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

As we approach the end of 2011, it is appropriate to reflect. Whilst business conditions remain generally very difficult, the past year has seen some progress in the Irish economy with a low level of growth returning.

At RDJ, our lawyers, working with clients in the export, food, IT and multi-national sectors have been very busy as businesses in these sectors are performing strongly.

The challenge for 2012 will be to expand these activity levels across all sectors so that all business boats are lifted by the economic tide.

As always, this newsletter has a range of interesting articles on legal subjects

together with some news about various RDJ activities.

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

Finally, with Christmas fast approaching, I would like to wish all our clients and business colleagues a Happy Christmas and best wishes for 2012.



John Dwyer
Managing Partner
john.dwyer@rdj.ie



In this issue...

- 1 Welcome note
- 2 The Multi Unit Developments Act 2011
- 3 Priory Hall - some hard lessons on Building Regulation
- 4 Posted on the Internet - Written in Stone
- 5 EU Consumer Rights Directive

FIRM NEWS

- 6 RDJ UCC Law Scholarship 2011
- 7 Cork BIC'S "Going International" Conference 2011
- 8 Marymount opens new hospital building
- 9 RDJ clients making headlines
- 10 RDJ Hockey Star
- 11 RDJ Glynn Sponsorship
- 12 CIPD Southern Region Breakfast Briefing



Pictured is a section of the attendance at a recent Breakfast Briefing on the legal issues regarding Social Media which was hosted by RDJ.

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2. The Multi Unit Developments Act 2011 - An Overview

By Carrie McDermott, Solicitor, Litigation Unit

The Multi-Unit Developments Act 2011 (the “Act”) came into force on 1 April 2011. The Act is applicable to both new and existing multi-unit developments (“MUDs”). A MUD is defined as a development comprising of at least 5 residential units. It may also have a commercial element in which case it is referred to as a “mixed” MUD.

Application of the Act

The Act applies to three categories of MUDs:-

1. Existing MUDs, where 80% of the units have been sold. The developer is obliged to ensure that the legal and beneficial interest in the relevant common areas is transferred by 1 October 2011.
2. Existing MUDs, where less than 80% of the units have been sold. The developer must ensure the legal interest in the common areas is transferred (again by 1 October 2011) but can retain the beneficial interest until the MUD is completed. On completion of the development the developer is obliged to vest the beneficial interest in the Owner Management Company (“OMC”) by way of declaration.
3. New MUDs, where no units have been sold prior to the commencement of the Act. In this case the legal interest in the common areas must be transferred to the OMC prior to any of the units being sold. Again the developer is permitted to retain the beneficial interest pending completion which must then vest in the OMC by way of declaration.

Obligations on Developers –

- Set up the OMC at their own cost;
- Ensure the transfer of relevant common areas to the OMC.
- Amend the Memorandum and Articles of existing management structures;
- Enter into a contract with the OMC in

respect of completion of the relevant common areas in accordance with planning permission and building regulations. The OMC is entitled to take independent legal advice on this contract and the developer is obliged to pay for this advice where necessary;

- Provide a fire safety certificate confirming that the relevant common areas comply with fire safety regulations;
- The developer and OMC must ensure that service charges are set out fairly and provide the basis for calculation of these charges on an annual basis; and
- Pay the service charge in respect of units while unsold.

Rights for Unit Owners –

- Application to the Circuit Court to compel the developer to transfer the relevant common areas or deal with issues that arise in respect of the MUD.
- Transparency in respect of annual service charges levied and assurance that the developer is obliged to contribute in respect of all unsold units;
- Assurance that a sinking fund exists to ensure the future viability of the development, which must be established within 18 months of the commencement of the Act (i.e. by 1 October 2012); and
- If the management company has been struck off the Register, the unit owners may apply to restore the management company within 6 years of the strike off.

Non-compliance – what are the penalties?

- While unit owners can apply to the Circuit Court to ensure the provisions of the Act are being adhered to, the Act does not provide for the Court to make specific orders penalising the developer for non

compliance with the Act. The Court is entitled to make appropriate cost orders, and to direct the parties to mediate where appropriate.

- Where the developer has entered into a contract with the OMC for the completion of the common areas, failure to comply with this contract will allow the OMC to bring specific performance proceedings.

The Act is generally a welcome step in the regulation of MUDs. While the Act places extensive obligations on the developer, unfortunately, for unit owners of existing MUDs, the challenge of ensuring compliance with its provisions may be onerous, costly and time consuming.

Carrie McDermott can be contacted at :
carrie.mcdermott@rdj.ie

David O’Shea who assisted with this article can be contacted at:
david.oshea@rdj.ie

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our email bulletins at....
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3. Priory Hall - Some Hard Lessons on Building Regulation

By Finola McCarthy, Partner, Construction Unit

Recent media reports of serious fire safety deficiencies in the Priory Hall apartment development at Donaghmede Dublin and the evacuation of residents have highlighted the real life consequences caused by defective buildings.

At first glance, it might seem surprising that this situation could have arisen in a recently built development given existing legislation which imposes high building standards.

Purchasers are advised to have a building survey carried out on the property prior to purchase and to obtain confirmation of compliance with Building Regulations. However, a building survey does not involve opening up work and therefore will not identify hidden defects.

Fire safety requirements and building standards are set out in the Statutory Building Code which came into force on 1 June 1992 under the Building Control Act 1990 and were strengthened with the Building Control Act 2007. Under the Act the various Building Regulations provide for building standards, workmanship, conservation of fuel and energy and access for people with disabilities. The Building Control Regulations provide for procedures to be administered by the Building Control Authorities (the local authorities) through notifications such as Commencement Notices and Fire Safety Certificates. There are also powers of enforcement and inspection. The legislation imposes a general obligation that every building to which the Act applies must be designed and constructed in accordance with the Regulations. The Building Control Authority (BCA)

receives notification of all works that are subject to the statutory code through the Commencement Notice issued by the developer prior to commencing construction work. Following this the BCA inspectors can inspect the works at any stage and issue an enforcement notice if there is any non-compliance.

Inspections by the BCA are not mandatory and reports indicate that random inspections of a target of only 15% of all developments are carried out. For the most part compliance with the statutory code relies on self-certification by those involved. A purchaser will require confirmation from the developer's architect or engineer that the development has been designed and constructed in substantial compliance with the Building Regulations. This is given in the form of an opinion, the format of which is agreed between the Law Society of Ireland and the representative bodies of the consultants such as the RIAI. The opinion may rely on confirmations from others involved in the development such as the contractor. The opinion will refer to the scope of services provided - if the architect has not been involved in inspecting the works during the construction phase the opinion will only be based on a visual inspection of the building after the works have been completed. Current economic difficulties have caused many projects to be suspended with consequent changes in the design team or contractors involved. The original architect may refuse to issue the required opinions and the replacement architect's opinion may be heavily qualified and may not confirm with sufficient certainty that the

constructed works are fully compliant. There is a convincing case to be made that improved enforcement of the Building Regulations is needed to minimise the reliance on self-certification. Independent inspections and certification by the BCA may be the most appropriate means of enforcing full compliance. This would result in placing responsibility and potential future liability for failures on the BCA. Alternatively, establishing a register of approved independent inspectors to carry out this work might be workable (similar to BER assessors). In the United Kingdom, approved inspectors work with the developer before, during and after construction with satisfactory outcomes for ensuring compliance.

In an already crippled construction industry, greater regulation may be seen as a further obstacle to recovery. However, the Priory Hall situation highlights the real need to strengthen the inspection and certification process to ensure full compliance with the Building Regulations.

Finola McCarthy can be contacted at finola.mccarthy@rdj.ie

www.rdj.ie



4. Posted on the Internet - Written in Stone

By Alice Crowley, Solicitor, Employment Unit

As Justin Timberlake's character in the movie "The Social Network" stated: "We used to live on farms, then in cities...now we're all living on the internet". So if we are all living on the internet how do organisations and employees get on in this cyberspace? There have been two interesting cases this year which deal specifically with the issues of social media and email and disciplinary matters which might arise.

In the case of JD Wetherspoons Plc –v- Ms KC Preece (January 2011) an employee of a pub chain was dismissed after she had posted ill-advised comments on her Facebook site about two customers who had allegedly verbally abused her while working behind the bar earlier in the evening. The customers' daughter spotted the comments and reported her. The English Employment Appeals Tribunal upheld the dismissal. In reaching this decision the Tribunal took several important factors into account. The employer had an unambiguous email and social media policy which expressly dealt with the use of social media which included a provision stating that disciplinary action could be taken

should the content of any online statement (including statements on sites such as MySpace or Facebook) "be found to lower the reputation of the organisation, staff or customers...". The employee had indicated her acceptance of the policy by way of signature and the employee handbook made it clear that any failure to comply with the email/internet policy could amount to gross misconduct leading to dismissal.

The very recent Bank of Ireland (ICS Building Society) case (28 September 2011) emphasises the requirement of employer fairness and proportionality even where there have been clear breaches of what would be considered reasonable email usage. The Bank took disciplinary action against ten employees over the circulation of emails of an indecent, obscene and pornographic nature. It ultimately dismissed five workers, including the two claimants in the case. The two women worked in the mortgage operations section. One had nearly 7,000 emails in her system 70% of which were non-work related and the other had close to 3,000, 56% of which were non-work related. There was no dispute that the emails had been sent and that they were inappropriate. The claimants' position was that the abuse of the policy was widespread in the ICS Building Society (then owned by Bank of Ireland) and breaches were being committed by staff at both the same and more senior levels than them. The Tribunal was not unsympathetic and while holding that the email policy was breached, nevertheless held that the

two employees had been unfairly dismissed essentially on the basis that the sanction in all the circumstances was disproportionate.

The cases are a reminder that a good email/internet/social media policy is essential. The days where policies could simply state whether or not an employee is allowed to use the internet or not are over. The policy should deal with what is acceptable in and outside the workplace, including social media. Inevitably situations will arise where employers have to consider disciplinary action or even dismissal. The normal rules apply. There must be a genuine belief, based on reasonable grounds, following a reasonable investigation that the employee was guilty of misconduct. Even if the employee is guilty, the employer must think about the sanction carefully. Be proportionate.

Prevention is of course the best cure. Employees should be made aware of the potentially drastic impact their social media or email activity might have.

Alice Crowley can be contacted at: alice.crowley@rdj.ie

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5. The EU Consumer Rights Directive

By Marie Gavin, Solicitor, Corporate and Commercial Unit

The EU Consumer Rights Directive (the “Directive”) was adopted by the EU Council of Ministers on the 10th October 2011 and concerns contracts for sales of goods and services from businesses to consumers. The purposes of the Directive are to enhance consumer confidence and strengthen consumer rights in the internal market and also to reduce business reluctance to engage in cross border trading. The Directive seeks to achieve these purposes by giving consumers a common level of protection across the EU.

Current Position:

The Directive will replace the Distance Selling Directive (97/7/EC) and the Door to Door Directive (85/577/EEC) and also amends the Unfair Contract Terms Directive (93/13/EEC) and the Sale of Consumer Goods and Guarantees Directive (99/44/EC).

The above directives lay down minimum requirements that Member States were obliged to transpose into their national law. However, as individual Member States can adopt stricter national rules, the laws of each Member State often vary considerably causing uncertainty for traders and consumers proposing to sell and purchase products and services in different countries.

Four Key Provisions of the Directive

(1) Cooling off Periods:

When a consumer buys a product or service off-premises or online he will be entitled to a cooling off period of 14 days (subject to certain exceptions set out in the Directive) in which he may withdraw from the contract without giving a reason. This replaces the cooling off period of 7 days currently provided for in the Distance Selling Directive. When a consumer buys goods online the 14 day cooling off period will commence from the date on which the consumer acquires physical possession of the goods, rather than the date of the conclusion of the contract which is currently the case.

(2) Refund Rights:

The Directive provides that a trader will be obliged to reimburse all payments received from a consumer (to include delivery costs) within 14 days from the date that the trader is informed of the consumer’s decision to withdraw from the contract. The consumer shall be responsible for bearing the direct cost of returning goods unless the trader has agreed to bear these costs.

(3) Pre -Ticked Boxes Prohibited:

Traders must obtain explicit consent from consumers for any payment due in respect of extra goods and services and cannot infer this consent by using pre-ticked boxes. For example an airline can no longer include a pre-ticked box for travel insurance on its website where a consumer is buying a plane ticket and if it does so the consumer will be entitled to reimbursement of this extra payment.

(4) Rules on delivery and passing of risk to the consumer:

The Directive provides that unless otherwise agreed by the parties the trader must deliver goods to the consumer within 30 days of the conclusion of the contract. If the trader fails to deliver the goods within this time or an additional period of time agreed to by the consumer the consumer will be entitled to terminate the contract. The Directive also provides that the risk of loss or damage to goods shall only pass to the consumer when the consumer has acquired physical possession of the goods and as such the trader will bear the risk of loss or damage to goods during delivery.

Preparation for new measures:

Member States will have two years from the date that the Directive is published in the Official Journal of the European Union in which to transpose the measures into national law. During this time period traders should review their sales practices, refund policies, standard terms of sale and also update their website terms and conditions to ensure compliance with the Directive.

Marie Gavin can be contacted at: marie.gavin@rdj.ie

www.rdj.ie

Firm News

6. Ronan Daly Jermyn UCC Faculty of Law Scholarship 2011



Pictured is John Dwyer, Managing Partner of RDJ with Anthony O'Dwyer, the recipient of this year's RDJ UCC Scholarship. Anthony is currently completing an LLM by Research entitled "Investigating the legitimacy of extending artist's resale right to other creators within an EU context" under the supervision of Dr. Louise Crowley, UCC.

7. Cork BIC's "Going International Conference 2011"

RDJ was a founding partner of CorkBIC's "Going International Conference 2011".

The conference took place on 13 October, 2011 and welcomed over 130 delegates for a day of exploration, discussion, networking, challenges and experiences. Adrian Wall, RDJ Corporate Partner, participated in a panel discussion on "Maximising Returns on Exits".

Pictured is Candace Johnson, a serial entrepreneur and voted one of Europe's most powerful women by Time Magazine, addressing the Conference



Firm News

8. Marymount opens new hospital building



Pictured at a recent visit and tour of the new Marymount facility are (left to right):

RDJ Consultant, Nicholas Comyn, Marymount CEO, Kevin O'Dwyer and RDJ Managing Partner, John Dwyer.

The new St. Patricks University Hospital and Marymount University Hospice opened in September 2011. Built at a cost of €56 million on a green field site at Curraheen, on the outskirts of Cork City, the facility has transformed how services for older people and specialist palliative (hospice) care are provided in Cork, and has set a new standard for such services in Ireland.

RDJ advised Marymount on the site selection and construction project and on the occasion of a recent visit to the facility by John Dwyer and Nicholas Comyn, Marymount CEO, Kevin O'Dwyer, took the opportunity to thank RDJ for their professional support throughout the entire process, and indeed for continuing to provide the full range of legal services for the hospital in all aspects of its business, something that they have been doing successfully for many years.

In addition to its role as legal adviser, RDJ is very pleased to support Marymount as a charity partner.

9. RDJ clients making headlines

RDJ is advising two young innovative companies who are developing exciting new technologies.

Aspirin
side
effects
removed

“An Irish company claims to have created a new form of aspirin that can be taken by patients over prolonged periods without suffering the side effects associated with long-term use.

Cork-based **Solvotrin Therapeutics** say they have created a “prodrug” version of the familiar medication meaning its key ingredients do not begin to work as soon as they are swallowed, with the associated risks to the gut that this entails, but are only activated when they reach a specific target in the body.”

Taken from the Irish Examiner, November 2011

“A Cork Company is boldly going where no other company has gone before after it won a €1 million contract to develop a new blood-testing device for astronauts onboard the International Space Station.

The European Space Agency has selected **Radisens Diganostics** to add a thyroid test to a point-of-care device currently in development at its facility in Bishopstown.”

Blood-test firm
wins €1m space
station contract

Firm News

10. RDJ Hockey Star



Pictured is John C. Jermyn in action for Ireland against Holland in the European Hockey Championships in Monchengladbach, Germany, last August where Ireland finished 5th.

John won his first Irish cap against Belgium in 2002 and he currently has 132 caps and has scored 72 goals for his country. Although injured presently, John hopes to be fully fit to play in the upcoming Olympic Qualification tournament which will take place in Dublin from the 11th to the 18th of March 2012.

John is a solicitor in the RDJ Employment Team who advise our clients on all aspects of employment and labour law.

11. RDJ Glynn Sponsorship



Pictured above is JP Gilmartin presenting the RDJ Glynn sponsorship of the Junior Chamber Ireland Galway Young Entrepreneur of the Year 2011 awards which took place at the Claregalway Hotel, Co. Galway, to the event organisers Mary Giblin and Oisín Concannon.

12. CIPD Southern Region Breakfast Briefing

On 28th September last, Jennifer Cashman, Partner in Ronan Daly Jermyn Solicitors' Employment Law Unit, presented at the CIPD Southern Region Breakfast Briefing on the implementation of the EU Temporary Agency Workers Directive in Ireland. The event was sponsored by RecruitIreland.com and was held in Maryborough House Hotel, Cork. In her presentation, Jennifer also gave practical advice to employers and managers on how to prepare their business for the changes and challenges they will face resulting from the implementation of the Directive.



Pictured at the recent CIPD Breakfast Briefing were from left: Charlie Dolan - CIPD Chair, Kate McGuinness, Horizon Coaching owner, Jennifer Cashman RDJ, Tom Crosbie RecruitIreland.com Managing Director, CIPD Committee member Barry Hill, & Sinead Johnson RecruitIreland.com.

Picture courtesy of Denis Minihan, Irish Examiner

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

This newsletter is intended for general interest and guidance only and should not be used as a basis for decisions. Whilst every effort has been made to ensure the accuracy of the content, no liability can be taken for any omissions or errors.

For further information on any matter in this newsletter please contact: Olivia Baldwin Tel: +353 21 480 2700 or Email: olivia.baldwin@rdj.ie