



**RDJ**  
SOLICITORS  
CORK &  
GALWAY

# 1. Working together through challenging times.



As with all businesses, we in RDJ are working hard through these challenging economic times. We see first hand the strains and pressures that many businesses in Ireland are under. We are very aware of the demands on our clients and the need for us to provide solutions that save our clients time and money.

With this in mind, we continue to develop key practice areas that are relevant to the current business climate and anticipate our client needs. This includes areas such as commercial litigation and dispute resolution, corporate restructuring and employment advices. In these tough times, these areas of expertise are key for our clients.

However, it is not all doom and gloom. We are also seeing some significant growth areas in the economy. In the past number of months we have been involved in a number of projects in the renewable energy sector and our team in this area have a wealth of experience working on wind farm, biopark and power storage facility developments and have advised various entities engaged in clean energy and energy efficiency products and services. Our partner Adrian Wall, who heads the

Renewable Energy Team, sets out some of the issues involved later in this issue.

In the past few weeks the Law Society has ranked us as a top ten firm in Ireland. To maintain the progress of the firm, we continue to invest in new resources. In this regard, we have strengthened our Insolvency and Restructuring team with the addition of Emma Crowley as a Consultant. Emma is a leading practitioner specialising in insolvency and has wide experience of examinerships, liquidations and receiverships, having previously been a Partner in a leading Dublin firm.

All of the team here at RDJ are committed to offering clients the best legal expertise in the most cost effective manner possible. Please feel free to contact me directly if you would like to discuss your current needs.

As always I would like to take this opportunity to thank you for your continued support and hope you enjoy your summer.

John Dwyer  
Managing Partner  
john.dwyer@rdj.ie

## in this issue...

- 1 Working together through challenging times.
- 2 Wind in those sales.
- 3 Examinership of tenants - what are the implications for landlords?
- 4 Defining the contract documents - a warning.
- 5 Ban on upwards only rent.
- 6 Judgment Mortgages on Registered Land - is the decision of Laffoy J. in Mahon - v - Lawlor fair?
- 7 Getting your house in order - Dwellinghouse and other Reliefs.

### FIRM NEWS

- 8 The Michael MacNamara Scholarship.
- 9 RDJ Glynn was the official legal advisor in Galway to the Volvo Ocean Race Stopover.
- 10 We've strengthened our team.
- 11 Law and the Environment 2009 Conference.

view all our archived newsletters online @

**rdj.ie**



## 2. Wind in those sales.

By Adrian Wall, Partner, Corporate and Commercial.

Ireland has set an ambitious target for the generation of electricity from renewable sources, with a target of 40% by 2020. There is widespread acceptance of the need to reduce our level of dependence on fossil fuels.

The renewable sector in Ireland is dominated by wind power. At a macro level, significant steps have been taken on the road towards meeting the 2020 target. However, the current financial crisis will inevitably test national commitment to capital spending in this area, including spending on increasing the capacity of the transmission grid, which is essential if we expect to meet the 2020 target.

A common complaint amongst those active in the wind sector is that, while the national policy commitment is all very well, the actual process of getting a wind farm project through the system is fraught with difficulty. No doubt the consenting process in Ireland should be streamlined but it looks like promoters of projects in the "Gate 3" cohort will need to continue to work within the parameters of the existing system.

Our team has handled a number of wind farm transactions in recent times. A notable feature of some of the deals that we have been involved in where the project being sold prior to development is the significantly divergent value per MW being offered by various buyers - largely reflecting, it seems, the level of overall regulatory and project specific risk.

In other words, one buyer is applying a price per MW that differs considerably from that offered by another buyer, reflecting the differing appetites for risk.

In many respects, wind farm sale transactions are similar to business trade sales generally. While some areas that tend to feature in most sales are not so important in wind transactions (for example, non-compete obligations on sellers, representations and warranties as to trading history, tax indemnities), there are a number of aspects that are more pertinent in wind farm deals. Wind farm promoters would do well to give significant attention to these initial areas as they develop their projects.

### Land rights

Securing access to the lands necessary to construct and operate wind turbines is an essential ingredient of any wind farm project. Invariably, the lands in question are owned by local farmers and the fact that the wind farm project company is effectively relying on a contract for access and use means that this document (which usually takes the form of an option to take a lease) needs to be properly prepared.

### Planning

It is of course important that the project has a grant of full planning permission. Grants of planning permission are usually subject to conditions and these conditions would need to be acceptable to a buyer as will the remaining duration of the permission.

### Wind Speed

Buyers will expect access to wind speed data gathered from a test mast located at the project site. Any question mark surrounding the availability of data over an extended period of time is likely to result in some deferral of payment of purchase monies by a buyer.

A wind farm project is very different from a traditional trading business which typically has a history of cash flows and income. With that in mind, and taking account of the risk factors mentioned above, interested buyers of projects which are not fully consented are likely to wish to defer part of the purchase price so that certain payments are only made upon the various connectivity and other defined requirements being met.

The good news for hard pressed wind farm promoters is that, notwithstanding the economic downturn, the sector is buoyant and it appears that finance is available for suitable investment and sale opportunities.

Adrian Wall can be contacted at [adrian.wall@rdj.ie](mailto:adrian.wall@rdj.ie)

visit our website

[www.rdj.ie](http://www.rdj.ie)



### 3. Examinership of tenants - what are the implications for landlords?

By Emma Crowley, Consultant, Insolvency and Restructuring.

The recent Chartbusters examinership has highlighted the position of landlords and how they fare in the process. In a recent High Court hearing, Mr. Justice John Edwards granted Chartbusters' application to repudiate its leases on six premises. Consequently, the landlords' claims for arrears of rent due and for loss of future rent has been written down in the examiner's scheme of arrangement. The landlords whose leases were repudiated are to receive a 5% dividend both in respect of the arrears of rent due at the commencement of the examinership and on the value of the rent which would otherwise have been due until the properties are re-let. The unsecured creditors are to receive a similar dividend.

Chartbusters' application to repudiate the leases was made pursuant to section 20 of the Companies (Amendment) Act 1990. Section 20 (1) provides that the company under the protection of the court may, subject to the approval of the court, repudiate any contract under which some element of performance other than payment remains to be rendered both by the company and the other contracting party. A lease of property would generally come within this description.

The section further provides that any person who suffers loss as a result of such repudiation shall stand as an unsecured creditor for the amount of such loss.

Whilst there is statutory protection for post examinership rent, in that this cannot be written down in the scheme, this protection is proving to be somewhat elusive. In the Chartbusters examinership, certain landlords agreed to reduce their rent going forward in circumstances where it was indicated that failing a reduction in rent, the landlord would be faced with an application by Chartbusters to repudiate the particular lease. As mentioned, that application was ultimately successfully brought in the Chartbusters case.

From reports of the case, it does not appear that the lease repudiation application was challenged by any of the landlords concerned. This may lessen the precedent value of the case. If a landlord was to oppose an application to repudiate the lease, firstly the High Court may proceed to make such an order despite such opposition if it is of the view that by doing so the prospects of survival of the tenant company are enhanced.

Furthermore, if the landlord succeeds in opposing the repudiation application, this may lead the examiner to conclude that there is no reasonable prospect of survival for the tenant company and liquidation or receivership will ensue. In such circumstances, the prospects for the landlord are likely to be worse than in the examinership.

During the period of court protection no steps may be taken by landlords against guarantors. However any write down of arrears of rent in the scheme of arrangement will not affect the ability of a landlord to rely, post examinership, upon any guarantee given in respect of the rent. This is subject to the proviso that the notice procedures laid down in the legislation are adhered to by the landlord. The examiner's scheme cannot affect the landlord's right to forfeit a lease or to re-enter the property in the event of non-payment of rent post examinership.

We are likely to see an increase, particularly in the retail area, of tenant companies availing of the examinership regime. There may very well be similar applications for repudiation of leases, as retailers in financial difficulties attempt to walk away from underperforming outlets.

Emma Crowley can be contacted at [emma.crowley@rdj.ie](mailto:emma.crowley@rdj.ie)

You can subscribe to our email bulletins at....

[www.rdj.ie](http://www.rdj.ie)



## 4. Defining the contract documents - a warning.

By Evin McCarthy, Solicitor, Commercial Property.

Modern construction projects by their very nature, involve a protracted period of offer, counter-offer and ultimately negotiation before being reduced to a formal written agreement (if at all). More often than not the actual construction work is also proceeding in the background on the understanding of mutual trust between the parties while a large amount of documents, some contradictory, both formal (invitations to tender, bills of quantities, tender offers etc) and informal (correspondence between the parties directly or with representatives of the design team, attendances of meetings etc) are in circulation.

The importance of setting out clearly what constitutes a contract document was underlined in the recent High Court case of McCabe Builders (Dublin) Limited - v - Sagamu Developments Limited and Ors (23 November 2007) which concerned, inter alia, the proposed incorporation of descriptions contained in tender documents as contract obligations.

Here, the Defendant engaged the Plaintiff to build 32 houses and 14 apartments at Kilmacanogue, County Wicklow. Trust had broken down and the Plaintiff claimed that the contract had become massively more expensive to perform and

was taking longer than initially anticipated due to the need to carry out extensive excavations on the site. The amount of rock that required excavation from the site amounted to 20 times the initial estimate.

The Plaintiff claimed for this increased excavation expense and delay, as, in its view, it was an extra to be measured by reference to the schedule of rates (which they argued the Bill of Quantities had become as they had signed the blue form RIAI Contract (without quantities)).

The Defendants contended that clauses in the tender documents operated to incorporate the Bill of Quantities, and by extension the descriptions in the Bill of Quantities, as part of the agreed contract. Significantly, such descriptions stated that the Contractor should visit the site and further that he "... is to be taken to have made himself acquainted with the nature of the works, the character, dimensions, levels and other features of the site...and all other things insofar as they may have any connection with, or effect, the works", and further "The Contractor shall properly execute the works whether or not shown on the drawings or described in the Bill of Approximate Quantities, provided that same may be reasonably inferred there from".

The Defendants therefore contended that the increase in the cost of excavation and time delay should not constitute a variation but instead should be borne by the Contractor, having assumed the risk in that regard.

Mr Justice Charleton rejected the Defendants' argument:

(i) (relying on the judgment of Griffin J. in Rohan Construction -v- I.C.I.) stating that the burden of establishing a derogation from a contractual obligation is placed on the person seeking to rely on that obligation (here the Defendants), and such derogation must be in a clear, express and unambiguous manner;

(ii) he felt compelled to give precedence to the express language used in the contract furnished to the Plaintiffs (blue form RIAI contract without quantities) which clearly stated that the Bill of Quantities did not form part of the contract but rather constituted a schedule of rates; and

(iii) that, given the parties were fundamentally disagreeing on the essential terms of their agreement, no contract had in fact been entered into.

In such a scenario the Plaintiff contractor was entitled to reasonable recompense from the Defendant employer for work carried out following negotiations with the understanding that a formal contract would be entered into later ("Quantum Merit"). The matter was referred to arbitration on the amount of compensation for the work at 2005 prices, the Defendant being entitled to reasonably competitive value from the Plaintiff.

Evin McCarthy can be contacted at [evin.mccarthy@rdj.ie](mailto:evin.mccarthy@rdj.ie)



## 5. Ban on upwards only rent.

By Ciara Lennon, Solicitor, Commercial Property.

**The objective of a rent review clause is to protect the value of the landlord's investment and to reflect the changing value of the property during the term of the lease.**

In Ireland, commercial leases generally contain a rent review clause providing that the rent payable is to be reviewed periodically (typically every 5 years) to the then open market rent of the property, but not so that the rent can be reduced. "Upwards only" clauses had become the norm and were accepted, if reluctantly, by tenants.

The current economic climate has resulted in weaker occupier demand generally which in turn has seen downward pressure on office, retail and industrial rents. This has led to the previously entrenched concept of upwards only rent reviews being questioned. A recent survey undertaken by Retail Excellence Ireland (REI) shows that 70% of Irish Retailers have actively sought a rent reduction from their landlords this year alone. More than 50% of respondents indicated that they had negotiated the altering of rental payments from quarterly to monthly. High street tenants were more successful than both shopping centre and retail park tenants in negotiating rent reductions.

In a recent arbitration hearing, the Master of the High Court commented that the economic downturn should be considered when "upwards only" clauses governing rent reviews are being interpreted.

These comments were made in an arbitration decision, which may only be regarded as an expression of his views. The case has since been forwarded to the High Court for hearing, where the issue of upwards only rent review clauses may be scrutinised.

The Master paid particular attention to public policy and the importance of reasonableness. He further noted that "even in a case in which the drafted meaning is clear and unambiguous, the device of severance of an offending clause will be employed by the court where performance would be contrary to public policy". This was interpreted as a willingness to strike down as fundamentally unfair the concept of the upwards only rent review.

It is also noteworthy that in the recent Chartbusters examinership, some shop rents were reduced by agreement, where the landlords faced the possibility of the Examiner asking the Courts to repudiate those leases.

Against this background, the Minister brought forward legislation to ban upwards only rent reviews and this legislation (Landlord and Conveyancing Law Reform Act 2009) was passed into law in early July.

The new Act will apply to all leases which are entered into after the commencement date of the Act (likely to be some months as the Minister has allowed a period for landlords "to factor the change into their future investment decisions"). The change will not apply to any leases or agreements in place prior to the commencement date.

This ban will fundamentally change the commercial property market in Ireland and will impact on pension funds, developers and private landlords. It certainly remains to be seen if this long term change brought about by current economic conditions will ultimately be a positive one for landlords and tenants alike.

Ciara Lennon is in our Galway office and can be contacted at [ciara.lennon@rdj.ie](mailto:ciara.lennon@rdj.ie)

You can subscribe to our commercial property email bulletins at....

[www.rdj.ie](http://www.rdj.ie)



## 6. Judgment Mortgages on Registered Land - is the decision of Laffoy J. in Mahon - v - Lawlor fair?

By Peter Groarke, Solicitor, Family Law.

What is a judgment mortgage? If money is owed and a Court judgment has been obtained by the person to whom it is owed, then that person may apply to attach the debt legally to land or interest in land owned by the debtor. That person can then apply for an Order for sale and force the repayment of the debt.

Complications arise however when the person who owes the money, owns the land jointly with another person and the subject land is Land Registry title.

**Unregistered Land** - Section 7 of the 1850 Act provides that the registration of a judgment mortgage affidavit in the Registry of Deeds operates to transfer and vest in the creditor the land. Thus creating a mortgage i.e. it creates an interest in the land subject to the equity of redemption in the owner of the land.

**Registered land** - the registration of a judgment mortgage charges the land and creates a burden. There is no alienation of the interest of the judgment debtor. The judgment mortgage is not in any sense the conveyance or assurance of an interest.

It is in respect of registered land that there have been significant judgments of late delivered by the High Court. Most notable is the decision reached by Judge Laffoy on the 30th July 2008 in a case involving Hazel Lawlor the wife of Liam Lawlor, deceased.

Costs were ordered against Mr. Lawlor in litigation involving the Mahon Tribunal. The total costs were approximately 5 million Euro together with interest. All of these orders were made and registered as judgment mortgages on the subject lands before Mr. Lawlor died in a crash in Moscow in October 2005. Liam Lawlor and his wife were registered as owners of folio lands in County Dublin of which they were deemed as a matter of law to be joint tenants.

Mrs. Lawlor became registered as full owner to those folio lands by right of survivorship following the death of her husband.

The question for the Court was whether the registration of the judgment mortgage affected a severance of the joint tenancy and, if it did, Mrs. Lawlor would not have been entitled to the entire property by right of survivorship.

Judge Laffoy took the view that the registration of a judgment mortgage on registered land did not affect a severance of the joint tenancy and accordingly that Mrs. Lawlor was entitled to take the land by right of survivorship. Mr. Lawlor's interest in the land ceased on his death and accordingly the judgment mortgage also ceased or as Judge Laffoy put it - "passed out of existence".

There were the signs that the Courts were of the above mindset in a previous case of *Irwin v Deasy*, Judge Finlay Geoghegan (1st March 2004). The primary practical

result of that case is that the courts have determined that they do not have the power to make an order for sale over jointly owned land registry land in favour of a judgment creditor whose judgment and consequent judgment mortgage is only against one of these owners.

As it stands the decision in *Irwin -v- Deasy* is on appeal to the Supreme Court. The Revenue has requested the Supreme Court to run the matter as a moot case on the basis that the issue is one of public interest. The decision in *Mahon -v- Lawlor* remains unchallenged.

The decision in *Mahon -v- Lawlor* and *Irwin -v- Deasy* are seen by most as unfair to those who had, or have, registered judgment mortgages on registered land jointly owned. Both cases have led to the existence of an unacceptable inconsistency in the position held by a Judgment Creditor based solely on whether the subject lands are registered or unregistered land.

Peter Groarke can be contacted at [peter.groarke@rdj.ie](mailto:peter.groarke@rdj.ie)

You can subscribe to our email bulletins at....

[www.rdj.ie](http://www.rdj.ie)



## 7. Getting your house in order - Dwellinghouse and other Reliefs.

By Deirdre Wilson, Partner, Private Client.

The rose tinted glasses donned by many during the recent and fast dissipating economic boom has meant many of us have avoided making the tough decisions which are now required. Many are now faced with trying to extract themselves from investment properties plummeting in value and businesses which are floundering. The good news is that you have options and some options come with the added bonus of various reliefs and allowances which are, at least until the December Budget, still available.

The first step I would advise is to update your Will. Talk to us about your changing circumstances, let us advise you in conjunction with our Tax Department and indeed your accountant as to how your Will should be structured. A well drafted Will can result in tax savings and can also prompt some lifetime transfers, which may not otherwise have been considered.

The property market is still very sluggish and if one is to believe reports, a recovery is not expected until at least next year. If you cannot sell a property what can you do? The existence of Dwellinghouse Relief may facilitate a tax efficient transfer of the property to another. The Relief is subject to certain conditions but once satisfied the Relief allows the

recipient of the property to receive it without having to pay CAT (**Capital Acquisitions Tax**):

1. The donee must occupy the dwellinghouse as their only or principal residence for a period of 3 years prior to the gift.

2. The donee of the property must not have a beneficial interest in any other dwellinghouse at the date of the gift.

3. The dwellinghouse must remain the donee's only and principal residence for a period of 6 years after the gift to avoid a claw back of the allowance (unless the donee is over 55 years at the date of the gift).

4. Any period during which the donor resides in the dwellinghouse with the donee is disregarded in the calculation of the three years period referred to in condition one unless the donor was dependent on the donee by reason of infirmity or old age.

Dwellinghouse Relief is also available where a dwellinghouse is inherited subject to the foregoing conditions. Whilst this allowance was primarily used by family members in the past it is available to co-habitees and can be very useful in this regard. The Civil Partnership Bill which is not yet passed into law should extend various tax reliefs to co-habitees not currently available.

The gift of the dwellinghouse can be made subject to the payment of a mortgage and in the event of the existence of a mortgage must be subject to bank consent but it may be an option for some.

The farmers amongst you will already be familiar with the existence of Agricultural Relief which has the effect of reducing qualifying assets by 90% thus reducing tax exposure for the recipients. There are conditions attaching to this relief also but it may be the ideal solution where you wish to transfer a farm and farm assets to another.

Retirement from a business can be a daunting time but for many the recession has accelerated their decision to hand over the reins. Business Relief may also be available to such proposed transfers. It applies to qualifying "relevant business property" as defined in the CAT legislation and again has the effect of reducing the value of those assets by 90% again reducing the donee's exposure to CAT. There are conditions which must be satisfied and there are also claw back provisions in the event the qualifying assets cease to qualify within 6 years of the relief being availed of.

The purpose of this article is not to give an exhaustive guide to the various reliefs available but to alert you to the existence of some which may be relevant to you. The important thing is that you must take this opportunity to explore your options and make the most out of the reliefs which are available.

Deirdre Wilson can be contacted at [deirdre.wilson@rdj.ie](mailto:deirdre.wilson@rdj.ie)

## Firm News

### 8. The Michael MacNamara Scholarship

The recipient of the Michael MacNamara Scholarship, sponsored by RDJ Glynn, is Aisling McMahon, from Ennis, Co. Clare who is pictured receiving the Scholarship from NUI Galway President, Dr James J. Browne.

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



Pictured from left to right: Padraic Brennan, Partner, RDJ Glynn; NUI Galway President, Dr James J. Browne; Aisling McMahon; Phyllis MacNamara; Rónán Kennedy, The School of Law, NUI Galway and Professor William Schabas, Director, Irish Centre for Human Rights, NUI Galway.

### 9. RDJ Glynn was the official legal advisor in Galway to the Volvo Ocean Race Stopover

RDJ Glynn was delighted to be chosen as the Official Legal Advisor in Galway for the Volvo Ocean Race Stopover. Our offices are based on Long Walk so we were fortunate to be in the heart of the action during the two weeks the boats were in Galway. The event was a huge success for Galway and the West of Ireland and we were very excited to be providing our legal services in helping with such an important occasion.



Padraic Brennan and Billy Glynn of RDJ Glynn on board the Green Dragon Racing Yacht moored at Galway Harbour during the Volvo Ocean Race Stopover.

### 10. We've strengthened our team



We are delighted to announce that Emma Crowley has joined the firm's Insolvency and Restructuring Team as a Consultant.

Pictured from left to right is Darryl Broderick, Partner, Emma Crowley, Consultant, Imelda Tierney, Solicitor, Nicholas Comyn, Partner and Aisling Walsh, Solicitor.

### 11. Law and the Environment 2009 Conference



Pictured is Aoife Shields speaking at the conference.

Aoife Shields, a Solicitor in our Environmental Law Team, spoke at Law and the Environment 2009, the 7th Annual Conference for Environmental Professionals, held at UCC. Aoife spoke on 'Critical Analysis of the Land Damage Provisions of the Environmental Liability Directive'.