Issue 24 | Spring 2009

LK SHIELDS SOLICITORS

# UPDATE

# Welcome

As we approach the end of the first quarter of 2009 it is my great pleasure to welcome you to the latest edition of LK Shields Solicitors Update.

In this edition of Update we carry, as usual, articles on a range of topics identified as of relevance (and hopefully of interest and assistance) to those conducting business in Ireland in these ever changing times. As a sign of the times, many of this edition's articles have a common financial theme and address issues being faced by many businesses in the current climate. Our team remain ready, willing and able to assist you in navigating through the current economic waves.
I am also delighted to be able to introduce you to a number of our newly qualified solicitors. Ide O'Neill, Niamh Hackett (née Murray) and Shane Neville all recently qualified as solicitors and remain in our Litigation and Dispute Resolution Department. Linda Scanlon and Andrew Gill also recently qualified as solicitors and remain in our Commercial Property and Banking and Financial Services teams respectively. Dawn Byrne joined us as company secretary in our Company Secretarial and Compliance Unit having previously worked in another large Dublin firm. Their respective biographical summaries are to be found in the back of this edition.

Last month, in addition to marking the 21st anniversary of the establishment of the firm, the members of our Employment, Pensions and Employee Benefits team were announced as Irish "Employment law firm of the year" in the ACQ Finance Magazine Country Law Awards.

Notwithstanding the fast pace of economic change, the last six months have been a tremendously active period for our clients and consequently for our team. To get a flavour of some of the work we have been involved in during that period please feel free to visit our website at www.lkshields.ie where you will find examples of the diverse and high profile nature of some of the work we continue to be proud to assist our clients with.

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# Company secretarial

**If recent events have shown us anything, it's that now more than ever corporate governance is a critical concern for the entire business community, including small private companies. Alan Browning tells us why**

As Ireland and the rest of the word grapple with the downturn in the world economy, many companies are looking at costs and ways of making savings. One of the areas they may turn to are the costs associated with corporate governance, and although this may appear to be a quick fix in the short-term, it must be weighed up against the potential long-term damage this can cause to the reputation, business relationships and good standing of a company.

It has been a common assumption that issues of corporate governance were not a concern for private companies, the argument being that private companies were very small one or two-person organisations for which governance was yet another burden in an already over-regulated sector.

- **Corporate governance and small business**
- **Non-executive directors**
- ***Companies Acts 1963-2006***

In the case of a large proportion of the smaller and larger private companies in Ireland, the board of directors was in most cases synonymous with the shareholders, and poor governance only hurt themselves and not others. In other words, there were no outside parties dependent on the success of the company. Also, if the company was owned by one or two large shareholders, the reality was that all decisions would in any case be made by and in the interests of those shareholders whatever the view of the minority. In addition, other than the Office of the Director of Community Enforcement (ODCE), there is no regulatory body such as the Stock Exchange to account to.

Finally, if the company wished to raise fresh capital, this was to a large extent funded by the board itself and the banks. Inevitability, the banks did not look at the governance of the companies but at the managers and management accounts. However, although this thinking is still quite prevalent, in recent years there has been a significant change in attitude.

### Some of the reasons for this change in attitude are:

- Investment made by private individuals in their private companies at the start-up stage often involves them in borrowing money which is secured against their homes. Also, financing of the company itself will often come from bank loans and overdrafts, guaranteed by the management of the company which again may be secured by their homes. It is therefore crucial to have in place a good basic corporate governance structure and process to act as a risk management tool.
- The ongoing financial needs of private companies, particularly when they are going through an expansion or development stage, are too great for individuals so they need to access capital from other sources such as banks or private equity providers. These sources will often look to ensure that there is good governance through holding regular board meetings, appointing non-executives and having audit committees.
- Even without development capital, a private company can benefit from a non-executive director with experience of the business sector in which they are operating. Alternatively, the company could use their corporate secretary as a sounding board on corporate governance and statutory issues.
- If the sale of the company is proposed, the existence of good governance will probably enhance the valuation and will also act as a good defence in any possible claim for breach of duty by a successor board.
- For private companies converting to public with a view to flotation on AIM or a listing on the Irish Stock Exchange, there may be succession issues as well as a need to access more experience and expertise which the board does not have. The presence of good governance in the form of non-executive directors and the procedures for board meetings and committees can provide that expertise and long-term stability thus addressing the issues of succession.

As a private company develops and its needs become more complex, regard must be made to the obligation and duties imposed on directors in the *Companies Acts 1963-2006*. If a company does not pay attention to these obligations and duties, it is asking for trouble either in the form of claim made by a successor board following the sale of the company, from the auditor through reporting to the ODCE or from a liquidator. Board governance helps to eliminate the risks of such claims.

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# Full steam ahead for railway safety

**The Railway Safety Commission, established in 2005 to oversee railway safety in Ireland, has recently been given new powers under EU law. Bruneau Joseph looks at what's coming down the tracks**

- **Role of Railway Safety Commission**
- ***Transport 21* projects**
- **The pan-European dimension**

Despite the economic downturn, the government says it is committed to implementing previously-approved vital infrastructure projects, such as *Transport 21*. Under this plan, seven Luas projects along with two Metro lines are being developed in the greater Dublin area, and the intercity rail networks are being upgraded and expanded.

Recently, the body set up in 2005 to oversee railway safety in this country, the Railway Safety Commission (RSC), has been given new powers under the *European Communities (Railway Safety) Regulations 2008*, which transpose into Irish law EC Directive 2004/49/EC. Under the new regulations, both railway operators and infrastructure managers must provide to the RSC evidence that they have put in place a safety management system in accordance with new EU standards.

The overall ambition behind this new directive is "to pursue efforts to establish a single market for rail transport services". To this end, the European harmonisation of key elements of safety (including, for instance, certification that rolling stock meets EU standards) is felt to be essential if safety is not to present a barrier to pan-European transport operations. This means that where a railway operator has been granted a safety certificate in another EU member state and then plans to operate additional railway services in Ireland, it no longer requires a brand new safety certificate as a condition of operation but instead an "additional safety certification" issued by the RSC will be sufficient.

## Common safety standards

The new safety certification regime seeks to make it easier to run pan-European transport operations by maintaining common safety level across Europe. On this basis, the new Irish regulations introduce a series of safety standards, to be implemented by railway undertakings in their 'safety management system'. These include:

- Common safety methods (CSMs): describing how compliance with safety levels and achievement of safety targets are assessed.
- Common safety targets (CSTs): setting out the safety levels that must be reached by different parts of the rail system and by the system as a whole, expressed in risk assessment criteria, and
- Technical specifications for interoperability (TSI): the specifications by which each sub-system meet the essential requirements to ensure the interoperability of the trans-European high-speed and conventional rail system.

However, CSM, CST and TSI do not apply to the Luas and Metro projects. The regulations do not extend their applications to railways which have been designated as light railway or metro. Nonetheless, these common safety requirements will apply to the Irish conventional rail system and intercity rail networks when operators are applying for new licences or their renewal after a five-year period.

The new Irish regulations also give the investigation unit of the Railway Safety Commission new powers of investigation, which, by analogy, are almost similar to the common law search powers. These new powers include the rights of access (for example, to the site of a railway accident or incident, to any relevant information or records and to the results of examination of bodies of victims) as well as rights of use (of contents of on-board recorders and equipment recording verbal messages and signals).

Transport 21 will mark a new era in the modern history of transport in Ireland. It will present some important challenges at a number of levels – transportation planning, civil engineering, technological, ecological as well as railway safety. The new railway safety legislation will no doubt give the RSC a broader scope in its supervisory role, and in particular in ensuring the attainment of the highest safety standards for this new generation of railway infrastructure, a colossal project which is expected to be completed by 2015.

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# Examining the options

**These are hard times for business. In an era of falling asset values and tight trading conditions, some firms may be facing paper losses or technical insolvency. In the fight for survival, applying for examinership is one way they can avoid being forced into a 'fire sale' of their assets. But, Andrew Gill explains, timing is critical**

- **What does examinership mean?**
- **Windows of opportunity**
- ***Companies (Amendment) Act 1990***



As the fallout from the credit crunch persists, the effects continue to be felt across the global markets. Those companies that have borrowed heavily to fund their asset purchases are now facing a stark reality. Due to decreasing asset values, many of them are flirting with technical insolvency, as the book value of their assets now approaches the equivalent value of their liabilities.

With defaults looming as a realistic possibility, many of these companies are now contemplating the forced liquidation of their assets by counterparties, with little hope of achieving more than fire-sale values. Companies such as these need to carefully assess their options for survival.

One possibility is to make an application for examinership under the *Companies (Amendment) Act 1990*. The process is designed to give fundamentally viable companies a period of refuge from their creditors and an opportunity to reorganise their affairs. Crucially, what it can offer to companies is time. While under the protection of the court, companies can negotiate schemes of arrangement with their creditors, with a view to agreeing compromises to facilitate their survival.

The timing of an application for examinership is critical, with a limited window available in which it may be usefully employed. A premature application for examinership by a company is likely to trigger a default under its financing arrangements, giving its counterparties the right to close out financing transactions and realise their security. This would hasten a fire-sale of the company's assets and crystallise the decreases in asset values. However, examinership may be a useful device where default is imminent or has just occurred.

## Application procedure

In order to ensure a successful application for examinership, it is first necessary to demonstrate that:

- The company is or is likely to be unable to pay its debts
- No resolution subsists for the winding-up of the company, and
- No order has been granted for the winding-up of the company.

In situations where a default is imminent, there is unlikely to be any difficulty in demonstrating that the company is unable to pay its debts. Managing the timing of an application for examinership will be critical in satisfying the other requirements set out above.

The key obstacle to a successful application for examinership is contained in section 2(2) of the Act. This section provides that the court shall not make an order unless it is satisfied that there is a reasonable prospect of the survival of the company and the whole or any part of its undertaking, as a going concern. It is not sufficient to demonstrate that an examinership would allow a more advantageous realisation of the company's assets.

The first step is to demonstrate that the company constitutes a 'going concern'. The more difficult condition to fulfil is that there is a reasonable prospect of the survival of the undertaking. While the prospects for each company will turn on their own particular circumstances, securing fresh investment for the company will certainly make this condition easier to satisfy.

Under section 3(A) of the Act, a petition for examinership must be accompanied by the report of an independent accountant. This report must contain, among other things, a statement of the affairs of the company and the opinion of the accountant as to whether there is a reasonable prospect of the company's survival. Only in exceptional circumstances will the court hear an application that is not accompanied by an independent accountant's report. Given the extensive information that must appear in this report, companies considering examinership should begin the process of compiling this report in advance of making an application.

In dealing with these unprecedented conditions, companies need to consider all of their available options critically. Examinership can be a useful mechanism for asset preservation, but companies should ensure that they are fully prepared to act when the window opens.

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# Examinership: can secured creditors bank on it?

**Examinership gives an insolvent company protection from its creditors for up to 100 days while it attempts to save its struggling business. But in the case of secured creditors such as banks, recent case law suggests the situation may not be as clear-cut as was once thought.**

- **Banks as secured creditors**
- **Schemes of arrangement**
- **Birchport Ltd and ACC Bank**

In the current economic climate, the examinership process has never been more in demand. Record numbers of companies are now asking the High Court for protection from their creditors in order to buy some breathing space to solve their financial problems.

Once placed under the protection of the court, the role of the examiner is to formulate proposals for a compromise, or scheme of arrangement, in respect of the company and to try to reach agreement with the company's creditors. Ultimately, the examiner must deliver a report to the court outlining his proposals for a scheme of arrangement. The court must approve the scheme of arrangement in order for it to become binding – even where the scheme of arrangement is accepted by a majority of the creditors. If a scheme of arrangement is not approved by the court, an order will invariably be made for the company to be wound up.

It should be noted that the court cannot sanction a scheme of arrangement in a number of circumstances, including where doing so would unfairly prejudice a class of creditor whose interests would be impaired by the implementation of the proposals. In the case of a secured creditor, the court would be unlikely to write down its debt where it is expected to remain in situ as the primary lender to the company.

It should also be borne in mind that in many cases a company's loans will be personally guaranteed by the company's directors. The approval of a scheme of arrangement is likely to trigger the crystallisation of these personal guarantees. In the event that a secured creditor has to write down its debt through an examinership, it is likely to seek to enforce any personal guarantees that it holds.

## The examinership of Birchport Limited

October 2008, Birchport Limited (the company behind Ocean Bar, an upmarket pub and restaurant in the Docklands area of Dublin) was the then latest in an increasingly long line of companies to be placed into examinership. Like many businesses affected by the current economic downturn, it suffered cashflow difficulties and was unable to repay its creditors, including ACC Bank (€1.2 million) over which it holds security and the Revenue (€0.25 million).

ACC Bank had originally provided a loan to the company of €1.4 million. Its loan was secured against the lease that the company held over the property. That lease had been originally valued at €1.4 million. By the time of the examinership, the balance of that loan stood at €1.2 million. By the time the company went into examinership, the value of the lease has fallen significantly. The examiner and the bank separately had the lease valued: the examiner's valuation was €500,000, while the bank's was €950,000.

The bank rejected the examiner's first proposal for a scheme of arrangement (which adopted the examiner's valuation of the lease), which would have required the bank to agree to write off in excess of half of the balance then on its loan. Under the terms of the revised scheme of arrangement which was ultimately agreed with the company's creditors (including ACC Bank) and approved by the High Court on 2 December 2008, the company and ACC Bank agreed that ACC Bank would retain security over a sum of €950,000 (repayable over 15 years). It was agreed that the balance of the loan (€250,000) was to be treated as unsecured, with the bank receiving 10% of this sum – the same as the company's other unsecured creditors.

In the wake of the Birchport examinership, a number of commentators suggested that the court's decision reflected a change in the law whereby lending institutions could, as part of the examinership process, be forced to write down the value of their secured loans to the market value of the charged asset. Some commentators also suggested that the court's decision could result in the banking sector facing losses in excess of €1 billion on loans secured against commercial property.

In reality, the Birchport decision does not represent a new departure in Irish law. In fact, it would have been very unusual if the court had not approved the scheme of arrangement which had the support of each class of creditor, including the approval of the bank, the fundamental point being that ACC Bank agreed to reduce the value of its security. While its agreement clearly took account of the lower value of the security it held, it isn't the case that ACC Bank had a reduction of its security thrust upon it by a decision of the High Court.

Of course, other secured lenders may increasingly find themselves in a similar position and facing a similar choice. Only time will tell whether the €1 billion estimate is accurate.

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# Too close for comfort?

**Shoppers are used to seeing lookalike products on supermarket shelves, but how do the manufacturers get away with producing and selling such blatant imitations? And how do you know if a lookalike product is sailing too close to the wind? Aine Matthews has the answers**

Lookalike or copycat products have been described as products where "distinctive features of a brand's packaging are hijacked in order to trick shoppers into buying something they believe to be that brand, made by the brand manufacturer or sharing the reputation of that brand". Manufacturers of lookalike products obviously do not share this view. They maintain that they are merely increasing price competition which is to the advantage of the consumer.

The main legal remedies available to brand holders to prevent the sale of lookalike products are those of trade mark infringement and passing off. Other reliefs exist under copyright, design rights, *the European Communities (Misleading and Comparative Marketing Communications) Regulations 2007 and the Consumer Protection Act, 2007*. However, we will concentrate on trade mark infringement and passing off.

Essentially (and without delving into the legal niceties), it must be shown that a consumer is likely to have been confused or misled. These remedies, particularly trade mark infringement (which requires that the brand, product shape and/or packaging are registered as trade marks), are excellent remedies for the brand holder when there is actual or probable consumer confusion between the premium brand and the lookalike product. 'Passing off' is a remedy used by brand holders that have acquired a reputation and goodwill in their product in a territory through extensive sales but who have not registered the name or the packaging of their product as a trade mark. Passing off protects unregistered trade marks. Trade mark law protects registered trade marks; passing off is usually more difficult to prove than trade mark infringement, which is the reason that brand holders are advised to register their brands and packaging as trade marks.

Some cases in relation to lookalikes have been considered by the Irish courts over the past few years and the decisions are never foregone conclusions.

- **Trade mark infringement and passing off**
- ***Irish Distillers Limited v Cooley Distillery plc***
- ***Jacob Fruitfield Food Group v United Biscuits (UK)***

## Irish Distillers Limited v Cooley Distillery plc

This case, in July 2008, concerned lookalike bottles of whiskey. The plaintiff's whiskey was marketed under the brand name 'Jameson's' and the plaintiff had secured registered trade marks for the label of its whiskey product. The defendant marketed its whiskey under 'St Patrick's'. The court found both trade mark and copyright infringement on the basis that the labels were substantially similar even though both products had prominent and very different brand names. This would be considered to be a very favourable decision from a brand holder's point of view. The decision was not appealed as the parties reached an ultimate settlement.

## Jacob Fruitfield Food Group Limited v United Biscuits (UK) Limited

This 2007 case dealt with an interlocutory injunction application in respect of lookalike biscuit packaging. An interlocutory injunction was granted in respect of the lookalike packaging for the fig rolls biscuits. In this case, no exclusivity was asserted in respect of the colour of the packaging, which was red. The case did, however, turn on the size and prominence of the brand name, Jacobs/McVitie's on the packaging. The court found that there was a serious issue to be tried in terms of whether passing off existed as regards the original packaging and the lookalike packaging. In the same case involving a cream crackers product, an injunction was not granted on the grounds that the court was of the view that the prominent display of the brand names differentiated the products, even though the colour scheme of the packaging was identical.

These cases show that there is really no clear-cut position when it comes to lookalike products. However, they also demonstrate the importance of having a registered trade mark for the brand name and also for the packaging. While the Jacob Fruitfield case did not involve trade marks, Jacobs did have significant reputation and goodwill in the fig rolls biscuit packaging. It is fair to say that had the packaging been registered as a trade mark, Jacobs may well have had an easier case rather than having to prove its reputation and goodwill.

Manufacturers of lookalike products will sometimes encounter turbulent waters and hit the rocks, but sometimes it may be plain sailing. One thing is clear: they should have a clear understanding of the lines drawn by the law and the rights of brand owners before deciding to launch a lookalike in the Irish market.

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# All things being equal

**Last year over 1,000 people brought claims to the Equality Tribunal, 85% of which related to alleged discrimination in the workplace. As Jennifer Clarke explains, the absence of fair procedures and non-adherence to the principles of natural justice can seriously affect the outcome of any claim against an employer**

- ***Employment Equality Acts 1998-2008***
- **Obligations on employers**
- **Need to ensure fair procedures**

Last year, the number of work-related discrimination cases brought before the Equality Tribunal rose by 28%. More than four out of ten cases were brought on the grounds of race. And claims of alleged age discrimination in the work place have doubled year on year.

Since the Equality Tribunal was established in 1999, the number of cases of alleged discrimination has grown annually from 102 in 2000 to 998 in 2008. In the last nine years, some 22,000 claims have been brought. Increasingly, employers are faced with complex and costly claims giving rise to a number of problems, including:

- The compensation that might be awarded,
- The legal costs incurred in defending a claim,
- 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 of employers complying with their obligations under the *Employment Equality Acts 1998-2008* and the various associated codes of practice. Further, it is essential that employers are fully aware of the need to adhere to fair procedures when dealing with any grievance or complaint brought by an employee against a co-worker or a member of management.

Where an employer acts in an unfair manner, the dismissal itself will normally be held to be unfair even where substantial grounds exist to justify it. It is therefore essential that employers adhere to the principles of natural and constitutional justice and ensure that an employee is afforded the opportunity to defend himself and tell his side of the story.

The following are some of the procedural issues that should be considered by an employer before proceeding to dismiss an employee:

- Whether a fair warning was given: an employee should be put on notice of the complaint. For example, where the standard of an employee's work or behaviour falls below the standard the employer deems acceptable, the employee should be made aware of this.
- Whether a reasonable and full investigation was appropriate: where grievance procedures exist, they must be strictly followed. Where no procedures exist, employers should be aware of the ministerial-approved *Industrial Relations Act, 1990 Code of Practice on Grievance and Disciplinary Procedures (Declaration) Order, 2000* and comply with it.
- Whether the employer had reasonable grounds for believing that the allegations against the employee were true and accurate.
- Whether the employee was given notice of and the opportunity to respond to an allegation made against him and, in particular, the opportunity to cross-examine incriminating witnesses and have access to their written statements.
- Whether an employee ought to be allowed to be accompanied by a representative at a disciplinary hearing. It is normally a good idea for an employer to allow employee representation. As to whether the employer is obliged to inform the employee of the right to representation, in circumstances where allegations of wrongdoing are to be put to the claimant at a meeting, it would be prudent for the employer to advise the employee of his right to be accompanied by a representative.

The importance of following fair procedures cannot be overstated. There is substantial case law where substantial grounds existed to dismiss an employee but, because fair procedures were not followed, a significant award of compensation was made. The absence of fair procedures and non-adherence to the principles of natural justice can seriously affect the outcome of a claim against an employer.

Having regard to the level of compensation that may be awarded against an employer, it makes commercial sense to ensure that employers are fully aware of their duties and obligations to employees and thereby seek to minimise potential exposure to costly claims.

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# Redundancy: the pensions issues

**Employers in a redundancy situation want to reach a fair severance arrangement with their staff and an amicable parting of the ways. But how can this be achieved? Gillian Dully and Fiona Thornton highlight some of the issues that might arise**

Depending on his age, an employee is likely to consider his pension benefit a valuable benefit within the overall context of his 'termination package', particularly if he has long service and is a member of the senior management team. For its part, an employer needs to establish what it can afford to pay.

Pension benefits may feature in the severance terms. The pension benefits may merely reflect the pension scheme's usual leaving service entitlements or perhaps special enhanced terms may be on offer. In either event, the pension scheme's documents need to be carefully reviewed to establish the impact, if any, that redundancy has on the scheme and what procedures might need to be followed to enable special terms to be offered.

- **Redundancy packages**
- **Trustees of the pension fund**
- **Providing the right information**

## Communication

Employers are generally required to participate in an information and consultation process in the run-up to a redundancy. Pension benefits need to be factored in to this process. Depending on the circumstances, it may be appropriate for the employer to sound out the trustees of the pension fund in advance of publishing the terms of the redundancy programme to the workforce. The employer may need to get the trustees to buy into its proposals in advance of these being published so that it can be sure that what is proposed is capable of being delivered.

A delicate balance needs to be struck here between getting the trustees on board and making sure that there is no leaking of possible terms that may not in fact come to anything (perhaps due to improved trading or, in a worse case scenario, be less valuable due to the employer's reduced ability to pay). Even though it may be feasible to make sure that trustees are legally bound not to make any inappropriate disclosure, the employer still needs to make the call as to whether there might be a leak.

## Is tax planning appropriate?

An employee facing termination may well be anxious about his pension benefits. Depending on the employer's flexibility it may be possible to permit departing employees to tailor their severance terms to suit their own circumstances. For example, one employee might prefer a larger sum on termination whereas another employee might prefer a greater pension on retirement. Providing individual tax advice comes at a cost and this is another point that needs to be factored in to the cost of the redundancy.

## Information to be provided

A departing employee must be provided with specific information by the trustees of the pension scheme, including details of his pension rights and the options available to him on leaving service. This information must be provided as soon as practicable on leaving service and, in any event, no later than two months from that date. Failure to meet these deadlines is an offence under the *Pensions Act* and the trustees could be prosecuted for non-compliance

## Severance agreement

Where the severance arrangements say that departing employees must sign a severance agreement containing waivers of rights against the employer, it is strongly advisable that the leaving service option statement is included as a schedule to the agreement so that the departing employee signs off on such benefits and waives all rights against the pension

scheme trustees as well. This requires advance planning by the employer so that the trustees are briefed to have their administrators ready to supply the leaving service option statement at or in advance of the termination date. This step will invariably save the employer money.

In most cases, the employer pays the running costs of the pension scheme. Should a dispute arise, even if the trustees only have to provide the benefits outlined in the leaving service statement, it is likely that professional costs will have been incurred by the trustees in dealing with the complaint or dispute. If the outcome of the dispute means that more pension benefits have to be paid, it may be that, indirectly, the employer will have to fund for these. By providing the option statement during the redundancy process, this issue will either surface when the option statement is first presented to the employee or perhaps never because the waiver has been signed.

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# Spirit of the Age?

**Off-licence sales are booming. Between the smoking ban, the clampdown on drink driving and the downturn in the economy, more and more people are choosing to drink at home. And this means that more off-licences are opening all the time. Jennifer Clarke explains what's involved in obtaining an off-licence to sell liquor to the public**

- **How to apply for an off-licence**
- ***Intoxicating Liquor Act 2008***
- **Voluntary code of conduct for retailers**

Last year it was revealed that in Dublin 15 the number of off-licensed premises alone had doubled in three years from 17 to 33. During the same period, the number of premises selling beer, spirits and wine almost trebled from seven to 19.

The increase in the number of off-licence applications can to some extent be explained by the introduction of section 18 of the *Intoxicating Liquor Act 2000*. This section abolished the requirement that an applicant for an off-licence had to 'extinguish' a licence in the same town or city or in the immediate vicinity of the proposed premises or in the same parish. As a result, a retailer applying for a new licence can now tender for extinguishment of a licence attaching to premises situated anywhere in the state.

You will no doubt have noticed the increased number of off-licenses and convenience stores operating in your neighbourhood, for example, Spar, Centra, Londis and Mace. These stores, along with discount retailers Lidl and Aldi and traditional supermarkets such as Dunnes Stores and Superquinn, all sell alcohol. They are entitled to do so under three types of licence:

- A wine retailer's off licence,
- A spirit retailer's off licence, and
- A beer retailer's off licence.

A retailer who wishes to obtain any of these off-licences must apply to the District Court. Prior to the introduction in July 2008 of the *Intoxicating Liquor Act 2008*, there was no requirement to apply to the District Court for a wine off-licence as this type of licence was granted by the Revenue Commissioners. The position now, however, is that a wine retailer's off-licence will not be granted by the Revenue Commissioners unless a District Court certificate has been obtained.

An important change for off-licence retailers introduced by the 2008 Act was the change to the times for the sale of alcohol for consumption off the premises. Off-sales of alcohol can now only be made between 12.30pm and 10pm on Sundays (and St Patrick's Day) and between 10.30am and 10pm on all other days.

Another important provision of the 2008 Act is section 9, which provides for the structural separation of alcohol products in supermarkets, convenience stores, petrol stations and any other 'mixed trading' premises. In such stores, alcohol must be displayed and sold in a specified area which is physically separated from the rest of the premises. Where this is not feasible (for instance, in smaller premises) alcohol products – other than wine – must be displayed and sold from a part of the premises to which the public do not have access, such as from behind a counter.

It should be noted that this section has not yet come into operation and the Minister for Justice, Equality and Law Reform has introduced a voluntary code of practice as an alternative to implementing it. The cornerstone of the code of practice is the manner in which alcohol/licensed products are displayed. Retailers of licensed products are required to ensure that such products are displayed separately to non-licensed products in a part of the premises through which customers do not have to pass in order to gain access to other non-licensed products. It is preferable that this area would be at the rear of the premises.

Licence holders are required to comply with this part of the code in so far as they can. Unlike section 9 of the 2008 Act, the code does not require structural separation of products by a physical barrier.

It is important to note that compliance with the code will be subject to independent audit and the department has made it clear that if it is of the view that the code is not being adhered to on a voluntary basis, section 9 of the 2008 Act will be brought into force.

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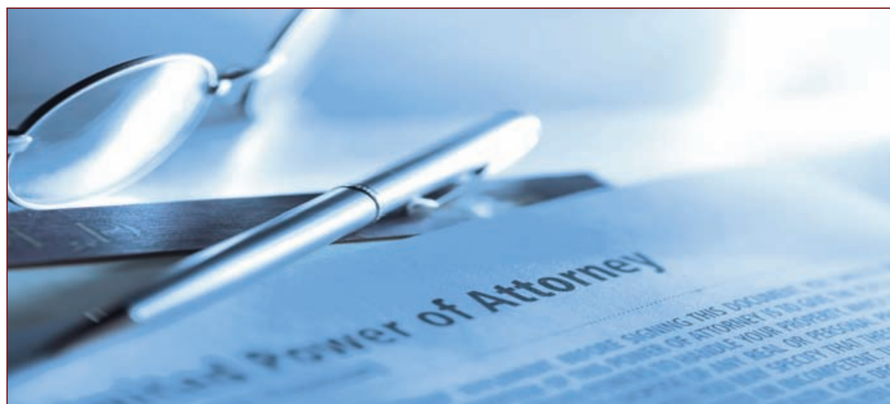
# Someone to watch over me

**You already know that it's a good idea to make a will to provide for your assets after your death, but what if during your own lifetime you become unable to manage your own affairs? Well, that's where an enduring power of attorney can help, as Paul McCutcheon explains**






Life is what happens when you're busy making other plans. You can't be ready for every eventuality and if you happen to become incapacitated, it would be a comfort to know that you have someone acting in your best interests. An enduring power of attorney (EPA) ensures that your wishes about who is to manage your affairs and make personal decisions on your behalf if you become unable to manage your own affairs are acted upon.

It gives you 'the disponer' the freedom to nominate a person (known as an 'attorney') to manage your affairs in the event that you become mentally incapable of doing so. Without an EPA in place, if you become mentally incapable, it may be necessary to make you a ward of court. The wardship procedure is complex, cumbersome and expensive and it could end up with the court appointing a person that you might not wish managing your affairs. In addition, the High Court would have the final say on everything affecting your health and welfare.

In creating an EPA, the disponer can make the scope of his Attorney's powers as wide or as narrow as he or she wishes. Generally, powers created under an EPA are split into two main areas; business and finance, and personal care.

- Business and financial affairs: you can give the attorney authority to do anything that you could lawfully do. Alternatively, you can limit the attorney's authority as you think fit. Limiting the authority should be carefully considered as it may prevent the attorney taking very necessary action on your behalf. The attorney may also be authorised to provide for your family or other dependents, if you so wish.

- Personal care decisions: the attorney can also be given the power to make personal care decisions such as where you live, what you do on a day-to-day basis and who you see.

The procedure for creating and subsequently registering an enduring power of attorney incorporates a number of safeguards to prevent abuse and misapplication of the EPA procedure. For example, the disponer must notify at least two people, known as 'notice parties', that he or she has created an EPA. Neither of the notice parties can be an attorney under the EPA. At the time of signing the EPA, a doctor must certify that the disponer has the mental capacity to understand the effect of creating the EPA and the disponer's solicitor must also certify that his client understands the effect of creating an EPA and is not executing it as a result of fraud or undue pressure.

- **Enduring of power of attorney**
- **Business and financial affairs**
- **Personal care decisions**

Once executed, the EPA will only take effect once the disponer has become mentally incapable and the EPA has been registered in the High Court. Prior to registration, the disponer must be notified formally that his or her attorney intends to apply for registration and a doctor must certify that the disponer is mentally incapable of managing his or her own affairs. The notice parties will also have to be formally notified that the attorney intends to register the EPA and, after making the relevant notifications, the attorney will need to wait for five weeks before the EPA can be registered to allow the disponer or the notice parties to object to the registration, if necessary.

Without an enduring power of attorney in place, no-one has the power to administer your affairs for you if, for whatever reason, you lose the power to do so yourself. An EPA should be regarded as an insurance policy against a scenario we would all hope to avoid and, like all insurance policies, will hopefully never be needed. However, given the advantages of having an EPA in place, and the potential consequences if one has not been executed, it is clearly an essential safeguard for people of all ages.

*For further information, please contact Paul McCutcheon at pmccutcheon@lkshields.ie.*

# Shareholder Rights Directive

The EU Directive on Shareholders rights is to be implemented into Member States' Laws by August 2009. The Directive establishes requirements in relation to the exercise of certain shareholders rights attaching to voting shares of listed companies. The Directive introduces minimum standards to ensure that shareholders have timely access to relevant information ahead of general meetings and simple means to vote from a distance. It also abolishes share blocking and introduces minimum standards for the right to ask questions, put items on the Agenda and table resolutions at general meetings.

The following key provisions feature in the Directive:-

- Minimum notice of 21 days will now be required for Extraordinary General Meetings ("EGM's") as well as Annual General Meetings ("AGM's"). The notice period for EGM's can be reduced to 14 days if the shareholders can vote by electronic means and agree to this by passing a resolution at an AGM.
- Internet publication of the notice and the documents to be submitted to the General Meeting at least 21 days before the General Meeting.
- Abolition of share blocking and introduction of a record date which may not be more than 30 days before the General Meeting.
- Abolition of obstacles on electronic participation to the General Meeting including electronic voting.
- Right to ask questions and obligation on the company to answer questions.
- Abolition of existing constraints on the eligibility of people to act as proxy holder and excessive requirements for the appointment of the proxy holder.
- Disclosure of voting results on the issuer's internet site.

Listed companies may wish to consider passing the resolution to continue holding EGM's at 14 days notice at their next AGM. If possible this might be done in advance of the provisions of the Directive in Ireland coming into effect. If the resolution is left until after August, there will be a period of time when the Company will not be able to hold EGM's on the shorter notice period of 14 days.

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