

WELCOME

As we enter the final quarter of 2008 it is my pleasure to welcome you to the latest edition of LK Shields Solicitors *Update*. In these ever-changing economic times we hope that you will find the range of topics covered of interest and relevance to your business. As usual, please feel free to let us know if there are topics that you would like us to deal with in future editions of *Update* – your comments and suggestions are always appreciated.

In this edition of *Update*, we carry a wide range of topics we believe of relevance to those currently conducting business in Ireland. Many of this edition's articles have a common theme and highlight pitfalls that exist for the unwary. While the pitfalls in question exist at all times they are, perhaps, of particular relevance and concern in times of economic uncertainty. Our team remain ready, willing and able to assist you to avoid these, and any, pitfalls you may encounter in the course of your business.

I'm also delighted to be able to introduce you to a number of new members of our team. Paul

McCutcheon has joined the team as a Partner in our Commercial Property Department, Susan Battye has joined our Litigation and Dispute Resolution Department and Ciaran Markey recently qualified as a solicitor and remains a member of our Litigation and Dispute Resolution Department. Their respective biographies can be located in this edition.



For further information, please contact Hugh Garvey, managing partner, at hgarvey@lkshields.ie

As you will see from our website, we have recently established a Hotel and Leisure Unit. The unit is a cross departmental unit bringing together those on our team who have the expertise and experience to assist those in the hotel and leisure sector deal with the particular issues they encounter.

Finally, 2008 has been a tremendously active year for our clients and consequently for our team. To get a flavour of some of the work we have been involved in this year please feel free to visit our website at www.lkshields.ie where you will find examples of the diverse and high profile nature of the work we continue to be proud to assist our clients with.

CONTENTS

2 COME TOGETHER

New EU regulations on cross-border mergers became law in May. Seanna McGrann and Richard Curran examine how they will affect Irish firms

3 THE DISCOVERY CHANNEL

Do you work on documents on a laptop or desktop computer? Do you use the Internet in your work or personal life? If so, you need to read this!

4 COMPANIES IN TROUBLE

The recent economic turbulence has resulted in a sharp increase in insolvencies. Jill Callanan looks at the options open to troubled companies

5 WHEEL OF FORTUNE

Justice Minister Dermot Ahern has published the long-awaited report on regulating gaming in Ireland. Aine Matthews rolls the dice

6 LAST RIGHTS

Few of us are likely to give any thought to death-in-service benefits, but we really ought to. Catherine Crowley and Fiona Thornton tell you why

7 FIRST AMONG EQUALS

If your company doesn't have written policies to deal with workplace discrimination, it's leaving itself wide open to costly claims, as Jennifer Clarke explains

8 USE IT OR LOSE IT!

Adverse possession sounds like arcane legal jargon, but call it 'squatter's rights' and you know exactly how important it can be. Caroline McNamara reports

9 HEAT OF THE MOMENT

New regulations mean that property owners must provide prospective buyers or tenants with a certificate detailing the building's energy efficiency

10 SHOOTING THE BREEZE

Just say you have an idea for a wind farm and you know just where to put it. Do you have to buy the land or are there other options? Gerard O'Hanlon shoots the breeze

11 A COMPLEX ISSUE

Ireland has seen a huge rise in the number of apartment complexes, and this has created a range of new difficulties, particularly when it comes to managing them



Come together

New EU regulations governing the cross-border merger of companies became law in May. Seanna McGrann and Richard Curran examine how they will affect Irish firms that may be involved in such a move

The *European Communities (Cross Border) Regulations 2008* were signed into law on 27 May with immediate effect. The Regulations transpose into Irish law an EU directive relating to cross-border mergers of limited liability companies within the European Economic Area (EEA). The Regulations provide for a new pan-European procedure and will apply to a merger between Irish and non-Irish EEA private and public limited companies where the merger occurs by way of:

- merger by acquisition (where an existing company acquires all the assets and liabilities of another company)
- merger by absorption (where an existing company acquires all the assets and liabilities of its wholly-owned subsidiary), and
- merger by transformation (where the new company acquires the assets and liabilities of two or more existing companies).

■ CROSS-BORDER
Mergers of
Companies
■ EUROPEAN
Communities
(Cross Border)
Regulations
■ Criteria for
Irish Companies

In each case, the transferor companies dissolve automatically without going into liquidation. After completion, the applicable company law is the law in the state in which the surviving company resulting from the merger has its registered office. Where an Irish company or companies are involved, certain pre-merger criteria must be satisfied and an Irish company proposing to participate in any of the above types of merger must be able to merge under Irish domestic law. The main steps involved are as follows.

COMMON DRAFT TERMS

Common draft terms must be drawn up in writing by all of the merging companies and adopted by the board of directors of each Irish merging company. The new Regulations provide that the common draft terms should include certain specific information about the merging companies and the proposed

transaction and generally may also include any additional terms that are not inconsistent with the Regulations.

DIRECTORS' EXPLANATORY REPORT

The Regulations provide that the board of directors of any Irish merging companies must draw up an explanatory report which is to be made available to the members of the company and the representatives of its employees or, where there are no representatives, to the employees themselves. This explanatory report should state the legal and economic grounds

for the common draft terms and explain the implications of the cross-border merger for the company's members, creditors and employees.

EXPERTS' REPORT

Except for certain circumstances set out in the Regulations, an auditors' report may be required stating that the consideration for the transfer is reasonable.

PUBLICATION REQUIREMENTS

Each Irish merging company is required to submit a notice along with a copy of the common draft terms to the Registrar of Companies, which the registrar will publish in the *CRO Gazette* and each company must separately publish a notice in two national daily newspapers. The common draft terms must be approved by the members of each Irish merging company not earlier than one month from the publication of the notice by the company and the Companies Registration Office.

EMPLOYEE PARTICIPATION RIGHTS

One of the key aspects of the Regulations is the protection of employee participation rights. The Regulations require that where the employees in a transferor company have employee participation rights, these must be protected where the successor company is Irish and provision must be made for this.

Employee participation is the practice of mandatory representation of the employees on the board of companies of a certain size and is an evolving trend in Europe and includes the right of employees to elect or object to a nomination to the board. While the concepts of employee information and consultation procedures are already a feature of Irish law, this country does not have any equivalent legislation for employee participation. The Regulations do not, however, create new rights where employee participation rights do not already exist but simply protect those which do exist in any one of the merging companies. The Regulations provide that the merging companies can either agree to negotiate a new agreement in relation to participation rights or alternatively they can adopt the default position of the standard rules (a standard criteria for the involvement of the employees).

OTHER CONSIDERATIONS

As the transferor companies dissolve automatically in the case of a merger completed in accordance with the Regulations, a pre-merger reorganisation may be required in order to ensure that any assets and/or liabilities which are not intended to transfer are moved elsewhere. Tax-restructuring reliefs – for example, relief from stamp duty in relation to an inter-group transfer of assets under section 79 of the *Stamp Duties Consolidation Act 1999* – should also be considered when structuring a merger. Due to the lack of familiarity with the concept of employee participation, it also remains to be seen as to whether the protection of participation rights under the Regulations will act as a deterrent for using the scheme where the surviving entity is an Irish company. In general, however, where this issue does not arise, the Regulations offer a useful new means of cross-border restructuring for Irish limited companies.

For more information, please contact Seanna McGrann at smcgrann@lkshields.ie or Richard Curran at rcurran@lkshields.ie

The Discovery Channel



Do you work on documents on a laptop or desktop computer? Do you use a mobile phone or Blackberry to send messages or emails to customers or colleagues? Do you use the internet in your work or personal life? If so, as Amy O'Brien and Michael Kavanagh explain, this article is relevant to you

Discovery is the process through which parties to litigation can gain access to documents that the other side has within their possession or has the power to obtain. This enables parties to gain an insight into the type of evidence that the opposing side might use against them in court and, in certain cases, might even help to expose gaps in a party's evidence.

In terms of the procedure, parties must first try to agree the categories of documents to be discovered. This is done by way of a voluntary request for discovery which is sent by one party to another. If the parties cannot agree the categories, the party seeking discovery can apply to court for an order directing that this process takes place.

Once the categories have been agreed between the parties (or ordered by court), the disclosing party swears an affidavit which lists the documents that are or have been in its possession or power of procurement which are relevant to the agreed categories. The party seeking discovery may, following a review of the affidavit of discovery, request to inspect some or all of the documents disclosed.

The rules of the courts do not require discovery of information other than that recorded in 'documents'. Unfortunately, the rules do not provide a definition of the word 'document' and it was unclear until quite recently as to whether the courts would interpret the word 'document' to include data which is stored in electronic form.

The Supreme Court in *Dome Telecom v Eircom* ([2007] IESC 59) held that "it is common knowledge that a vast amount of

information in the business world which formerly would have been in documentary form in the traditional sense is now computerised. As a matter of fairness and common sense, the courts must adapt themselves to this situation and fashion appropriate analogous orders of discovery ... Otherwise, potential litigants could operate their business computers in such a way that they would be able to evade any worthwhile discovery."

It is clear, following the Supreme Court decision in *Dome Telecom*, that the word 'document' will be interpreted by the courts to include electronically stored information or 'ESI' as it is commonly referred to in the United States and Britain. The decision clarifies the obligation upon parties to make discovery of numerous different types of ESI.

ESI can be stored in many different forms. Indeed, courts in other jurisdictions have shown how parties have been in possession of different types of ESI without even knowing it. The use of IT experts to retrieve data (even deleted data) is becoming more common.

A 2004 report in the UK identified different categories of data that can be found on an average desktop computer. It seems that the following three types of data are likely to be particularly relevant in litigation:

- **Active data.** This is the data that we can open on our desktop computers or laptops. Examples include documents or correspondence which you would store in your email inbox or items that you might save in a documents folder in Microsoft Word

- **Residual data.** This is data that is deleted from your active data. Common opinion is that once a file is 'permanently deleted' from a desktop computer it can no longer be retrieved. Despite the fact that deleting a file can sometimes cause the data to become lost or fragmented, this data can often be retrieved using specialist software and expertise
- **Embedded data.** This provides background information about the active data, such as when a file was created or amended, by whom the file was amended and who accessed the files over their lifespan.

■ THE RULES OF DISCOVERY
 ■ WHAT CONSTITUTES A 'DOCUMENT'?
 ■ DISCOVERY IN THE ELECTRONIC AGE

It is important to bear in mind that when anything is committed to record, whether that record is in paper or electronic format, whether it is the first draft or the finalised document, that record could end up the subject matter of a discovery order and could ultimately come before the court.

At present, there are no formal rules in place in respect of discovery of ESI and it appears that for the time being discovery of ESI will be dealt with on a case by case basis by the courts.

However, it is likely that discovery orders for ESI will be sought on an increasing basis and you should bear this in mind before recording any information in electronic form or otherwise. Furthermore, it is important to put in place effective data retention and protection policies in your business and to seek advice at an early stage when a matter appears likely to result in litigation.

For more information, please contact Michael Kavanagh at mkavanagh@lkshields.ie or Amy O'Brien at aobrien@lkshields.ie.

Companies in trouble



The first anniversary of the credit crunch passed in recent weeks and the economic turbulence in this country has been reflected in the sharp increase in the number of insolvencies over the past 12 months. Jill Callanan looks at the options open to the directors of troubled companies

According to figures compiled by accountancy firm FGS, 130 companies were placed into liquidation, receivership or examinership in the first three months of 2008, representing a sharp increase (60.5%) on the equivalent numbers for the same period in 2007. Among the first casualties of the credit crunch in August 2007 was Structured Credit Company (SCC), a provider of credit risk protection.

SCC sells derivatives to market dealers providing credit protection to such dealers. Between the beginning of July and mid-August 2007, SCC suffered a huge increase in its collateral liabilities – rising from US\$5 million to US\$350 million in the space of some six weeks. In addition, SCC's exposure to its creditors during this period grew at an exponential rate to the point where, having posted some US\$175 million by way of collateral, SCC was left with funds on hand amounting to US\$15 million to meet liabilities of a further US\$175 million.

Acting on instructions from our client, Nomura International Plc, a creditor of SCC, LK Shields successfully petitioned the Irish High Court for a provisional liquidator to be appointed to SCC. Following this appointment, the directors of SCC successfully petitioned to appoint an examiner to the company.

In light of this ongoing uncertainty in the Irish economy, it is imperative that company directors fully understand the plethora of duties and obligations which are imposed upon them by both common law and the company law. In particular, directors of



insolvent companies need to be aware of the various actions that can be taken by a company liquidator against them if they are found not to have complied with such obligations and duties.

■ RISE IN NUMBER OF INSOLVENCIES
■ OBLIGATIONS ON COMPANY DIRECTORS
■ IMPACT OF RECENT COURT DECISIONS

This firm has acted in a number of high-profile actions taken by liquidators against company directors, two examples of which are set out below.

RESTRICTION PROCEEDINGS

Pursuant to section 150 of the *Companies Act 1990*, a director (either executive or non-executive) can be restricted from acting as a director or secretary of a company for a period of five years unless the company has a paid-up share capital of €317,425 in the case of a public company and in the case of a private company, €63,487.

In order to avoid a restriction order, a director must prove to the court that:

- he has acted honestly in relation to the affairs of the company
- he has acted responsibly in relation to the affairs of the company, and
- there is no other reason why it would be just and equitable that he should be subject to the restrictions imposed by the section.

The Supreme Court recently delivered a landmark judgment overturning a decision of the High Court restricting a non-executive director from acting as a director. Our client was a non-executive director of Tralee Beef and Lamb Limited and was appointed to the position by a fund management company involved in business expansion schemes. In restricting our client from acting as a director, the High Court held that the fact that a director had been nominated to join the board by a shareholder in the company did not reduce the

duty of care and skill in discharging the obligations imposed by him under the *Companies Acts*. This decision was successfully appealed by our client to the Supreme Court.

In the course of the Supreme Court judgment, Mr Justice Hardiman expressed significant dissatisfaction with the section 150 procedure. This Supreme Court decision has been widely reported as of significance to all directors, and, in particular, non-executive directors of Irish corporate entities.

FAILURE TO KEEP PROPER BOOKS AND RECORDS

Under section 204 of the *Companies Act 1990*, an application may be brought by a liquidator seeking to hold a director personally liable for the debts of the company on foot of the company's failure to maintain proper books and records. Where there has

been a failure to keep proper books of account, the court may hold a director liable for the company's debts if it considers that such failure:

- has contributed to the company's inability to pay its debts, or
- has resulted in substantial uncertainty as to the assets and liabilities of the company, or
- has substantially impeded the orderly winding-up of the company.

This firm acted for the liquidator in the seminal case in this matter (*In the matter of Mantruck Services Limited, In Liquidation*). On foot of an application brought by the liquidator, the court found that proper books of account had not been maintained. Mr Justice Shanley found that such contravention had substantially impeded the orderly winding-up of the company and

resulted in substantial uncertainty as to its assets and liabilities. The court found that the losses sustained by the company as a result of this failure to maintain proper records were reasonably foreseeable by the respondent director and made an order imposing personal liability for the additional costs incurred in the liquidation by our client arising from this contravention.

In summary, in light of the current downturn in the Irish economy, it is imperative that company directors are fully aware of the various options open to them in circumstances where they find their company in financial trouble. In addition, it is imperative that directors of insolvent companies are fully aware of their duties and obligations.

For more information, please contact Jill Callanan at jcallanan@lkshields.ie.



Justice Minister Dermot Ahern has published the long-awaited report on regulating gaming in Ireland. Aine Matthews rolls the dice

The long-awaited Report of the Irish Casino Committee entitled *Regulating Gaming in Ireland* was finally published on 10 July. Overall, it appears to take a pragmatic approach in recognising the existing market for casino-type activities in Ireland.

On a positive note for the Irish casino industry, the report (which runs to 222 pages) contains very few surprises. It has long been rumoured that the report would recommend that gaming legislation be overhauled in this country, particularly with regard to the licensing of casinos given the proliferation of private member club casinos in Ireland.

Wheel of fortune

In one of its 32 recommendations, the report proposes "the adoption of a restrictive licensing regime which provides the appropriate body with the power to strictly licence premises, operators, suppliers and key employees".

Of particular interest is the recommendation that if casinos are to be licensed, then registered charities, Horse Racing Ireland and Bord na gCon (the body responsible for the greyhound industry in Ireland) should be allowed to apply for licences. This is obviously aimed at negating any revenue losses the horse racing and greyhound industries might suffer.

On a less than positive note for the casino industry, it appears that the prospect of any draft legislation reforming the area is not imminent. This will be a major disappointment to private member club casino operators in Ireland, who are understandably keen to see their uncertain legal position under the current legislation clarified.

The Minister announced at the launch of the report that he intended to establish an informal cross-party Oireachtas committee to examine all aspects of gaming in Ireland which would provide a final report with recommendations on the future architecture for gaming in Ireland. Already statements from certain quarters, such as the Labour Party, suggest that cross-party consensus may be difficult to achieve and the Minister may be forced to take an alternative route.

In the meantime, we expect that many in the industry will continue to lobby and will make submissions to the Minister in an effort to shape the future of gaming and gambling legislation in Ireland. While the casino market is unlikely to change in the short term, Ireland is nevertheless on the road to change.

If you would like our firm to provide you with a more detailed analysis of the report, please contact Aine Matthews of our Gaming and Gambling Unit at amatthews@lkshields.ie.

■ REPORT OF THE
IRISH CASINO
COMMITTEE
■ OVERHAUL OF
GAMING
LEGISLATION

Last rights



Most of us probably do not give any thought to death-in-service benefits, but we ought to. Catherine Crowley and Fiona Thornton consider the respective roles of the employer, trustees and employee and how they can all work together to provide these benefits

Death-in-service benefits are almost always insured and are usually an inexpensive benefit to provide. No employer wants an employee to die in service without a death benefit being paid. Have you checked with your broker that your workforce is on cover on joining service?

Sometimes eligibility for these benefits depends on whether the employee has joined the company's pension scheme. This may happen immediately when an employee joins service. However, frequently there may be a waiting period in which case the employee is not covered for death-in-service benefits until the waiting period has expired. Best practice is to ensure that all employees are covered for death-in-service benefits on joining. Additional cover can be provided when an employee joins the pension scheme.

Where you provide a death benefit, make sure your workforce knows about it. If you operate a pension scheme, the death benefits are likely to be arranged in conjunction with the retirement provision and both will need to be communicated to members via the members' explanatory booklet.

Your employees should be encouraged to send the scheme trustees a nomination form

or 'wishes letter' setting out to whom they would like their death-in-service benefit to be paid and in what shares and proportions. Pro forma wishes letters usually are included in well-drafted explanatory booklets.

While wishes letters are not usually binding on the trustees, they are likely to influence them when paying the benefits. You should consider working with the trustees to remind staff to update their wishes letter from time to time.

In the event of an employee's death, you may need to assist the trustees in establishing the circumstances of all potential beneficiaries. You may have a better understanding of the deceased's circumstances and be better placed to make discreet enquiries than the trustees. You may need to collaborate with the trustees with as much detail as possible in relation to the individual concerned. This will enable the trustees to make an informed decision as regards to whom the death-in-service benefit should be paid and in what shares and proportions.

- DEATH-IN-SERVICE BENEFITS
- ROLE OF EMPLOYERS, STAFF AND TRUSTEES
- WISHES LETTERS

WHAT SHOULD EMPLOYEES DO?

Employees should complete a wishes letter to let the trustees know to whom they would like their death-in-service benefits to be paid. Employees should ensure their wishes letters are clear and understandable. They should regularly review them and update them if their circumstances change.

They should be aware that Revenue limits apply to the payment of lump sums under a scheme. Cover in excess of Revenue limits may be applied in the form of pensions for the member's dependants.

Employees should also bear inheritance tax in mind when suggesting to the trustees to whom the death-in-service should be paid. Death-in-service benefits are treated as coming from the deceased for capital acquisitions tax (CAT) purposes. There is no CAT on inheritances between spouses. Payments to others might be taxable depending on their relationship to the deceased and the values involved.

ROLE OF TRUSTEES

Trustees should check that their scheme documentation is clear and unambiguous and is capable of being implemented. Old documentation might be unnecessarily cumbersome. They should check whether their needs to be consolidated and updated. Trustees should also ensure that they are satisfied that the members' explanatory booklet reflects what is set out in the rules.

Trustees should work with the employer to obtain wishes letters from all employees. Employees should be asked to update these from time to time, if required. Wishes letters are usually submitted in a sealed envelope, which the trustees do not open until the employee's death. This is to protect the employee's privacy.

Employers usually know more about employees than trustees do. This means that where an employee dies in service, trustees should be in close contact with the employer with a view to getting an accurate picture of

the deceased's position in life at the time of his death. For example, this might prevent the trustees from paying a lump sum and the spouse's pension to a person who is not the deceased's spouse.

It is essential that trustees follow proper procedures before paying benefits out. Most insurance companies will not pay death-in-service benefits until they receive a death certificate. Where there is likely to be a delay in issuing a death certificate, trustees should check with the insurer as to whether it is possible to pay the monies out on foot of a coroner's certificate, if there is one. This is particularly relevant where delays in paying out will result in hardship to the beneficiaries.

Trustees should also bear tax issues in mind. Although the receipt of a death benefit may be within the charge to CAT, trustees are secondarily accountable for the payment of any CAT arising. They can be

held to account for it if the beneficiary fails to pay it to the Revenue Commissioners. Consequently, depending on the circumstances, it may be appropriate for

trustees keep back a part of the payment pending receipt of a certificate of exemption from the Revenue or evidence of payment of tax.

For more information, please contact Catherine Crowley or Fiona Thornton at ccrowley@lkshields.ie or ftornton@lkshields.ie.



First among equals

The Equality Tribunal has seen a huge increase in the number of cases taken alleging discrimination in the workplace. If your company does not have clear written policies in place to deal with an allegation of discrimination, it is leaving itself wide open to costly and embarrassing claims, as Jennifer Clarke explains

The Equality Tribunal recently published its annual report for 2007. According to the report, a record number of claims were referred in 2007, resulting in a 36% increase on claims received in 2006. The number of claims being brought before the Equality Tribunal is increasing each year and in the first six months of 2008 employment equality claims are up by 32% on 2007 and equal status claims are up by 11%.

- 106% increase in claims on the race ground
- 59% increase in claims on the disability ground
- 5% increase in claims on the gender ground
- 14% decrease in claims on the age ground.

Discrimination in Ireland is dealt with under two pieces of legislation, namely the *Employment Equality Acts 1998 to 2007*, which deal with discrimination in the workplace, and the *Equal Status Acts 2000 to 2008*, which deals with discrimination outside of the workplace. The Acts prohibit discrimination on nine grounds, namely, gender, marital status, family status, sexual orientation, religion, age, disability, race and membership of the travelling community. Many cases of alleged discrimination are brought on multiple grounds with a view to maximising a claimant's prospects of success.

Increasingly, employers are faced with complex and costly claims brought by their employees. The problem for employers when such claims arise include the monetary compensation that might be awarded to a victim of discrimination as well as the legal costs that will be incurred by the employer, the time involved in dealing with the claim, the

damage to corporate reputation and the possibility of similar claims emerging.

One cannot overstate the importance for employers to comply with their obligations under the Acts and associated codes of practice and to ensure that proper policies and procedures are in place to deal with any complaint of alleged discrimination made by an employee.

One recent case which illustrates this point is *A Female Employee v A Recruitment Company*. Here, the equality officer found that the complainant had been sexually harassed by explicit and suggestive text messages sent to her mobile phone from her manager's phone and ordered the respondent company to pay the complainant €25,000. In this case, it was evident from the correspondence that passed between the complainant and the company that the company was unclear about how to handle the complaint of sexual harassment and had no policies and procedures in place to deal with it.

The equality officer expressed her concern about the implications for the complainant as a result of the respondent's failure to have proper policies and procedures in place and, in addition to awarding the complainant compensation, ordered the company to draft a policy on the prevention of harassment and sexual harassment in the workplace and to take appropriate measures to communicate the policy to all of its employees and to display this policy permanently in a

prominent position in the workplace. A vital aspect of dealing with any grievance or complaint is the existence of a clear written policy which sets out for employees:

- where to direct a complaint
- what to expect when a complaint is made
- that the complaint will be investigated in as confidential and sensitive a manner as possible
- what the procedure is for carrying out an investigation of a complaint
- what to expect when the investigation concludes in circumstances where a complaint is upheld or not upheld.

It is important to note that it is a defence for an employer under the *Employment Equality Acts 1998 to 2008* to prove that it took such steps as are "reasonably practicable" to prevent the harassment in question. Employers who do not have in place appropriate, clear and written policies and procedures – which make clear that discrimination will not be tolerated – and who do not properly implement them are much less likely to be in a position to successfully defend legal proceedings brought against them.

Having regard to the level of compensation that may be awarded if proceedings are issued against a company, it is prudent for employers to seek appropriate legal advice both in relation to formulating policies and procedures and in relation to dealing with incidents or allegations of discrimination.

For more information, please contact Jennifer Clarke at jclarke@lkshields.ie.

- EQUALITY TRIBUNAL REPORT
- RISE IN NUMBER OF CLAIMS
- NEED TO HAVE PROPER PROCEDURES IN PLACE

Use it or lose it!



The doctrine of adverse possession sounds like an arcane piece of legal jargon, but call it 'squatter's rights' and you know exactly how important it can be – just ask broadcaster Pat Kenny and his neighbour. Caroline McNamara examines the current position in Ireland and how it differs from the law in the UK

Most land owners are aware of the need to prevent squatters from acquiring rights over their property. However, they may be unaware of what steps they need to take in order to prevent a claim of adverse possession by squatters on their property. Following a number of recent cases in the UK, the European Court of Human Rights and Ireland, the law in the UK and Ireland now differs. This article outlines the changes made and their implications.

POSITION IN THE UK

Prior to the case of *Pye (Oxford) Limited v Grahams* in 2002, the process in the UK of establishing a claim for adverse possession was based on the landowner's claim becoming statute-barred after 12 years and the squatter then being entitled to apply to become the registered owner of the land. The regime made no provision for the paper owner to be warned of a potential claim for adverse possession and there was no entitlement for the landowners who lost their land to claim compensation or to call for the register to be altered.

In the *Pye* case, the House of Lords overturned a Court of Appeal decision and held that the Grahams acquired 23 acres of land by adverse possession following the expiry of a grazing agreement they had with Pye. This resulted in the implementation of a new regime in the England and Wales for registered land since October 2003. The *Land Registry Act 2002* there now provides for an early warning system whereby a squatter may apply to register his title after ten years but the registrar must, in turn, give notice to the legal owner that an application for title to the



property has been lodged by the squatter. The legal owner must oppose the registration and a two year clock starts to run, within which time the owner must take steps to regularise his title, namely by taking eviction proceedings and enforcing any order for possession within that time. If the registered owner ignores this notice, then the squatter will be granted possession. If, however, the registered owner disputes the issue, the squatter is required to give specific reasons justifying acquirement of title through adverse possession.

In the meantime, the *Pye* case went to the European Court of Human Rights where, in August 2007, the court upheld the House of Lords' decision and voted to retain the doctrine of adverse possession as it exists.

The court confirmed the four key principles of the law on adverse possession:

- all the possessor has to do is enter into ordinary possession of the land without permission, with the requisite intention to possess
- possession is made up of two elements, namely, factual possession and an intention to possess
- an intention to possess is "an intention in

one's own name and on one's own behalf to exclude the world at large, including the landowner with the paper title, in so far as is reasonably practicable and so far as the processes of the law will allow" and that it does not mean an intention to own or require title

- the idea that possession depends on the intention of the paper owner is at the very most only an inference which can be drawn from the actions or inactions of the possessor in view of the express intentions or interests of the paper owner.

THE IRISH POSITION

In September 2007, a High Court case, *Dunne v Iarnród Éireann and CIE*, set out the test for determining whether a squatter had acquired the property by adverse possession in Ireland. In summary, the principles applied by the court were as follows:

- is there a continuous period of 12 years during which the squatter was in exclusive possession of the lands in question to an extent sufficient to establish an intention to possess the land itself?, and
- is any contended period of possession broken by an act of possession by the landowner? If so, time will only start to run when the act of the landowner terminates.

■ SQUATTER'S RIGHTS
 ■ THE UK AND IRISH POSITIONS
 ■ DUNNE V IARNRÓD ÉIREANN AND CIE

The court qualified the second part of the test by holding that the sufficiency of the act of possession required for the landowner to break possession and wind the clock back to zero was a very low threshold. This would be satisfied by even the slightest of acts of possession on the part of the landowner. The court also accepted that the future intended use of the land by the landowner could not be relevant except perhaps as one of the indicators relevant to a *bona fide* held intention to possess, or lack thereof. In this case, the owner, CIE, had carried out works on part of the land and had at one stage re-established fences between the lands and the

neighbour's lands. The court found the actions to be sufficient to start the clock running again.

CONCLUSION

Following the enactment of the 2002 Act in the UK, the early warning system applies in England and Wales only and there seems to be no immediate plans to change the legislation in Ireland. In fact, the amendments recommended by the Law Reform Commission to the law on adverse possession were left out of the *Law and Conveyancing Reform Bill 2006* so it can only be assumed that the legislature has no

desire at this stage to amend the law. Hence, there are now two distinct differences between the two jurisdictions. On both counts, the paper owner comes out more favourably in Ireland as the law stands.

It is difficult to see how a squatter could win, short of the paper owner being unaware of his title or being abroad or having absolutely no interest in the property.

For more information, please contact Caroline McNamara at cmcnamara@lkshields.ie.



Heat of the moment

New regulations mean that property owners must provide prospective buyers or tenants with a certificate detailing the building's energy efficiency

The EU *Directive on the Energy Performance of Buildings* has come into effect in Ireland by way of the *European Communities (Energy Performance of Buildings) Regulations 2006*. The effect of the legislation is that building owners must provide a building energy rating (BER) certificate to prospective buyers or tenants on sale or letting. The measures are being phased in on the following timescale:

- **New dwellings:** the regulations apply to new dwellings for which planning permission was applied for on or after 1 January 2007. There are transitional BER exemptions that will apply to new dwellings for which planning permission was applied for on or before 31 December 2006 and where the new dwellings involved are substantially completed on or before 30 June 2008
- **New non-domestic buildings:** the regulations apply to new non-domestic buildings for which planning permission was applied for on or after 1 July 2008. As in new dwellings, transitional BER exemptions will apply where planning permission was applied for on or before 30 June 2008 provided the new

buildings involved are substantially completed by 30 June 2010

- **Existing buildings:** (dwellings or other buildings) offered for sale or let on or after 1 January 2009.

There are exemptions for certain categories of buildings, such as protected structures and temporary buildings, but the net effect is that whenever a building is sold or let, a BER certificate will be needed, as per the dates above. The owner or developer of the building will need to engage the services of a BER assessor, who will issue a certificate.

Failure to comply with these provisions could hinder or delay the legal completion of the sale/letting or the future sale/letting. It could also result in a fine up to a maximum of €5,000 upon conviction in the District Court.

A BER certificate will take into account several factors – for instance, the glazing used, insulation of the walls/floors/attic, boiler efficiency and so on. The energy performance of a building is expressed as:

- primary energy use per unit floor area per year (kWh/m²/yr)
- associated carbon dioxide (Co₂) emissions in kgCO₂/ m²/yr.

- NEW REGULATIONS
- BUILDING ENERGY RATING CERTIFICATE
- TIMETABLE FOR INTRODUCTION

It is also important to note that a BER certificate does not cover electricity used for purposes other than heating, lighting, pumps and fans (for example, it does not include electricity used for cooking, refrigeration and so on). Certificates are valid for a period of ten years from date of issue, unless a significant change has taken place in the building that would affect its energy performance.

Owners and developers should note that there are several grants available for new and existing buildings aimed at incentivising the implementation of energy efficient performance and a reduction of CO₂ emissions by households. Information on these grants can be found at www.sei.ie.

For further information, please contact Gerard O'Hanlon at gohanlon@lkshields.ie.

Shooting the breeze



Just say you have an idea for a wind farm and you know just the place to put it. Do you have to buy the land outright or are there other options you can take? Gerard O'Hanlon shoots the breeze

If someone wants to build, say, a wind farm to generate power, he doesn't need to buy the land outright (to acquire an 'absolute freehold interest'). Planning permission for wind farms normally provides that the wind farm should cease operations and the site be reinstated to its former condition within, perhaps, 20 to 25 years. So there's no need for a developer to acquire a freehold interest: a leasehold interest of 20 to 25 years could well be enough.

Once an appropriate site has been identified, the key thing is to acquire a sufficient 'property interest'. This property interest will allow for feasibility studies by the developer's technical experts and so forth. An efficient method of obtaining such an interest from the relevant land owner is an option agreement (the option).

As well as providing the developer with a potential property right (if the option is exercised), it will allow him and his experts onto the site to complete a technical evaluation as to the site's full potential. In addition, it should contain a mechanism whereby, in the event of the evaluation proving satisfactory, the developer can acquire a formal property right by serving a formal notice exercising the option. This property right will allow the developer to ground his planning application and is essential in providing security to a bank.



A prudent developer should try to agree the format of this lease in advance and have this draft lease appended to the option document. Once the option is exercised in writing by the developer, the party on whom the notice is served will be required to grant the developer a lease in the agreed format for the period required.

It would also be prudent to incorporate a special purchase vehicle (SPV) to take the lease. Ultimately, it will be the SPV and not the developer which will have the landlord and tenant relationship with the property owner, and which will complete the required security documents with the bank. The option should therefore be drafted to facilitate the SPV taking the lease.

CONSIDERATION

The option will also set out what is to be paid by the developer (or SPV) on exercising the option. A small consideration might be discharged on the signing of the option itself, with a greater consideration discharged on the exercise of the option. On signing the lease, a lump sum or premium may well be paid by the SPV to the land owner. The lease itself may also provide for the payment of an additional rent.

MULTIPLE OWNERS

In many cases, the developer will have to deal with not just one but a number of land owners and will have to complete a separate option with each. The negotiation of such option arrangements may vary from project

to project, but in the majority of cases it might be prudent to negotiate firstly, and to sign off an option, with the land owner who owns the majority of the required site.

Pending exercise of the option, it is worth registering the option in either the Property Registration Authority or the Registry of Deeds, as appropriate.

A prudent developer would be wise to make a thorough title enquiry before the option is signed. After all, he does not

want to find out at a later date that the land owner does not own all the land or that third parties have not or will not provide appropriate consents.

A bank will also require that the developer or SPV have a sufficient property interest in the site to secure the draw-down of development funds. Invariably, a bank will require the option to have been exercised and a lease or other sufficient interest actually granted to the developer before sanctioning the draw-down of development funds. Care should be taken to include appropriate rights of access and egress to/from the site, as well as any additional land strips adjacent to access roads necessary to ensure the safe delivery to the site of large turbines.

As you can see, if carefully drafted, the option is a most useful and flexible tool.

For more information, please contact Gerard O'Hanlon at gohanlon@lkshields.ie.

- ACQUIRING A PROPERTY INTEREST
- OPTION AGREEMENTS
- DEALING WITH MULTIPLE LANDOWNERS

A complex issue



Over the past number of years, Ireland has seen a huge rise in the number of apartment complexes being built, and this has brought with it a number of difficulties, particularly in the management of these new developments. Alan Browning explains

The rise in the number of apartment developments has been mirrored by a rise in associated problems. Examples include the lack of transparency of the roles of developers, owners and property management agents, excessive administrative control by management companies, developers retaining control of the management companies after all apartments are sold, AGMs held with inadequate notice, increasing annual service charges not explained and no long-term building investment funds (sinking funds).

But there is some good news for apartment owners: the Law Reform Commission has prepared a report on multi-unit developments containing recommendations for reform and a draft *Multi-Unit Developments Bill*. Some of the recommendations for new and existing developments are highlighted below.

RECOMMENDATIONS FOR NEW DEVELOPMENTS

- in developments of more than five units, the developer would have to incorporate an owners' management company (OMC). The report suggests that the developer would be required to transfer legal title of the development to the OMC and must register the title with the Land Registry/Property Registration Authority before any apartment sale was completed. The OMC holds the multi-unit development in trust for the developer until the scheme is completed. This would provide more clarity;

■ GROWTH OF APARTMENT COMPLEXES
 ■ LAW REFORM COMMISSION REPORT
 ■ NEW LEGISLATION PLANNED

- core covenants (mutual agreements) would have to be agreed between developers, unit owners and the owners' management company;
- each apartment owner would have one vote in the OMC;
- the purchaser would pay 5% of the purchase money to the OMC, which holds this sum in trust for the developer until completion is certified. This is designed to encourage developers to complete the common areas of developments and would also encourage a system of orderly snagging before hand-over of the retained sum;
 - an AGM to be held annually with 21 days' notice given to apartment owners, to be held reasonably near the development and at reasonable times;
- property managing agents (due to be licensed and regulated by National Property Services Regulatory Authority shortly) would be prohibited from having excessive administration control over the OMC (for example, being company secretary of the OMC).

RECOMMENDATIONS FOR EXISTING DEVELOPMENTS

- an AGM to be held annually with 21 days' notice given to apartment owners, to be held reasonably near the development and at reasonable times;
- all developments to have schemes for service charges in place with adequate information on the breakdown of these charges;

- all developments must provide specified financial information to apartment owners, including how annual service charges will be spent in the next year;
- all existing developments to put a scheme for building investments funds in place within five years of the legislation coming into force. The commission wants to stop developers from using the investment funds to cover snagging;
- existing developments to be allowed to convert to new OMC system;
- core covenants must be agreed between developers, unit owners and the owners' management company;
- the Small Claims Court could deal with non-payment of service charges or building investment funds up to €3,000 (this would also be applied to new developments);
- the Circuit Court could make a 'remedial order' to allow rescue and rehabilitation of a multi-unit apartment development (for example, if company goes into liquidation). This is also applicable to new developments.

While not incorporating all the recommendations in the Law Reform Commission report, the draft Bill is a welcome development and will hopefully result in the implementation of new legislation in this area.

For further information on management companies and company law compliance, please contact Alan Browning at abrowning@lkshields.ie.

NEW FACES AT THE FIRM

PAUL MCCUTCHEON



We are delighted to welcome Paul McCutcheon to LK Shields Solicitors, Paul has recently joined our Commercial Property Department as a

Partner from another leading Dublin law firm. Paul qualified as a Solicitor in 1997, having trained with Maxwell Weldon & Darley. He has a Law Degree from Trinity and a Diploma in Business Studies from UCD. Paul also has the Law Society's Diploma in Property Tax. Paul has experience of a wide variety of commercial property work including extensive experience acting for both landlords and tenants in commercial leases of retail, industrial and office properties. Paul also has considerable conveyancing experience particularly with regard to site acquisition for both residential and commercial developments. His most recent project was the new Opera Centre development in Limerick city centre which required the acquisition of almost fifty individual interests.

CIARAN MARKEY



Ciarán recently qualified as a solicitor having completed his apprenticeship with the firm. Ciaran is now an Associate in the Litigation and Dispute

Resolution Department where he advises on all aspects of commercial litigation including property disputes, professional negligence, family law, corporate restructuring and insolvency and debt recovery.

FOR MORE INFORMATION

To discuss your legal needs, please contact the LK Shields Solicitors' team members listed here:



Chairman
Laurence K Shields
lshields@lkshields.ie



Banking and Financial Services Department
Joe Gavin
jgavin@lkshields.ie

SUSAN BATTYE



Susan recently joined us as an Associate in our Litigation and Dispute Resolution Department and is a member of the firms Employment,

Pensions and Employee Benefits Unit. She advises on both contentious and non-contentious employment issues and has dealt with a wide variety of commercial litigation issues. She also tutors in employment law and civil litigation on the Law Society of Ireland's Professional Practice Courses.



Business Department
Emmet Scully
escully@lkshields.ie



Business Department
Gerry Halpenny
ghalpenny@lkshields.ie



Litigation and Dispute Resolution Department
Edmund Butler
ebutler@lkshields.ie

LK Shields Solicitors is one of the leading law firms in Ireland. Founded in 1988, today we number some 22 partners, and over 145 staff. Our principal areas include corporate, litigation and dispute resolution, commercial property, financial services, intellectual property, employment, and pensions and employee benefits.

The material in this publication is for general information purposes only. Professional legal advice should always be sought in relation to any specific matter. No liability will be accepted for any losses incurred by those relying solely on this publication.

If you would like to reproduce any of this publication, please contact Nicola McNamara, Marketing Executive on + 353 1 6610866.

©LK Shields Solicitors, October 2008. All rights reserved.