

Proposed New Rules for Property Services Providers

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Before you can practice as an auctioneer or house agent in Ireland you must obtain a licence. The current licensing system is governed by the Auctioneers and House Agents Acts 1947 to 1973 ('the Acts'). This system is regarded as unsatisfactory as anyone can obtain a licence if their application in the District Court is successful.

Once a person obtains their licence there is no uniform regulatory body in place to monitor their conduct. There is no official system to discipline those whose actions prejudice their clients and no form of redress for aggrieved clients. Furthermore, there is no emphasis on educational and professional standards for licensees.

The Auctioneering/Estate Agency Review Group ("the Review Group") examined the auctioneering profession in Ireland and in July 2005 published its Report. The Review Group referred to the current regulation of auctioneers, letting agents and property management agents as "outdated, inappropriate and inadequate for the present day market in Ireland".

The Property Services (Regulation) Bill 2009 was published in May 2009 to give effect to the recommendations of the Review Group. The Bill provides for the establishment of the 'National Property Services Regulatory Authority' ('the Authority'). The Authority currently operates on a non-statutory basis. However, the intention is for it to control and supervise those providing property services, to take over the Court based licensing system, to promote increased consumer protection and enforce standards for the granting of licences including qualification requirements, minimum levels of professional indemnity insurance and technical and ethical guidelines. The new licensing system will apply to all providers of property services, such as auctioneers, estate agents, letting agents and property management service providers.

In addition to the establishment of the Authority, the Bill includes a number of other reforms some of which are detailed below:-

Licensing

The Bill sets out the application and renewal procedures for licences, which will be dealt with by the Authority. It includes a prohibition on the provision of property services or holding oneself out as offering

property services without a licence and allows for fines and/or imprisonment on conviction. It also includes provision for a Property Services Register which will detail information on all licensed property service suppliers. The register will be available to the public on the Authority's website to assist consumers in choosing a licensed provider.

Client Accounts

The existing provisions of the Acts concerning the holding of client's funds in designated client accounts have mainly been carried through in the Bill. The requirement to have designated client accounts will be extended to funds under the control of management agents who are engaged by property management companies in multi-unit developments.

Property Services Compensation Fund

The Bill provides for a Property Services Compensation Fund to be established and administered by the Authority. The fund will compensate clients of licensees who sustain losses as a result of dishonesty on the part of the licensee. An annual contribution to the fund will be made by each licensee on the grant or renewal of their licence.

Sale or Letting of Land

To combat misleading guide prices and to give potential purchasers a more realistic estimate of the likely value of property, licensees will be required to give vendors a statement of the 'advised market value' of property within 7 days of its valuation for sale. Similar provisions are provided for property being valued for letting purposes.

The practice of vendors (or someone on their behalf) bidding up to the reserve price of their property at auction will be prohibited. A licensee cannot knowingly accept such a bid.

Complaints, Investigations and Sanctions

The Authority will investigate complaints that are made in good faith and are unlikely to be resolved informally. The Authority will, of its own volition or following a complaint, appoint an inspector to investigate a licensee. The inspector will have strong powers of entry and inspection and will be able to require the production of records, books and accounts necessary for the investigation. The inspector's report will identify whether the licensee is or was engaged in improper conduct.



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Breakfast Seminar

O'Rourke Reid would like to thank all those who attended our Breakfast Seminar entitled 'Recession: Risk or Opportunity' that was held recently.

From the reaction on the morning and the feedback we received, our three speakers; Harry Slowey, Bobby Kerr and David McWilliams provided plenty food for thought in the present challenging environment.

Harry Slowey, Director Finance One, opened the seminar by speaking about the financial sector's current views on borrowing and lending. He noted that there would be no new net growth in borrowing over the next few years and that credit would be funded solely out of redemptions.

Bobby Kerr lightened the tone of the event by speaking about his time as a 'Dragon' on RTE's "Dragon's Den". From his retail experience as CEO of Insomnia, he reminded the audience that in the present market "value is king" and that "if you are not giving value, you are not going to stay in business".

Well-known economist David McWilliams told the audience that transparent decision-making is absent from NAMA. He went on to note "you can't legislate a price, for that you need a market". McWilliams remarked that there was as much influence at the seminar as there was in any room in the country and felt that Ireland has an abundance of talent but this talent base requires leadership.

We would again like to thank everyone who attended and made the event such a success.

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The Authority can impose sanctions for improper conduct ranging in severity from issuing guidance or a reprimand, to suspending or revoking a licence. The Bill sets out the matters that will be considered in determining the sanctions to be imposed.

In certain circumstances the Authority will be empowered to apply to the High Court for an order to suspend a licence where the Authority considers it necessary to protect a licensee's customers or users or potential users of its services. The licensee would be given notice of such an application. However, if the Authority considers there to be an immediate risk of financial harm to the licensee's clients, the Authority can make an application to the High Court,

without notice to the licensee, for an interim order to suspend the licence.

Appeals

The Bill provides for the establishment of the Property Services Appeal Board to hear and determine appeals against certain decisions of the Authority. This will be an independent body.

Professional Competence

Provision is made for the Authority to make regulations for schemes of education and training to ensure the ongoing maintenance of the professional competence of licensees. The Bill places a duty on licensees to maintain their professional competence on an ongoing basis.

Passenger's Contributory Negligence and Drunk Driving

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The Supreme Court has clarified a grey area in road traffic cases and brought the outcome in line with other types of personal injury actions. Earlier this year they confirmed the application of the law of contributory negligence in road traffic accidents as it applies to passengers injured in an accident where the driver has been drinking alcohol. In such cases, the passenger will be held to have contributed by virtue of their own negligence where they knew or should reasonably have known that the driver had consumed alcohol.

Mr. Justice Kearns upheld a High Court finding against Ms. Cynthia Hussey that she was 40% liable for injuries suffered in an accident while she was travelling as a passenger in a car driven by her friend's boyfriend who had been drinking. Mr. Justice Kearns noted that tolerance towards intoxicated drivers and their passengers "is very much a thing of the past".

The issue of contributory negligence in such cases must be approached objectively and in light of the circumstances of each case. The more a passenger should have realised, or did realise, the risk in getting into a car with a driver who had consumed alcohol, the greater the degree of contributory negligence according to the judgment. In addition, an intending passenger who had been drinking could not rely on their self-intoxication to avoid a finding of contributory negligence.

In the Hussey case, Ms. Hussey was adamant in her evidence that the driver appeared to be "fine" and not drunk. She said that if she thought he was drunk she would not have got into the car. When found by the gardai following the accident, they noted that his

eyes were blurred, his speech slurred and in evidence a garda said it was quite obvious he was "very drunk". The Supreme Court ruled that there was ample evidence before the High Court to prefer the garda's evidence to that of Ms. Hussey whom the High Court had found "lacking in candour".

Prior to this judgment, the law was somewhat uncertain. It has always been accepted in non-road traffic cases, if a person had suffered an injury by reason of their own stupidity, for example, an occupational injury sustained where the injured party was engaged in horseplay, then the person could be held liable for their own injuries.

In cases where the passenger of a car was injured, there was a tendency to review the evidence on a subjective basis. For instance, this firm acted in defence of a road traffic case where an issue of contributory negligence was ultimately defeated. The Trial Judge felt that the injured passenger, although at the same party as the driver of the vehicle where they had been for over five hours, could not have noticed the intoxication of the driver as they were at opposite ends of the function room for part of the evening.

The effect of the Supreme Court decision is to put the determination of the issue of contributory negligence on an objective basis. In the judgment, it was noted that while the knowledge of an intending passenger that the driver had taken one alcoholic drink would not constitute contributory negligence, as the law permits one drink, it might prompt the intending passenger to ensure any consumption was within the legal limits.

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Bankruptcy Bites

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The recent decline in the commercial property market has resulted in individuals involved in significant property transactions facing challenging times. In Britain there were more than 50,000 personal bankruptcies during 2008 and in the United States the figure was set to reach the 1 million mark. In Ireland very little data is known on personal bankruptcies.

Bankruptcy law seeks to provide a means whereby creditors can recover rateably or equally among themselves. It is for the benefit and relief of creditors and their debtors in cases where debtors are unable or unwilling to pay their debts. Bankruptcy can be instigated either by the debtor himself filing for his own bankruptcy or more commonly by an aggrieved creditor petitioning the courts.

The majority of Irish businesses operate as limited companies thereby protecting their shareholders from insolvency. However during the "Boom Years" a number of individuals got involved in property development without the protection of limited liability and therefore we are seeing private individuals who have purchased a small number of properties facing negative equity.

Historically a stigma was attached to those who became bankrupt. However attitudes have changed and it is now widely perceived that only a small proportion of individuals facing bankruptcy proceedings have handled their finances dishonestly or incompetently.

The Bankruptcy Act 1988 and the Rules of the Superior Courts, 1989 Order 76 contain the relevant principles and rules in relation to bankruptcy law and the adjudication of a bankrupt in this country. Under this legislation, when a person becomes bankrupt all of his assets and property pass out of his hands and into the jurisdiction of an Official Assignee. The Official Assignee, who is a court official, is the trustee to whom any property of the debtor is transferred. They then administer the estate of the bankrupt person.

The family home can also be repossessed. Although the Courts will take into account the needs and financial resources of a spouse and any children involved, precedence has shown that the interests of the creditor usually take priority. The

greatest disadvantage from the bankrupt's perspective is the restriction placed on his ability to obtain credit as a bankrupt person must disclose their status if seeking credit over €630. This can make it impossible to continue in business.

A bankrupt person is also forbidden from acting as a director or taking part in the management of a company and if in employment, their salary would be attached in favour of the Official Assignee. Any property or assets acquired by the bankrupt subsequent to adjudication must be handed over to the Official Assignee. The bankrupt will not be discharged from bankruptcy until 12 years have elapsed from the date of the bankruptcy order or longer if the estate is not fully realised.

An alternative to the bankruptcy process is a court-supervised arrangement whereby the insolvent debtor must petition the court for protection against his creditors. If granted, the court will direct the debtor to call a preliminary meeting of creditors to consider his circumstances, followed by a number of complex and costly Court sittings to hear the matter further. As a result, the bankrupts' business could suffer by the time the Court sitting takes place.

In contrast the British Insolvency Act 1986 brought into effect an alternative to bankruptcy proceedings known as the Individual Voluntary Arrangement (IVA). This process has little court involvement producing a simplified, cheaper and quicker distribution of the debtor's assets to his creditors. It offers the debtor an opportunity to come to an arrangement with his creditors and to continue in business, which is not possible in the event of bankruptcy.

The downturn in the property market, allied with an uncertain future means that the Irish legislature may have to look more closely at the Bankruptcy procedure. Many individuals are struggling financially due to the downturn. The necessity for a realistic and practical procedure with limited court involvement, as is utilised in other jurisdictions, is becoming more and more apparent.

Draft Regulations: Shareholders Rights (Directive 2007/36)

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The Directive, which is due to be implemented across the EU on or before 3 August 2009, sets out a number of important provisions on the rights of shareholders in EU listed companies.

The regulations will be of interest to companies listed on the Main Market of the Irish Stock Exchange or listed on a regulated market elsewhere in the EU but having their registered office in Ireland.

The Directive introduces minimum standards to ensure that shareholders of listed companies have timely access to the relevant information ahead of the Annual General Meeting and simple means to vote at a distance. The main objective is to ensure the exercise of voting rights without physically attending meetings, with a strong emphasis on full participation in such meetings by electronic means. This will facilitate non-resident shareholders and resident shareholders who cannot attend such meetings.

One of the most significant provisions of the Directive relates to the notice period for General Meetings, which can be reduced from 21 to 14 clear days if you pass the necessary resolution and ensure all members have access to electronic voting.

Apart from the notice period for meetings, the Directive also deals with the information to be included in the notice of all general meetings, the publication of the notice on the company website, shareholders' rights to add items to the agenda and to table resolutions, shareholders' rights to ask questions at meetings and receive answers, proxy voting and the instructions given to proxies, shares held by nominees, electronic participation and voting, voting by correspondence and the establishment and communication of voting results.

This proposed directive aims to modernise company law and enhance corporate governance across the Member States. Shareholders will have timely access to information and can exercise their voting rights by proxy, thus ensuring equal rights and access to all shareholders of listed companies throughout the European Union.

Supreme Court Decides for Employers

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Employers will be encouraged by the recent finding of the Supreme Court in the case of Berber and Dunnes Stores. It found that the employer responded reasonably to each of the incidents complained of, and was not liable for the harm caused. In making its unanimous judgement, the Court overturned an award of damages made in the High Court for psychiatric and physical injury caused by stress in the workplace.

In assessing the conduct of both parties, the Supreme Court found the conduct of the employer in relation to a series of incidents involving the employee that lead to his resignation, did not amount to a repudiation of the contract of employment.

It further held that the Plaintiff's claim for damages for stress related personal injuries failed on the test of foreseeability.

Background

Mr Berber was a buyer with Dunnes Stores from 1988 until November 2000, having been promoted up the ranks since he joined the company. His last performance review in February 2000 made reference to his colour blindness and Mr Berber claimed that the Company's attitude to him changed after that review.

On 22 November 2000 Mr. Berber was told he was to be transferred to department manager level, which he considered a demotion. At a meeting with the Defendant's owner Mrs. Heffernan, it was agreed that he would be transferred to the flagship Blanchardstown store, where he would be re-trained and fast-tracked for the position of store or regional manager in the following six to twelve months.

Mr. Berber was instructed to report to the Homewares department one week earlier than expected when he had believed that he would be working in the Ladies wear department.

He considered this a variation of the agreement and tried unsuccessfully to meet again with Mrs Heffernan, who was abroad at the time. Instead, he held two meetings with the store manager the following day, at which the company claimed that Mr Berber had demanded to meet Mrs Heffernan, had

displayed an attitude toward the manager, refused to explain the issues involved and simply read out a statement refusing to attend work. For these actions, he was suspended with pay.

After an exchange of letters, the Company indicated that they were prepared to overlook Mr Berber's actions and lift the suspension provided he reported for work once certified fit to return (he was off due to an exacerbation of his pre-existing Crohn's disease).

A number of incidents occurred thereafter. These included Mr. Berber attending for work in his casual clothes (which he would have worn as a buyer) and being told to wear a conservative suit and tie; a widely circulated duty roster classifying him incorrectly as a "new trainee"; and an issue arising in relation to his bonus. There was an exchange of letters and a number of further meetings to try and agree a fast track timetable and a relevant training programme. Mr Berber also had a heated altercation with the store manager over a mistake on the roster regarding his start time.

Mr Berber constructively dismissed himself, claiming he was medically advised to do so, in May 2001 and sued the Company for "wrongful dismissal arising out of a breach of trust and confidence" and damages for injuries caused by the actions of the employer.

Conduct of the parties

The Supreme Court found that the employer responded reasonably to each incident as it arose and the only alternative responses available to the employer would have amounted to an abdication by it from all control of the manner in which the employee carried out the duties of his employment.

Mr Justice Finnegan noted the fact that Dunnes Stores did not dismiss Mr Berber despite his refusal to obey "the lawful and reasonable orders of his employer" and he went on to review the actions of the Company thereafter.

It was noted that Dunnes had, upon hearing of his worsening health, indicated that Mr Berber's actions would be overlooked if he returned to work. The Court indicated that the dress code request was reasonable and that the duty roster incident was acknowledged as a mistake and corrected (albeit not to his satisfaction). Reasonable attempts were made to accommodate Mr Berber's concerns and a training plan was produced.

Mr. Justice Finnegan stated that Mr Berber's insistence that his manager deal with his solicitors for a minor incident relating to a mistake on the roster was damaging to the employment relationship and unreasonable.

The conduct of Mr Berber was heavily criticised and the employer's conduct had to be viewed in light of that conduct. It was therefore held that the contract of employment was not repudiated by the actions of the employer and Mr Berber's claim for wrongful dismissal failed.

Conclusion

This judgment emphasises the importance for employers of considering the conduct of both parties in the relationship and the cumulative effect of the conduct on the parties' relationship as a whole.

In this instance the employer's actions stood up to the rigorous examination of the Supreme Court, whereas the employee's actions were held to have been unreasonable and oppressive.

The response of the employer in this case was determined by the response of the employee to each incident and the employee's behaviour. In particular, the involvement of his solicitor in relation to minor operational issues was found to have been unreasonable and to have damaged the employment relationship.

This Judgment should reassure employers that they are entitled to manage difficult employees in a robust but fair manner. The decision will also be of assistance to employers defending employee claims for psychiatric injury alleged to have been caused by stress in the workplace.

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