# Making Good Neighbours

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The Land and Conveyancing Law Reform Act 2009 ('the Act') represents the first major reform of Irish Land Law since the foundation of the State. One of the many areas covered is the modernisation of the law relating to the rights of adjoining property owners regarding their adjacent properties. The Act introduces a new statutory right for a landowner ('the building owner') to carry out works to a party structure.

A 'party structure' is defined as any arch, ceiling, ditch, fence, floor, hedge, partition, shrub, tree, wall or other structure which horizontally, vertically, or in any other way divides adjoining and separately owned buildings. It may be situated at or on or as close to the boundary line between the adjoining and separately owned buildings or between such buildings and unbuilt-on lands that it is impossible or not reasonably practical to carry out works to the structure without access to the adjoining building or unbuilt-on land.

The term 'works' covers adjustments or alterations, cutting into or cutting away, decoration, demolition, improvement, lowering, maintenance, raising, renewal, repair, replacement, strengthening, removal, cutting or replacing hedges or trees, clearing or filling in of ditches, repairing or replacing various types of cables, drains, sewers, pipes, wires or other conduits.

A building owner may carry out works to a party structure to comply with any statute, notice or order, to carry out exempted developments or developments for which planning permission has been granted. They may also carry out any work for the preservation of the party structure or any other works which will not cause substantial damage or inconvenience to the adjoining owner or if they may cause such damage or inconvenience it is reasonable to carry them out.

A building owner who is in dispute with an adjoining owner over works to a party structure may apply to the District Court for an Order (called a Works Order) authorising the works. The Court in deciding whether to make such an Order, will determine the appropriate terms and conditions it may attach to the Order. The Court has a wide discretion as to the terms and conditions, which may be attached to such an order, and it may take into account any circumstances it considers relevant. However a Works Order shall not authorise permanent interference with or the loss of any rights relating to the party structure. The District Court is also entitled to discharge or modify a Works Order on such terms as it deems suitable.

In carrying out such works, the building owner must make good any damage caused to the adjoining owner's property during the resultant works. Alternatively he must reimburse the adjoining owner the reasonable costs and expenses of making good any damage caused, pay any reasonable professional costs incurred and compensation for any inconvenience caused. The building owner is entitled to claim a contribution or make a deduction from such amounts to take account of the proportionate use or enjoyment of the party structures which the adjoining owner makes or is likely to make.

In addition an adjoining owner may apply to the Court for an Order, requiring any damage caused by the building owner to be made good. If the building owner fails to correct this damage within a reasonable time or fails to reimburse the costs and expenses for such a project, the adjoining owner may recover the costs and expenses as a simple contract debt. Likewise the building owner may recover any contribution owed by the adjoining landowner as a simple contract debt.

These provisions set out clearly and simply the rights and obligations of a building owner and provide a simple mechanism whereby the matter can be decided by an independent arbiter in the event of any dispute. Because the District Court has jurisdiction to hear such applications, the process will be relatively inexpensive and fast. It has often occurred in the past that neighbours have fallen out with each other over such everyday issues as replacing or decorating gutters which overhang an adjoining property or building an extension up against a party wall. The existence of these provisions may encourage neighbours to resolve any issues between them amicably and so avoid the dreaded 'neighbours from hell' syndrome.

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### Repossession Orders

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Following passing of the Land and Conveyancing Law Reform Act 2009 from 1st December 2009, the Circuit Court will have exclusive jurisdiction to hear applications for repossession of a family home which is subject to a house loan.

In addition, recent changes to the Circuit Court rules means that from 8th July 2009, the County Registrar has the power to make an Order for Possession without a Judge hearing your case.

The County Registrar's power to grant an Order for recovery of possession of any land on foot of a mortgage, arises when one or more of the following occurs:

- No appearance is entered to the Civil Bill; or
- A replying affidavit to the Civil Bill, disclosing a *prima facie* defence has not been filed

It is essential that the replying affidavit discloses a clear defence to the claim for possession. Given the onerous consequences of failing to show there is a defence to the claim, it is prudent to seek legal advice before filing an affidavit. Advice should be sought at an early juncture as there are considerable time constraints involved in filing an appearance and a replying affidavit. A defendant only has 10 days from the date of service of the Civil Bill to file an appearance. The replying affidavit must be filed at least 4 days before the trial date.

Once an appearance is entered and a proper affidavit filed, the County Registrar must transfer the matter to a Judge for hearing.

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# Enforcement of Judgments

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With cashflow crucial for the survival of many businesses during the current recession, what can you do to enforce your judgments?

There are three types of Judgments also known as instruments of execution: the High Court instrument is called a Fi-Fa; the Circuit Court's is called an Execution Order and the District Court instrument is called a Decree. Judgments obtained by default or otherwise also include an award for costs and interest from the date of Judgment.

Creditors have a number of enforcement options. The following are the most common options and it is worth noting that none of the methods described are mutually exclusive.

### Seizure by the Sheriff

A creditor, once in receipt of an Execution Order, can instruct the Sheriff to levy execution, in other words, seize goods belonging to the debtor. The Sheriff will then sell the goods and give the proceeds to the creditor less his fee, on execution of the Order.

The Sheriff can seize all of the debtor's moveable goods such as household furniture, stock, shop goods and personal chattels. The debtor must have a saleable interest in the goods in his own right i.e. they cannot be subject to a hire purchase agreement or leasing arrangement or joint ownership. Once an Execution Order is given to the Sheriff, this means that the creditor places control in the hands of the Sheriff.

### Registering a Judgment Mortgage

A Judgment Mortgage is another method of securing a judgment debt in this case by mortgage over the property of the debtor. An Affidavit is sworn by the creditor and certified by the Court office that issued the judgment. The Affidavit is then registered as a mortgage with the Property Registration Authority. The onus is on the creditor to be satisfied that the debtor owns the lands to be mortgaged or has a beneficial interest in the property. If he is wrong, there is a risk of being sued for defamation. On payment of the debt, a Judgment Mortgage can be removed by the registration of a satisfaction piece or discharge form. The Judgement Mortgage must be enforced within 12 years.

### Well Charging Order

Where a creditor has a Judgment Mortgage over a property, he can force the debtor to pay the debt by applying for a Well Charging Order and an order for possession or sale. The application is made by way of a Special Summons in the High Court or by an Ejectment Civil Bill in the Circuit Court. The Courts usually grant a stay on proceedings for 3 to 6 months on such orders.

### Publication of a Judgment

A creditor can also register a judgment in the Registry of Judgments. The Register is inspected weekly and extracts are published in Stubbs Gazette, Experian and Sunday Business Post. This is a useful tool with which to threaten a debtor, as they often rely on their credit rating for the supply of credit.

### Instalment orders

This process is governed by the Enforcement of Courts Acts 1926 and 1940, as amended by the Enforcement of Courts Orders (Amendment) Act 2009. The debtor is examined as to his means in the District Court, regardless of which Court issued the original judgment. The District Court area where the instalment process is issued must be where the debtor resides. The District Court will examine the debtor as to his income and will decide the appropriate instalment for the debtor to pay in order to discharge the debt along with the costs and any accruing interest.

### Committal orders

Up until recently, failure on the part of the debtor to pay at least €2,000 of an instalment order could result in a committal order. The creditor could apply to the Court for the debtor to be committed to prison. However, the recent High Court decision in *McCann v Judge* of Monaghan District Court, ruled that the legislation which allowed imprisonment as a mechanism to enforce the payment of debt, breached a number of constitutional rights and was therefore ineffective.

Shortly after the McCann ruling, the Government enacted the Enforcement of Courts Orders (Amendment) Act 2009. This new legislation states that a summons can be issued directing that the debtor appear before the Court for failure to pay an instalment order. The Summons must now be served personally on the debtor unless the District Court orders otherwise. The Judge under the new Act has a number of options; he can decide to refer the dispute to mediation, vary the original instalment order or fix a term for imprisonment.

Under the Act the debtor must be informed of his right to seek legal aid where they are at risk of imprisonment. The creditor, before an order for imprisonment is made, must be able to prove to the satisfaction of the Court that the debtor is wilfully refusing to pay the instalments previously ordered and that their goods cannot be seized and sold in payment of the debt. The level of proof and type of evidence that will have to be provided to the Court before a Committal Order is granted is significant.

*Continued from page 2*

### Garnishee Order

A creditor can make an application for a Garnishee Order with the aim of seizing funds due to the debtor. Through this process, the Court can order that a third party, the Garnishee, pay the creditor the debt accruing to him in satisfaction of the debt the Garnishee owes to the debtor.

## Caught in the Middle

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The recent examinership and ultimate liquidation of O'Brien's Irish Sandwich Bars turned on the question of the leases held by the main company. That company held the majority of the leases which were then sub-let to the franchisees. The majority of franchisees opposed the plans of the examiner on the basis that he wished to repudiate the head leases thus leaving the franchisees with the leasehold interests and the rental burden. A number of questions arise from the failure of O'Brien's but perhaps one of immediate concern is that of the ability of the High Court to order the repudiation of contracts (including leases).

All proposals for a scheme of arrangement must be sanctioned by the Court before they become binding. Even where proposals are accepted by a majority of the creditors they require Court approval. Under Section 24(4) of the Companies (Amendment) Act 1990 ("the Act") a Court cannot confirm any proposals:-

(a) unless at least one class of creditors who would be adversely affected has accepted the proposals; or

(b) if the primary purpose is the avoidance of the payment of tax; or

(c) the court is satisfied

- the proposals are fair and equitable in relation to a class of members or creditors that have not accepted the proposals and whose interests or claims would be impaired; and
- the proposals do not unfairly prejudice any interested party.

The Court's discretion is restricted as it cannot confirm proposals where either (a) or (b) or (c) apply. The guiding principle for the Court is that the scheme should be fair and reasonable.

Section 20(1) the Act provides that where proposals for a scheme of arrangement are being formulated, the company may, with the approval of the Court "affirm or repudiate" any contract under which some element of performance, other than payment remains to be rendered by both the company and the other contracting party. This allows a company to renege on onerous contractual obligations.

Anybody who suffers loss or damage as a result of the repudiation of a contract is an unsecured creditor for the amount of loss or damage.

However, Section 25B(1)(a) prohibits the scheme of arrangement from providing for the extinguishment or reduction in the amount of rent or other payment in a lease after the scheme is approved. Section 25B(1)(b) prevents a court from approving a scheme where it restricts the exercise by a landlord of any right whether under the lease or otherwise, to recover possession of the land, effect a forfeiture of the lease, recover the rent or claim damages in respect of the failure by the tenant to comply with any obligation in a lease.

A scheme of arrangement, which affects the rights protected by Section 25(B), may only contain such provisions where the landlord of the property has consented in writing. Thus a Court has the power to limit a landlord's rights under a lease both in terms of the amount of rent payable and enforcement of any remedies only where the landlord has consented in writing.

However, at the same time, the Court may repudiate any contract under S. 20 (which would include a lease) which is the subject of any onerous obligation or covenant. The scheme proposed in O'Brien's Irish Sandwich Bars would have required the repudiation of a large number of leases between O'Brien's and its landlords.

A large number of the franchisees opposed the repudiation of the leases. The immediate result of the repudiation of the Head Leases would have been that the franchisee sub-tenants would have been directly responsible to the landlords for all of the provisions of the leases including rent and other obligations. It was reported that a number of landlords were seeking personal guarantees from the franchisees.

The scheme as proposed required the repudiation of the leases and the opposition of the franchisees appears to have convinced the Court that the repudiation of the majority of the leases did not satisfy the principles set out in Section 24(4)(c) above. In other words the Court was not satisfied that the proposal was fair and reasonable in all of the circumstances.

We await the written judgment setting out the reasoning behind the High Court's decision to refuse to approve the Scheme of Arrangement.

## Costs versus Disclosure

Raphoe Collins,
Associate,
Private Client

We have all heard the old saying, "where there's a will, there's a relative". While this is often said in jest, challenges to Wills are becoming more commonplace. A recent decision in the Courts gives some direction on how best to deal with such a matter if it arises.

A solicitor has a professional duty of confidentiality in respect of all matters concerning the solicitor/client relationship. This cannot be breached without the permission of the client or the direction of the Court. In the case of a Will, the solicitor must maintain this duty after their client's death and it transfers to the new client, the executor(s).

When a relative or beneficiary challenges a Will, they will seek all the information concerning the making of the Will. This presents a problem with the solicitor's duty of confidentiality. The case of Elliot v Stamp (2008) highlighted what information the executor(s) and his solicitor should provide in such an instance.

The case concerned a challenge to the validity of a Will on grounds of lack of testamentary capacity, duress, undue influence and non-compliance with formalities. At trial the validity of the Will was upheld. Undue influence was the only issue in dispute at the trial. The Plaintiff was awarded one third of his costs from the estate.

The matter was appealed to the Supreme Court. In his judgment, Justice Kearns stated that he was "not satisfied, based on an objective evaluation of the documents supplied to the plaintiffs before trial, that there was sufficient information therein to meet all of the requirements or concerns which the plaintiff may reasonably have had".

Even when solicitors are bound by the duty of confidentiality, it appears that the best way of protecting an Estate's assets from trivial claims would be to disclose as much information as possible at an early stage before litigation arises, as to do so may defeat a later claim for costs.

# Showing on a Screen Near You!

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The main legislation providing for the health and safety of people in the workplace is the Safety, Health and Welfare at Work Act 2005 ('The Act'). The Act applies to all employers, employees (including fixed-term and temporary employees) and self-employed people in their workplaces. It sets out the rights and obligations of both employers and employees and provides for various fines and penalties for breaches of the legislation.

### The (General Application) Regulations 2007:

The Safety, Health and Welfare at Work (General Application) Regulations 2007 ('The Regulations') Chapter 5 affect employees who use display screen equipment ('VDUs') on a regular basis as part of their normal work.

Under this legislation **employers** are now required to:

(i) evaluate health and safety at their employees workstations with particular reference to eyesight, physical difficulties and mental stress;
(ii) where any risks are identified, appropriate steps must be taken to control such risks;
(iii) the analysis of the workstation must be conducted by a competent person, with the necessary skills, training and experience; and
(iv) the analysis must also take account of the minimum requirements in Schedule 4 of the Regulations.

In general, these regulations provide that **employees**:

(i) are entitled to have their workstation assessed in line with the requirements set out in the legislation;
(ii) must be trained in the use of their workstation and be given information about health and safety factors;
(iii) must have periodic breaks or changes of routine, away from VDUs; and
(iv) must be informed by their employer that they are entitled to an appropriate eyesight test before working with VDUs and at regular intervals are entitled to spectacles to be provided, at no cost to the employees, for working at a display screen.

### Upper limb pain and discomfort

A range of effects on the arm, hand and shoulder areas linked to work activities are now described as work-related upper limb disorders (WRULDS). These range from temporary fatigue or soreness in the limbs, to cramp and ongoing pain in the muscles or nerves.

The Health and Safety Authority ('The HSA') states that problems can be avoided by good workplace design and good working practices. Prevention is easiest if action is taken early through effective analysis of a workstation.

The onset of fatigue and stress can be minimised by careful design, selection and location of VDUs, good design of the workstation, its environment and the task involved as well as training, consultation and involvement of the employee.

### Actions and Damages

Under the legislation if an employee has suffered an injury at work, they cannot seek compensation directly from their employer but they may make a personal injury claim through InjuriesBoard.ie.

### Consequences of non-compliance

The Act allows the HSA to take action where statutory contraventions are observed or where there is a risk of serious personal injury. These actions include:

- The issuing of an Improvement Direction, which requires an employer to respond with an Improvement Plan;
- The issuing of an Improvement Notice stating the Inspectors' opinion that a duty holder has contravened a provision of an Act or Regulations, and requiring that the contravention be addressed within a certain time period of not less than 14 days;
- The issuing of a Prohibition Notice, which takes immediate effect;
- The issuing of an Information Notice requiring a person to present to the HSA any information specified by the notice; and
- The HSA has the power to impose various fines and penalties for violations of the legislation. These include a possible fine up to €3,000 and/or up to six months imprisonment on summary conviction in the District Court.

### Recent Case Law & Reports

In the recent UK case of *Fifield v Denton Hall Legal Services*, a legal secretary who had developed considerable pain in her wrists in the course of her work successfully held her employer liable for the injuries she had suffered. The Court held that the employer had failed in his statutory duty to ensure the health and safety of their employees by carrying out regular assessments of workstations and providing adequate training in the use of VDUs. The secretary was awarded over £150,000 of which half of the sum was for future earnings.

The English Court of Appeal has recently held in the case of *Latona Allison v London Underground Ltd (2008)* that risk assessments are meant to be an exercise by which an employer examines and evaluates all the risks entailed in its operations and takes steps to remove or minimise those risks.

Delivering judgment in the case taken by an underground train driver, who developed tenosynovitas due to the strain caused by holding a traction brake controller, Lady Justice Smith said risk assessments 'should be a blueprint for action'. She held that 'a proper assessment of the risks of developing a static upper limb disorder from the prolonged use of a traction brake controller was likely to be beyond the capabilities of anybody other than an ergonomist'. This is regarded as a significant judgment as the Judge highlighted the need for employers to take the advice of experts when carrying out risk assessments.

Ergonomics first came to the attention of the professional sector as a creative way of increasing productivity and employee efficiency. Medical research also began to link certain musculoskeletal disorders to common work practices in the average workplace from the incorrect use of the keyboard. Ergonomics in the workplace has thus become an issue related to the safety of the employee, as well as a profit-affecting variant.

### Recent reports in the UK and Ireland have told us the following:

(i) Repetitive Strain Injury (RSI) costs UK businesses more than £300 million every year. The report by Microsoft also stated that more than 370,000 people in the UK are affected by RSI;
(ii) According to the CSO, 980,200 workdays were lost in 2006 because of work related illnesses; and
(iii) Musculoskeletal disorders have been found to arise from the following work-related tasks:
  - Lifting/carting/pushing/pulling – 33%
  - Materials manipulation – 31%
  - Keyboard Work – 19%

The HSA announced that their 'Programme of Work 2009' will focus on VDU assessments as well as other safety issues.

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