Structured Settlement Arrangements

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Structured settlement agreements or awards for personal injuries actions has always been a topic of discussion. However recent developments in the Courts brings the issue sharply into focus for solicitors and insurers alike.

The President of The High Court, Mr Justice Kearns praised legal representatives for constructing a 'historic' agreement, where the Plaintiff, a 40 year old security guard with a severe brain injury, was awarded a lump sum settlement in respect of general and special damages. Thereafter he will receive an annual sum in respect of medical costs and loss of income for the duration of his life with those payments index linked.

The settlement agreement was made on a preliminary basis pending the introduction of legislation facilitating such settlements and was adjourned to October 2011 in anticipation of such legislation. The intention is for Mr Justice Kearns to make a periodic payment order on the introduction of the legislation.

At present settlement payments are exempt from tax, but second or subsequent payments are liable to taxation. It is unlikely these arrangements will become popular until such time as the entire settlement funds are exempt from tax.

Structured settlements are not uncommon in other common law jurisdictions, having been in use in Britain since the mid 1980's and even earlier in USA. The formula is used in cases involving catastrophic injuries which attract damages and are assessed on a capitalised basis. Typically those damages relate to future loss of earnings or future cost of care management for the injured party.

In such cases the Courts are asked to determine between competing evidence concerning not only the valuation of the future losses, but also frequently on the life expectancy of the injured party. This is an issue for some members of the Judiciary and legal commentators, as people who suffer catastrophic injuries may find their awards do not last for the duration of their life. A further concern arises if the injured person dies; the original wrongdoer who may be a close relative, may benefit by inheritance of the remainder of the original lump sum.

Mr Justice Quirke was recently appointed to chair a Working Group to examine whether certain categories of damages for catastrophic injuries can or should be awarded by periodic payment orders. It is expected that the findings recommend facilitating structured agreements with periodic payments. Insurers are watching closely for the introduction of these types of settlements as they have consequences for how they manage their capital funds. Changes to reserving practices may be required and such payment orders will undoubtedly also have implications for cash reserves and portfolio expansion.

It will be interesting to see if the Working Group recommends restricting such payments to claimants suffering from certain injury types, such as brain injuries or other injuries which require particular protection from the Courts. It seems reasonable to suggest that the Group will support any party who voluntarily agrees to such an arrangement. It remains to be seen if provision will be made to revisit the agreement, if for example, medical inflation over a long period is greater or less than anticipated. A further issue is whether claimants who suffer catastrophic injuries of a physical nature be required to accept periodic payment orders. That scenario might deprive those individuals of investment opportunities and is therefore unlikely.

No system of periodic payments is going to work unless there is security for payments and a requirement that those payments be index linked. The issue of periodic payments appears more suited to settlements/awards against the State, or state organisations such as the HSE in the case of a medical negligence action, with the payments being guaranteed by the State.

The situation may be different where the Defendant has private insurance for the claim. It is impossible to say with certainty that general insurers are immune from financial collapse. With recent events, in the short term Judges may refrain from approving structured settlements with periodic payment orders against general insurers.

This form of payment arrangement has received a lot of attention. It is clear there are advantages for both claimants and insurers. Both insurers and solicitors should view the matter of periodic payment orders as a probability rather than mere possibility.

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Where does your allegiance lie?

Cormac Wilde,
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The theory that sport and politics make uneasy bedfellows is one that has existed for quite some time. However, when one exposes this relationship to the world of law, things can get even more complicated. Unfortunately for Irish football, this is exactly what happened when the Court of Arbitration for Sport ('CAS') in Lausanne, Switzerland recently rejected an appeal by the Irish Football Association ('IFA') against a decision by FIFA (football's world governing body) to allow Daniel Kearns to play for the Republic of Ireland rather than the country of his birth, Northern Ireland.

In contrast to rugby union, football in Ireland exists in an environment whereby two international teams co-exist and compete under two separate national associations. Until 1950, complaints of 'player poaching' were common place, ultimately concluding in the 1950 FIFA Ruling whereby each association agreed not to select players born outside their own territory.

The Good Friday Agreement of 1998 recognised the birthright of all Northern Ireland citizens to view themselves as Irish, British or both. In recent years, the decision of the Football Association of Ireland ('FAI') to begin selecting players born north of the border has infuriated their counterparts in the IFA, culminating in them making a complaint to FIFA. When FIFA rejected this complaint, the IFA decided to pursue it further and an appeal was heard in the CAS on 30th July 2010.

In their submissions, the IFA raised the 1950 FIFA Ruling as a principle tenet of their argument. According to the IFA, this agreement was akin to an 'accord' which had developed between the two countries and had functioned perfectly until 2006 when the FAI began approaching Northern Ireland players who had no birth or residence connection to the territory of the Republic of Ireland.

The second part of their appeal surrounded FIFA's own '2009 Application Regulations' and specifically Article 16. The IFA argued that FIFA's stance directly contravened its own rules regarding the eligibility of players to play for more than one nation. Article 16 states that in order to represent a football association, a player must fulfil one of the following:

- He was born on the territory of the relevant association;
- His biological mother or father was born on the territory of the relevant association;
- His grandmother or grandfather was born on the territory of the relevant association; and
- He has lived continuously on the territory of the relevant association for at least two years.

It was their submission that Mr. Kearns, a citizen of Northern Ireland who had no territorial connection to the Republic of Ireland, did not satisfy any of the requirements laid out in Article 16.

In a not unexpected decision, the CAS dismissed the appeal and confirmed the decision of FIFA, which recognised that Kearns was eligible to play for the FAI and their national team. In reaching its decision, CAS placed major significance on FIFA'S 2009 regulations and stated that player eligibility should be determined by reference to them.

In the present case, they ruled that Article 16 had no relevance given that Mr. Kearns already possessed 'dual nationality' and therefore this rendered the IFA's territoriality argument redundant. The CAS contended that Article 15 was applicable in the present situation. Article 15 states that any person holding permanent nationality in a country attains eligibility to play for the representative teams of the association of that country. Whilst this also stipulates that a player must not have represented another country up to 'A' level in any official competition, it did not apply to Kearns as he had only represented Northern Ireland at youth level.

The decision of CAS provides closure to what has become an extremely contentious sporting issue on the island of Ireland. It is without doubt that the negotiation of the Good Friday Agreement has been instrumental in shaping Irish society both politically and socially. Unfortunately for the IFA, its creation has facilitated the possibility of a talent drain of players from one national team to another. The decision of Daniel Kearns to switch allegiance is merely one of many that have been made by players born north of the border and CAS's judgement will work to cement this practice well into the future.

Party Structures – New Proposed Legislation in Northern Ireland

Noelle McDonald,
Solicitor/Compliance Officer

The Northern Ireland Law Reform Commission plan to introduce new statutory measures regulating party structures and access to neighbouring land in the near future. Similar legislation already exists in England and Wales under The Access to Neighbouring Land Act 1992 and The Party Walls Act 1996 and in the Republic of Ireland under the Land and Conveyancing Reform Act 2009.

It is envisaged that the new legislation will provide for and deal with the difficulties and disputes which may arise between neighbouring landowners over works to party structures or works to land and buildings which may only be carried out with access to neighbouring land. The statutory measures will not apply if consent has been obtained from the neighbouring owner.

Party structures will include any arch, ceiling, ditch, fence or any other structure that divides adjoining or separately owned buildings and to which it is impossible to carry out works without access to the adjoining building or lands.

If no consent or agreement is forthcoming, then the building owner would be required to serve a party structure notice before exercising any rights to carry out the building works. The party structure notice must comply with certain requirements, such as the time sales for completion, detail the impact the proposed works will have on the adjoining lands and submitting a proposal for making good damage for any inconvenience caused. The building owner must also in advance of commencement of any works nominate an independent panel surveyor to certify the contents of the party structure notice.

The adjoining owner can serve a counter notice and can refer to matter to the Land Tribunal for determination. Where a counter notice has not been served, consent will be deemed to have been given.

The new statutory measures aim to reform and modernise dispute procedures relating to party structures to avoid such disputes ending up in Court.

Another nail in the Tenants' coffin?

Bernie Coleman,
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Commercial Property

In the recent case of *Meagher and Anor - v - Luke J Healy Pharmacy Ltd,* the Supreme Court ruled that a tenant is not entitled to recover damages even though he may have suffered a loss arising from the landlord's refusal to give consent to assignment.

The lease in question contained an absolute covenant by the tenant where he covenanted 'not to assign the said premises or any part thereof without the previous consent in writing of the lessor first had and obtained'.

Most leases contain a similar covenant in qualified form with the above restriction being followed by the proviso that 'consent shall not be unreasonably withheld'.

Where a lease contains an absolute covenant, it is now modified by Section 66 (2)(A) of the Landlord and Tenant (Amendment) Act 1980 to provide that 'such consent shall not be unreasonably withheld'.

After a review of Irish and English case law over the past century, the Supreme Court held that the statutory modification does not place a positive obligation on the landlord to act reasonably. It is not interpreted as a covenant by the landlord that he will not withhold or refuse consent unreasonably, it is merely a qualification of the lessee's covenant. In the absence of a specific covenant by the landlord, the tenant is not entitled to damages for any losses suffered by him arising from any delay in assignment due to the landlord's refusal to consent.

Tenants and their solicitors should ensure that all future leases contain a specific covenant by the landlord that he shall not unreasonably withhold consent either for assignment, subletting or change of use.

A Slap in the Facebook

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Defendant Litigation

The recent High Court case of *Alan Danagher ~v~ Glantine Inns Limited* highlights the consequences for both Personal Injury practitioners and Plaintiffs that may seek to exaggerate personal injuries claims. The Plaintiff claimed that the injuries sustained forced him to abandon his involvement in sports and to severely curtail his social life. However the Plaintiff's Facebook page painted a difference picture of his lifestyle since the alleged assault. Numerous self-authored entries recorded his participation in sports, references to his social life and his eagerness for partying.

In addition, it was revealed that the Plaintiff took part in a parachute jump six months after the alleged assault. The Plaintiff claimed that the parachute jump had taken place prior to the assault but as it had been reported in the local newspaper, he was found to have deliberately misled the Court.

The High Court dismissed the case as it found the Defendant had no liability in the matter. However, Ms Justice Irvine noted that under Section 26 of the Civil Liability & Courts Act 2004, where a party knowingly gave false and misleading information in relation to a material aspect of his case, the Court may dismiss such a claim.

This case demonstrates the necessity that details of personal injuries claims must be honest and accurate. Defendants are reinforcing conventional surveillance methods with social networking sites such as Facebook. By use of such sites, a Plaintiff may unintentionally provide evidence against themselves which ultimately leads to dismissal of their claim.

A New Deal for Tenants

Bernie Coleman,
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With the global recession at its height and domestic spending at an all time low, many of the country's retailers have suffered hugely difficult trading positions over the past two years.

Market rents remained artificially high due to the upward only rent review clause (UORRC), standard in commercial leases, while turnover fell. After extensive and effective lobbying by ISME and Retail Excellence Ireland to name but two organisations, the UORRC was abolished in February 2010.

Many business tenants believe that the rent review procedure and arbitration process were inherently biased in favour of landlords. This was due partly to the absence of accurate and accessible information as to the true level of letting transactions and partly to the professional background of arbitrators who were perceived to be in league with landlords. These perceptions, allied with the absence of reasoned arbitration awards, generated substantial tenant dissatisfaction with the process.

The Minister for Justice. Dermot Ahern TD set up the Working Group on Transparency in Commercial Rent Reviews in March 2010 to address the concerns of the retail sector. This Working Group has recently published their report.

Accurate Information

The Working Group recognised that access to accurate information was crucial to the ascertainment of true market rent and that the current process of gathering information was not systematic. The information was based on the market knowledge of individual valuers, surveyors and auctioneers and the use of personal contacts to discover the relevant facts underlying a particular letting.

In addition, the widespread use of side agreements with confidentiality clauses has made compiling comparative evidence more difficult and unreliable. This has given rise to the situation where the headline rent (the rent disclosed on the face of the lease), does not always reflect the rent being paid. Furthermore as these side agreements often dealt with matters other than rent (for example rent free periods, contributions to fit out costs, early break clauses etc), the non-disclosure of their existence and content totally undermined the rent review process.

Recommendations

The Working Group has recommended that:

- An independent and accessible public database should be established to address the present information deficit. This database is to have statutory backing.
- A mechanism should be found to ensure that the basic information currently available only to the Revenue Commissioners for the purpose of stamp duty returns be transferred to the new database.
- In future, all parties to the rent review process have to make full disclosure of all relevant information to avoid distortion of the market.
- An obligation will be imposed on landlords and their solicitors/agents to supply additional information to include the net floor area per floor, frequency of rent reviews, rent free periods, break clauses, fitting out time, fit out allowances or capital contributions, liability for rates/insurance/service charge/repairs, and any new rents agreed and/or variations to leases.

It suggests that the new Property Services Regulatory Authority (PRSA) might be given a role in relation to the database. Legislation is currently been debated in the Houses of the Oireachtas for the establishment of the PRSA.

Knowledge of the process

The Working Group highlighted the lack of awareness among many participants about the extent to which they might control the rent review process as a serious obstacle to a satisfactory outcome. While the statutory regime for arbitration offers a general framework, it is not focused particularly on the specifics of commercial rent review arbitrations.

Recommendations

The Working Group developed as part of their report a code of best practice called the Rent Review Arbitration Code 2010 ('the Code'). It was recommended that the Code should apply in the arbitration process and should be adopted on an industry wide basis.

A further recommendation was the issue of reasoned awards following any arbitration. They should include as a minimum, the following information:

- The evidence including comparative evidence considered during the course of the arbitration;
- The weight given to such evidence; and
- The basis for the weight which was given to such evidence.

Rent reviews should take place as close to the review date as possible and both parties to the lease should have a shared responsibility in relation to this review. The parties to a commercial lease should, unless there is particularly strong reason otherwise, ensure that rent review clauses are drafted in a neutral way which will facilitate either party in instituting the rent review process.

The Code is intended as an addition to the Arbitration Act 2010 ('the Act'). It is not intended and cannot override the mandatory provisions of the Act nor can it not override any specific provisions in a lease. The Code sets out the particular processes and procedures for commercial rent reviews which are not specified in the Act. It emphasises the pre-eminent duty of the arbitrator to deal fairly with the parties and the overriding duty of the parties to provide honestly all relevant information to the arbitrator. The Code provides a limited right to apply to the arbitrator to revisit the arbitration where the duty of the parties to make full and honest disclosure has been breached. Such application must be made within 50 days of the proposed award, otherwise it becomes final.

The full text of the Code is available on our website at www.orourkereid.com

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