operators (engaged in business activities, even where not for profit) can be made liable for the prevention or remediation of this type of damage, if at fault. This could include wind farm operators and construction companies who are operating on or near a Special Area of Conservation or a protected species, such as fresh water pearl mussels or the hen harrier or an engineer who negligently designs a structure causing flooding which damages protected habitat or species.

The operator has a number of defences:

- 3rd party causation
- damage resulting from compliance with a CPO or instructions from public authorities
- permit defence (not yet available)
- state of art defence (not yet available)

#### *What are the operator's duties?*

1. In respect of imminent threat of environmental damage, the operator must take immediate necessary preventive measures and if these fail inform the EPA.
2. Where environmental damage occurs, the operator must immediately inform the EPA, and take all practical interim steps to control and manage the damage.
3. The EPA may issue a remediation direction. This direction must be complied with.

Breach of these duties is a criminal offence.

#### *Role of the public*

The public have a significant role in the ELD regime. It has the power to notify the EPA of environmental damage issues and request the EPA to take action. Already the public (including an environmental NGO) have requested the EPA to take action under the regime.

#### *Things to watch out for*

- Internal reporting systems, risk assessments and response procedures may need to be devised or updated, as the ELD regime imposes a positive duty to notify the EPA of imminent or actual environmental damage and to take immediate action.
- If environmental damage is discovered during a sale transaction, this may trigger notification requirements to the EPA and parties to the transaction may seek more contractual protection.
- The regime specifies the standard to which contaminated land is to be remediated, namely so that land does not pose significant risk to human health being adversely affected, having regard to the current or future approved use of the land. The EPA Guidance (draft) provides for new risk assessment procedure for determining land damage. These are welcome developments.
- Insurance policies may need to be reviewed to bring ELD liability within the scope of cover.

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## 4. Employment Law - TUPE and Contracting Out

By Jennifer O'Sullivan - Solicitor - Employment Unit

### *Recent ECJ Decision Reaffirms The Law on Transfer of Undertakings in a Contracting out situation.*

The application of the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 ("TUPE") in Ireland to the area of contracting out services is often a grey area with no clear statutory framework. In the current economic climate, this is a key legal consideration for employers seeking to reduce cost by either outsourcing facilities for the first time, changing service provider for an existing outsourced facility or potentially bringing that outsourced activity back in-house.

TUPE applies only to the transfer of an *"undertaking, business or part of an undertaking or business from one employer to another employer as a result of a legal transfer"*.

The Courts and Tribunals have identified that the key issue is whether a transferee has obtained a business, or part of a business, which they can continue to operate. It is essential that the transfer relates to a stable economic entity.

The general legal principle which emerged from a landmark European Court of Justice decision is that loss of a customer contract does not constitute a transfer. The rationale behind this is that the original undertaking does not cease to exist simply by losing a customer and part

of the business belonging to it cannot be considered to have been automatically transferred to the new awardee of the contract. A catering company, for example, will not cease to exist as a whole entity if they were to lose one contract to supply cafeteria workers to a competitor.

There are important exceptions to this general rule. In certain labour intensive industries, a group of workers engaged in a joint activity on a permanent basis may constitute an economic entity. If the new employer does not merely pursue the activity in question but also takes over a major part in terms of the numbers of the employees specifically assigned by the original employer to a particular task, TUPE will apply. The new employer has taken over a body of assets enabling it to carry on the original activities on a regular basis. In certain industries, tangible assets, such as plant or machinery, are unimportant. The real asset is the employees and their skills or knowledge.

An obvious example of an asset reliant industry is the transport industry, where trucks and machinery would be the assets without which the business could not be run. The employees in that industry are not the focus of the business. In those cases, the Court or Tribunal will consider whether assets have been transferred. Conversely, in many cases involving contracts for cleaning or security services, the EAT has instead focused on whether a substantial part of the workforce is taken over.

It will therefore be necessary to examine each existing service which an employer proposes to transfer to a new service provider. The activities carried out by the existing service provider will need to be fully considered to determine whether they potentially fall into the *Süzen* exception, the key question being whether the activity is labour dependent or whether it is asset based. This distinction is crucial. If, after analysis, it is determined that the activity carried out is labour intensive, importance is attached to whether or not the employees transfer. Therefore, by refusing to take on the employees, the new entity could potentially avoid TUPE, depending on the specifics of the case. This has led to some arbitrary results, which is why this area of law was radically overhauled in the UK in 2006.

This remains a grey area of law, with employers requiring advice on the specific facts of each individual situation to determine the potential applicability of TUPE to the proposed outsourcing arrangement. Until any future amendment of the 2003 Regulations, the law at present is dictated by caselaw of the ECJ and EAT, and so employers should be vigilant in keeping abreast of developments.

*1 Süzen v Zehnacher Gebäudereinigung GmbH Krankenhausservice and another (Case C-13/95)*

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## 5. Commercial - Investments in Irish Companies

By Sean Daly - Solicitor - Corporate / Commercial Unit

### *“May you live in interesting times” - Chinese Proverb*

One of the more interesting transactions that I personally (as part of the corporate team at RDJ) was involved in last year was the sale of Firecomms to a Chinese corporation, the ZJF Group. RDJ handled the legal and tax aspects of the sale. I believe that this was the first ever acquisition of an Irish high-tech company by a Chinese corporation.

This deal received significant coverage in the Irish and Chinese media. The expansion of Chinese firms around the world is a familiar news story and this transaction may be a sign that Chinese companies will become much more active in acquiring interests in Irish companies in the future.

### *Firecomms*

Firecomms is a Cork-based manufacturer and designer of semi-conductors which enable low-cost plastic optical fibre cables to be used for high-speed communications in home, industrial and motoring applications. ZJF Group's acquisition of Firecomms was driven by the move by provincial governments in China to reduce the use of copper cables and increase the use of plastic optical fibre in infrastructural projects. Firecomms was established in 2001 as a spin-out from the world class Tyndall National Institute and over the years successfully secured substantial investment funding.

Apart from the interesting Firecomms' shareholder mix (founders, management, institutional investors, key customers and state agencies), for me the deal was

somewhat unique for a number of reasons. First, Chinese companies place a huge importance on staff retention and value staff loyalty highly. They see staff as very important and the key drivers of the development of their business. The consequence of this was that the existing jobs were retained in Ireland and, in fact, new jobs were created. This is an important consideration in the current economic climate.

Secondly, Chinese companies investing overseas may have to obtain local and national governmental approval in China and comply with Foreign Exchange Control Regulations in connection with the movements of funds outside of China. This can impact on the timelines involved and is a factor which is somewhat unusual for us nowadays but needs to be considered and addressed at an early stage.

### *Recent Trends*

We have noticed a number of trends from cross border transactions (including Firecomms) that we have been involved in recent years.

Buyers are seeking stronger warranty protection from sellers. Buyers (particularly US buyers) will often insist that a portion of the consideration price is held in escrow for a certain period in order to ensure that there is a fund to meet any warranty claims.

Many Irish venture capital investors (following the lead of their international counterparts) do not, as a matter of policy, provide any warranties to a buyer in an M&A transaction. As a result it often falls on the founders of a company to provide the warranties alone and there

can be a lack of alignment between the burden of providing the warranties to the buyer and the apportionment of the sale consideration.

Another notable feature of recent deals which we have acted on is that a significant amount of the consideration is made up of non-cash consideration. US buyers, in particular, will often finance a deal through the issues of shares in the buyer.

Another area which crops up in deals is examining whether the target company has received grant or funding from State agencies such as the IDA or Enterprise Ireland. The terms of any grant agreements need to be checked carefully as typically such grants will restrict the transfer of intellectual property out of Ireland for a certain period. The most practical way to deal with this may be to pay off any outstanding liabilities under the grant agreements.

The tendency of buyers in more recent times to offer non cash consideration, when coupled with escrow arrangements to cover warranty claims, often means that sellers must wait longer than was previously the norm to receive the deal consideration. However, the good news is that deals are still happening albeit in a changed and arguably more interesting environment.

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## Firm News

### 6. NUI Galway Awards Day



Pictured at the recent NUI Galway Awards Day, sponsored by RDJ Glynn was (l-r): Dr William Golden, Dean of the College, Business, Public Policy and Law, NUI Galway; Dr Oliver Mills, School of Law, NUI Galway; Padraic Brennan, RDJ Glynn Solicitors; Sana Farooq Khan, from Ocean Links, Co. Sligo, who was presented with the Michael MacNamara Scholarship; NUI Galway President, Dr James J. Browne; and Professor Nollaig Mac Congáil, Registrar and Deputy President, NUI Galway.



### 7. UCC Commercialisation Awards

Pictured at the UCC Commercialisation Awards ceremony are Adrian Wall, RDJ Partner, Prize Winner Robert McEvoy, Department of Electrical and Electronic Engineering, UCC and Dr. Michael Murphy, President of UCC.

## Firm News

### 8. Genesis Awards

RDJ was one of the principal Sponsors of the Genesis Showcase & Awards which took place in March at CIT. The awards were presented to new businesses which came through the Genesis Programme.



Pictured are the Award prize winners and Sponsors including RDJ Partner, Adrian Wall.

### 9. Dr. Aoife Shields



Aoife Shields, who practises in the RDJ Environmental Law Group, has been awarded an EPA funded Ph.D. by UCC with her thesis being "The need for a dedicated legal regime for the management of contaminated land in Ireland".

Aoife was highly commended for her work which was praised as making a significant contribution to knowledge about the legal issues concerning contaminated land both in Ireland and elsewhere.

### 10. New Ventures for RDJ Partners

Two of the Partners here at RDJ are moving on to significant new challenges outside the firm. Rosemary Horgan has been appointed a District Court Judge and Garvan Corkery is starting a new career as a Barrister.



Pictured with Rosemary Horgan on the occasion of her swearing in as a District Judge at the Supreme Court are (l-r) Fergus Long, Partner, Garvan Corkery and John Dwyer, Managing Partner

## Firm News

### 11. Grahame Walsh and Employment Law Team

New RDJ Partner Grahame Walsh has recently joined the firm from a leading Dublin practice. Drawing on his extensive experience in Employment Law and Commercial Dispute Resolution, Grahame will head up the RDJ Employment Law Team.



Grahame is pictured with the lawyers in the Employment Law Team (l-r) David O'Flanagan, Jennifer O'Sullivan, Jennifer Cashman, David O'Carroll, Antoinette Vahey, John C. Jermyn and Alice Crowley



### 12. Succession Planning

Pictured at a recent seminar on Succession Planning jointly hosted by RDJ and City Life, are Eamon Dwyer, City Life, George Lee, Guest Speaker and John Cuddigan, RDJ Tax Partner.

### 13. Irish Guide Dogs for the Blind

Irish Guide Dogs for the Blind is an organisation which does tremendous work in assisting the visually impaired. It also provides dogs for autistic children. RDJ is pleased to be associated with the IGDB as a charity partner.



Pictured at the announcement with Padraig Mallon, CEO of the IGDB and guide dog, Lenny are RDJ Managing Partner, John Dwyer and Partner, Grahame Walsh.