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GALWAY

1. RDJ Glynn hosts official launch event with keynote presentation by Warren Gatland

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

It is good to be able to report some positive news in these challenging economic times and the continuing development of RDJ Glynn in Galway is certainly positive news.

The official launch of RDJ Glynn took place in the Hotel Meyrick in Galway city centre and was attended by over 250 guests from

was an important development for those seeking specialist legal advice in the region. Padraic set out how our legal team in Galway will provide new specialist capabilities in areas such as corporate and commercial law, commercial property, employment and taxation and also that the firm has recruited a number of experienced solicitors in specialist areas. The firm intends to continue to expand our staff base in Galway.



Pictured speaking at the launch of RDJ Glynn - Warren Gatland.



Pictured at the launch of RDJ Glynn - Warren Gatland, John Dwyer & Padraic Brennan

the local business community. Hosted by friend of the firm, Warren Gatland, the Wales Rugby Union coach gave a presentation titled "Management and Motivation" which drew parallels between success on the rugby field and in the business world. Warren gave an excellent insightful presentation which everyone attending really enjoyed.

Padraic Brennan, Partner in Charge of RDJ Glynn spoke at the launch and commented on how RDJ had identified a strong demand in the west of Ireland for a law firm providing legal services to the business community and how the formal launch of RDJ Glynn

All of us in RDJ are very excited about the huge opportunities in Galway and the West and we all look forward to growing our business in the region.

Finally, with the year end fast approaching, I would like to take this opportunity to wish all our clients and friends season's greetings for a happy Christmas and a prosperous 2009.

John Dwyer
Managing Partner
john.dwyer@rdj.ie

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2. Competition Authority blocks Kerry/Breeo Merger

By Diarmaid Gavin, Solicitor, Commercial Department

On the 28th August 2008, the Competition Authority announced that after a five month investigation, it had decided to prohibit Kerry Group's proposed acquisition of Breeo Foods Limited and Breeo Brands Limited. This is the third time since the Competition Act 2002 came into force that the Authority has prohibited a merger. It is an interesting case given the closeness between Kerry and Breeo as competitors and contains a very detailed analysis of the impact of the merger on competition. It is also the first prohibition decision to be appealed to the High Court, Kerry having exercised its right to do so under the Competition Act. The High Court has the power to overturn the Authority's decision or confirm it subject to modifications.

The Authority's decision, which was published on its website on 26 September last, identified 9 relevant product markets where Kerry and Breeo overlapped:

- the market for the production, distribution and supply of puddings;
- the market for the production, distribution and supply of sausages;

- the market for the production, distribution and supply of bacon products;
- the market for the production, distribution and supply of poultry cooked meats;
- the market for the production, distribution and supply of non poultry cooked meats (NPCM);
- the market for the production, distribution and supply of butter;
- the market for the production, distribution and supply of non butter spreads;
- the market for the production, distribution and supply of natural cheese; and
- the market for the production, distribution and supply of processed cheese.

The Authority found that the transaction would substantially lessen competition in the markets for production, distribution and supply of bacon products, NPCM and natural cheese. In analysing the impact of the merger, the Authority used an economic tool known as the Herfindahl - Hirschmann Index (HHI) which measures market concentration by squaring the market shares of all firms in the relevant market, adding the results and then comparing the situation pre and post merger. The higher the HHI the higher the level of concentration and the more closer the market is to monopoly. In its merger guidelines, the Competition Authority indicates three zones of HHI into which mergers may fall ranging from Zone A with low levels of concentration to Zone C with high level of concentration. The HHI in this case was in Zone C indicating that the three affected markets were highly concentrated.

In deciding whether the merger would raise competition concerns in these markets, the Authority was influenced by the following issues:

- the closeness of Kerry and Breeo brands – Kerry's "Denny" and Breeo's "Galtee" were each other's closest competitors in the rashers market;
- the absence of strong competitors post-merger – in all three affected markets,

the Authority found that there were no credible alternative brands to those of the merged entity;

- ease of entry – the Authority found that new entrants would not be able to establish a sufficiently strong presence within two years to counter a price increase by the merged entity
- private label brands were not seen as being able to restrain a price increase by the merged entity despite having 45-50% share of the rashers market;
- insufficient buyer power – the Authority was not convinced that customers of Kerry/Breeo (which included large multiples such as Tesco, Dunnes Stores and the Musgrave Group) would act as a sufficient constraint on the merged entity's ability to raise prices.

Conclusion

This case is a good example of how the Authority will approach mergers between close competitors and the factors that will influence its decision. It also reinforces the need for robust expert economic analysis in complex cases: while the merging parties produced their own expert analysis, this was rebutted by the Authority's own expert. The outcome of Kerry's appeal and how the High Court reviews the Authority's decision will be of interest.

Diarmaid Gavin can be contacted at diarmaid.gavin@rdj.ie

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3. Equality considerations in a changing climate

By David McCarroll, Solicitor, Employment Department

With claim numbers and award levels up, and margins for many businesses getting tighter, more than ever employers must ensure that they have the proper policies and procedures in place to prevent and defend equality claims.

The basics

The Employment Equality Acts, 1998-2004 (“the Acts”) prohibit discrimination in the workplace on the grounds of gender, marital status, family status, sexual orientation, religion, age, disability, race and membership of the travelling community (the “discriminatory grounds”). Discrimination concerns less favourable treatment of persons based on any of the 9 discriminatory grounds. This prohibition covers discrimination in relation to access to employment, conditions of employment, training, promotion, re-grading and classification of posts – basically, the whole employment cycle from interviews through to redundancy arrangements and everything in between. Claims are taken before the Equality Tribunal (the “Tribunal”) and are dealt with either by mediation or by a hearing before an Equality Officer.

The Acts also set up the Equality Authority (the “Authority”) as a separate entity to the Equality Tribunal, whose general functions involve the promotion of equality. A member of the public can request assistance from the Authority in taking proceedings for breaches of the Acts.

The numbers

The Tribunal’s 2007 Report sets out a 44% increase in Employment Equality claims, with a huge increase in the level of claims taken on the race ground (105% increase) and disability claims up by 59%. However, there is a 14% decrease in the number of age claims, which contrasts with the

fact that the majority (24%) of Authority assisted cases related to age. Furthermore, on preliminary figures, claims overall are up another 32% for the first half of 2008 also, as compared with the first half of 2007.

Amounts totalling €461,816 were awarded in compensation, with the average award up to €14,431, compared to €10,113 in 2006.

Incidentally, given the pressure to cut expenditure, there has been speculation that the Authority and the Tribunal may well be considered for a merger by the government with the Irish Human Rights Commission thrown in for good measure. Such a merger would in itself be highly controversial as it could place the role of prosecutor and judge in the same hands.

Discriminatory dismissals

Given the economic climate, it is clear that we are likely to see an increase in discriminatory dismissal claims and employers need to be mindful about the risks of such claims, particularly their double edged nature.

In cases such as *Zhang v Towner Trading* (DEC E2008/01) and *Kavanagh v Aviance* (DEC E2007/39), the Claimants were awarded close to four years’ remuneration; two years’ for the act of discrimination and two years’ for the dismissal.

Therefore, employers need to be careful when dismissing an employee that they have a documented process which can be used to demonstrate that the reason for the dismissal is not a discriminatory one. Remember, unlike Employment Appeals Tribunal awards, equality awards are not linked to financial losses alone.

Redundancies

Employers must be prepared and should do the ground work to justify redundancy selection in advance:-

- document any financial difficulties the Company is experiencing
- document the process of selecting certain areas for consideration
- document consultations with the staff

- and meet with the obligations under the redundancy legislation.

Employers often make the mistake of assuming that because a worker does not have two year’s service (and thus not entitled to a redundancy payment), they can be let go more easily. Remember, quite apart from breaches of redundancy legislation, employees can challenge their selection too, under:-

- Unfair dismissal legislation, once they have one year’s service;
- Equality legislation, where they claim they were selected on discriminatory grounds. (no service period required)
- Protection of Employees (Fixed Term Work) Act 2003, where fixed-term workers are treated less favourably.

Time and time again, Equality Officers make determinations which state that a prima facie case has been raised of discrimination and the employer has not rebutted that claim. The cost of not preparing the documentation to rebut dismissal claims can be four years’ salary, an expensive and unnecessary cost.

David McCarroll can be contacted at david.mccarroll@rdj.ie

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4. The commercial court four years on: Implications for clients

By Darryl Broderick, Partner, Commercial Litigation Department

The Commercial Court began operations on 12 January, 2004. In this article we examine the knock-on effects for clients who are involved in a dispute before the Commercial Court.

“ A major positive change is the speed with which cases can be concluded. ”

Background

The Commercial Court is a division of the High Court dealing with “private law disputes of a commercial nature”. It was established because of concerns about the length of time it was taking for large commercial High Court cases to be concluded. The Court utilises case management procedures to ensure that parties to disputes are not in a position to unnecessarily delay the progress of proceedings.

What cases does the Court deal with?

It is open to either party to a High Court claim to make an application to have the proceedings entered into the Commercial List. The Commercial Court must determine

whether the dispute falls within one of the categories of disputes with which the Court deals. As a rule of thumb the Court deals with commercial disputes with a value in excess of €1million. However there are other disputes where a monetary minimum is not applied, such as intellectual property disputes.

A major positive change is the speed with which cases can be concluded. For example this firm has acted in proceedings that were heard by the Court within three months of the issue of proceedings. That case involved a net point and it was possible to fix a hearing date quickly. Previously it would not have been generally possible to get a hearing date in any High Court case in a period of less than two years. This firm has also been involved in a complex case that was subsequently appealed to the Supreme Court and settled immediately prior to the Appeal hearing. The entire case including the Appeal was concluded in 19 months. Previously it would have been approximately five years before that case reached its Appeal hearing.

Implications for clients

The speed with which the Court acts does not just mean a frontloading of work for legal practitioners but it also involves a frontloading of time, effort and sometimes costs for clients

Speed and Intensity of Litigation

The Court sets strict deadlines and expects the parties to stick to those deadlines. Frequent instructions are required from clients in order to meet deadlines. Where a case involves discovery of documents clients will likely be under time pressures to produce documents for the discovery process. Sufficient time has to be set aside to deal with matters that arise during the course of the proceedings. Without frequent client input it would often be impossible to meet the deadlines set. If deadlines are not met by a party this can have adverse costs consequences.

Pre-litigation work/ Case Preparation

Given the Court’s strict time deadlines it is generally necessary for a Plaintiff bringing

the proceedings to have as much of its case as possible ready before the proceedings are entered into the Commercial List. Previously there would have been a number of weeks/months between the delivery of various Court documents (pleadings). It was open to either party to take no action in the proceedings over a number of months and deadlines were often missed because the adverse consequences were limited.

Costs

The frontloading of work inevitably leads to costs being incurred more quickly. Regular Court attendances by solicitors and counsel are required which has added another layer of costs. While cases are dealt with more quickly the same work is squeezed into a shorter period, so unfortunately quicker litigation does not necessarily mean cheaper litigation. In addition the tight deadlines set by the Commercial Court may require legal advisors to allocate more resources than would previously have been necessary which can also add to costs.

Conclusion

The Commercial Court has been a resounding success and is here to stay. Legal practitioners and clients who are best able to adapt to the new streamlined procedures will get the most benefit from the Court.

Darryl Broderick can be contacted at darryl.broderick@rdj.ie

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5. Max Mosley v News Group Newspapers Limited and the Law of Privacy

By Uilliam O'Lorcain, Solicitor, Commercial Litigation Department

Max Mosley, the President of the Fédération Internationale de l'Automobile ("FIA"), recently won a highly publicised case in the UK against the publishers of the News of World.

This was on the foot of an article headed 'F1 boss has sick Nazi orgy with 5 hookers'. The article appeared in the News of the World on 30 March 2008 and alleged that Mr. Mosley was involved in Nazi style S&M sexual activity with a number of prostitutes. Interestingly, Mr. Mosley sued not in defamation but for breach of confidence and/or the unauthorised disclosure of personal information which he claimed infringed his rights of privacy as protected by Article 8 of the European Convention of Human Rights (the 'Convention').

The judgment handed down in the case can be used as a guide here in Ireland as to how the Courts may attempt to balance an individual's right of privacy with the media's right to freedom of expression.

The rights to privacy and freedom of expression are enshrined as follows in Articles 8 and 10 respectively of the Convention:

Art. 8.1

Everyone has the right to respect for his private and family life, his home and his correspondence.

Art. 10.1

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions...

In balancing these rights, a number of tests are applied by the Courts. These tests are outlined as follows:

1) The claimant must demonstrate that a reasonable expectation of confidence or privacy arises.

In the Mosley case it was held that, even though the issue of whether a reasonable expectation of privacy arises depends largely on the particular facts of each

case, anyone indulging in sexual activity on private property between consenting adults is entitled to a degree of privacy.

The Court also held that the fact that the nature of the relationship in this particular case, between Mr. Mosley and the women involved in the sexual activity was one where 'a large element of friendship was involved' and was conducted in a 'scene' which was based on 'complete trust and discretion', Mr. Mosley had a reasonable expectation of confidence in the woman who provided the material to the News of the World, and that this expectation had been breached.

2) The Court will attempt to weight the relevant competing Convention rights by placing an 'intense focus' upon the individual facts of each case. In applying an 'intense focus' to the facts of the case, the Court will attempt to ultimately balance (the "ultimate balancing test") whether a countervailing consideration of public interest may be said to justify any intrusion which has taken place in respect of an individual's right to privacy. In implementing an ultimate balancing test the Court will apply a degree of proportionality and decide whether the degree of intrusion into the claimant's privacy was proportionate to the public interest favouring disclosure.

3) An added hurdle has also been placed on the publisher by the judgment handed down in the case of *Leempoel v Belgium* judgement of the ECHR where it was held that there is also a requirement that the publication of the disputed material should "serve the public interest and make a contribution to the debate of general interest to society". In the Mosley case, the Court held that while the publication of the visual images of Mr. Mosley's sexual activity were no doubt interesting to the

public, they were not a matter of public interest.

Therefore, in considering whether an individual's right to privacy could be breached by a publication, one should consider the following:

1. Does an expectation of confidence arise between the parties?
2. Is there a potential breach of the individual's right to privacy?
3. Is the breach in the public interest, and does it contribute to a debate of general interest to society?
4. Is the content of the material proportional or does it contain unnecessary detail which will sensationalize the story?

Many commentators believe that this judgment has pushed the privacy boundaries out too far in circumstances where Campbell and Von Hanover, both decisions of the ECHR, had already pushed the privacy boundaries out substantially. Only time will tell whether the ECHR will take a similar view.

Uilliam O'Lorcain can be contacted at uilliam.olorcain@rdj.ie

“...the judgement handed down in the case can be used as a guide here in Ireland.”

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6. Separation and divorce in a recessionary economy

By Rosemary Horgan, Partner, Family Law Department

International research indicates that couples who experience any sudden significant and unexpected change in income — whether positive or negative — are at risk of breaking up.

However, international research and experience also show an “inevitable link” between a downturn in the economy and a rise in the number of family break-ups. As the lyrics from Billy Joel’s song “Scenes from an Italian Restaurant” say:

“ They started to fight when the money got tight,
and they just didn't count on the tears...”

Divorce is now Ireland's fastest growing marital status. The number of divorced people has increased by 70% from 35,100 in 2002, to 59,000 in 2006 and unfortunately there is no sign of this trend reversing itself. Breaking up can be very hard to do in a falling property market and global credit crunch. Financial experts are not uniform in their predictions of how long the current cycle will last. Properties are hard to sell, and finance is hard to source and to repay.

In middle income situations this makes the dilemma faced by a separating couple very serious. Lenders are reluctant to allow the financially stronger party out of a joint mortgage so that the property can be transferred into the name of a dependant spouse, subject to them taking on the repayment of the existing mortgage. The fall in house prices can mean that the family home has to remain in joint names to meet the housing needs of the financially dependant parent and children. The other partner may not be able to get on the first rung of the property market in their own right. The cost of the weekly shopping basket alone may encourage some couples to stay together but live separate lives under the one roof.

In “big money” situations the dilemma tends to be more one of ‘scale’ and timing. Problems of gearing, currency fluctuations, and share and pension values all create their own dilemmas in the current economic world recession. There is little doubt that expectations can be more realistic, and settlements are lighter than they might be in a booming economy. Courts are not unaware of the current economic realities and court outcomes on separation are adjusting to meet the challenges faced by the family to ensure overall “fairness”.

Marital difficulties can have a profound impact on a family for many years and these difficulties need not always result in separation or divorce. Marriage counselling is far cheaper and, where this is a viable alternative, many couples may see the sense in exploring it.

The Chinese symbols for ‘crisis’ imply there is both danger and opportunity in a bear market. The “black swan theory” developed by the American financial analyst, Nicholas Taleb noted that before Australia was discovered people thought that all swans were white. However, after the eighteenth century, it became clear that this was not always so.

The future remains uncertain. Couples facing the hard reality of relationship breakdown frequently have no control over that fact and never have control of the economic climate. Marital breakdown no longer features as a ‘low probability high impact’ black swan event; it is an everyday risk in modern Ireland. Nurturing family life is sound risk management.

Where family disruption is inevitable however, it makes sense to deal with separation and divorce in a way which preserves relationships and family wealth as much as possible. In a credit crisis, getting into the “reality zone” sooner rather than later is essential and more achievable, and more couples than ever are choosing to engage in one or another form of Alternative Dispute Resolution rather than institute legal proceedings and rely on the ‘dice and slice’ of the family law courts. Negotiating a fair and workable solution to forestall or conclude matrimonial litigation makes sense. By negotiation, the parties, armed with shrewd legal and taxation advice, can retain far more control over the options and outcomes they chose in restructuring their family life.

For Advice on Mediation options, Collaborative Law, Traditional Negotiation and Separation and Divorce Litigation contact the Ronan Daly Jermyn Family Law Department.

Rosemary Horgan can be contacted at rosemary.horgan@rdj.ie

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7. Succession Rights of Children

By Carol Jermyn, Solicitor, Private Client Department

While it is true to a certain extent that a person is free to dispose of their property by way of their Will as they see fit, this freedom is curtailed somewhat by the Succession Act 1965 when it comes to making provision for children.

Section 117 of the Succession Act 1965 enables the child of a deceased person to apply for provision out of their parent's Estate. The Applicant must show that the deceased parent failed in his/her moral duty to make proper provision for the child in accordance with his/her means, whether by Will or otherwise. A claim can only be made where the deceased parent has made a Will.

It is important to note that children do not have an automatic right to any particular share in the Estate; they merely have a right to make a claim where they feel that they have not been properly provided for by their parent.

Successful Applicants must prove that there has been positive failure in the parent's moral duty to provide, and in addition that the Applicant had a need which could have been provided for by their parent. There is an extremely high burden of proof placed on the Applicant child to prove that there has been such a failure.

“ Children do not have an automatic right to any particular share in the Estate ”

When considering whether adequate provision has been made for your children by way of your Will it is important to bear in mind what class of child will be afforded succession rights to your estate.

The following classes of children will be entitled to make a claim pursuant to Section 117:

- Children of blood, both marital and non-marital
- Adopted children in respect of their adoptive parent's estate

The following classes of children will not be entitled to make a claim pursuant to Section 117:

- Step-children
- Foster children
- Adopted children in respect of their natural parents' estates.

There is no definitive test that can be applied when considering whether or not a parent has failed in their moral duty to provide for the child. Each case is treated by the Court on its individual merits and all factors are taken into consideration.

Whilst no definitive test applies, Case Law has developed a check list of sorts, which is widely used in assessing Section 117 applications. Among the factors that will be considered are:

- The financial and marital condition of the Applicant
- The health of the Applicant
- The conduct of the Applicant
- Whether the Application worked in the family business
- The means of the parent
- Whether provision was made for the Applicant during the parent's lifetime
- Provision for the Applicant by others.

This list is not exhaustive and is merely an indication of the factors which have been taken into account by the Court in deciding such claims.

The costs of such proceedings will be at the discretion of the Court. It is normal that the costs of both sides would be awarded out of the Estate, on occasion even when a claim fails. If the Court were to form the view that a claim was vexatious or without merit it would be less likely to award costs out of the Estate.

There is a very strict time limit for the bringing of Section 117 Applications. Section 117 was amended by Section 46 of the Family Law (Divorce) Act 1996. This reduced the time limit for making such an application to 6 months from the taking out of the Grant of Representation to the Deceased's Estate. If an application is made outside this time limit, both the right and remedy are strictly statute barred.

Spending time giving consideration to these issues when making a Will should ensure that your Estate is passed with minimum legal and administrative costs. In addition, you can plan to avoid litigation in your Estate to the largest possible extent. This enables you to safeguard your successors so that your intended beneficiaries receive the maximum inheritance.

Carol Jermyn can be contacted at carol.jermyn@rdj.ie

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Firm news

8. Two new partners for Ronan Daly Jermyn



Pictured: John Dwyer, Managing Partner; Darryl Broderick, Partner; Richard Martin, Head of Commercial Dispute Resolution Team, and Ronan Geary, Partner.

Ronan Daly Jermyn is delighted to announce the appointment of two new Partners, Darryl Broderick and Ronan Geary.

Darryl and Ronan are both part of the firm's Commercial Dispute Resolution Team.

Darryl's practice has a particular emphasis on insolvency and corporate restructuring matters and Ronan specializes in the resolution of commercial disputes.

9. Family of Legal Eagles

An incredible history of involvement in the legal profession by the Jermyn family has been extended by the latest generation to join the profession with Carol Jermyn who works in the Private Client Department of RDJ, and John Jermyn Jnr. who has joined the firm as a trainee solicitor. Carol and John are the daughter and son of John (Partner with RDJ) and Mary (Solicitor with RDJ) and this family of legal eagles are pictured below.



Pictured above: The Jermyn Family - Carol, John Jr., Mary and John Sr.

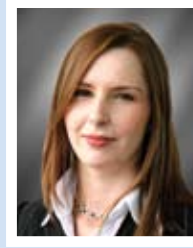
10. New Galway recruits



David McCarroll,
Employment
Department,
Galway



Ciara Lennon,
Commercial Property
Department, Galway



Catherine O'Grady,
Private Client
Department, Galway



11. RDJ staff take part in charity work

We want to give our best wishes to three of our staff who are embarking on challenging charitable projects. Emma Weld-Moore is going to work for the month of December in the Gisimba Orphanage, Kigali in Rwanda. Olivia Buckley is taking part in the 2008 Niall Mellon Building Blitz in Capetown, South Africa while Amy Roberts spent time working with orphans in an orphanage in Ho Chi Minh City, Vietnam.

Left to right, Emma Weld-Moore, Olivia Buckley and Amy Roberts.