



MORGAN MCMANUS SOLICITORS

With Offices in Northern Ireland and Republic of Ireland
and also practising in England/Wales



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NEWS ITEMS

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The All-Island Trade and Business Awards

Morgan McManus Solicitors were one of only four businesses nominated for the "Best Newcomer" award at the All Island Trade and Business Awards held at the Waterfront Hall, Belfast on the 3 June 2004. The awards were promoted by InterTradelreland.

Pictured at the awards ceremony (left to right) are members of Morgan McManus: Seymour Major, Brian Morgan, Fergal McManus (Barry Fitzsimmons of InterTradelreland), Mary B. Duffy and Dolores McMahon.

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Ronan Hannan

- Qualified chartered accountant following 3 years training contract with PricewaterhouseCoopers from 1998 - 2001.
- Travelled extensively throughout Asia, Australia, New Zealand and South America for 2 years.

Always looked closely at property market in these countries.

- His company "OnePoint Investments Ltd" is now mainly involved in the bulk purchases/reservation of residential units in the north of England which are then sold on to Irish investors.

He provides a "one-stop shop" for the Irish investor in a foreign market. This involves everything from dealing directly with the developer to arranging discounted prices from off-plan properties, arranging the financing, conveyancing, annual returns package for non-resident landlords, furnishings and letting of apartment units.

Shortly, all this information will be available on his website www.onepointinvestments.com which is currently under construction. At the moment he is offering an off-plan residential opportunity in Leeds. This is ideally located in a riverside setting, yet within 10 minutes walk from the city centre. Further prospects are becoming available all the time.

He also sources specific commercial requirements at home and abroad. He is moving into the area of development and hopes to coordinate syndicates for large development projects.

Financial Intelligence Seminar

On the 15th June last Morgan McManus facilitated a Seminar on "Financial Intelligence" in conjunction with advisor Babu Shah (founder of TICN - an internationally franchised company of investment clubs) Brendan Hannan, professional property investor and Ronan Hannan (see Profile) at the Slieve Russell Hotel, Ballyconnell, Co. Cavan. Delegates and Clients of Morgan McManus Solicitors who attended the Seminar were advised on understanding how the financial system works and using the financial system to their best advantage in property acquisition.

There was an excellent response to the Seminar with attendance of delegates from both Northern Ireland and the Republic of Ireland.

Anyone interested in attending such Seminars in the future should contact Elizabeth Treacy at our Enniskillen office 02866320102 or send an e-mail to law@morganmcmanus.co.uk.



Brian Morgan

Data Protection after "Durant"

Employers now breathe a sigh of relief?

Employers will be pleased to note that their obligations under the Data Protection Act appear to have been limited as a result of the UK Case of "Michael John Durant -v- Financial Services Authority". This 2003 Court of Appeal Decision has become commonly known as the "Durant" Decision.

Since the Durant decision the UK Information Commissioner's office has issued guidelines on the 2nd February 2004 titled "the 'Durant Case' and its

impact on the interpretation of the Data Protection Act, 1998". As both the UK and Irish legislation devolve from the same EU directive, the document will be of great benefit to HR Managers in Northern Ireland and the Republic of Ireland.

The Information Commissioner concludes that, following the Durant judgment, it is likely that very few manual files will be covered by the provisions of the DPA.

Before employers jump for joy and decide to be reckless with all of their employee records, it must still be borne in mind that the Durant judgment specifically related to "manual files". Information stored on computer can still be readily retrieved and is therefore subject to the Data Protection Act.

For a detailed Article on the "Durant" Decision and the UK Commissioners Guidelines please refer to an article prepared by Brian Morgan Solicitor of Morgan McManus of April 2004 which can be accessed on our website at www.morganmcmanus.com

STRESS IN THE WORKPLACE EMPLOYERS SHOULD BE ALERT TO THE CLAIMS WHICH CAN ARISE

Brian Morgan, Solicitor, advises employers that stress-related Claims will give rise to more than just Unfair Dismissal Hearings.

Employers have a legal duty to their employees to take reasonable care for their safety at work. Up to the beginning of the 1990's this duty almost exclusively concerned physical injuries. Since then, the law has developed to include a duty to take reasonable care for their safety from mental,

psychological or psychiatric injuries that emanate from workplace stress, harassment and bullying. In this article we shall concentrate on stress injury, which can arise from excessive workload rather than from bullying and harassment. While work related stress can be a good motivator, too much stress or unrealistic expectations can affect workers' health and lead to problems with performance and attendance, which in turn can translate into legal claims.

What is stress?

"Stress" is not an illness in itself, despite the fact that many doctors will put it on a medical certificate.

The Irish Health and Safety Authority defines stress as arising:

"when the demands of the job and the working environment on a person exceeds their capacity to meet them".

The U.K. Health and Safety Executive defines stress as:

"the adverse reaction people have to excessive pressure or other types of demand placed on them".

However, long-term or (severe) stress can, result in actual physical and/or mental illness. This could give rise to the following types of legal complaints; personal injury, constructive dismissal, unfair dismissal, discrimination and disability discrimination;

Personal injury

A personal injury claim in this context is an allegation that the employer has failed in its duty to take reasonable steps to ensure an employee's safety and to protect him or her from reasonably foreseeable risks.

CCTV

WHEN CAN AN EMPLOYER INSTALL CCTV IN THE WORKPLACE

Brian Morgan advises that employers should exercise caution before considering installing CCTV in the workplace.

Many employers, in an effort to keep a watchful eye over their employees, rush to install CCTV in the workplace without considering the legal implications which can arise. Considerations of installation of CCTV should be approached with both the legal and HR issues in mind.

Legal Issues

Prior to the UK Data Protection Act 1998, which came into force in Northern Ireland on the 1 March, 2000 and the ROI Data Protection Act 2003, which came into force in Ireland on the 1 July 2003, there was no statutory regulation on the use of CCTV in the workplace. These Acts place responsibilities on employers to process personal data (data relating to identifiable living individuals) which they hold in a fair and proper way.

There are both civil and criminal penalties for breach of this legislation. The UK Information Commissioner has published a draft code on the use of personal data in the workplace. It is intended to help employers comply with the Act and establish good practice regarding the handling of personal data in the workplace. While this is a UK guide, it is also of assistance in ensuring compliance with the Irish Legislation as both the UK and Irish Data Protection Acts evolved from the same EU Directive.

The code applies to all aspects of monitoring employees in the workplace, including the use of CCTV. While it is not legally enforceable, it contains the Information Commissioner's recommendations on compliance with the legal requirements of the Act. An employer would therefore be strongly advised to follow the code. Under the code, an employer must:

- Ensure that he has a specific purpose for introducing the CCTV before he puts it into operation. This is important, as it will determine whether the monitoring, particularly if it is to be covert, is permissible.
- Decide if and how the CCTV monitoring should be introduced by carrying out a detailed impact assessment. This must take into account that the monitoring must be no more than is necessary and proportionate to achieve the business purpose. Accordingly, monitoring by CCTV in parts of the workplace other than where the employer suspects that a criminal act is being committed will be difficult to justify.
- In most cases staff should be made aware that they are being monitored. They should also know why the CCTV is being introduced. This is not necessary where the monitoring is being introduced to prevent or detect criminal activity, as it may tip off the person being monitored.
- Visitors or customers who are likely to be captured by monitoring should also be made aware that it is in operation and informed of

reasons why they are being monitored. However, again, this may not be practicable if it is likely to tip-off the people the employer wants to monitor.

- The employer must also not use personal information collected through CCTV monitoring for purposes other than the prevention or detection of the criminal activity for which monitoring was introduced. The only exception is when the information is such that no reasonable employer could ignore it because, for example, it reveals other criminal activity or gross misconduct. Once the purpose for which the monitoring was introduced has been achieved the monitoring must cease.
- Lastly, all CCTV footage should be securely locked away from prying eyes. The employer has legal duties and responsibilities regarding the collection and use of CCTV footage, including a common law duty of confidentiality. Any footage should only be used for the purposes for which it was intended and not be sold or given to any unauthorised person.

HR Issues

In considering the above legal issues the person dealing with human resources issues must be particularly conscious of the following:

- The assessment should consider a number of factors, such as the benefits of monitoring, any adverse impact it might have on staff and whether the firm can achieve similar benefits by using a less intrusive method.
- The employer should also ensure all discussions regarding the CCTV surveillance, including the impact assessment, are properly documented. If CCTV is to be used, all employees affected need to know why (unless this defeats the object of introducing the CCTV- such as the prevention or detection of criminal activity).
- The employer should also ensure that the CCTV is not used for any other purpose and for no longer than is absolutely necessary.
- The employer must be aware of his duty not to misuse the information collected by CCTV. He should also be instructed not to act on any information collected by it without giving the employee an opportunity to respond.
- The information collected should be destroyed if it is not to be used for the intended purpose, unless other misconduct is revealed.

Breaches of the provisions of the Legislation can lead to complaints by employees to the relevant Information Commissioners in each jurisdiction and can also result in criminal prosecution.

For a more detailed Article on employers obligations under Data Protection Acts, visit www.morganmcmamus.com and access an article dated April 2004 by Brian Morgan on "Data Protection after Durant" - employers now breathe a sigh of relief?.

Where an employee:

- suffers a recognised illness (eg clinical depression);
- as a result of the employer's negligence; and
- the employer could reasonably have been expected to foresee that this might happen

the employee can recover unlimited damages for the illness, including damages for loss of income, pain and suffering and loss of amenity.

Constructive dismissal

Employers are also under two implied contractual duties that are relevant in cases of stress at work, these being:

- the duty to take reasonable care to protect workers' health; and
- the duty not to act in a way that destroys mutual trust and confidence.

Breaching either of these implied terms can amount to a fundamental breach of contract entitling the employee to resign and claim wrongful and/or constructive dismissal. However, for the employee to be successful in such a claim, the employer's breach must be very serious.

Unfair dismissal

Until recently, stress-type issues were thought to be irrelevant to an ordinary unfair dismissal claim in that Employment Tribunals did not award damages for non-financial loss. However, the position in the UK may have been changed as a result of the decision in *Dunnachie v Kingston upon Hull City Council* [2004] IRLR 287 CA, in which the Court of Appeal held that damages are possible for 'real injury to self respect'. This could include injury to feelings and/or psychiatric damage caused by the manner of a dismissal.

Discrimination

In Northern Ireland race, sex, disability, religious or sexual orientation discrimination or in the Republic of Ireland discrimination arising because of gender, marital status, family status, sexual orientation, religion, age, disability, race or membership of the travelling community causes stress, this can lead to an increase in the compensation awarded by the tribunal.

Disability discrimination

If the condition suffered by a stressed employee is sufficiently serious, it could amount to a disability in Northern Ireland under the Disability Discrimination Act 1995 and in the Republic of Ireland under the Employment Equality Act, 1998 and dismissal of the employee or a failure to make 'reasonable adjustments' could amount to unlawful discrimination.

A more detailed Article on this subject which covers Caselaw and how to deal with a stress-related complaint may be downloaded from our website at www.morganmcmamus.com

THE PERSONAL INJURIES ASSESSMENT BOARD AN IRISH SOLUTION TO AN IRISH PROBLEM?

With effect from midnight on the 31 May 2004 all employer liability claims in the Republic of Ireland in which Proceedings have not yet been issued must be submitted for assessment to the PIAB. With effect from midnight 21 July 2004 all road traffic accident and public liability claims also, where proceedings have not been issued, must be issued for assessment by the PIAB. The PIAB was established by the Personal Injury Assessment Board Act, 2003. It is an independent statutory body whose main function is to assess the amount of compensation due to an injured person where those injuries arise from workplace accidents, road traffic accidents or public liability claims. The PIAB can only assess such claims if the respondent does not wish to dispute liability for the accident.

Where liability is disputed the PIAB will issue a document called an Authorisation to the claimant to allow that person to issue Court Proceedings. It is important to note however that if a party agrees to an assessment being carried out by the PIAB, this does not constitute an admission of liability. Both

the claimant and respondent are free to accept or reject the assessment made by the PIAB. If this happens, the PIAB will issue an Authorisation allowing the claimant to issue proceedings before the Courts. In that instance however the respondent can effectively change his mind on the liability issue and then contest liability where he had previously indicated to the PIAB that he did not wish to dispute liability.

It is understood that it will take the PIAB approximately one year to dispose of claims. This effectively means that, where the respondent rejects the assessment of the PIAB, the Claim will go before the Courts one year later than it would otherwise have gone. While it is the aim of the Government to exclude the costs associated with Court actions by the introduction of the PIAB, one wonders whether the Government is not simply adding in a further layer of cost by the introduction of the PIAB assessment procedure. Furthermore, looking at the experience of claimants in the Employment Appeals Tribunal where they have found it necessary to engage legal assistance but at their own cost, one can look forward to a system where the claimants will find it necessary to engage legal assistance and suffer the prospect of being obliged to pay the Solicitor out of their compensation. Would it not have been fairer for all concerned for the government to rationalise the Court's personal injury system, as had been suggested both by the Law Society and the Bar Council?

More illogical activity can be expected in the forthcoming Civil Liability and Courts Bill, 2004. If enacted, the Bill will require a claimant to detail in writing to the Defendant within 2 months of his accident the nature of his claim and to issue proceedings within two years (whereas the term allowed presently is three years). What the Government appears to have overlooked is the fact that there are genuine claimants who will not issue proceedings or indeed even instruct a Solicitor within two years of their accident, in the hope that they will recover from their injuries. Does this mean that all victims will be encouraged to issue claims immediately (whether genuine or not) for fear that those claims might become statute barred?

It must be acknowledged that in the past there may have been fraudulent claims. These were however a small minority. It must also be acknowledged that there have been excessive costs associated with the Court litigation system. The danger however is knee-jerk reaction. The writer believes that PIAB and the Civil Liability and Courts Bill 2004 is such a reaction. Neither the Claimants' or the Respondents' best interests will ultimately be served by this system. It is a quick-stitch solution which may lead to long-term problems.

by **BRIAN MORGAN**, Solicitor
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Seymour Major

GAZUMPING WHY IT HAPPENS AND WHAT CAN BE DONE ABOUT IT

Seymour Major, Solicitor, discusses gazumping and the over heating property market in Fermanagh.

When a person (the buyer) agrees verbally to buy a house at a particular price, it is reasonable for him to expect that once his solicitor has got the contract ready for him to sign, things will remain that way and the sale will eventually close on the terms agreed. Unfortunately, that is not always the case. Before a formal legal contract is entered into, the seller can pull out of the deal. If the seller then demands more money or sells to somebody else at a higher price, the buyer is said to be "gazumped".

Gazumping is more likely to occur when property prices are rising strongly. In a weak property market where prices are falling buyers have been known to re-negotiate a price downward just before offering a written contract. This phenomenon is known as "Gazundering".

To most people, gazumping or gazundering is morally reprehensible. Victims are often left having expended money on services such as surveys, legal and mortgage advice with nothing to show for it. This is not to mention the considerable emotional cost to people, particularly those that have set their heart on their dream future home. Most right-minded people agree that the law should protect people against gazumping or gazundering. So why does the law allow this to happen? The answer lies partly in the present law of contract and the present system of conveyancing.

Contract law and the present conveyancing system

- In law, for a contract to be binding, there must be
- (1) An offer by one party which is accepted by the other
 - (2) Consideration
 - (3) An intention by the parties to be bound by the contract
 - (4) Where the contract is for the sale of land, it must be signed or evidenced in writing containing the essential particulars of the contract and signed by the party to be charged or his duly authorised agent.

Normally, when parties agree an original deal through an estate agent to buy and sell a property, items (1) and (2) above are present, but (3) and (4) are missing. That is because the parties, particularly

the buyer, will not want to become legally bound to a contract until he is ready. He will need to arrange a survey. If he is borrowing, he will need a mortgage offer. He will also need his solicitor to check the title and find out as much as he can about the property through enquiries and searches. It is only when those matters are in order that the buyer can safely offer an unconditional contract to the seller. Unfortunately, it is precisely because the buyer needs that time that gazumping occurs.

How can gazumping and gazundering be prevented?

The problem has exercised the minds of UK Parliamentarians over many years. Other jurisdictions such as Scotland, where the conveyancing system is very different and where gazumping is less likely, have been scrutinised carefully. Unfortunately, without going into detail, those other systems have been found to have other problems, which outweigh the justification to adopt an entirely different system. Reform in this area, when it comes, will centre on ways to speed up the existing system. In November 2002, the a bill was introduced in the UK Parliament which would compel the seller to make available a home information pack containing all the searches and a survey report. The new bill applies to England and Wales only. According to the Government's timetable, it is unlikely that buyers will benefit from the new system until 2006. For people living in Northern Ireland, the reforms are not likely to be available for some years after that.

Are there any existing ways of minimizing the risk of gazumping?

One legal device, which has been used to prevent gazumping, is the lock out agreement. A lock out agreement is a contract ("the side contract")

whereby the seller agrees with the buyer that as long as the buyer offers a contract ("the main contract") to the seller within a set period of time and pays a non-refundable deposit, the seller is legally bound to sell the property under the main contract. Lockout agreements had been used frequently in England as early as the mid-1980s. In the case of *Walford -v- Miles* [1992] 2 AC 128 the House of Lords finally recognised that a lock out agreement was enforceable.

A lock out agreement has limits to its usefulness. A seller will not wish to be waiting too long for the buyer to commit himself whilst there are limits to how much the buyer is prepared to risk losing as a non-returnable deposit. Experience in England suggests that some developers are prepared to give lock out agreements for periods of up to 28 days for a non-returnable deposit of about £1,500. There is no reason why lock out agreements should not be used in Northern Ireland, particularly when the buyer is buying a property from a seller with no dependant purchase, such as a developer. Finally, in order for them to work in practice, it would be necessary for Estate Agents and those negotiating sales of property to be willing to work lock-out agreement and actively encourage the parties to make use of them, where appropriate.

DEBT COLLECTION NO HIDING PLACE FOR DEBTORS ACROSS THE BORDER

Seymour Major explains that creditors with debtors in both jurisdictions should consider using a solicitor's firm that practices in both jurisdictions to collect their debts.

No matter how well your business is run and no matter how well you check your customers, there will always be debtors who end up owing you money. For some companies this is an irritation to their business. At the other end of the spectrum, the survival of the business will depend on how quickly the debts, or some or part of them, can be recovered. By the time that solicitors are instructed, the debtor has had numerous letters, telephone calls and or direct approaches asking to pay the debt. Inevitably, it is the worst of the bad debts that the solicitors are usually asked to collect.

At some point, a decision must be made as to whether to write off the debt or to try to recover it by instructing a solicitor. Ideally, that decision should be on the basis of information about the debtor's creditworthiness. If the debtor is insolvent, there is no merit in pursuing the debt. Quite often, the debtor is in financial difficulty but not necessarily insolvent. It is often a matter of fine judgment deciding whether or not to pursue the debt. The economics of pursuing a case are always factors in deciding whether to take legal action. This is particularly so if the debt is a small one. A debt is a small debt if the claim is for £2,000 or less (Northern Ireland) or €1,270 or less (Republic of Ireland). If a small claim is defended, the successful claimant cannot recover costs except for the nominal fee for issuing proceedings. Some businesses are put off from pursuing a debtor, simply because they live or carry on business across the border. This would be due, in part, to extra expense and extra time taken, because most firms of solicitors would need to instruct another firm of solicitors on the other side of the border to commence proceedings for recovery of the debt.

Some debts can be recovered in the courts in either jurisdiction. An example of this is where goods and services were ordered in one jurisdiction but the debtor lives or carries on business in another jurisdiction. Usually, it is better to sue the debtor where he lives or carries on business because of the extra expense and time involved enforcing a judgment from one jurisdiction in the other.

Companies that use Morgan McManus debt collection service can content themselves with the knowledge that we can use whichever jurisdiction suits the particular circumstances of the case, thus resulting in savings to them in both time and expense.

BUYING AND SELLING PROPERTY IN ENGLAND AND WALES

Seymour Major, Solicitor who handles conveyancing work in both Northern Ireland and England, highlights the main differences in procedure in the two jurisdictions.

There are considerable differences in Land and Conveyancing Law between England and both jurisdictions of Ireland. However, to the person who is buying and selling property, it is the procedural differences in the jurisdictions, which are most significant.

Some of the procedure in England though similar, is simpler. There is no equivalent of the Home Charter Scheme in England, by which the Northern Ireland Law Society reassuringly regulates and monitors conveyancing processes relating to residential property.

There are fewer essential searches in English Conveyancing. For example, the information contained in Northern Ireland searches made of the Department of Environment, the District Council, the Northern Ireland Housing Executive and the Statutory Charges Register are all set out in one search made to the local authority in England. In Northern Ireland, the standard conditions of sale provide that it is the vendor who is responsible for the cost of all pre-contract searches. In England, it is the buyer who usually has to bear those costs.

Before contract, in both Jurisdictions, the buyer's solicitor must satisfy himself that

- (a) The searches are in order
- (b) the draft contract is satisfactory
- (c) the vendors' solicitors have provided satisfactory replies to preliminary enquiries.

If the buyer is taking out a mortgage, it is essential that the buyer has a satisfactory mortgage offer before contract. In Northern Ireland, the standard contract provides that the contract can be conditional upon the buyer receiving a satisfactory mortgage offer. One of the difficulties with that type of condition is that the completion date is not fixed on a specific calendar date. In England, many property transactions are tied up in a "chain". Where there is a chain, the parties cannot usually move on any date, except the completion date. For this reason, this type of conditional contract is rarely used in England. The most common cause of delay in English property transactions is the wait for one or more parties in a chain to receive their mortgage offer. The lesson for those buying property in England is that they should give top priority to

the arrangement of their finances. In England, the parties become legally bound on exchange of contracts. This occurs when their respective solicitors simultaneously exchange two identical documents, signed by the seller and the buyer. This differs from Northern Ireland in that only one document is signed by each of the parties. In that case, contracts become binding when the seller has signed and accepted the contract, which has already been signed by the buyer.

In both England and Northern Ireland, final searches must be carried out between contract and completion. In England the buyer's solicitor carries out a Land Registry search and a bankruptcy search or (if the property is unregistered) a Land Charges Act search. Other processes between contract and completion are similar as between Northern Ireland and England. The buyer's solicitor has to prepare requisitions on title, draw up the sale deed and the mortgage deed and report on the title to the mortgage lender.

Once contracts are exchanged, the buyer is legally bound to buy the property. The contract will usually stipulate the date on which the buyer must complete (the completion date). In any jurisdiction, failure to buy the property on the contractual completion date is a breach of contract. However, experience shows that in Northern Ireland, there is a much more relaxed view taken when completion is delayed. In England, a much stronger line is taken. Furthermore, the consequences of delayed completion are usually much greater. The vendor will rarely allow the buyer to move into the property until the purchase money has been received. Where there is a chain, the situation is more acute because a number of parties in the chain depend on each other to get money through on time. Where there is a breach of contract because of delay, the damages can be large in the event of a chain. The party at fault can end up being obliged to pay not only his accommodation and storage bills, but also those of the others in the chain. Due to the greater need for speed and precision in England, the buyer almost always sends the purchase money by the bank telegraphic transfer or CHAPS. In Northern Ireland Telegraphic transfers or Chaps payments are much rarer and it is usual for the buyer's solicitor to send the purchase money in the post by client account cheque.

In both Jurisdictions a Stamp Duty Land Tax Form must be completed and delivered to the Revenue, whether or not there is any tax to be paid on completion. The Stamp Duty Land Tax rates are the same in both England and Northern Ireland. For the first £60,000, there is no duty payable at all. Between £60,000 and £200,000 it is 1% between £250,000 and £500,000 it is 3% and above £500,000, it is 4%.

A transaction must be registered at the Land Registry in both England and Northern Ireland. In England, the Land Registry fees are cheaper. For example, if you are buying a property for £150,000 the land registry fee in England is £150, whether or not you have a mortgage. In Northern Ireland, the land registry fees are £300 with an additional fee of £70 if the buyer has a mortgage.

Needless to say, it is obvious that it would be a much simpler process for a person in Northern Ireland or the Republic of Ireland contemplating purchasing property in England to instruct a solicitor's firm that is familiar with the procedures that apply in both jurisdictions.

by SEYMOUR MAJOR, Solicitor,
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Mary Brigid Duffy

Where there's a Will

Mary Brigid Duffy, Solicitor (Clones office)
Seymour Major, Solicitor (Enniskillen office)
advise on the benefits of making a Will.

Why should I?

It is said that there are only two things that we are sure of in life, Death and Taxes. Making a Will can help minimise any potential tax liability for your beneficiaries. It will also ensure that your wishes are carried out after your death. In particular, if you own property or any other any sizable asset, a validly executed Will should make the administration of your estate more straightforward and will lessen the obligations on your next of kin.

What happens to my estate if I don't?

If you die intestate, i.e. without a valid will, your assets in the Republic of Ireland will be divided as follows:

If you have a surviving spouse and children two thirds of your estate will pass to your spouse and one third will be divided equally between your children including children of any pre-deceased child. If you have no children, your spouse takes the entire beneficial interest in your estate. If you have no spouse your children take all equally. If you are single and have no children and your parents survive you, they are your beneficiaries. If your parents are deceased, your siblings and any child of a pre deceased sibling take the entire estate equally. After that aunts/uncles will inherit if they survive you and cousins inherit if there are no aunts or uncles. The State is the ultimate intestate successor if no next of kin can be traced on your death. The position in Northern Ireland differs from the above in respect of the entitlements in a situation where there is a surviving spouse. If there is a surviving spouse and no surviving children, parents or siblings or their children, the spouse takes the entire estate. If there is a surviving spouse and surviving children, the spouse takes the first £125,000, the personal chattels (belongings) and a portion of the estate depending on the children, including those of a pre-deceased child. This changes again if there is a surviving spouse and parents or siblings. As in the Republic of Ireland, if there is no surviving spouse, the children, including children of a predeceased child, take the entire estate equally. The Crown is the ultimate intestate successor in Northern Ireland. The intestacy rules in England and Wales are also different.

What about if I'm married?

Making a Will is perhaps most important in cases where you have a spouse and children. Nowadays

most married couples own their family home jointly and the vast majority of married people appoint their spouse the sole beneficiary of their estate. However, no one can predict the future and you should be aware of the importance of including provisions in the tragic case of joint death. Who will look after your children? What provision will be made for their future?

Who will look after my children?

You can use a Will to appoint guardians for your children if you die when they are minors. This is usually only crucial if the other parent has died but sometimes there are issues regarding the ability of the other parent to look after a child. We can advise you about this. In Northern Ireland, an appointment of a guardian can result in the guardian obtaining parental responsibility under the Children (NI) Order 1995.

Or if I'm getting married

If you are single and have already made your Will, you should be aware that after your marriage your Will is no longer valid. A spouse has certain rights to their spouse's estate. This is known as a "legal right share" and prevents a spouse being deliberately excluded from another spouse's Will. If this occurs the living spouse can sue the deceased spouse's estate.

Or separated or divorced

If you are divorced or separated, a clause preventing your former spouse's entitlement to the legal right share in your estate should have been included in your court order.

Does it make any difference where I live or where my assets are?

Which laws apply to your estate depend upon (a) where you are domiciled and (b) where your assets are. If you die without making a Will, the law of the country where you are domiciled will determine which intestacy rules apply. As above, the intestacy rules are different as between England and Wales, Northern Ireland and the Republic of Ireland.

If you are domiciled in Northern Ireland or England, you can have a claim made against your estate under the Inheritance Provision for Family and Dependents (NI) Order 1979 (Northern Ireland) or the Inheritance Provision for Family and Dependents Act 1975 (England). Under these statutes, there are a number of classes of relative and dependants that can make a claim against the estate if the Will or intestacy is unfair. In the Republic of Ireland, The Succession Act, 1965, governs the position. A spouse can make a similar claim against the estate. However, a child of the deceased can claim against a Will if they feel that the will did not make proper provision for them.

Both your domicile and the whereabouts of your assets are the major factors, which determine how much tax comes out of your estate. If there is any cross-border element to your estate, it is crucial that you obtain advice from a specialist cross-border law firm such as Morgan McManus.

If you need more information

By contacting our Clones or Enniskillen offices we will provide you with our "Making a Will" Booklet which will assist you with your preparation and answer any questions that you have.

by
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Fergal McManus

Tax Tips for Property Investors in the Republic of Ireland

Fergal McManus, Solicitor and Professional Tax Advisor, outlines a number of tips that may reduce the tax liability of residential property investors in the Republic of Ireland.

In this Article, I intend to set out certain tax saving tips that will help residential property investors reduce their tax bills. It is important to point out to potential investors the importance of getting coherent legal advice not only in respect of the purchase of the property but also the Tax framework, in order to minimise the overall cost to the investor. Conveyancing services provided by certain low cost providers often take little account of the most tax efficient way of conducting a particular transaction or indeed the long term tax implications of the investment. Morgan McManus Solicitors endeavour at all times to take a holistic approach to our clients' needs in this regard.

TAX TIPS

- The value of contents, fixtures and fittings can be deducted from the overall price of a property when calculating stamp duty.
- The interaction of VAT and stamp duty can be used to significantly reduce, or in certain cases even remove, liability to stamp duty.
- It is possible for residential property investors to reclaim VAT on the purchase price of newly erected property. However, there are consequences of reclaiming the VAT which should be discussed with your Solicitor or Tax Advisor.
- When you are calculating your Tax bill on your rental income, you are allowed to deduct the interest on any loans or mortgages you obtained to acquire the property, as such large borrowing or interest only borrowings on residential property investment is tax efficient.
- You are allowed to claim a tax deduction against rental income for the depreciation of contents, furniture and fittings that are provided by you for your tenants.
- Section 23 type investments allow an investor to off-set a significant proportion of the cost of building a Section 23 property against not only

the rental income of that Section 23 property, but all that investor's other Republic of Ireland rental income.

- Certain Tax Shelters provide for capital allowances e.g. certain designated commercial property. These "capital" allowances are more flexible than Section 23 relief as capital allowances can be off-set not only against rental income but the balance, subject to certain limits, can be off-set against all of the investor's earned income e.g. the investor's salary.

The moral of the story is that the clever property investor will make sure to get the best advice at the outset, as this may well save him or her a significant sum of money over the lifetime of the investment.

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Adrian Kelly

As the owner of a Limited Liability Company do you need Employer's Liability Insurance?

Adrian Kelly, Company Law Advisor, discusses the shortcomings of limited liability protection afforded by a company to an employer in the running of a business. Recent case law has confirmed that if an employer is actively involved in the running of a company's business, he may be held personally liable in a claim taken by an employee.

Employer's Liability insurance is not compulsory in Ireland, and so many companies in Ireland do not have Employers Liability Insurance. For many company directors and shareholders the common perception is that the limited liability status of their company will limit their financial liability to whatever amount, if any, is unpaid on the shares that they own.

However, the recent Supreme Court case of *Shinkwin v QuinCon Ltd. & Nicholas Quinlan* (Unreported November 21 2000) has shown this belief to be a misconception. This case involved an accident on 3rd August 1993. The plaintiff who was twenty years old at the time of the accident worked for a small factory, which made trophies. He injured himself while working on a jig saw machine. He had been working on that machine for eight months. While moving the jig saw machine, which was at the time in motion, the plaintiff's right hand slipped and came in contact with the saw and he lost the index, middle and ring finger and part of his thumb. The machine was inadequately guarded and he had never received instruction in how to move the machine whilst cutting. The plaintiff issued proceedings against the company and its owner. The company was uninsured, had no assets and did not defend the claim. The plaintiff issued a claim against the owner and sole shareholder of the company in his personal capacity.

The High Court found in the employee's favour and awarded him IRE304,000.00 against the owner of the company. The Supreme Court, on an appeal against the High Court decision, analysed the protection afforded to the owner of a company by virtue of its limited liability status. Interestingly, the Supreme Court gave an example of when an owner, or owners of the company, would be absolved from liability. Fennally J. stated that a person might be the sole effective and controlling shareholder in a business run by a company, but have no involvement in the day-to-day operations of the business. In this instance a person would have control of the company but not of the manner in which it conducted its operations. Such a person, he said, would not be responsible to employees injured by the negligent acts of the company and in particular, the failure of the company to ensure that there was a safe system of work in operation in its factories.

The Supreme Court found the owner of the limited company personally liable to the injured party. This was primarily because it was found in evidence that he had personally taken on the young and untrained employee to work in a factory managed by him and put him to work on a potentially dangerous machine. Therefore, it was found that he was unable to benefit from his company's limited liability status and that he was personally liable for the acts of negligence which injured the plaintiff.

This was not a ground breaking legal decision, as no new area of law was decided upon. However, it is noteworthy because it confirms that which was previously thought to be the position. Hence, the legal position is that if you are the owner of the limited company and are actively involved in the day-to-day running of your company's business you should consider obtaining Employer's Liability Insurance to protect you in the future.

To find out more about your responsibilities as a director or secretary of a limited company, contact Fergal McManus or Adrian Kelly at our Clones Office.

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Darina Blake

DEALING WITH REQUESTS FOR FLEXIBLE WORKING IN NORTHERN IRELAND

Darina Blake, Solicitor, looks at how employers should follow the legal duty to consider applications for flexible working from qualifying employees.

One year on many employers seem to be somewhat confused regarding their legal duty to consider applications for flexible working from employees who are parents of young or disabled children. The Employment (Northern Ireland) Order 2002, which came into effect more than twelve months ago, gave parents of children under the age of 6 years or disabled children under 18 years the right to apply for flexibility in their working arrangements.

In order to make an application to work flexibly the employee must:

1. Have a child under 6 years, or 18 years in the case of a disabled child.
2. Be employed for at least 6 months with their current employer.
3. Apply at least two weeks before the child's 6th birthday or in the case of a disabled child his 18th birthday.
4. Make the application to allow them to provide care for that child.
5. Have responsibility for the child's upbringing.
6. The employee must not have made any other application to work flexibly during the previous 12 months.
7. The employee must not be either a member of the armed forces or an agency worker.

It is imperative for employees to note that flexible working is not an automatic right, as there will be circumstances where the employer is unable to accommodate an employee's request. However, a the employer has a duty to respond to the employee's application.

So what ways can an employee be accommodated by working flexibly?.....

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FREE EMPLOYMENT LAW AUDIT

The Department of Trade and Industry (DTNI) has published the following guidance:

- Annualised hours- this relates to working time organised on the basis of the number of hours to be worked over the year rather than a week.
- Compressed hours- this allows individuals to work their total number of agreed hours over a shorter period eg. To work their weekly hours over 4 rather than 5 days.
- Flexi-time- gives employees choice about their actual hours at work.
- Home working- this doesn't have to be on a full-time basis and it may suit an employee to divide time between home and office.

- Job sharing- this typically involves two people employed on a part time basis, who work together to cover a full time job.
- Shift working- this gives employers the scope to have their business open for longer periods than an 8 hour day.
- Staggered hours- this allows employees to start and finish their day at different times.
- Term time working- this allows employees to take unpaid leave of absence during school holidays.

Although it will not always be possible to accommodate an employee, an employer is under an obligation to give serious consideration to a flexible working application.

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EMPLOYERS

- Do you provide written information to your employees on commencement of employment in accordance with your legal obligations?
- Do you provide contracts of employment and staff handbooks to your employees?
- What legal protection would you have if you were sued by your employee?

For advice and assistance,
contact us for an initial free 1 hour consultation.

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