

Welcome

We hope you enjoy the spring issue of the Tyrrell Solicitors Legal News, and that you find it interesting and informative. It's part of our commitment to the highest standards in everything we do, especially client service.

This issue looks at the High Court's ruling compelling PIAB to deal directly with claimants' solicitors, new financial services legislation, new rules on VAT and stamp duty, and much more.

If you would like more information on any topic outlined here, or on any legal matter, please contact us. You can be assured of a friendly and professional service at all times. We look forward to hearing from you.

Roderick Tyrrell

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Night view of The Four Courts, Dublin 7.

High Court orders PIAB to deal directly with claimants' solicitors

The High Court has ruled that the Personal Injuries Assessment Board (PIAB) must deal directly and exclusively with lawyers acting for applicants if this is what the applicant wishes. PIAB had refused to deal with solicitors representing people who had been injured, and had insisted on addressing correspondence to the claimant directly, instead of to their legal advisors. The judgement confirms that legal representation exists to maintain fairness between the strong and the weak and to "guarantee equality of arms". Mr Declan O'Brien of Tullamore, Co Offaly claimed that PIAB's actions infringed his right to legal representation. In the High Court, Mr Justice McMenamin addressed the question as to whether the policy or practice of the board was *ultra vires* (beyond the powers) of the PIAB Act. He found that board had acted *ultra vires* in a manner that might well represent a breach of the applicant's legal rights. Mr

Justice McMenamin said that PIAB had not succeeded in demonstrating how its interference with the lawyer-client relationship was necessary, expedient or incidental to its functions.

The Law Society welcomed the judgement and its director, Mr Ken Murphy, stated that "legal representation is necessary to guarantee the rights of victims of accidents against the interests of big business and the insurance industry that PIAB was designed to protect. The judgment exposes the imbalance and anti-claimant bias of PIAB." In his judgement, Mr Justice McMenamin stated that compensation for personal injuries sustained could involve substantial sums and that the issue of entitlement was likely to be of vital importance to a claimant and their family. In circumstances like this, PIAB's contention that the issues before the board were inconsequential were difficult to sustain.





Central Bank, Dame Street, Dublin 2.

Legislation creates new Financial Services Ombudsman

The Central Bank and Financial Services Authority of Ireland Acts 2003 and 2004 have introduced a new regulatory regime for banks and financial service providers. Among its provisions, the Acts establish a Consumer Director for financial services, a Financial Services Ombudsman, and a Financial Services Appeals Tribunal. The Irish Financial Services Regulatory Authority (IFSRA) gets increased powers to demand answers and impose sanctions. These new powers apply to every area of financial service, from banking to insurance, stock broking, investment services and funds management. Where IFSRA finds that regulations have been contravened, it now has powers to hold individual managers personally liable for the consequences of their actions and inactions. The Financial Services Ombudsman will take up the position on 1st April 2005. The Ombudsman will deal with complaints from private persons who are consumers of financial services. In the UK, the term "consumer" includes businesses with a turnover of less than £1million. A similar approach is expected here.

IFSRA has also introduced new draft regulations to prevent financial institutions from offering unsolicited

pre-approved loans to consumers and will prevent credit card companies from increasing a customer's credit limit unless the customer requests an increase. All financial institutions, including mortgage lenders, will now be obliged to state in writing why they are recommending a particular financial product to their customer.

Equality Act 2004 passed

The Equality Act 2004 has been signed into law. Among its main provisions are the extension of protection under the Act to self-employed persons, domestic workers, and partners and partnerships. The Act also expands the definition of sexual harassment given in earlier Acts. Sexual harassment is now defined as "any form of unwanted verbal, non-verbal or physical conduct of a sexual nature, being conduct which has the purpose or effect of violating a person's dignity by creating an intimidating, hostile, degrading, humiliating or offensive environment for the person." Under earlier Acts, the behaviour had to be "unwelcome" and be "reasonably regarded as offensive, humiliating, or intimidating." Removing the word "reasonably" has significantly expanded the interpretation of sexual harassment.

Chief Justice appointed

Mr Justice John L. Murray has been appointed as Chief Justice of Ireland. He has served as a Supreme Court Judge since 1999. He has also been Attorney General of Ireland on two occasions; briefly in 1982 and from 1987 to 1991. He served as a Judge of the Court of Justice of the European Communities from 1991 to 1999.

Who's Who in Ireland' says that Justice Murray was "a highly respected Attorney General; said to possess a cool and concise legal brain and a good sense of humour." He was born in Limerick in 1943, called to the Bar in 1967 and became a Senior Counsel in 1981. He married Gabrielle Walsh in 1969 and they have 2 children.

The Hon Mr Justice Nicholas Kearns has been nominated as a judge of the Supreme Court. He was born in Dublin in 1946, called to the Bar in 1968 and was appointed to High Court in 1998.

High Court rules on Garda speed detectors

Thousands of motorists may escape sanction for speeding offences committed in the latter half of 2004 following a ruling by the High Court that laser speed guns used by Gardai do not meet the requirements of Section 21 (1) and 21 (3) of the Road Traffic Act 2002. The High Court ruled in February 2005 that the Act requires a speed detection device to produce a permanent record of the vehicle's speed for the purposes of evidence. Laser guns do not produce a permanent record. However, the ruling is not a licence to speed, as new legislation was introduced last month to close the loophole exposed by yesterday's ruling.



Checkpoint in operation

Improvements to leased premises no longer subject to VAT

The Finance Act 2005 has clarified an area of legal uncertainty by stating that improvements (such as an office fit out or refit) made by tenants to a leased property do not amount to "redevelopment" for the purposes of VAT. Since 2002, many landlords had been uncertain whether improvements made to their property by a tenant after they had granted a lease would bring the landlord's freehold interest back into the VAT net.



Dublin Castle, Revenue Commissioners' HQ

Regulations for financial services marketing

Marketing of financial services to consumers will be further regulated following the adoption by Brian Cowen TD, Minister for Finance, of the European Communities (Distance Marketing of Consumer Financial Services) Regulations 2004 in December of last year. The regulations came into effect on February 15th 2005 and will apply to all consumers (persons acting in their personal or private capacity). The regulations outline information which the consumer must be given before entering into a contract, their rights to cancel certain contracts, prohibition on providing unsolicited services and restrictions on unsolicited marketing communication.

New Land Bill will benefit farmers, sports clubs

In a move that will be welcomed by many farmers, sports clubs and community groups throughout the state, a new Land Bill allows for write off of small land annuities and arrears of same. Effectively, the new Land Bill

aims to finalise the winding up of the former Land Commission, whose role was overtaken by the Department of Agriculture on its dissolution in 1998. The Land Bill 2004 will allow for write off and buyout of land purchase annuities and introduces a scheme to allow annuities to be paid off in full at a discount of 25%, providing that arrears are paid in full.

Many sports clubs who operate on Land commission Trust property will also benefit, as the Bill provided for the transfer of this property to the clubs and community groups in question. This should enable clubs to develop better grounds and facilities.

Changes to redundancy payments

Since 1st January 2005, under the Redundancy Payments Act 2003, the weekly cap on the level of an employee's remuneration that could be considered for the purposes of calculating redundancy payments in cases of insolvency has been raised to €600 per week. The formula for calculating statutory redundancy has also been changed in the employee's favour. Previously, an employee was entitled to half a week's pay for every week

served plus one bonus week. Now the entitlement is for two weeks' for every week served, plus one bonus week. Part-time and fixed purpose contract workers are now also entitled to claim redundancy in situations of insolvency.

Passports for children

Since October 1st of last year, the Department of Foreign Affairs has ceased the practice of adding children's names to their parents' passports.

Parents' passports that include children's names will continue to be valid as long as they are in date, although parents should be aware that since October 26th 2004, every person entering the United States of America is required to have their own passport, irrespective of their age. The international Civil Aviation Organisation has recommended that a "one person, one passport" policy be introduced before the end of January 2005. Passport application forms and parental consent forms are available from any Garda Station.



Revised stamp duty on second hand houses

Following Budget 2005, stamp duty on second hand houses for first time buyers has been reduced. First time buyers of second hand dwellings who are owner occupiers will be charged a reduced rate on houses up to €635,000 in value. First time buyers are exempt from stamp duty on second hand dwellings up to €317,500 in value. The revised stamp duty rates apply to transactions executed on or after 2 December 2004. See table below.

Revised First Time Buyers Rates		
Aggregate Consideration	Existing First Time Buyer Rate	New First Time Buyer Rate
Up to €127,000	Exempt	Exempt
€127,001 - €190,500	Exempt	Exempt
€190,501 - €254,000	3%	Exempt
€254,001 - €317,500	3.75%	Exempt
€317,501 - €381,000	4.5%	3%
€381,001 - €635,000	7.5%	6%
Over €635,000	9%	9%

First time buyers will continue to be exempt from stamp duty on new residential property with a floor area of 125 square metres. The new rate structure will now apply to first time buyers in cases where the floor area is larger than 125 square metres.

10 Steps to creating a contract.

1. Introduction.

The contract lies at the heart of everyday business and is the means by which the simplest to the most complex of business is done. Effectively, a contract is a promise or agreement enforced or recognised by law. Five basic elements are necessary in order for there to be a legally enforceable contract.

2. Intention to create legal relations.

Sometimes it is difficult to establish that there was an intention to create legal relations, especially in family matters. The court will consider many factors including the closeness of the family relationship and the extent to which one of the parties relied on the 'agreement'. In business, there will be a strong presumption that it was the parties' intention to be legally bound.

3. Letters of comfort.

When a body gives an undertaking in respect of some related or subsidiary body, a degree of uncertainty exists as to the legal enforceability of these 'letters of comfort'. The courts will treat them on a case by case basis and analyse the facts to find out the real intentions of both parties.

4. Offer.

An offer is essentially an expression of willingness to contract made with the intention that it shall become binding on the person making it as soon as it is accepted by the person to whom it is addressed. It will usually be a matter of construction as to whether or not the offer was made in the first place and whether or not it was intended to create a legally binding agreement. The court will distinguish between an offer and an *invitation to treat* that is not enforceable. An invitation to treat requires further confirmation by the invitor.

5. Acceptance.

An acceptance is a final and unqualified expression of assent to the terms of an offer. It is sometimes difficult to determine when negotiations have ended and the offer has been accepted. Acceptance can be deemed to have taken place through the conduct of the parties. The general rule is that acceptance must be communicated to the person who makes the offer, although there are exceptions to this rule. Where acceptance is made by post, acceptance happens upon the posting of the acceptance. In practice, most contracts in today's business world will lay down very specific methods of acceptance.



Roderick Tyrrell. Always available to help and advise on any legal matter.

6. Consideration.

A promise is not, as a general rule, binding as a contract unless it is made in a deed or supported by some consideration. Where a contract is under seal no consideration need be provided.

7. Capacity.

The law presumes that everyone has the capacity to contract and the onus is on the person claiming that they were incapable to so prove. Incapacity may defeat the contract and make it unenforceable. The courts accept three categories of incapacity. (1) Contracts entered into by a minor. Apart from contracts for necessities and contracts of apprenticeships, education and service, contracts will not be binding on the minor. (2) Insanity. The person must show that owing to his mental condition he did not understand what he was doing, that the other party was aware of this incapacity and that the contract was not one for necessities. (3) Intoxication. The burden of proof is similar to the case of insanity.

8. Business capacity.

In a commercial law context, capacity to contract arises when registered companies enter into contracts. There are two issues that need consideration. Firstly, the company must have the power to enter into the particular contract. This will be evident from its Memorandum of Association and the Articles of Association. Secondly, it is necessary that person who is entering into

the contract on behalf of the company has the power to do so. This will be contained in the Articles of Association.

9. Formal requirements.

The general rule is that contracts do not have to be in writing. Where formal requirements are necessary, these will have been established by statute and will refer to specific contracts. For example, contracts concerning interests in land and guarantees must be in writing under the Statute of Frauds.

10. Contractual terms.

In general, the terms of a contract are those set out and agreed by the parties to the contract. However, in certain circumstances the courts have been prepared to imply terms into a contract. In order to do so it must be reasonable and necessary and must not be inconsistent with the express wording of the contract. There are also terms that are implied by statute, most notably by the Sale of Goods and Supply of Services Act 1980 and by other EU-driven consumer legislation as well as consumer law. Custom and the Constitution are also sources of implied terms in contract law.

Whereas every effort is made to ensure that all information contained in this newsletter is accurate, it is intended as a general guide only and the information herein may not apply to your individual circumstances. Professional advice should be taken before acting or refraining from acting as a result of any information contained in this newsletter. Always consult your legal advisors first. © McArdle Associates 2005. Tel 01-670 3909.

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