Legal Proceedings

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The National Asset Management Agency (NAMA) received approval from the European Union recently and the first loans have been transferred from the financial institutions into NAMA. Whilst there has been considerable debate in respect of the valuation process and whether NAMA will begin to free up credit, less has been written about how NAMA will engage with the legal process through the Courts.

Proceedings Generally

Part 10 of the NAMA Act deals with all legal proceedings to which NAMA is a party, relating to a designated or acquired bank asset or otherwise relating to NAMA.

If the proceedings concern a bank asset that has already been acquired by NAMA, the relevant financial institution must provide NAMA with any assistance reasonably required.

Where legal proceedings are commenced before the acquisition of the asset by NAMA, NAMA may choose to be substituted for the bank. In that case, NAMA assumes all the rights and obligations of the bank in relation to those proceedings, other than in relation to a claim against or by the bank itself.

If NAMA decides not to take over proceedings taken by a bank, then the bank is required to deal with the proceedings in a way which protects NAMA's interests and if applicable in accordance with any directions given by NAMA. NAMA may apply in that case to be joined to the proceedings as a Notice Party.

NAMA may enforce any judgment made in favour of a bank.

Damages Only

Section 179 of the NAMA Act specifies that the remedy for claims by debtors or others is limited to damages (money) or any relief that does not affect the bank asset, the underlying property asset, the acquisition of the bank asset or the interest of NAMA.

However, a person may apply to the High Court for an order allowing them to apply for relief other than damages. The High Court may only grant the application if it is satisfied that damages would not be an adequate remedy for the party bringing the application in respect of the asset.

Costs

Section 186 is of particular importance – this section sets out the liability for costs of any proceedings. It states that at the conclusion of each stage of proceedings, the Court will make orders as to costs and measure those costs. In general, in proceedings, costs are 'reserved' to await the final outcome of the proceedings. It does not appear to be intended in any proceedings concerning NAMA or bank assets that costs will be awarded only at the conclusion of the case.

Costs will be enforceable against the party directed to pay those costs and if they are not paid within 30 days of the court order, the Court may, on the application of any party to the proceedings or of its own motion, impose terms as to the continuation of the proceedings pending payment of the costs. In effect, a party to the proceedings e.g. NAMA may apply to halt (temporarily) the proceedings until such time as the costs are paid.

Injunctive Relief

Section 189 provides that where an injunction is sought on an interim or interlocutory basis to compel NAMA to take or refrain from taking any particular action, where the order, if granted, would adversely affect NAMA, then the High Court will have regard to the public interest. The public interest in this context means that the High Court has to take into account the purpose of the Act and the importance of allowing NAMA to carry out its functions efficiently.

Judicial Review

The Act in Section 190 limits the circumstances and timescales in which it is possible to seek judicial review of a decision under the Act. Leave to seek judicial review shall not be granted where the application is made more than one month after the decision is notified to the person or if there are substantial reasons why the application was not made within that period and the High Court is satisfied that the application raises a substantial issue for determination.

Conclusion

Anybody contemplating bringing proceedings against NAMA or in connection with a designated or acquired bank asset should be aware of the limitations in the NAMA Act which favour the public interest underlying the legislation.

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The Only Way is Up?

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From 1st March 2010 the ban on upward only rent review clauses in commercial leases became effective. However the Section only applies to leases granted after that date. It has no effect on existing leases. The ban will be welcomed by tenants with regard to new leases.

This leaves existing tenants in the invidious position of being placed at a market disadvantage as they will still be bound by the upward only review clause in their leases. These tenants will find it extremely difficult to assign their leases in future due to the availability of leases which will not contain this clause. The ban will create a two-tier market in this area and cause difficulty for many tenants.

It will also cause difficulty for landlords and their lenders by giving rise to uncertainty over rent flows for future lettings and the potential instability of their existing tenants in an adverse economic climate and a two tier market.

A Private Members Bill, currently before the Dail, may, if adopted by the Government, give temporary relief to tenants holding under existing leases. This provides that the ban may be extended to existing leases by Government order where the Government is of the opinion that, arising from a serious disturbance in the economy and a decline in economic circumstances in the State, existing tenants cannot be fairly expected to pay rents at previous levels or any increased rate.

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Whats 'new' about the new regime?

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The Defamation Act 2009 ('The Act') was signed into law on 1 January 2010. The Act has restated existing law in many areas and has put on a statutory basis many procedures already in existence. The main changes brought about by the Act, both in the law and procedurally, are set out below.

Definition

Defamation has been redefined in the Act, by abolishing the separate torts of libel and slander and replacing them with the **'tort of defamation'**. The tort of defamation consists of 'the publication, by any means, of a defamatory statement concerning a person to one or more than one person'.

Limitation Period

An important change brought in by the Act is that the limitation period has been reduced to one year, although a Court has the discretion to extend this to two years in the interests of justice. This change benefits defendants when allied with the single publication rule in Section 11. Prior to the Act, a new cause of action arose with every publication.

Procedural Changes

The most significant changes for defendants are procedural. Perhaps the most important of these is that they will now be able to make a lodgement **without** an admission of liability.

Damages in defamation actions have been criticised as being unpredictable. In an attempt to reform this aspect, Judges must now give directions to the jury on damages and the parties may make submissions on the issue. The Supreme Court has also been empowered to substitute its own damages figure on appeal, rather than putting the parties to the cost and hazard of a re-trial. This is an important consideration for defendants in actions which are likely to attract high damages.

A change which will assist defendants in relation to costs is the increase in jurisdiction of the Circuit Court to €50,000.

New Reliefs

Whilst damages will undoubtedly be the primary relief sought by plaintiffs, the Act introduces innovative alternative reliefs. The plaintiff can apply to the Court for a declaration that a statement was false and defamatory. **'Declaratory Orders'** are only available in the Circuit Court. An application can be made at any stage during the proceedings and relief will only be granted where material is clearly defamatory, where the applicant sought a retraction or apology and the request was declined or the apology was not given suitable prominence. If a declaratory order is sought, only costs can be awarded. If the application fails, a plaintiff can continue with the substantive proceedings.

A plaintiff can also apply for an order directing the defendant to publish a **correction** of the defamatory statement. The Court can order publication of a correction instead of or in addition, to damages.

Changes to Defences

Part 3 of the Act provides a consolidated source of defences open to a defendant. The old defence of **'Justification'** is now known as **'the defence of the truth'**. As before, truth is an absolute defence in defamation proceedings.

The defence of **'honest opinion'** is very similar to the common law defence of **'fair comment'**. The defendant must prove not only that the opinion is based on allegations of fact, but also that the allegations are true.

Absolute privilege is placed on a statutory footing, with the Act listing an extensive, but not exhaustive, set of statements to which the privilege applies. **Qualified privilege** is similarly treated.

The most significant change to the defences is that of **fair and reasonable publication of a matter of public interest.** The purpose of this new defence is to facilitate public discussion on matters of public interest for the benefit of the public.

Section 22 establishes a potentially useful weapon in a defendant's armoury, **the offer to make amends**. Where a defendant has published an allegedly defamatory statement, it can offer to publish a correction and apology, pay compensation and costs. The offer cannot be made after the delivery of the defence. An offer of amends, if rejected, may possibly mitigate damages. In Britain, making such an offer leads to a discount of as much as 50% in any damages that may be awarded at trial. Where **an offer to make amends** is pleaded as a defence, no other defence can be pleaded.

Conclusion

The Act has codified the law of defamation into one Act and has also introduced helpful procedural changes and some innovative alternative reliefs.

Plaintiffs can tip their Cap

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The cap or limit on general damages has been raised to €450,000 as a result of the case of Maggie Yang Yun. General damages are defined as compensating the Plaintiff for pain, suffering and loss of amenity as the result of an accident.

The concept of the cap or limit of general damages which can be awarded arises from the case of **Sinnott -v- Quinnsworth Ltd 1984**. In the Sinnott case, the Supreme Court held that when awarding general damages for catastrophic injuries, the Court should bear in mind that a 'limit must exist, and should be sought and recognised, having regard to the facts of each case and the social conditions which obtain in our society'. After this case, the cap was set at £150,000 but the figure has been reviewed periodically over the years.

Ms Yun, a Chinese national sustained severe spinal injuries in a road traffic accident involving three cars on the 9th May 2002 on the Dublin to Drogheda road. In the resulting High Court case of **Yun -v- MIBI and Tao 2009**, Justice Quirke laid down the following guidelines for the assessment of general damages in the cases of catastrophic injury:-

'*1. Where the claimant has been awarded compensatory special damages to make provision for all necessary past and future care, medical treatment and loss of earning, there will be a limit or "cap" placed upon the level of general damages to be awarded.*

When applying or reviewing the "cap" on general damages the court should take into account the factors and principles identified by the Supreme Court in Sinnott v Quinnsworth and in M.N. v S.M. (2005) 4 IR including 'contemporary standards and money values'.

2. Where the award is solely or largely an award of general damages for the consequences of catastrophic injuries there will be no "cap" placed on the general damages awarded.

Each such case will depend upon its own facts so that (a) an award for general damages, could, if the evidence so warranted, make provision for factors such as future loss of employment opportunity or future expenses which cannot be precisely calculated or proved at the time of trial, (b) life expectancy may be a factor to be taken into account and, (c) a modest or no award may be made where general damages will have little or no compensatory consequences for the injured person.

3. There must be proportionality between:

(a) court awards of general damages made, (i) by judges sitting alone and, (ii) in civil jury trials and,

(b) by statutory bodies established by the State to assess general damages for particular categories of personal injuries'.

In deciding on the new level of the cap, Justice Quirke heard detailed evidence from Irish economic experts and also looked at such indicators as inflation, the average industrial wage and the standard of living. On a comparison between the consumer price index in 1984 and 2008, the equivalent value of £150,000 in 1984 was around €400,000 in 2008.

Justice Quirke accepted that the current economic crisis was a factor which had to be taken into consideration and he further stated that life expectancy of the pain and the distress suffered by Ms Yun should also be taken into consideration.

Taking all these matters into consideration, Justice Quirke held that an adjustment was required to the 1984 cap as set out in the Sinnott case and that the figure should be raised to €500,000. However he made a further adjustment of 10% as a result of the unprecedented economic crisis and therefore found that the cap should be €450,000.

The new cap imposed by Justice Quirke shall allow Plaintiffs who have suffered catastrophic injuries to be awarded higher levels for their injuries to meet the current standards of living, the cost of their everyday care and on-going medical treatment.

Ms Yun was awarded €325,000 in general damages and a total award of €1.8 million was given to the Plaintiff.

Think Before You Click!

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Billigfluege (BF), a German based company, operated a price comparison website to allow their online users compare flight prices amongst a number of airlines. Ryanair sued Billigfluege in the High Court to restrain them from screen scraping their website which it claimed was in breach of their website's Terms of Use (TU) which were accessed by means of a hyperlink at the bottom of the homepage. BF contended that it should have been sued in Germany where it was domiciled.

Under the Brussels Regulation on court jurisdiction, a defendant is sued where they are domiciled. However, the parties may agree the Courts of a particular EU member state have exclusive jurisdiction over any case. Ryanair's Terms of Use had an exclusive jurisdiction clause which nominated the Irish Courts. Billigfluege denied that there was a contract between the parties as it had never agreed to the Terms of Use.

In a preliminary ruling, the High Court held that it had jurisdiction to hear the proceedings as there was a legally binding contract. It stated that there must be reasonably conspicuous notice of the existence of contract terms, unambiguous manifestation of assent to those terms and consideration (value). The Court ruled that the exclusive jurisdiction clause had been fairly brought to Billigfluege's attention before it entered the contract, the hyperlink was not hidden or in an awkward part of the screen. Billigfluege had manifested assent by its conduct of systematically accessing the website and it was unnecessary to click an "I accept" tab. Ryanair's provision of information constituted sufficient consideration on its part.

It pays to put Safety first

Lorna Daly,
Commercial Property

All employers must make themselves aware of, and ensure they comply with, the provisions of the Safety, Health and Welfare at Work Act 2005 ('the Act').

A key aspect of the 2005 legislation is that the employer must 'manage' workplace activities. It is not sufficient to have a safety statement in place. This statement must be continually re-assessed and updated; a competent person must be placed in charge of health and safety in the workplace and ongoing training provided to all employees. From the employers' point of view, should an accident occur, maintaining full and accurate records of all discussions held and measures taken will be central to the defence of any potential claim.

Section 80 provides that where the acts that constituted a health and safety offence were consented to or authorised by a director or manager or are attributable to their negligence, then the individual (as well as the company) shall be guilty of a criminal offence.

This highlights the necessity for health and safety concerns to be addressed at the very highest level of the company and to be discussed as an integral part of the business. The Courts also have the discretion to disqualify a director for health and safety offences under the Companies Act 1990. In the case of an indictable offence under the Act, the penalty is automatic disqualification for a period of five years. Section 80 carries a fine of up to €3 million and/or a term of imprisonment of up to two years. The Health and Safety Authority ('the HSA') may publish lists of employers that have been convicted of health and safety offences as a further deterrent.

The employer must prove that it took all 'reasonably practicable' steps to ensure the health, safety and welfare of its employees at the workplace and to have a safe system of work in place. The Act defines what is 'reasonably practicable'.

An employer must assess the risk and then address it with precautionary and preventative measures as appropriate. The only defence available is that it would have been unforeseeable and unreasonable to expect steps to have been taken that could have prevented the offence occurring.

Health and Safety issues must be integrated into the main corporate governance structure of every undertaking. To assist in this aim, the HSA issued a document entitled 'Guidance for Directors On Their Responsibilities For Work Place Safety' **(See our Newsletter May 2008: 'Health and Safety Guidelines for Directors from HSA')**.

In 2004 at the Circuit Court in **DPP for HSA v Smurfit News Print** fined Smurfit €1 million. Although a full-time safety officer had been employed, neither he nor the manufacturer of the equipment had identified the risk that led to two workers being seriously injured within the space of two weeks. The Court stated that the company had shown a 'cavalier disregard' for health and safety.

The Courts have looked to the financial position of the defendant company/individual in assessing the fines payable in each particular case. In **DPP for HSA v Markethaven and Walmac** (February 2010) a complaint was lodged with the HSA regarding the presence of asbestos at a demolition site. After an inspection, all works ceased. The total cost of the clean-up operation was in excess of €300,000. A fine of €60,000 was imposed on Markethaven and €30,000 on Walmac as sub-contractor. The judge stated that he 'must be fair in relation to ability to pay' and fines are set at a level to deter offences.

In June 2008, Dublin Circuit Criminal Court imposed a fine of €2 million on Bus Eireann when five schoolgirls were killed in an accident when the buses' ABS brakes failed to function properly **(DPP for HSA v Bus Eireann and others)**.

Due to other factors involved in the accident, a further fine was imposed of €100,000 on Meath County Council and €100,000 on Keltank Limited. Judge Patrick McCarten noted that the fatalities were 'entirely avoidable'.

If the financial burden of the level of fines imposed is not sufficient motivation to ensure health and safety compliance, the Courts have now shown a willingness to impose custodial sentences for breaches of health and safety legislation.

In November 2009, Judge Griffin handed down a 3 month prison sentence, suspended for two years, for a breach of Section 13(1)(g) of the Act **(DPP for HSA v Daniel Lynch)**. An excavator driver, was convicted of 'failing, having regard to his training and instructions from his employer, to make correct use of articles provided'. A worker was killed when the bucket of the excavator became detached and fell on him.

Last month, the Ennis Circuit Criminal Court handed down a 12 month sentence, suspended for two years to a retired local authority senior executive engineer **(DPP for HSA v Michael Scully and Clare County Council)**. The deceased, Mr. O'Grady, was operating a site dumper and tipping material over the edge of an embankment when his dumper overturned and he sustained fatal injuries. A representative from the Council stated that the accident could have easily been avoided had stop blocks been in place to prevent the dumper going over the edge of the embankment. A fine of €50,000 was imposed on Clare County Council.

In times where businesses are cutting costs, it is important that health and safety remains at the forefront of every management plan. The HSA have shown that they have no hesitation in enforcing the legislation through the Courts by means of large fines and even prison sentences.

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