



Introduction

Welcome to the Spring 2009 edition of the Lavelle Coleman newsletter. Like all businesses, lawyers have to respond to the changing economic times. Our role has evolved with our clients and we are advising more and more on the commercial aspects of transactions, where clients are experiencing difficulty. We provide commercially focused strategic advice to assist our clients in attaining a position of strength for the future.

We have received an increasing number of instructions on commercial problems. Many of those problems relate to banks and other financial institutions, services provided by them and products sold by them. In some cases, clients believe they have been misled by financial institutions and suffered a loss as a result. We are advising on a large number of disputes which have been referred to the Financial Services Ombudsman and we are acting for both clients who have made complaints and clients who are defending complaints.

In a landmark case, we recently acted for a Property Developer in a case against ACC Bank where the bank was held liable for €4.76m after the loss of title deeds.



Michael Lavelle Managing Partner

We will be holding seminars in the following areas in the upcoming months. If you are interested in attending any of these events, please contact: events@lavellecoleman.ie or 01 6445862.

- **Planning for the future**
Family Law and Estate Planning
- **Safeguarding your business**
Corporate Restructuring and Insolvency
- **Legal Issues for Employers and Employees**
Employment Law

Employment Law – Protecting Your Company’s Assets



Marc Fitzgibbon
Senior Partner

The employment landscape in Ireland has changed dramatically in the last twelve months. Employers and employees are concerned at how best to prepare themselves for the potentially difficult times ahead and how to make sure a company is in good health when the economy starts to pick up.

During the boom years, redundancies were few and far between and for most businesses, the reality of implementing a redundancy programme has been a steep learning curve. There has inevitably been a significant increase in the number of cases being brought by employees against employers who have failed to fulfil their legal obligations in terms of consultation, notice, and selection. There are a number of pieces of legislation dating back to the late 1960’s which contain the legal framework for the process. While some of these may be well known and understood in Human Resources and Industrial Relations terms, we have in recent years seen a sizable increase in new statutory enactments implementing further protection for employees. Employers seeking redundancies would be well advised to take expert advice in relation to all aspects of the process. Many employers are unaware of the serious sanctions including substantial fines for breaches of the legislation, particularly in relation to collective redundancies.

The recent downturn in the economy has created significant challenges and opportunities for businesses in managing one of their most important resources – its people. Employers across all sectors of our economy are looking at cost saving measures, including the traditional option of redundancies. In the present downturn, many employers are considering and implementing various alternatives to redundancy, in an effort to maintain their staffing levels and protect the future of the business. Options available to employers include the following:

1. Pay-cuts

Some employers have sought, as an alternative to redundancy, to implement salary reductions and there have been many recent high profile examples of this. In implementing salary reduction employers need to give some consideration to the potential difficulties that a variation in an employee’s terms and conditions of employment can lead to. Advice should be sought on the manner in which pay-cuts are implemented as well as the potential exposure an employer may have.

2. Reduced working hours

Companies are negotiating and agreeing reduced working hours for their staff which has the benefit of keeping the employee in some employment and preserving the employees skill set which will be of significant benefit when the upturn in the economy occurs. Because the reduction in working hours in effect amounts to a salary reduction, the same considerations need to be given reaching agreement with the employees. It is also important to remember that, if the reduced hours are less than one half of the weekly working hours, for four or more consecutive weeks or, within a period of thirteen weeks for a series of six or more weeks, the employee can make a claim for a statutory redundancy payment.

3. Layoff

Layoff can occur where an employer believes that, due to a lack of work for its employees which is not permanent, it may be appropriate to put those employees on layoff. There is no requirement to pay employees during layoff however they may have an entitlement to social welfare. There may, as in the case of reduced working hours, be an entitlement to statutory redundancy for the employee where a layoff persists.

4. Career breaks

Some employers are using career breaks as a means of reducing costs. This approach has the effect of retaining valuable employees for the future. Although it is not necessarily appropriate in all cases, it can in certain circumstances, be acceptable to both sides. The agreement usually involves the employee agreeing to return to his or

her job after a break of as long as two or three years during which the employee will not receive any salary or benefits and in respect of which the period of the break will not count as service.

In implementing the necessary response, and considering the four alternatives outlined above, in the changing economic environment employers need not only to be decisive, proactive and opportunistic in securing their future, but to do so with expert, up to date and commercially focussed legal advice.

Employees remain the key asset for businesses and the future of many companies depends on involving employees in an equitable and open manner in good times as well as bad. This will ensure staff loyalty which will be of ultimate benefit when the economy recovers.



Corporate Restructurings – The Way Forward?

Corporate restructurings have long since been a popular way to make a business more effective and profitable – in good times and bad. One of the most famous examples of successful restructuring comes from Jack Welch’s time as CEO of General Electric. Welch restructured GE and made it smaller but better armed for global competition.

The term “corporate restructurings” has many negative connotations when read and reported in the current downturn and it has become synonymous with the appointment of liquidators and examiners to struggling and insolvent companies and businesses.

However, corporate restructurings were very much a part of the Celtic Tiger era, but they didn’t receive the same attention as they are now attracting in the media. Corporate restructurings, or “corporate reorganisations” as they are commonly referred to, involve the transfer of trades from one company to another and are often undertaken to streamline a group of companies to make the resulting structure a more profitable and manageable corporate entity.

groups where substantial savings on potential tax liabilities can be preserved by refraining from transferring the assets out of the companies to the beneficiaries or to the shareholder(s).

Corporate restructurings are also undertaken in anticipation of the sale of certain subsidiaries or the group holding company itself to make the group more attractive. It involves the packaging of the more valuable trading assets and income streams within a group and there are various tax-neutral transactions that can be adopted in order to dress-up the relevant target assets for a potential buyer.

The compliance costs of a group can be substantially reduced by simplifying its structure and winding up subsidiaries which no longer serve any economic purpose within the group. Distribution of a company’s assets on a voluntary winding up of that company can often be received tax-free by the recipient, however professional tax advice should be sought for every such transaction.



Edward Johnston
Senior Associate
Corporate & Commercial



They can also be used to dispose of certain assets of a group in a tax-efficient manner for the benefit of the ultimate shareholders of the group or the group itself.

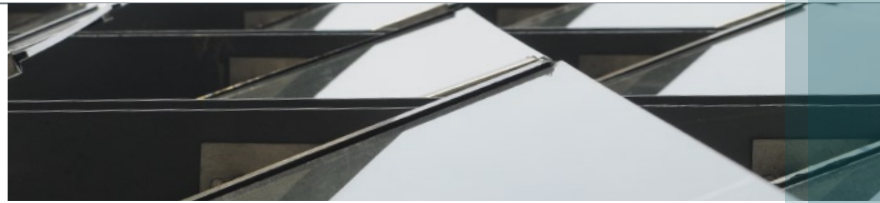
In other cases the shareholders of a corporate group may undertake a group restructuring to move assets into particular subsidiaries. This can be done to pass on the rights and entitlements to those subsidiaries to beneficiaries in their wills. This involves the creation of several classes of shares in the holding company, all of which have rights attaching to the particular subsidiaries in which either business or proprietary assets are held. This is particularly common in family owned and managed

Corporate restructurings are often undertaken to dispose of certain valuable assets within a group which creates distributable reserves within the group of companies. These reserves give the relevant company in which they reside the scope to transfer free of charge assets it holds without breaching the applicable capital maintenance rules in place for the protection of creditors, depending on the quantum of the reserves and the value of the particular assets being transferred.

Joint ventures often require the marrying of two separate businesses or groups of companies and these mergers also fall into the category description of corporate

reconstructions. There are various ways of ensuring that the new group of companies can be created in a tax-efficient, or in some instances tax-neutral, manner.

Similarly, joint ventures between parties often terminate on good terms and are often divided between two main shareholders when they decide to go their separate ways. The joint venture parties may agree to carry on different aspects of the group's business separately or agree to carry out the same business activities in different markets or jurisdictions. Such transactions are known as "demergers" and they can often have a positive impact when the resulting corporate entities are no longer restricted by the disagreement of the main shareholders/directors as to the conduct of the relevant business. Therefore it is worth



bearing in mind if you are a director, majority shareholder or owner-manager of a group of companies that there may be some scope for positive reconstruction of your group in order to improve its prospects as a trading entity, reduce unnecessary corporate compliance costs or prepare it for a trade or share sale to a prospective buyer or investor when merger and acquisitions activity inevitably picks up in the (hopefully near!) future.

Providing for young children

At some stage everyone worries about their little princess or superhero in the making.

Where young children are part of the family, how they are to be provided for in the event of unforeseen circumstances, is something that must be the subject of serious consideration and planning by parents, especially in today's changing economic and social climate. In event of their own early demise, parents will want to ensure that their children will be looked after by a suitable trusted guardian; that they will be able to complete their education and have their own sense of independence, whether that be in purely monetary / economic terms or having somewhere permanent to live or a combination of both. Other considerations to be taken in to account are if there is a second family involved or if there is a second spouse/partner that the person wants to provide for. A balancing act will have to be undertaken if a measure of equality across all of the family is to be attained. Whilst a will of itself is an important first step in the estate planning process, the type of will prepared in order to affect the parents' intentions can impact greatly on the legal and tax implications for the children. If the will is not carefully drafted with appropriate clauses to anticipate the various issues that may arise, it can cause unnecessary tax consequences at a later date and also have the effect that a child may not benefit when he/she expected to.

At present, there are a number of Capital Acquisitions Tax reliefs (which essentially means gift/inheritance taxes: "CAT") that may be claimed. Where appropriate, steps can be taken to ensure that a person's will is drafted so that these reliefs can be availed of by their children, reducing their overall CAT liability. These reliefs include, business property relief and agricultural property relief, both of which can have the effect of reducing the normal CAT rate of 25% down (rate effective from 8th April 2009) to an effective rate for 2.5% for the child. Other reliefs that can be considered are dwelling house relief and heritage property reliefs. The current CAT free threshold for 2009 that a child can obtain from their parents is €434,000 (reduced by 20% from €542,544 in the April 2009 budget). A significant number of businesses, farms and other property interests exceed this figure, underlining the importance of comprehensive estate planning.

When considering life time transfers it is also important to bear in mind Capital Gains Tax (CGT) and stamp duty. CGT

is chargeable at a rate of 25% for disposals made after 7th April 2009. Stamp Duty rates depend on the asset and the relationships between the parties. Very generous reliefs can also apply to both types of taxes depending on the circumstances of the transfer.

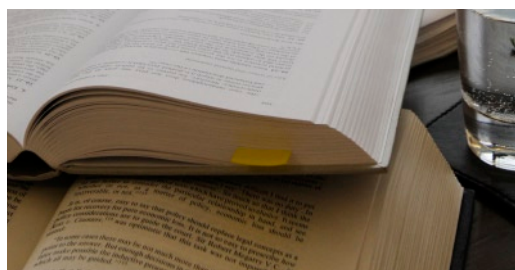
Discretionary Trust wills are popular in the case of young children as they allow for flexibility. The children are not automatically entitled to benefit under the will and the powers of appointment are left with the trustees, who are appointed under the will by the parent. Generally speaking parents are reluctant to have children inherit or acquire large inheritances before they reach a certain age. There is no universally accepted age as to when the children will reach the holy grail of maturity and as such prudent preparation is vital in order to avoid adverse taxation consequences arising. For example, under present taxation law, the Revenue will impose discretionary trust tax on wills that are discretionary in nature for tax purposes once the youngest child reaches the age of 21. The Revenue will take no account of the maturity or otherwise of the child inheriting at 21 years or what stage of life they are at.

Therefore well thought out estate planning is crucial. This can include either lifetime transfers of wealth/assets to the child whilst maintaining a measure of control by the parents and ensuring an income for themselves or post death planning through the use of a family partnership or will trust, respectively. A thorough review of a person's portfolio of assets from a commercial, legal and taxation perspective is a useful starting point in the estate planning process to find a solution that is both cost effective and versatile.

Given the relatively low market value of property and other assets it may now be an opportune time to consider providing for your children. Moreover, following comments by Minister Lenihan when delivering his April 2009 budget, it may be a case that the very generous CAT and CGT reliefs that are available at present may be reduced or written out of the statute books in December 2009 budget.



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Legal Issues for Suppliers Arising in a Liquidation

In these recessionary days, an unfortunate common occurrence is the matter of a company going into liquidation and leaving significant debts behind. This can have a catastrophic effect on the business of suppliers and creditors in general. This article focuses on what suppliers can do to minimise the fall out arising from liquidations. It should be said that the advice also has relevance even where a company may not go into liquidation, but the creditor/supplier wishes to secure some payment for goods supplied or in alternative retrieve its goods.

Retention of title

A supplier/creditor should ensure that its terms and conditions are printed clearly, if at all possible, on its order forms, invoices and delivery notes. One of the most important terms may be a retention of title clause. Essentially, this clause entitles the supplier to retain legal ownership over its goods whilst providing the customer with credit. It can also be an important protection against a buyers insolvency. There are a number of retention of title type clauses, but the two main ones are the simple retention of title clause and the all sums due or current account clause. The simple retention of title clause provides that the legal and beneficial title in the particular goods delivered to a buyer shall remain with the supplier until the price of the goods has been discharged. However, these clauses cease to apply to goods which totally lose their identity after they are incorporated for example in some manufacturing process. The all sums due retention of title clause allows the supplier to retain ownership in all goods, even after the particular consignment has been supplied to third party. This will allow the supplier to recover goods supplied as long as there are outstanding sums owed by the buyer to the seller. One of the key benefits of this particular clause is that when goods supplied are mixed with other goods and become unidentifiable, the seller would not need to identify goods which have been supplied against specific unpaid invoices. There are other types of retention of title claims, but the more complex they are, the more likely they may not be accepted by the Courts! Also, one runs the danger that they may be deemed more in the nature of a security or a charge that has to be registered at the Companies Office. Accordingly, they are not recommended.

Incorporating the Retention of Title Clause into the contract

It must be borne in mind that having such retention of title clauses may prove ineffective if it cannot be shown that the terms and conditions were brought to the attention of the buyer prior to or at the time the contract was made. A classic example of this situation is where a supplier

delivers an invoice after the goods have been supplied. This is why it is preferable that the terms and conditions should be brought to the attention of the buyer at the earliest stage, such as when an account is opened, or at the order acknowledgement stage. It is also useful to have a right of entry clause, permitting the supplier to enter upon the buyer's premises for the purposes of inspecting the goods at any reasonable time. However, if the company goes into liquidation, notice will have to be given to the liquidator and an appointment made to enter the site and inspect the goods. It is imperative that once a company goes into liquidation the supplier/seller inspects the goods as soon as possible and makes an inventory and if possible gets the liquidator to agree the contents of same. This will have the benefit of securing the situation whilst the liquidator and/or his lawyers review the contract documentation to see if the retention of title clauses are in order.

Importance of identification of goods

Even with all sums due retention of title clauses, it is still advisable to ensure that the goods sold have some identifiable mark, and ideally can be co-related with its description in invoices given. There have been many cases where the effectiveness of retention of title clauses have been totally undermined by the lack of such a simple practical step.

What happens if the Liquidator disputes the retention of title clauses?

It is important in such instances that you consult your Solicitor as soon as possible. If you are advised that the retention of title clause is proper, and that your proofs are in order, a case can be taken against the liquidator for conversion of goods. This will entitle you to a declaration that you can recover the goods, or more likely the appropriate value of same, as the liquidator may have sold off the goods. In some cases, this may be preferable e.g. if the goods supplied were computer equipment or other such goods which depreciate very quickly.

Personal Guarantees

It is also suggested that when a company opens an account with you as a supplier a personal guarantee should also be sought from the directors of the company. This can be in short form, amounting to no more than one page appended to the initial account opening form. This will at least give you the option of proceeding against the directors of the company on a personal basis, should there not be any recovery or only partial recovery against the company. Obviously, such guarantees are only as good as what assets back up the individual concerned.



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