MORGAN McMANUS
M
SOLICITORS

Morgan McManus Solicitors

Practising Northern Ireland and Republic of Ireland

Issue 2
april newsletter
04

CONTENTS

NEWS-ITEMS
Morgan McManus Website Relaunch 01
English Legal Services 01
MorganMcManus on www.IntertradeIreland 01
Monthly Employment Law Bulletin 02

Unfairly Dismissed - Can an Employee Claim for Injury to Feelings? 02

ROI Company Directors Beware Penalty Points / Liability / Corporate Homicide / Insurance 03

Driving Licences - International Points Totting Up 04
UK Budget 04 - Harmonisation a Long Way Off 04

UK Budget 04 - continued 05
Business Tenancies Order '96 - Outdated Already? 05

European Tax Ruling - Businesses Allowed to Shop Around 06
Jail Sentence for Company Director 06

Commerical Court - Dublin 07
Employment Law - Restrictive Covenants 07
No Smoking in the Workplace / UK to Follow? 07

Contact Information Northern Ireland and Republic of Ireland for Morgan McManus Solicitors 08

News Items

MORGAN McMANUS WEBSITE

Morgan McManus Solicitors are delighted to announce the re-launch of their website – www.morganmcmanus.com This website details the services provided by the firm in both Northern Ireland and the Republic of Ireland and will be of benefit to existing and prospective clients who wish to ascertain the extent of the private and commercial services which are provided by the firm. There are also valuable links to the websites of Government Grant Agencies in Northern Ireland and the Republic of Ireland and cross-border bodies. Overall, this website is a valuable resource to private and commercial clients living and working both North and South of the Border. The website also details the English Legal Services which are now provided by Morgan McManus Solicitors both at their Clones and Enniskillen Offices.

ENGLISH LEGAL SERVICES

Announcing the extension of their services in the provision of English Legal Services, Seymour Major, Solicitor, who previously practised in England from 1984 until he joined the firm of Morgan McManus in 1996, stated that " this service has been provided in response to demands from existing and prospective clients of Morgan McManus Solicitors both at their Clones and Enniskillen Offices". Before moving to Ireland, Seymour Major had handled a wide range of Private Client work and Commercial Law work relating to small businesses, including Partnership Law, Commercial Litigation and Conveyancing. He was the Senior Partner of Seymour Major and Co. of Harrow, North London.

ENGLISH LEGAL SERVICES AT YOUR DOORSTEP

The benefit for clients of Morgan McManus Solicitors who wish to transact business in England, such as purchasing or selling a property, is that they will be able to carry out this business merely by attending by appointment at either the Clones or Enniskillen Office. This will represent a major saving in cost to such clients.

Morgan McManus Solicitors featured as "Case Study" on InterTradeIreland Website

The InterTradeIreland Website – www.intertradeireland.com - is the Website of the cross-border trade and business development body established under the Belfast Agreement. One of the features on this Website is a section on the experiences of companies which have extended their services to both parts of the island of Ireland. In recognition of the fact that Morgan McManus Solicitors have offices in both jurisdictions, they have now been featured on this section of the website by InterTradeIreland – along with such prestigious companies as C&C, Musgraves, Norbrook, Quinn Direct and the Ulster Bank. These companies, and many others, give the benefit of their advice on what their experiences were in setting up business in the other jurisdiction. The advice of Morgan McManus Solicitors is to be willing to deal with the short term impediments and to look to the long term benefits, such as the effective doubling of the client/customer market-base. The assessment is that, while there is recognition of the operation of complexities in trading on an all-island basis, the ability to practice North and South has contributed and will lead to continued growth of the practice in the future.

Do you want to receive this newsletter by email?
To do so, simply email your request to: etreacy@morganmcmanus.co.uk

MORGAN McMANUS LAUNCH EMPLOYMENT LAW MONTHLY BULLETIN

Morgan McManus is delighted to announce they have now launched an Employment Law Bulletin advising on developments in Employment Law in both Northern Ireland and the Republic of Ireland. Announcing this service, Brian Morgan Partner in the Practice, stated that "employers are having ever increasing difficulties in keeping pace with changes in Employment Law which are being enacted every year as a result of EU Directives. The difficulties for Employers with bases in both Jurisdictions are doubled. This is where the Morgan McManus Employment Law Monthly Bulletin will be of great benefit". The Employment Law Bulletin is not restricted to clients of Morgan McManus. It will be provided by e-mail only and can be accessed by visiting the Morgan McManus website : **www.morganmcmanus.com** where other articles on Employment Law, including the "Cross-Border Analysis of Employment Law North and South" may be read. People may subscribe to this free service and ensure receipt of this e-mail every month by sending an e-mail request to **etreacy@morganmcmanus.co.uk,** detailing their name address, occupation and phone number.

Darina Blake

CAN AN EMPLOYEE WHO HAS BEEN UNFAIRLY DISMISSED CLAIM DAMAGES FOR INJURY TO FEELINGS?

Darina Blake, Solicitor, advises Northern Ireland employers to budget for "Injury to Feelings" in the defence of future dismissal claims.

On 11 February 2004 the Court of Appeal decided in the case of Dunnachie v Kingston Upon Hull City Council, on appeal from the Employment Appeals Tribunal, that compensation for non-economic loss, which includes damages for injury to feelings flowing from the dismissal, brought about by the manner of an unfair dismissal is on principle recoverable.

Mr Dunnachie had been the brunt of systematic abuse by a superior in the work place and became very distressed. He was absent from work for approximately three weeks before he resigned and claimed constructive dismissal against his employer. His financial loss was limited due to his finding new employment quickly. His compensation was consequently based on damage to family life and to the fact that his new employer would afford him less time with his children. In awarding him the sum of £10,000 the Tribunal cited the humiliating and distressing manner of his dismissal and loss of professional status as justification. No medical evidence was relied upon and no medical condition was considered at the hearing. His employer then appealed against this award of non-economic loss.

The Employment Appeals Tribunal decided on appeal that compensation for unfair dismissal should be limited to economic loss only. Mr Dunnachie's legal team appealed the Employment Appeals Tribunal's decision to the Court of Appeal. The issue of whether non-economic loss could be recoverable in such cases was thrown into doubt by the 2001 House of Lords' decision in the case of Johnson v Unisys. In this case Lord Hoffman was of the view that Tribunals might be able to make awards for injuries to feelings caused by the manner of a dismissal, in the event that it breached the implied duty of trust and confidence. Since the Johnson case it has been common practice for aggrieved employees claiming unfair dismissal to claim compensation for injury to feelings and in some cases these claims have been successful in the Industrial Tribunals. This is, of course, in contrast to discrimination claims when employees can claim and receive compensation for injury to feelings.

The appeal in Dunnachie provided the first opportunity for the legitimacy of such economic loss awards to be properly considered by the Employment Appeals Tribunal.

To quote from Lord Justice Smedley's leading judgment,

"Compensation for non-economic loss brought about by the manner of an unfair dismissal is an authority and on principle recoverable. The award of such compensation by the Employment Tribunal in the present case was not excessive and was adequately explained. I would accordingly allow the appeal and restore the award.

Given the division of opinion both within this Court and the effect of Johnson v Unisys Ltd... as well as the impact of these vagaries of authority upon the work of the Employment Tribunals, litigants and advisors, we propose if asked and not dissuaded, to grant Hull City Council leave to appeal to the House of Lords' in order that a definitive answer be given to what is ultimately a short question of statutory construction. In the meantime Employment Tribunals should manage, list and decide cases in the knowledge that the last word has not been said, but is going to be said in the foreseeable future, on this topic."

In the event that the City Council appeals this decision to the House of Lords, and it is likely that it will, a definitive answer will be given to the question of whether an employee who has been unfairly dismissed can claim damage for injury to feelings.

By Darina Blake, BC.L. LL.M.,
Solicitor
email: dmblake@morganmcmanus.co.uk

EMAIL US
NORTHERN IRELAND law@morganmcmanus.co.uk
REPUBLIC OF IRELAND law@morganmcmanus.ie
OR VISIT OUR WEBSITE www.@morganmcmanus.com

Adrian Kelly

company directors beware...

ROI COMPANY DIRECTORS - BEWARE

Adrian Kelly, Company Law Advisor, examines the dangerous and uncertain times that lie ahead for Company Directors in the Republic of Ireland as the following changes to company law appear on the horizon.

PENALTY POINTS

A new proposal is being considered for the possible imposition of 'Penalty Points' on directors of companies who receive any of the following; a warning, on-the-spot fines, a Company Prosecution, Director Prosecution, Strike-Off Listing or a High Court Application pursuant to section 371 of the 1963 Companies Act. A sufficient accumulation of such points, it is thought, will lead to restriction and possibly disqualification of the director in question.

PERSONAL LIABILITY FOR DIRECTORS PROPOSED UNDER NEW 2004 BILL

Section 27 of Part 2 of the new Companies Consolidation Bill 2004 proposes that "any judgment or order against a company wilfully disobeyed may, by leave of the court, be enforced...against the corporate property or by attachment against the director or other officers thereof or by order of sequestration of their property". This section is designed to put the officers of the company on notice that if the company fails to comply with a court order or judgment then the judgment may be attached to their personal assets.

CORPORATE HOMICIDE

A new crime of 'Corporate Homicide' for companies and their officers appears very likely in 2004/2005. The Tanaiste, speaking at the launch of the Law Reform Commission consultation paper on "Corporate Killing" confirmed she was prepared to consider this radical approach in the forthcoming review of the health and safety legislation. Corporate homicide or corporate killing are terms used to refer to circumstances where culpability can be attributed to a corporation for the death of a human being. For example, where a construction worker dies on a building site, owned or managed by a corporation, due to a lack of safety procedures.

The principal difficulty with corporate homicide is proving the culpability of the corporation. The details of this offence remain, as yet, undecided. Two of the options mooted in the consultation paper are:

a. Corporate killing based on identification
b. Corporate killing by careless management

IDENTIFICATION APPROACH

This may be achieved primarily through an analysis of the actions of the management of the particular company in order to identify the individual responsible. However, the danger however may be that the offence will be easier to prove with small companies who have fewer management personnel than to prove against, for example, multi-national companies with layers of management. This arises because analysing the actions or policy making of a multi-layered management structure in a multi-national company may be much more difficult to achieve than, for example, with a small private company.

CARELESS MANAGEMENT APPROACH

The dangers inherent in the above approach could be reduced somewhat if the careless management approach was adopted. This approach was envisaged by the Corporate Manslaughter Bill 2001, which lapsed without being enacted. The proposal in the 2001 Bill was that in order to secure a conviction against a company under the sub-section, it is only necessary to prove a "management failure" – an absence of a proper system of oversight and control. It was not necessary under the 2001 Bill to prove culpability on the part of an individual, let alone a senior management figure. However, the main difficulty with this approach is that the concept of collective culpability runs counter to the established doctrines of the criminal law which are based on individual culpability. Therefore, there may be great difficulty in getting a conviction.

It remains to be seen which approach will be taken. The 'Identification Approach' seems more likely to be adopted as it was provisionally recommended by the Commission in the consultation paper. The Commission, "provisionally", did not recommend the adoption of the 'careless management' approach.

INSURANCE FOR COMPANY DIRECTORS

Insurance cover for company directors may be available in the coming year. Section 56 of the Companies (Auditing & Accounting) Act 2003, permits a company to purchase and maintain insurance policies to protect any of its directors or officers from financial liability. This was not previously allowed pursuant to the Companies Act 1963. The 2003 Act has not yet been implemented and it is expected to be introduced into Irish law in stages. It is submitted that, given the ever more precarious legal position of directors, factors of particular interest will be the cost, cover and attainability of such insurance.

By Adrian Kelly
Email: akelly@morganmcmanus.ie

international penalty points...?

Seymour Major

DRIVING LICENCES – 'INTERNATIONAL TOTTING UP BY THE BACK DOOR'.

Seymour Major Solicitor at Morgan McManus Enniskillen advises ROI motorists prosecuted in Northern Ireland not to assume that their NI Penalty Points will not count.

It is a common perception of many people living near the border that if a motorist, whose driving licence has been issued from the Republic of Ireland, is convicted of a motoring offence in Northern Ireland then the penalty points system will not apply; This is true up to a point.

Penalty points can be imposed on a driver if he is convicted of an offence, which carries an obligatory endorsement. The number of points to be imposed depends on the offence. For example, a defective tyre carries 3 points. With other offences, the Courts have some discretion about the number of penalty points to be imposed. For example, a Court may decide to impose between 3 and 9 points for careless driving.

In Northern Ireland, the statute that gives the Courts the power to impose penalty points is the Road Traffic Offenders (Northern Ireland) Order 1996 (the "RTOO"). Under Article 40 of the RTOO, the Court must disqualify a driver for a minimum of 6 months if he has accumulated 12 or more points in a 3 year period between conviction of a previous offence and the commission of the last one. This is known as the "totting up" provision.

How then does a Northern Ireland Court deal with a motorist holding a licence from the Republic of Ireland? The Road Traffic (Northern Ireland) Order 1981 (the "RTNIO") makes provision for the regulation of Community Licences. A community licence is defined by article 19D as "a document issued in respect of an EEA State other than the United Kingdom by an authority of that or another EEA State (including the United Kingdom) authorising the holder to drive a motor vehicle".

An EEA State is a state within the European Economic Area. Thus, any driving licence issued by the Republic of Ireland authorities is a community licence.

Article 92A of the RTOO sets out which parts of that Order apply to Community Licenses. Significantly, Article 40 (the totting up provision) does not apply. Therefore, it is not possible for a Court in Northern Ireland to disqualify a driver with a Republic of Ireland driving licence just because he has accumulated 12 points. However, the Courts do have power to disqualify a motorist holding a community licence. They can do that if the holder commits an offence, which carries an obligatory or discretionary disqualification. The Courts also have power under Article 92A(4) of the RTOO to endorse the counterpart of the Community Licence. When it is endorsed, a record of it must be sent to the Northern Ireland licensing authority ("the Department") in Coleraine. If the Community Licence holder has been disqualified, the licence must be sent to the Department, which is then obliged to notify the EEA state that issued the licence. At the end of the period of disqualification the Community Licence must be returned to the driver if the licence still authorises him to drive; otherwise it must be sent back to the licensing authority of the relevant EEA state.

What then would be the position if the Courts were presented with what would otherwise be a totting up occasion if the motorist were not a community licence holder? This is where Article 31 RTOO is applicable. Under Article 92A, Article 31 does apply to Community licences. Article 31 provides that the Courts are still allowed to take into account previous penalty points within 3 years before commission of the offence in front of them. It is submitted that Article 31 enables the Northern Ireland Courts to take account of penalty points awarded in the Republic of Ireland. In effect, this could be described as 'cross-border totting up by the back door'.

It is only one year since the penalty points system was introduced in the Republic of Ireland. It is unlikely that there would be many (if any) examples of Courts in Northern Ireland using penalty points awarded on a R.O.I. licence to justify making a disqualification. However, it is only a matter of time before a case of this kind is brought to the attention of the public. In conclusion, any motorist with a republic of Ireland driving licence ought to be aware that the Northern Ireland Courts can take account of penalty points on their licence and also that they can be disqualified from driving there.

UK BUDGET 2004 – TAX HARMONISATION A LONG WAY OFF

Seymour Major Solicitor advises that there is not a lot of joy for Northern Ireland businesses after the UK Budget 2004.

For many people, the indefinite delay of the UK entry into the Euro is seen as a major stumbling block toward greater and efficient trading between Northern Ireland and the Republic of Ireland. However, the lack of tax harmonisation between the two states is also a significant obstacle in the way of this ideal. For example the very high levels of duty on petroleum and diesel is the main reason why so many motorists from Northern Ireland cross the border to pick up their fuel. How far away is tax harmonisation? A very long time, if this year's budget is anything to go by. A move towards tax harmonisation is simply not part of UK Government policy at present. Inevitably, businesses trading on both sides of the border will continue to need specialist cross-border accounting and legal professional services for many years to come. In later editions of this Newsletter we will discuss in more detail some of the taxation differences between Northern Ireland and the Republic of Ireland.

Meanwhile, we highlight below some of the budget measures, which will affect businesses:

TO KEEP INFORMED...
of legal developments in Northern Ireland and the Republic of Ireland visit our website at
www.morganmcmanus.com

BROCHURES AVAILABLE FROM MORGAN McMANUS SOLICITORS.

Free copies of the following brochures are available on request:

Making a Will - Republic of Ireland
Making a Will - Northern Ireland
Administration of Estates - Republic of Ireland
Administration of Estates - Northern Ireland
Cross Border Estates

TO OBTAIN COPIES-

If a Northern Ireland Resident – phone Elizabeth at our Enniskillen Office 028 6632 0102.
If a Republic of Ireland Resident - phone Caroline at our Clones Office 047 51011.

- There is to be a crackdown on the small business incorporation "loophole". Small limited businesses will for the first time pay incorporation tax at 19% on profits extracted from their companies. This follows an announcement two years ago that small businesses would not pay tax on the first £10,000 profits.
- All potential tax avoidance schemes will now require registration with the Inland Revenue in advance. This will give the Inland Revenue investigators opportunities to close loopholes. Any taxpayers using such a scheme will be obliged to use a registration number to identify it on their tax return.
- There is a six-month freeze on fuel duty and no increase in road tax. This concession by the Revenue will do little to attract back Northern Ireland consumers who presently obtain their fuel across the border.
- The Inland Revenue and Customs and Excise are to merge. The Chancellor stated in his speech that the benefits would be threefold: (1) It would provide a joined-up service to taxpayers, particularly businesses; (2) It would ensure that the effort in enforcing tax legislation reflected the risk of doing so. This would maximise revenues while reducing compliance costs for honest taxpayers; (3) It would share the administration, improving efficiency and giving greater flexibility to deploy staff.
- Rules are being introduced on transfer price fixing in relation to Intra- Group transactions wholly within the UK. These measures follow recent European Court rulings that laws which discriminate against new companies on grounds of Nationality are illegal under the principle of freedom of establishment in EU treaties. Fergal Mc Manus discusses the principle of freedom of establishment in his article in this Newsletter regarding a recent European ruling.
- The Inland Revenue, instead of employers, will now pay working tax credit. This measure is expected to reduce some of the administrative burden of making the payouts to workers on this type of benefit.
- Tax breaks are being introduced for companies who spend money on research and development, which results in the advancement of science and technology. The Chancellor has pledged to work to raise the level of science funding as a share of national income in the future.

THE BUSINESS TENANCIES NORTHERN IRELAND ORDER 1996 - IS IT ALREADY OUTDATED?

Seymour Major Solicitor at Morgan McManus Enniskillen advises on Business Tenancies in Northern Ireland and carries out a comparison with England.

The Business Tenancies Northern Ireland Order 1996 ("the Order") is the last in a series of enactments dating back to the early 1900s, which give a tenant protection over his business goodwill. The thrust of the Order is that a landlord will not be able to recover possession of the premises at the end of the term of the lease provided that the tenant performs his obligations under the lease and is prepared to pay a fair contemporary market rent. The policy of the legislation reflects three potentially conflicting interests:

- Landlord's property rights in the land,
- The tenant's property rights and the goodwill of his business,
- The public interest in the promotion of stability, growth and modernisation in the business sector.

The Order covers most types of business lease. It specifically excludes agricultural lettings, mining leases, tenancies that are dependant upon employment, Leases to residential tenants and leases for a term not exceeding nine months.

In recent years, the business sector has moved on. In the past, a typical new business lease would be for a term of 15 to 20 years. Nowadays most new business leases are much shorter, usually for a term of 3 to 5 years. This is partly because prospective tenants are limiting their losses against business failure but it also reflects the fact that businesses are becoming much more mobile and do not necessarily depend upon location for their goodwill. As the information technology rather than location, which is central to a business having strong lines of communication.

A landowner may have planned to use his premises for a development, project or business that will not happen for a number of years but he may be inhibited from risking letting the premises to earn income in the intervening period because of the present law. He cannot exclude the provisions of the Order in the lease itself. Any such clause is void under Article 24 of the Order. Is this right? It is submitted that the present law stunts economic development because it results in fewer premises to let. It also ignores the fact that many prospective tenants do not need a protected tenancy. Furthermore, it drives a tendency for leases to be drafted which are top-heavy with covenants and, in some instances, oppressive against the tenant.

As is already stated, the present law exists to protect the business goodwill of the tenant. To simply abolish the tenant's right to a new lease in all cases would be unfair in the other extreme.

In England the law is slightly different. The basic right of the business tenant to a new lease at the end of the term is similar but it is possible for the Landlord and the new tenant to opt out of a protected tenancy if there is a clause to that effect in the new lease and an order allowing this is obtained from the County Court. The English experience shows that obtaining this kind of court order actually proves to be a 'rubber stamp' exercise in practice but it is an extra cost. In practice, it is the new tenant, who will usually foot the bill.

Should the law be similar to England? It is submitted that English law on this particular issue is a fairer reflection of the balance of good public policy than in Northern Ireland. If a similar provision were enacted in Northern Ireland, it would fall on the Lands Tribunal, rather than the County Court, to administer these orders. What is the point of involving a court or tribunal if the exercise is purely one of a "rubber stamp"? It is submitted that the best approach would be simply to allow landlords and tenants to negotiate new leases that contract out of the provisions of the Order provided that the length of the lease does not exceed 5 years.

Until there is a change in the law, landowners will continue to be in dilemma and those that do will more likely instruct their solicitors to draft leases that are more and more draconian on the tenant.

By Seymour Major
Solicitor
Email : smajor@morganmcmanus.co.uk

BROCHURES AVAILABLE FROM MORGAN McMANUS SOLICITORS.
Free copies of the following brochures are available on request:
Making a Will - Republic of Ireland
Making a Will - Northern Ireland
Administration of Estates - Republic of Ireland
Administration of Estates - Northern Ireland
Cross Border Estates

TO OBTAIN COPIES-
If a Northern Ireland Resident – phone Elizabeth at our Enniskillen Office 028 6632 0102. If a Republic of Ireland Resident - phone Caroline at our Clones Office 047 51011.

Fergal McManus

EUROPEAN RULING ALLOWS BUSINESSES TO "SHOP AROUND" FOR BEST TAX RATES.

Fergal McManus, Solicitor and Professional Tax Advisor, advises that the "De Lasteyrie" case has major tax implications for UK Companies deciding to move their tax residence to the Republic of Ireland.

The European Court of Justice delivered a hugely important decision on 11th March last in the "De Lasteyrie" case. In effect, the Court found that a Member State is precluded from establishing a mechanism to tax "latent increases in value" which has the effect of hindering or dissuading a tax payer from moving to another member state.

There are much wider implications of this decision than may at first meet the eye. The EU Treaty provides that companies have the same rights as individuals when it comes to "freedom of establishment". UK Tax Experts have already identified UK Corporation Tax provisions that are likely to fall foul of this new ruling. Up to this, if a UK company decided to move its operation to Ireland it would be subject to an "exit charge" on going non-resident.

UK Tax Experts believe that the De Lasteyrie case removes this barrier by opening up the possibility for companies throughout the EU to move to low tax Member States, such as Ireland, without being penalised in their home State. Towards the end of this year a new legal entity known as a "European Company" will be entitled to operate across borders in the European Union. This corporate entity will make it all the easier for businesses to base their operations in low tax Member States.

By Fergal McManus LLB, LLM (Comm), AITI, QFA
Solicitor and Tax Consultant
e-mail: fmcmanus@morganmcmanus.ie

For a more detailed Article on this Court Ruling, go to the Articles section of our website at **www.morganmcmanus.com** or contact Fergal McManus directly for further information.

THE CROSS BORDER EMPLOYER

Are you an employer with workplaces in both Northern Ireland and the Republic of Ireland? If so, then you must be concerned with your employment law obligations to your employees in both jurisdictions. Different Statutes apply and you cannot afford to ignore this.

Morgan McManus have prepared a booklet- "A Comparative Analysis of Employment Law North and South"- to cover these different Statutes. If you are a cross border employer and are worried about these obligations, this booklet can be furnished to you free of charge. Simply phone Darina Blake Solicitor at our Enniskillen office on 028 6632 0102 or Brian Morgan Solicitor at our Clones office on 00353 47 51011 for further information.

COMPANY DIRECTORS:

Are you aware of your obligations under the Company Law (Auditing and Accounting) Act 2003?

For further information or advice: contact Fergal McManus or Adrian Kelly at our Clones Office.

JAIL SENTENCE SUSPENDED FOR ERRANT COMPANY DIRECTOR

On the 18th March 2004 the Office of Director of Corporate Enforcement (ODCE) secured its first criminal conviction against a company director. Garda officers who are working with the ODCE arrested the director and charged him with the following offences in December 2003:

- Failing to file annual returns with the Registrar of Companies;
- Failing to keep proper books of account; and
- Fraudulent trading.

A criminal investigation ensued after the liquidator of the company Corran Building Services Limited applied to have the directors of the company restricted in July 2003.

Naas District Court imposed two concurrent sentences of six months imprisonment (which are suspended for 12 months) in respect of the charges. The director is also bound to the peace on his own bond of €250.00 for a period of 12 months.

Significantly, the Director of Corporate Enforcement issued the following statement:

"We have over 50 criminal investigations in the pipeline ... our work will cover not only those situations where companies are in liquidation but also situations where the insolvent companies have ceased trading but have not been placed in liquidation."

TO KEEP INFORMED...
of legal developments in Northern Ireland and the Republic of Ireland visit our website at
www.morganmcmanus.com

Brian Morgan

THE NEW COMMERCIAL COURT (DUBLIN) "THE RICH MAN'S COURT?"

Brian Morgan Solicitor advises that initial assumptions that the Commercial Court would only be open to large Corporations would appear incorrect.

In issue one of the Newsletter we advised that the Commercial Court in Dublin had commenced business from the 12 January, 2004. The objectives of the Commercial Court are the early definition of issues in dispute and, through directions and case management, the speeding up of commercial litigation and reduced costs. It will operate as a separate division within the High Court.

This system will be of major benefit to companies which would otherwise have been involved in commercial proceedings which could have taken years to resolve and, in some instances, put the company out of business. While initial assumptions were that one could only transfer proceedings to the Commercial Court which had a value of at least 1m., under S.I. No. 2 of 2004 (the "Rules of the Superior Courts (Commercial Proceedings), 2004"), the Judge in the Commercial Court is also entitled to transfer to the Commercial Court for Hearing :

"...proceedings....which the Judge of the Commercial List, having regard to the commercial and any other aspect thereof, considers appropriate for entry into the Commercial List".

This provision in the Statutory Instrument will be of benefit to smaller companies who wish to see a speedy resolution of their claims. It does not mean automatic entry of their commercial cases in the Commercial List as this will be at the discretion of the Commercial List Judge. However, it does give some hope to a company which requires the speedy resolution of a litigation problem in order to ensure the company's survival.

More information on developments in the Commercial Court will be provided in future issues.

EMPLOYMENT LAW –ENFORCEABILITY OF A RESTRICTIVE COVENANT

Brian Morgan advises that extreme care should be exercised by Employers when imposing a Restrictive Covenant on their new employee.

WHAT IS A RESTRICTIVE COVENANT?

A Restrictive Covenant is a clause in an employee's contract restricting the ability of that employee, after leaving his former employer, to work in a certain territory for a period of time which might possibility be in competition with that former employer.

WILL THE COVENANT BE ENFORCEABLE?

It must be borne in mind that an effort by an employer to restrict the employee's ability to contract for other work is a restraint of trade. A restraint of trade is regarded as a severe encroachment of an individual's freedom to contract and do business. A contract which is in restraint of trade is void and unforceable against the former employee unless the employer can show:

(a) that the Covenant was intended to protect a legitimate interest, such as trade secrets, confidential information, solicitation and its workforce; and

(b) that the Covenant goes no further that is reasonably necessary to protect that interest.

Generally therefore, when examining the reasonableness of such a Restrictive Covenant, a Court will have regard to the following:

(a) Whether the particular business from which it is intended to restrain the employee has been properly defined.

(b) That the employer has defined a reasonable geographic territory over which the restraint is to extend.

(c) That the employer has set out the shortest necessary period of time for the restraint.

Essentially, the Covenant should ensure that only the most essential restrictions are imposed, rather than having the effect of preventing the employee from obtaining future employment.

STARVING THE COMPETITOR?

As one can see, the fact that an employer does not wish any of this former employees to work for any Competitor is simply not a good enough reason to impose a Restrictive Covenant on that employee.

POINTS TO NOTE

Employers quite reasonably seek advice on what is a reasonable territory and time within which to restrict the ability of an employee. Every case differs on its facts, but some of the following points, from caselaw, are worthy of consideration:

- Any clause that purports to restrict the freedom of a person to work will be in restraint of trade and void, unless the party imposing the restraint can show it is necessary to protect a legitimate business interest and it is in terms no wider than necessary to protect that interest.
- Courts will take a strict line and scrutinise carefully clauses in employment contracts that are in restraint of trade; they are less stringent with Covenants that are entered into in the context of the sale of a business between vendor and purchaser.
- Although an employer can protect its trade secrets, it cannot protect against the use of the employee's own skill, experience and knowhow.
- Employers should take care to use the least onerous type of Covenant necessary to protect a particular interest – the presence of one restraint diminishes the need for others.

Whether a Covenant is wider than necessary to protect a legitimate business interest will depend on all the circumstances of a particular case. The seniority and experience of the employee, the type of interest to be protected, the duration and scope of the Covenant will all be relevant. Specific legal advice should be taken in each individual case where an employer wishes to impose a restrictive covenant on a new employee.

By Brian Morgan, B.C.L.
Solicitor
e-mail : bmorgan@morganmcmanus.ie

UK FOLLOWING IRELAND'S LEAD ON WORKPLACE SMOKING?

A Bill which would protect employees from being forced to work in smoking areas has been introduced in the House of Lords. Presented on national No-Smoking Day, 10 March 2004, the private member's Bill would also give statutory backing to the provision of no-smoking areas in enclosed public places such as pubs, bars and restaurants. Under the proposals, the Government could set maximum permitted exposure levels to environmental tobacco smoke for both employees and members of the public. Meanwhile the TUC has called for tobacco smoke to be classified as a "hazardous chemical" and restricted in workplaces, including bars and restaurants, like other dangerous substances.

To read an Article on the ROI Workplace Smoking Regulations go to the Employment Law Section of our Website and read the March edition of our Monthly Employment Law Bulletin: www.morganmcmanus.com

Do you want to receive this newsletter by email?
To do so, simply email your request to: etreacy@morganmcmanus.co.uk

BROCHURES AVAILABLE FROM MORGAN MC MANUS SOLICITORS.
Free copies of the following brochures are available on request:
Making a Will- Republic of Ireland
Making a Will- Northern Ireland
Administration of Estates- Republic of Ireland
Administration of Estates- Northern Ireland
Cross Border Estates

TO OBTAIN COPIES-
If a Northern Ireland Resident – phone Elizabeth at our Enniskillen Office. If a Republic of Ireland Resident- phone Caroline at our Clones Office.

OFFICES AT

ENNISKILLEN
12 PAGET LANE, ENNISKILLEN, COUNTY FERMANAGH, BT74 7HT
TELEPHONE 028 6632 0102
FACSIMILE 028 6632 2232

CLONES
LAW CHAMBERS, THE DIAMOND, CLONES, COUNTY MONAGHAN
TELEPHONE 047 51011 - FROM NORTHERN IRELAND - 00353 47 51011
FACSIMILE 047 51679 - FROM NORTHERN IRELAND - 00353 47 51679

NEWTOWNBUTLER - THURSDAY EVENINGS
MAIN STREET, NEWTOWNBUTLER, COUNTY FERMANAGH, BT92 6JT

EMAIL US
NORTHERN IRELAND LAW@MORGANMCMANUS.CO.UK
REPUBLIC OF IRELAND LAW@MORGANMCMANUS.IE

OR VISIT OUR WEBSITE WWW.MORGANMCMANUS.COM

morgan mcmanus

PHOTOGRAPHY EUGENE T. HAMILL / PHOTOGRAPHY / T. R.O.I. 047 51788
email / emhamill@eircom.net / www.ethamill.com

DESIGN+PRINT ACOS DESIGN / WWW.THEPRINTFACTORY.COM
TELEPHONE 028 6632 6960 - NI 048 6632 6960 - ROI
JOB 58933