

# Morgan McManus NEWSLETTER



BRIAN MORGAN AND FERGAL McMANUS  
- PARTNERS

**W**elcome to the Spring 09 edition of the **Morgan McManus Solicitors** Newsletter. Morgan McManus practise in both the Republic of Ireland and Northern Ireland, providing an All-Island legal service.

The purpose of this Newsletter is to keep our clients informed of developments – to ensure that you, our clients, are aware of the skills of our Partners, Solicitors and staff and of our services. If you don't have reason to use our services in the near future, please recommend us to other persons requiring legal services in the Republic of Ireland and Northern Ireland. We rely on your support.

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## Morgan McManus Announces Launch of New Website



Morgan McManus are delighted to announce the launch of an additional website [www.accidentclaimslaw.com](http://www.accidentclaimslaw.com).

This website provides information on personal injury claims and employment law claims. Whether your accident or employment issues arise in the Republic of Ireland or Northern Ireland; whether you are claiming or a Claim has been made against you, it is important that you are informed.

As well as comprising information on processing a Claim, we also look at the claims process from the view of the prospective defendant. There is no website of this nature in Ireland covering accident claims and employment claims from an all-island perspective. It is our aim to keep this website fully updated by regular news items, letting our clients know the latest developments in these ever-changing areas of the law.

This website will be of benefit to the victim of a road traffic accident, a factory accident, an accident in a

public place and many other incidents. It will also be of benefit to employees aggrieved at the manner in which they have been treated at their workplace. It will however also be of benefit to a Defendant (Respondent) who is being sued, to the employer who faces a personal injury claim in respect of a factory accident and the employer who is obliged to deal with a grievance or disciplinary matter in the workplace.

This website deals with personal injury claims and employment law claims. More importantly, it deals with such claims from the perspective of both the Plaintiff and the Defendant (the Claimant and the Respondent), the employer and the employee and all other persons who have an interest in ensuring that they are fully informed when they are faced with claims of this nature.

If visitors to this website have any views as to how the resources of this website could be improved or indeed, whether they would like us to cover any other issues relevant to the topics in this website, we would be delighted if you would contact us.

primarily in the areas of property and commercial law and the associated taxation implications.

Colin O'Neill is an Associate Solicitor in Morgan McManus Solicitors. He is a member of the Society of Trust and Estate Practitioners. He practices primarily in the areas of property and probate / administration of estates and the attendant tax aspects.

*For further information on this service visit our website at [www.morganmcmamus.com](http://www.morganmcmamus.com) or contact Fergal McManus at [fmcmamus@morganmcmamus.ie](mailto:fmcmamus@morganmcmamus.ie)*

## Morgan McManus Capital Taxes Group

We are pleased to inform our clients that we now have a dedicated Capital Taxes Group headed by Fergal McManus and Colin O'Neill Solicitors.

Fergal McManus is a Partner in the firm of Morgan McManus Solicitors and is an Associate of the Irish Taxation Institute since 2003. Fergal practices

### Main Office

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**MORGAN  
McMANUS  
SOLICITORS**

## Morgan McManus to present Seminars on "Redundancy and Reorganisation"

In announcing these Seminars, Brian Morgan Partner in Morgan McManus, stated that there has been widespread concern among employers as to how they are going to manage in the current climate.

- Will their business survive?
- Should they downsize?
- Should they implement redundancies?
- What procedures should they adopt? Is it "last in" then "first out"?
- If they adopt wrong procedures are they likely to be sued by disgruntled employees?
- Are there positive measures that employers can undertake to assist those employees made redundant in seeking alternative employment?

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## Morgan McManus Solicitors announce affiliation with Harris Cartier Solicitors London

Morgan McManus Solicitors are delighted to announce their affiliation with Harris Cartier Solicitors London.

Harris Cartier LLP, a firm founded in Slough in 1922 and now also with

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## National Minimum Wage Changes in Northern Ireland

The rates for National Minimum Wage rose from 1st October 2008. For workers aged 22 and over the new rate is £5.73 per hour, up from £5.52. For workers aged 18-21 the rate is now £4.77 up from £4.60. For 16 & 17 year olds the rate is now £3.53 up from £3.40. NMW rates will rise again on 1st October 2009.

## Personal Injury Accident Claims – Do you need a Solicitor anymore?

For more information, go to [www.accidentclaimslaw.ie](http://www.accidentclaimslaw.ie)

## Where can I find a Compensation Claims Guide that gives information to the Employer as well as the Employee?

For more information, go to [www.accidentclaimslaw.ie](http://www.accidentclaimslaw.ie)

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## Morgan McManus to present Seminars on “Redundancy and Reorganisation”

These are very worrying times for employers. Many will be very busy over the coming years fire fighting to save their businesses and cannot

afford therefore to get their procedures wrong when reorganizing their business, resulting in Dismissal and Discrimination Claims from former employees (see Article in this Newsletter on Implementing Redundancies – A Word of Caution).

To keep their clients on the correct side of employment law, Morgan McManus will be holding a series of Seminars in the near future. To find out more and book your place contact Debbie at Morgan McManus by email ([dmcdermott@morganmcmanus.ie](mailto:dmcdermott@morganmcmanus.ie)) or by phone – 00353(47) 51011.



## Staff & Achievements



### Fergal McManus, Solicitor

Fergal McManus has been admitted as a Solicitor in Northern Ireland, enabling him to undertake practise in Northern Ireland as well as the Republic of Ireland. Working particularly in the area of property law, this has enabled Fergal to become one of the few practitioners in this area who can undertake conveyancing in both jurisdictions. Coupled with his expertise in Capital Taxes, Company Law and Commercial Transactions, this additional qualification will be invaluable to clients of Morgan McManus who require the one Solicitor with knowledge of their unique business affairs in both jurisdictions.

CONTACT [fmcmamus@morganmcmanus.ie](mailto:fmcmamus@morganmcmanus.ie)



### Colin O'Neill, Solicitor

Colin O'Neill Solicitor was awarded his Diploma in Trust and Estate Planning by the Law Society, Dublin in October 2008. The awarding of this Diploma has led to Colin becoming a member of the Society of Trust and Estate Practitioners, which is an association of professionals who specialise in trusts and estates, executorship, administration and related taxes. Members of this association are the most experienced and senior practitioners in the field of trusts and estates. (For more information visit their Website at <http://www.step.ie>). This expertise will further enhance the service provided by the recently formed Capital Taxes Group in Morgan McManus.

CONTACT [coneill@morganmcmanus.ie](mailto:coneill@morganmcmanus.ie)



### Brian Cullen, Solicitor

Brian Cullen graduated from Manchester Metropolitan University in 1993 with an Honours Degree in Law. He joined Morgan McManus in March 2008 having completed his Solicitors examinations at the Queen's University of Belfast Institute of Professional Legal Studies. He qualified as a Solicitor in September 2008. Before joining Morgan McManus Brian trained with Comerton & Hill Solicitors in Belfast. Prior to this Brian worked as a paralegal in the in-house legal department of Moy Park Limited who are one of Northern Ireland's largest employers. Over the years Brian has gained a wealth of experience in litigation and employment law and these are the areas in which he works with Morgan McManus.

CONTACT [bcullen@morganmcmanus.ie](mailto:bcullen@morganmcmanus.ie)



### Dr. Dolores McMahon

Dolores McMahon joined Morgan McManus in 1998 initially working in the areas of Litigation and Probate. In 2002 she commenced managing the Accounts Department. Dolores is now the Practice Manager of Morgan McManus. On top of her busy schedule Dolores took time to complete a Certificate in Legal Studies from Queens University Belfast in 1999. More recently also she was awarded a MBA (Masters of Business Administration) from Liverpool John Moores University in 2006.

CONTACT [dmcMahon@morganmcmanus.ie](mailto:dmcMahon@morganmcmanus.ie)



### Stephanie Hannon

If any of you have reason to be involved in litigation you will have met Stephanie Hannon of the Clones office who works in the Litigation Department. Stephanie is an Associate Member of the Irish Institute of Legal Executives and holds a Certificate in Legal Studies.

CONTACT [shannon@morganmcmanus.ie](mailto:shannon@morganmcmanus.ie)



### Denise McKenna

Denise McKenna graduated from Letterkenny Institute of Technology with an Honours Degree in Legal Studies and Taxation in 2006. She joined the Morgan McManus team in 2007 as a Legal Executive and, under the guidance of Fergal McManus, deals mainly in the area of Conveyancing, working particularly in New House Estates sales. Denise works in the Clones office where she undertakes work in both the Republic of Ireland and Northern Ireland.

CONTACT [dmckenna@morganmcmanus.ie](mailto:dmckenna@morganmcmanus.ie)

## Clones Office Refurbishment

They said it would never be done. They thought it couldn't be done but we confounded all our critics and finally completed the refurbishment of the Clones office over a year ago. For better or for worse, we decided to remain in situ while the works were being undertaken. In retrospect, this was probably not wise but we thought it was the best way to ensure continuance of service. Looking back on it, we did well, considering the

replaced floors, the broken down walls, the new walls, stairs and floors; not to forget the many times the wires were cut! That said, it has all been worth it. Normal service has been resumed and we apologize to all concerned who were inconvenienced. We rounded off the work by also installing a completely new networked computer system. This office building has been on the go as a Solicitors office since 1895 – and built long before that. We believe that

we now have a very modern office premises which is in keeping with the requirements of our ever-growing client base. Why not drop in to see the improvement the next time you are on the Diamond!



Photographs: Eugene T. Hamill Photography [www.ethamill.com](http://www.ethamill.com)

# “ a word on employment law...”



For more information contact either: Brian Morgan [bmorgan@morganmcmanus.ie](mailto:bmorgan@morganmcmanus.ie) or Brian Cullen [bcullen@morganmcmanus.ie](mailto:bcullen@morganmcmanus.ie) or phone +353 47 51011.

## Implementing Redundancy – A word of caution!

Currently many organisations are experiencing redundancies for the first time after a decade of unprecedented growth and prosperity. Redundancies typically arise in circumstances of:

- Business closure;
- Rationalisation, where certain roles are cut or the numbers carrying out certain roles are reduced;
- Reorganisation, where job specifications are changed so that people with different skills/qualifications are required to do the job; or
- Mergers/takeovers, where two workforces are combined and numbers need to be reduced.

It is vitally important that the redundancy is genuine and that employees are selected for redundancy in accordance with fair and objective selection criteria.

It is also important to remember that an employer's conduct in implementing a redundancy can be taken into account by the Employment Appeals Tribunal when assessing the fairness or otherwise of a dismissal.

Adopting incorrect criteria can also land the employer before the Equality Tribunal where the employer, in choosing to make particular employees redundant, offends the provisions of the Employment Equality Acts.

## Morgan McManus Launch Updated Comparative Analysis of Employment Law North & South.

Updated to include reference to latest changes in Employment Law, the Comparative Analysis of Employment Law North and South has been published on the Morgan McManus website – [www.morganmcmanus.com](http://www.morganmcmanus.com).

This is particularly of benefit to the many businesses which now trade in both the Republic of Ireland and Northern Ireland. There are many variations in Employment Law in each Jurisdiction and it is important that

employers are kept alert of changes in this growing area of the law.

Brian Morgan and Brian Cullen Solicitors in Morgan McManus are unique in this region in that there are very few firms in the island of Ireland who can advise on Cross-Border Employment Law.

The Comparative Analysis of Employment Law North and South is updated on a yearly basis as a handy



reference document and is widely acclaimed in the business community as a necessary document on the desktop of every Human Resources Manager.

## Collecting Debt on Both Sides of the Border...

Brian Morgan, Partner in Morgan McManus Solicitors, who holds Practising Certificates in both the Republic of Ireland and Northern Ireland, outlines the importance of being familiar with the steps which apply in the Debt Collection process in both Jurisdictions.

Because we act for clients who have debtors in both the Republic of Ireland and Northern Ireland we are often asked to explain the different processes which apply in each Jurisdiction. The Debt Collection process is, by reason of the fact that it bound to Court dates and time limits, slow and, in the reasonable view of the client Creditor (the person who is owed the money), frustrating. This frustration is made worse where the Creditor finds that he has reached another stage in the process against the Debtor (the person who owes the money) only to find that there are a number of further stages yet to be undertaken.

Many of these stages involve payment of fees to the various state agencies where the Creditor is often left worrying whether he is “throwing good money after bad”.

Where a Creditor, familiar with the process in one Jurisdiction, comes for the first time to collect money from a Debtor in another Jurisdiction, lack

of knowledge of the processes which apply in that other Jurisdiction or, indeed, failure to issue Proceedings in the correct Jurisdiction can lead to costly mistakes.

The Debtor can be sued where the Debtor resides / carries on business or where the original Contract occurred. This can often give a choice to the Creditor in the Border area as to whether he issues proceedings in the Republic of Ireland or Northern Ireland. For instance, the Contract may have been made in the Republic of Ireland where the Creditor undertakes his business but an Irish Judgment may not be of much benefit to that Creditor if the Debtor resides in Northern Ireland and all his assets / income are based in Northern Ireland.

While an Irish Judgment can be enforced in Northern Ireland it must first go through an application for recognition by the Northern Ireland Courts and this will only delay further the enforcement of the Judgment

against the Debtor.

These are issues which must be considered by the Creditor before issuing Proceedings and not after he has obtained Judgment against the Debtor. At Morgan McManus, because of our knowledge and experience of the systems which apply in both Jurisdictions, we ensure to advise the Creditor on whether his Proceedings should be issued in the Republic of Ireland or Northern Ireland. Where that client at least understands the processes which apply on either side of the Border that understanding can assist the client in coming to some assessment at the start as to how he should proceed.

**For more information on the various steps which apply in both Jurisdictions the full Article on this subject can be downloaded from the Articles section (Private / Commercial Client) of our Website at [www.morganmcmanus.com](http://www.morganmcmanus.com)**

## Migrant Workers (Northern Ireland)

On 29th February 2008 the laws relating to employing migrant workers changed. The Government regards employers as having a major responsibility in preventing illegal migrant working in Northern Ireland. It is believed that a new system of civil penalties for employers who employ illegal migrant workers will provide a more effective means of tackling those employers who fail to carry out specified document checks on prospective migrant employees.

The system requires employers to check & copy certain documents which establish the worker's right to work in Northern Ireland. Where an employer fails to do this a penalty notice can now be served by Border & Immigration Agency officials.

Failure to follow the new rules attracts a maximum (civil) penalty of £10,000 for each illegal worker. In addition, knowingly employing an illegal worker is a criminal offence which carries a sentence of up to 2 years in prison and/or an unlimited fine.

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## Morgan McManus Solicitors announce affiliation with Harris Cartier Solicitors London

offices in London, is one of the largest solicitors firms in the Thames Valley. They have specialist departments providing services to both business clients and private individuals.

They offer a full range of commercial and private client legal services, including catastrophic Personal Injury and Clinical Negligence, Corporate and Commercial transactions and complex multi jurisdictional dispute resolution and litigation.

Commenting on the affiliation Justin Neal, Partner and Head of the Commercial Property Department in

Harris Cartier, stated:

*"Having already acted for a number of large corporate Irish firms in England, we are already familiar with the requirements of Irish clients when transacting business in England. We look forward to developing this affiliation further with Morgan McManus Solicitors".*

Commenting on the affiliation Brian Morgan Partner in Morgan McManus stated: *"For a number of years we provided a limited property service in England to our Republic of Ireland and Northern Ireland clients. Now, through*

*the affiliation with Harris Cartier, we can refer and recommend to our clients an established and reputable firm in England with offices in London next to the Law Courts. The fact that our clients can instruct Morgan McManus and have access to this wide range of legal services in the United Kingdom will be of major benefit going into the future".*

**More information on the services provided by Morgan McManus Solicitors can be obtained by visiting their Website at [www.morganmcmanus.com](http://www.morganmcmanus.com)**

## Morgan McManus assist on MicroTrade Cross-Border Guidelines

**MicroTrade Ireland** is a programme that helps small businesses build contacts, markets and partnerships across the island of Ireland.

The programme is an initiative of the County & City Enterprise Boards of the Republic of Ireland, Enterprise Northern Ireland and InterTradeIreland. They offer a range of supports including networking events, funding and training. Further details of their services are available on their Website at [www.microtrade.org](http://www.microtrade.org). Cross-border trade offers immense opportunities for business expansion, but there are a number of legal and administrative requirements to bear in mind.

### **GUIDELINES FOR DOING TRADE ON THE ISLAND OF IRELAND**

The 2008 edition of A Simple Guide to

Cross Border Business has been produced in partnership with FPM Chartered Accountants, Morgan McManus Solicitors and the Northern Bank.

It contains up-to-date information on a variety of cross-border issues with an additional chapter on debt collection for these times of 'credit crunch'. The questions answered on tax, legal and currency issues are based on those most frequently asked concerning cross-border business. It also contains contact details for the experts behind the guide.

The latest findings from InterTradeIreland's all-island Business Monitor survey show that cross-border trade still offers great opportunities to companies even in the current economic climate. The survey which canvassed 1,000 companies found that 40% of the companies are helping

their bottom line by doing business across the border. Indeed the average company turnover accounted for by cross-border trade is actually up to 19.3%, from 16.8% in 2007.

The Business Monitor also shows that barriers to cross-border trade have changed dramatically, with currency fluctuation cited as their main concern by 28% of companies, well ahead of concerns about political instability or the availability of business elsewhere.

These guidelines, which can be downloaded from the Microtrade website at [www.microtrade.org](http://www.microtrade.org) are recommended as a very good source of practical business tips for those involved in cross border trade. The Guidelines have also been published in Booklet form by InterTradeIreland and can be obtained by telephoning Eoin Magennis for a copy at 028 ( from Rol 048) 3083 4100. **The Booklet is also available to be downloaded from the Morgan McManus Website at [www.morganmcmanus.com](http://www.morganmcmanus.com).**

## Brian Morgan is invited to speak at the "Ask the Expert" Session at Microtrade Export Seminar October 2008

This event organized by MicroTrade Ireland, open to companies from multiple sectors, focused on the practicalities of exporting; as they apply to micro-enterprises and small businesses.

Particular attention was given to North / South cross-border trading. The event gave attending companies opportunities to participate in workshops that increased knowledge and gave an in-depth understanding of the exporting process, and to gain advice and tips from successful Irish businesses that have benefited from the export market.

The event afforded attendees a unique opportunity to ask experts in the fields of finance, law and business for advice on issues directly affecting their businesses, to network with other businesses and representatives from business support agencies from across the island of Ireland

and to learn how to access opportunities in NI, ROI and other markets during this economically challenging period. Brian Morgan spoke at the "Ask the Expert" session on legal issues affecting Cross-Border business.

Pictured left to right at the MicroTrade event holding the latest issue of the Simple Guide to Cross-Border Business : Brian Morgan Morgan McManus Solicitors, Michael Farrell FPM Accountants, Orla Charles, Senior Dealer, Danske Markets/National Irish Bank and Brandán Casey of MicroTrade Ireland.



### Criminal Records (Northern Ireland)

A new statutory-based framework was introduced from 1st April 2008 whereby the criminal history of a potential employee or volunteer can be provided to employers & other organisations. The previous system of obtaining information directly from the Police has ceased. AccessNI is the new body responsible for releasing the information & is part of the Northern Ireland Office.



**Where can I find out information about [InjuriesBoard.ie](http://InjuriesBoard.ie) (previously known as PIAB)?**

For more information, go to [www.accidentclaimslaw.ie](http://www.accidentclaimslaw.ie)

## When can a Director be made personally liable for the Debts of a Company?

Fergal McManus advises that in the current difficult trading conditions we are likely to see a lot more instances of the Courts making Directors liable for some or all of the debts of insolvent companies.

As the economic difficulties continue Company Directors are increasingly facing the prospect of insolvent liquidation of their companies. In answering the question posed one must first understand the difference between Shareholders and Directors. Shareholders are the members of the Company who contributed capital (even if only nominal) when the Company was incorporated or else they acquired Shares in the Company at a later stage. The shareholders own the Company. In the traditional sense it is the shareholders who have limited liability i.e. if the company is insolvent then the Creditors of the Company cannot chase the shareholders personally for the Company debts. Apart from one or two technical exceptions, Shareholders do not have anything to worry about in the context of Insolvency.

The matter is quite different for Directors who are the persons appointed by the Shareholders to run the Company.

In a small private company the Shareholders and Directors are very often one and the same people. Nevertheless the distinction is important and it is understandable that the law should impose a significant burden on those running the Company to do so in a reasonable manner and without abusing the benefits of limited liability. Generally it is in the context of Directors who allow their Company to continue to trade while such a Company is insolvent that triggers personal liability. There are three main instances in which a Director may be made personally liable for the debts of the Company. These are:

1. Fraudulent Trading
2. Reckless Trading
3. Failure to keep proper Books of Account

We examine each of these below:

### FRAUDULENT TRADING

Fraudulent Trading is also a criminal offence but in the context of attaching personal liability to the Directors, it arises where the Directors intended to defraud the creditors of the Company and had knowledge of such intent. Fraudulent Trading occurs if the Directors of the Company continue to carry on business or to incur debts at a time when they know that there is no prospect of paying the Creditors or indeed if the Directors incur Credit on behalf of a Company knowing that there is no good reason to think that funds will be available to pay the Debt when it becomes due or shortly thereafter. The Courts may impose personal liability on Directors found to have fraudulently traded on the basis of a compensatory or punitive award. By compensatory it is meant that the director will be made personally liable for the loss caused to the company directly referable to the fraudulent trading. This may only constitute part of the debts of the Company. More dangerously for a Director, the court is entitled to make the Director personally liable for the entire debts of the Company where there has been a serious wrong doing and the Court believes that a punitive award is appropriate.

### RECKLESS TRADING

Reckless trading is a more difficult concept to encapsulate in a short definition. There are a number of tests but the element of reckless trading that is likely to concern most Directors is known as "Deemed" Reckless Trading where a Director can be made personally liable for the debts of his company if he was a party to the contracting of a debt by the Company and did not honestly believe on reasonable grounds that the Company

would be able to pay the debt when it fell due for payment as well as its other debts (taking into account contingent and prospective liabilities). Obviously this is a cause of great concern to directors who perhaps are experiencing cash flow difficulties.

In an era where many businesses are experiencing cash flow problems it is very easy for a Director to fail that test and expose him or herself to the prospect of personal liability. The courts approach in imposing personal liability is based on the amount of the Company's loss directly referable to the reckless trading. Unlike fraudulent trading personal liability cannot be imposed on a punitive basis for the entire debts of the Company. The law does however provide a defence where the Director can show that he or she acted honestly and responsibly in relation to the conduct and affairs of the Company.

### FAILURE TO KEEP PROPER BOOKS OF ACCOUNT

Personal liability for the Director arises where the Court considers that the failure by the Directors to keep proper books of account has contributed to the Company's inability to pay its debts or has resulted in a substantial uncertainty as to the assets and liabilities of the Company or it substantially impeded the orderly winding up of that company. The Courts approach in imposing personal liability on foot of this heading tends to be on the basis of the loss resulting to the Company by virtue of the failure to keep proper Books of Account. It does not trigger personal liability by the Directors for all of the unpaid Debts of the Company.

### CONCLUSION

With the current regulatory environment and the difficult trading conditions we are likely to see a lot more instances of the Courts making Directors liable for some or all of the debts of insolvent companies. The advice is simple, if you are getting into trouble consult your Accountant and Solicitor at the earliest opportunity.



## Morgan McManus contribute to PLATO Family Business Succession Programme



FPM Accountants Newry were appointed by PLATO Blackwater to plan, co-ordinate and manage a PLATO Blackwater Family Business Succession Course for businesses located in the Monaghan and Armagh areas, over a twelve week period. FPM gave workshops during the course assisted by Brian Morgan and Fergal McManus of Morgan McManus Solicitors.

Pictured at Plato Blackwater Family Business Succession Course Workshop are Brian Morgan and Fergal McManus of Morgan McManus Solicitors with Fergal McCormack of FPM Chartered Accountants and some of the delegates who attended the Course.



*Is the Statute of Limitations (the period within which Proceedings must be issued for an accident) the same in Northern Ireland as it is in the Republic of Ireland?*

For more information, go to [www.accidentclaimslaw.ie](http://www.accidentclaimslaw.ie)

*I'm an Employer. My employee is making a Claim against me but my Insurance Company has declined Cover? Where can I get information on what I need to do?*

For more information, go to [www.accidentclaimslaw.ie](http://www.accidentclaimslaw.ie)

*My Employee has been absent from work this week. I have received a Sick Note from her doctor which states that she is suffering from "Occupational Stress". Should I be worried about this?*

For more information, go to [www.accidentclaimslaw.ie](http://www.accidentclaimslaw.ie)

## How do I defend a Personal Injury Claim?

For more information, go to [www.accidentclaimslaw.ie](http://www.accidentclaimslaw.ie)

## I crashed my car but the other driver is not insured.

### What should I do?

For more information, go to [www.accidentclaimslaw.ie](http://www.accidentclaimslaw.ie)

## The other driver claims he is suffering from Post Traumatic Stress Disorder. What is that?

For more information, go to [www.accidentclaimslaw.ie](http://www.accidentclaimslaw.ie)

# Legal updates...

Your update on the latest commercial and private client legal developments



## Brian Morgan advises...

### What is Mediation?

Mediation is part of a system of Alternative Dispute Resolution and is considered to be a key tool for the resolution of disputes between parties.

It is a voluntary, non-binding, non-adversarial and without prejudice dispute resolution process that allows the parties involved in the process to find a mutually acceptable outcome. This is unlike an adversarial litigation process in front of an independent

third party who has the power to adjudicate on the matters before him/her and impose an outcome.

Whilst a Mediator is an independent third party the role of a Mediator is one of facilitation rather than imposition of an outcome. Therefore Mediation allows parties to avoid the litigation of a dispute in front of a third party.

Having completed seminar attendance and assignments at the Queens University of Belfast Brian Morgan, partner in Morgan McManus Solicitors was awarded a Certificate in "ADR and Mediation Training" on the

27th October 2004. The benefits of ADR (Alternative Dispute Resolution) and Mediation training have been well recognised by the Courts. Continually, the Courts are encouraging parties to avail of Mediation in order to resolve disputes at minimum cost and expeditiously. Morgan McManus Solicitors have always been conscious of encouraging clients, whether they are in family, business or employment disputes, to resolve those disputes with least possible hurt to family or damage to business and the availability of this service to clients of Morgan McManus Solicitors is of definite advantage.

## Are Solicitors and Counsel the only Advisers who can claim confidentiality on their advices during the course of advising clients on Disciplinary Proceedings?

In the UK case of Stephen Mooney and Riccardo Cafolla v Andras House Limited (Case 185/05FET and 210/05 FET) the Tribunal was satisfied that documentation relating to communications passing between the respondent and Peninsula Human Resources Advisers during the disciplinary and appeals process is not subject to legal professional privilege or litigation privilege because the advisers were not legally qualified. communications with Peninsula during the disciplinary process.

The Tribunal stated that privileged advice should be strictly confined to legal advisers such as solicitors and counsel, who are professionally qualified, who are members of professional bodies, who are subject to the rules and etiquette of their professions and who owe a duty to the court. Accordingly an order made was against the respondent employer to produce to the

claimants' representatives all written communications with Peninsula during the disciplinary process.

This decision will be an unwelcome reminder for non-professionally qualified advisers (such as employment consultants and also to their clients) that their communications and advice can be the subject of discovery during a hearing.



## Fergal McManus advises...

### Retirement Relief Extended - Rol

Retirement relief exists to give tax relief against Capital Gains Tax ("CGT") for over 55's who sell or give a gift of their business or farms.

The first significant change to take place under the Finance Act 2007 was to extend the tax relief threshold from €500,000 to €750,000. This means that, subject to certain conditions, an individual aged 55 or over, who is disposing of a business or farm will have no Capital Gains Tax liability, provided the proceeds are less than €750,000.

One of the pre-conditions of obtaining retirement relief under Capital Gains Tax legislation is the requirement that the assets transferred must have been used for the purpose of

the business for the previous 10 years.

In a farming context, this often led to unfairness as, very often, older farmers let their lands and this was not considered to be sufficient "use for business purposes" to qualify for retirement relief. The requirement that the retiring person should have actively worked the assets for the previous 10 years has now been adjusted, but only in the case of a gift or transfer by a retiring farmer to his son or daughter.

It has always been the case that a transfer from a parent to a child was not subject to any upper value limit under retirement relief legislation. A retiring farmer can now obtain relief from Capital Gains Tax, if the land in question had been let for a period of not longer than 15 years, ending with the date of the disposal to his child and it must have been owned and used for farming purposes by the farmer making the disposal for a

period of not less than 10 years prior to the initial letting of the land.

Some further tweaks to the legislation now ensure that persons transferring their farm or business to the child of a deceased child (grandchild) will now be able to obtain the benefits of Capital Gains Tax retirement relief.

It is somewhat unfortunate that the Minister for Finance did not take the opportunity to extend the retirement relief to farmers who have been letting their lands for some years and then proceed to sell or gift it to someone other than their child.



## Have you been mis-sold a financial product?

Since the establishment of the Office of the Financial Services Ombudsman in 2005, it has become much easier for a consumer to obtain compensation where they have been sold financial products that are not suitable for their circumstances.

The Financial Services Ombudsman is a statutory officer who deals

independently with claims from consumers about their individual dealings with all financial service providers that have not been resolved after they have been through the internal complaints resolution system of the providers. The Ombudsman is, therefore, the arbitrator and is impartial.

All personal customers, limited companies with a turnover of €3 million or less, unincorporated bodies, charities, clubs, partnerships, trusts, etc can complain to the Ombudsman. It is a free service to the Complainant, compensation up to €250,000 can be awarded and the decisions are binding,

subject to appeal to the High Court. Morgan McManus Solicitors provide legal services to assist complainants in their dealing with the Financial Services Ombudsman

*For further information, please contact Fergal McManus at [fmcmanus@morganmcmamus.ie](mailto:fmcmanus@morganmcmamus.ie)*



### Colin O'Neill advises...

## Getting out of a Property Contract

Colin O'Neill Solicitor advises that there are sometimes ways to get the reluctant Purchaser released from what might have been a legally binding Contract of sale.

In the current economic climate many Purchasers of properties with long closing dates have found themselves in a position where, had they been able to see into the future, they perhaps would not have bound themselves to a contract in the first place. Before the economic downturn, purchasers who wished to be released from a contract, might have been able to successfully negotiate with the Vendor Builder/Developer their exit from the Contract as the Vendor may well have felt confident that he would be able to secure a fresh Purchaser at, in all likelihood, an increased sale price. However, those Purchasers who have bound themselves to a Contract are undoubtedly now finding such Vendors less willing to allow Purchasers to exit a Contract.

In recent times, vendors have been swifter to utilise their own remedies under the Contract, including the right to forfeit a contractual deposit or to force specific performance of the Contract – in effect compelling a purchaser to complete.

Below, I look at possible ways in which a purchaser, who is contractually bound to a contract, can seek to have that contract set aside, thus enabling the purchaser to walk away.

### 1. DURESS

A contract entered into where either party has been coerced into so entering is not enforceable. Duress will exist where a person has not entered into a Contract freely and where in fact there has been force or other means applied to coerce a person into a Contract. An example of this would be where a person is put in fear of physical harm unless they enter into a Contract.

### 2. BREACH OF A FUNDAMENTAL TERM

This can take place where a contract is made subject to a condition being fulfilled or an event happening. For example, if a Contract makes its enforceability subject to the obtaining of an

appropriate Planning Permission, which is not obtained, then the party relying on the condition will be able to (what is known as) "rescind" the Contract and effectively walk away.

### 3. FRAUDULENT MIS-REPRESENTATION

This can occur if the Vendor or his agent (such as, an Auctioneer) makes statements which are untrue and which he knows are untrue. If the Purchaser has entered into the Contract in reliance upon said statements and this can be proved, then the Purchaser may be entitled to regard the contract as at an end.

### 4. CONTRACT NOT EVIDENCED IN WRITING

In Ireland, under the Statute of Frauds 1695, a Contract for the sale of land must be in writing in order to be enforceable. Therefore, a Purchaser cannot be compelled to complete a Contract unless that Contract is physically reduced to writing and is signed by him.

### 5. IMPOSSIBILITY OF PERFORMANCE

This can occur where something, which is not foreseeable at the time the Contract was entered into, happens, which will prevent the Contract being performed. For example, if two parties enter into a Contract for the sale of land which land is then compulsorily purchased by a Local Authority then the original Contract cannot be performed between the original parties.

### 6. MISTAKE

This may occur where both parties to the Contract have entered into it upon a fundamental assumption which goes to the root of the Contract and which assumption turns out to be false. If both parties can be regarded as having in mind the fundamental assumption at the time they entered into the Contract without which they would not have so entered it, then the Contract may be void.

### 7. FRUSTRATION

This can occur where an event takes place which results in a situation where the intention of the parties to the Contract cannot be met. The parties to a Contract cannot foresee every eventuality which will occur. For example, if the subject matter of the Contract is physically destroyed before the Contract can be performed then that Contract is said to be frustrated. This will usually be an event for which neither party can be held responsible. However, the question of insurance will clearly be an issue here and the Purchaser may still be kept to the Contract if, for example, the property is insured and the Vendor can have the property re-instated.

### 8. ILLEGALITY

A situation may arise where a Contract is unlawful on its face. For example, the Vendor may not have complied with a statutory requirement in relation to the property and therefore any contract for its further sale cannot be enforced.

### 9. INSOLVENCY OF THE BUILDER/DEVELOPER

If it comes to light after a Contract has been entered into between a Builder/Developer and a Purchaser that the Builder or Developer has in fact become insolvent then a Contract may be set aside as generally the Builder or Developer will have given various indemnities in relation to the property. In that situation, where the Builder/Developer is insolvent, these indemnities cannot be relied upon and may result in the Purchaser being able to claim that a fundamental term of the Contract has been breached. These routes out of a binding contract will only apply in very particular circumstances, as has been outlined. However, where purchasers feel that their set of circumstances do fall into any of the above categories they should take immediate legal advice.

## What about Farm Accidents?

For more information, go to [www.accidentclaimslaw.ie](http://www.accidentclaimslaw.ie)

## What is a "Compromise Agreement"?

For more information, go to [www.accidentclaimslaw.ie](http://www.accidentclaimslaw.ie)

## Increase in Annual leave (Northern Ireland)

A worker's minimum statutory leave entitlement is to be extended from 4 weeks to 5.6 weeks commencing on 1st April 2009. This means an increase of 8 days per year for a full-time worker & a pro rata increase for part-time workers.

## Morgan McManus Services

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- Act for number of large clients with businesses on both sides of the border.
- It is our strategy to act for larger clients who place importance on immediate response to their legal requirements.
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# “ Focus on...Property ”

## Investment Property and Mortgage Arrears – Beware, you could be pursued

Brian Morgan, Litigation Partner with Morgan McManus, advises Purchasers not to abandon their Loan obligations.

Some purchasers, namely those who have bought investment properties, neglect to seek advice with regard to their liability to the Bank. They panic, incorrectly believing that, because they cannot afford their Mortgage repayments, they might be forced by economic circumstances to forego the investment and discontinue their Bank repayments. This has happened in the current climate in situations where investors have purchased houses which they then cannot rent out or where they have bought development sites for the purpose of construction of an investment dwelling house and then run into financial difficulty with the project. From hereon, we'll call the Purchaser a "Debtor", because that is effectively what he has become once he has taken on a Mortgage. A number of questions generally arise.

### Can the Debtor cease paying his Mortgage?

The difficulty for the Debtor in doing so is that the Bank, holding a Charge/Mortgage over his property, will issue Proceedings against him for payment of the arrears and seek an Order for Possession of the property from the Court with a view to selling the property to pay off any arrears. The Bank will also obtain an Order for Costs in such Proceedings. These could be quite substantial.

### But the bank can then clear the Mortgage and everyone is happy?

Not necessarily so! In the event that the sale proceeds of the property are not sufficient to cover the arrears (and there is every likelihood that this would occur in the current economic climate) then the bank would be entitled to pursue the Debtor directly for payment of the

balance due.

### Debtor's Credit Rating.

A further difficulty for the Debtor would be that the registration of a Judgement Debt against him would affect his Credit Rating for the future and would inhibit his ability in the future to source Bank Finance. More significantly, even if a Debtor falls behind in the repayments of his Mortgage this fact will appear on his Credit Rating Report. That is, this will occur even without the issue of Proceedings against him.

### But what if the Debtor owns no assets other than his Family Home? Sure they can't take blood from a stone?

The Debtor may believe that, because he owns no other assets and his Family Home is in joint names with his spouse, that the Creditor would not be able to pursue him. Not so! The likelihood is that the Creditor would register a Judgement Mortgage against the Debtor's interest in the Family Home. The effect of this is that if the Debtor subsequently decides to sell the Family Home he will be obliged to pay the debt together with legal costs and interest (at the rate of 8% per annum) from the proceeds of sale. More importantly, if the Debtor seeks to remortgage his Family Home at a later date (for instance, to release funds to assist him in getting through the current credit crisis) he will not be able to do so without first discharging that Judgement Mortgage.

Regardless of this, the Judgement Creditor has many other means of pursuing the Debtor for payment, one of which would be to seek to have him adjudicated a Bankrupt, where the Official Assignee in Bankruptcy would take charge of

the Debtor's assets with a view to discharging the Debtor's liabilities to his Creditors.

### But I live in Northern Ireland - sure they could not get a Republic of Ireland Judgment against me in Northern Ireland?

Because a Debtor lives in Northern Ireland does not mean that the Bank could not pursue him for payment. It has always been possible to register a Judgement obtained in one Jurisdiction in another Jurisdiction for the purpose of enforcement. This has been made even more simple for Creditors by reason of the introduction of Regulation No. 805/2004 by the European Parliament and the Council on the 21 April 2004 which has created a European Enforcement Order ("EEO") for claims throughout the EU. The EEO avoids the necessity to go through complicated procedures which previously existed and this will now make it easier for creditors in one jurisdiction to pursue a Debtor in another Jurisdiction.

### What should I do?

We never wish to alarm Purchasers but it is important that they realize the consequences of any decision made in haste and particularly where they might take free advice from a non-lawyer (very often the worst advice possible!). It is our experience that where a Debtor approaches his/her Bank and explains their difficulties the Bank will usually come to some arrangement with a view to assisting the Debtor, such as deferring capital repayments for a period of time. After all, the banks have been obliged to eat humble pie recently and know too well what it is to be cash-strapped!



[www.morganmcmanus.com](http://www.morganmcmanus.com)

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