Publicans Duty of Care to Customers?

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A recent decision of Mr. Justice Feeney in the High Court held that if a customer is capable of deciding to drink to excess and he or she causes injury or damage as a result of that excess, that person is entirely at fault and not the publican who served that person the drink.

Background

AXA Insurance brought recovery proceedings against the insurers for publicans Seamus and Concepta Kelly who were the owners of the Diamond Bar. On the afternoon of 31 March 2005, John Connolly was driving his car in Leitrim when he was involved in a collision with a vehicle being driven by Ms. Mary Flanagan. As a result of the collision, Mr. Connolly and one of the passengers in Ms. Flanagan's car were killed. The crash occurred as Mr. Connolly had driven onto the wrong side of the road. Two children in Ms. Flanagan's vehicle were also seriously injured and require care for the rest of their lives.

Connolly had been served 5 to 6 pints of alcohol at the Diamond Bar prior to the crash. Having heard the evidence and given the blood alcohol level in Mr. Connolly's blood at the time of death, Mr. Justice Feeney said that it was apparent that Connolly had probably consumed additional alcohol earlier that day.

The Court rejected arguments that Connolly should not have been served alcohol given he was likely to drive a car. AXA had settled Ms. Flanagan's claim against the Estate of Mr. Connolly and sought to recover the cost of the settlement in the proceedings against the insurers for the publicans.

The claim was dismissed by Mr. Justice Feeney who held that it was not for a publican to supervise or enforce the provisions of the Road Traffic Acts. He went on to say that it was the duty of the driver only to comply with the Road Traffic Acts and there was no obligation on any other party to ensure their compliance. The Judge remarked that to place such a burden on any publican is unacceptable and was an undesirable shift of an individual's responsibility for their own actions.

Mr. Justice Feeney went on to say that if a publican was required to restrain a customer drinking on their premises, then he may be committing a criminal offence e.g. false imprisonment/assault and battery. If public policy was to require a change in the burden of responsibility onto a publican to restrain a customer, this was a legislative matter and not for the Court to decide.

In reaching his decision, Mr. Justice Feeney relied on previous decisions made in the UK and Australia rather than contrary decisions made in the US and Canada. Had the Court pursued the decisions of the Canadian and the US Courts, this could have had drastic implications for publicans in Ireland.

Mr. Justice Feeney's decision is important for publicans as it creates a precedent on this issue in the Irish Courts. Although he found in favour of publicans, in agreeing that they do not owe a duty of care to persons who drink alcohol to excess and then cause injury, he remarked that in exceptional circumstances a publican could owe a duty of care to a customer if that person was so intoxicated that they are unable to look after themselves. In this case, Mr. Justice Feeney accepted that Mr. Connolly was a regular customer at the premises and often consumed alcohol but not in a manner indicating that he was intoxicated.

Mr Connolly had, on many occasions in the past, decided not to drive home and on no occasion had the publicans felt it necessary to ask him not to drive.

Floating Charges and Priorities

On 25 March 2011 the High Court gave its first written judgment on the construction of the Section 285(7) of the Companies Act 1963 and the priority of debts in a winding up. The case concerned three companies in the Belgard Motor Group.

Finlay Geoghegan, J. concluded that the preferential debts of a company in liquidation rank in priority to the claim of a bank to any funds realised from assets which are the subject of a floating charge. The priority of preferential debts to a claim by a bank arises regardless of whether the floating charge had crystallised prior the commencement of winding up. The usual preferential creditors are the Revenue and certain sums due to the former employees of a company.

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New Forms B1 for Annual Returns

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Every company, whether trading or not, must deliver to the Registrar of Companies an Annual Return signed by a director and the company secretary. All companies should complete and submit the prescribed Form B1 no later than 28 days after its Annual Return Date. A new version of Form B1 came into effect on 1 April 2011.

Auditor Registration Number
Although a number of minor changes have been made to this form, the principal one is the requirement to provide an Auditor Registration Number (ARN) when an audited set of accounts is filed with an Annual Return.

The ARN is a unique number allocated to each individual auditor/firm of auditors by a Recognised Accountancy Body. The officers of a company must ensure the person engaged to audit the company's accounts and who signs the auditor's report, has an ARN and is on the Public Register of Auditors. You can check your auditor's ARN at http://www.cro.ie/auditors/Default.aspx.

Companies exempt from filing accounts with the CRO but whose Annual Return is accompanied by a special auditors report should provide the ARN. However the ARN is not required where a company is entitled to, and is claiming, an audit exemption. Furthermore, recently incorporated companies making their first Annual Return can leave the ARN field blank, as they are not obliged to attach accounts to their first Annual Return.

The CRO will accept the old version of the paper Form B1 until 1st October 2011. However, those using the CRO online facility (www.core.ie) will be submitting the revised form.

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Women on Boards - Not just a Gender Numbers Game

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In February, Lord Davies of Abersoch published his report entitled "Women on Boards". The report originated in the Coalition Government Agreement in the UK which spoke of promoting "gender equality on the boards of listed companies". Lord Davies was asked to review the current position in the UK and to identify barriers preventing more women reaching the boardroom. In the UK 12.5% of directors of FTSE 100 companies are women. The estimate for women directors in Ireland is just 7.5%.

Why does it matter?

Lord Davies noted that the debate is as much about improving business performance as about promoting equal opportunities for women. The report identifies four key dimensions to the debate for more gender diversity on boards:

- Improving performance
- Accessing a wider talent pool
- Responsiveness to the market
- Better corporate governance.

Improving performance

Boards are often criticised for having similar type board members, with similar backgrounds, education and networks. Research suggests that women take their non-executive director roles seriously and prepare more conscientiously for meetings. They also bring different perspectives and voices to the table, to the debate and to decision making.

Accessing the Talent Pool

Lord Davies suggested that tapping into the under-utilised pool of female talent at board level is vital if businesses are to remain competitive and respond to market demands. In his view corporate competitiveness is at stake.

Responsiveness to the Market

Women are estimated to be responsible for about 70% of household purchasing decisions and to hold almost half of the UK's wealth. Lord Davies suggests that having women on boards, who represent consumers of companies' products, could improve understanding of customer needs and lead to more informed decision making.

Achieving better Corporate Governance

According to the report, a Canadian study found that more gender-balanced boards were more likely to identify criteria for measuring strategy, monitor its implementation, follow conflict of interest guidelines and adhere to a code of conduct. They were also more likely to ensure better communication and focus on additional non-financial performance measures, such as employee and customer satisfaction, diversity and corporate social responsibility. A 2010 survey conducted by Harvard Business School researchers suggests that women appear to be more assertive on certain important governance issues such as evaluating the board's own performance and supporting greater supervision on boards.

Recommendations

"Women on Boards" makes ten main recommendations. These include a voluntary target of 25% female board representation by 2015. The report suggests that Chairmen should announce their representational goals by September 2011. The report expects Chief Executives to review the percentage of women they aim to have on their Executive Committees in 2013 and 2015. Other recommendations include a proposal to require quoted companies to disclose on an annual basis the proportion of women on the board, women in senior executive positions and female employees in the whole organisation.

The report suggests that the Financial Reporting Council should amend the UK Corporate Governance Code to require listed companies to establish a policy concerning board diversity, including measurable objectives for implementing the policy which should form part of the Annual Report. Under the proposals, Chairmen should disclose meaningful information about the company's appointment process and how it addresses diversity in the Annual Report including a description of the search and nomination process.

A further recommendation of the report is that executive recruitment firms should draw up a Voluntary Code of Conduct addressing gender diversity.

Conclusion

The debate about gender diversity on boards of directors has attracted attention globally. There have been varying responses to the lack of female representation on boards. Norway, Spain and France, amongst other countries, have either introduced or are considering introducing legislative quotas.

The European Commission launched a consultation on the EU Corporate Governance Framework on 5th April 2011. As part of that consultation process, the Commission noted that while it should be for companies to decide whether they introduce a diversity policy, boards should at least be required to consider the matter and disclose the decisions they have taken. The Commission is considering these matters in the context of its "Strategy for equality between women and men 2010 – 2015".

It is not known whether the Irish Stock Exchange is considering a review of gender diversity and its role in corporate governance in Ireland following the "Women on Boards" report.

Caught in the Middle

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Section 17 of the Civil Liability and Courts Act 2004 ('the Act') introduced an obligation on the parties to personal injury actions to deliver formal offers of settlement on each other not later than 14 days after service of the Notice of Trial. This obligation applies in the Circuit Court and High Court. The legislation allows the Court, when considering the costs order to be made at the conclusion of the case, to consider the "reasonableness of the conduct of the parties in making their offers". However the legislation did not address the issue of which party should make the first offer.

In practice, plaintiffs are reluctant to show their hand and deliver the first offer. Thus they have sought simultaneous exchange of offers or sought to delay the making of such offer. However some recent decisions of the Courts demonstrate that before setting down a personal injuries action for hearing, a plaintiff needs to ensure that his case is ready to be heard and that the injuries sustained are capable of accurate assessment.

In *O'Donnell v G.P. McEntee and Tierney* [2009], Kearns P. dismissed argument that Section 17 allows the parties to a personal injury action to make their formal offers at any stage up to the Trial date. He stated that the legislation requires an offer to be made within the prescribed period i.e. not later than 14 days after the service of the Notice of Trial. This decision, although providing clarity on this issue, did not resolve the difficulty of which party should make the first offer. The Court noted that while this may produce the oddity of simultaneous offers, this difficulty was created by legislation that was poorly drafted.

Section 17 was again raised in an application brought by the defendant in the case of *Ahern v Waterstone* [2010]. Mr. Justice Quirke noted that he was constrained by the legislation and could only provide a broad outline to be adopted in future cases. He indicated that by and large in assessment cases and catastrophic injury cases, the defendant will be ordered to make their formal offer first and the plaintiff could then consider same. In all other cases, it would appear that the Court must determine the matter based on its individual merits.

Mr. Justice Quirke determined that the plaintiff could make her formal offer on three points. First, as she had served a Notice of Trial this indicated that her case was ready to go to hearing and was capable of assessment. Second was that the case was fully defended and finally, that it was the defendant who had brought the Motion before the Court.

Therefore unless a claim is an assessment of damages only or incapable of accurate assessment due to its catastrophic nature, there appears to be no definitive approach set out for the making of formal offers. Indeed the unsatisfactory arrangement of simultaneous exchange of offers has not been dismissed by the Court. However as can be seen from the above applications, it would appear the Court will direct one party to make the first formal offer.

What is clear is that plaintiffs needs to ensure that their case is ready for hearing when serving their Notice of Trial as they may be directed to put a formal offer to the other party to the proceedings within the specified time limits.

UK Applies Competition Law to Property Agreements

Since 6 April 2011, all land agreements in the UK are subject to Competition Law. A land agreement is an agreement between businesses which creates, alters, transfers or terminates an interest in land. They include transfers of freehold interests, leases, assignments of leasehold interests and agreements relating to easements and licences.

The Office of Fair Trading published a guidance note for businesses on the types of land agreements that may infringe Competition Law.

For more details, please see our article at www.orourkereid.com/leeds/news.htm

More News...

Cormac Wilde,
Private Client

NAMA Charge Register

The Property Registration Authority (PRA) recently established a register where the ownership of charges acquired by the National Asset Management Agency ('NAMA') can be registered. The blocks of charges acquired by NAMA can now be maintained on individual folios.

Section 8 of the Registration of Title Act 1964 ('the Act') provides that the Registrar of Deeds and Titles may maintain a register of ownership of "such rights in land as may be prescribed".

Under Section 8 of the Act, identifiable NAMA charges will be maintained in a separate folio on the subsidiary register. The letter "S" will be used to denote folios on the subsidiary register. Part 1 of the register contains details of the registered charge to include information regarding the identity of the affected lands together with notes on the borrowers' folio.

The borrowers' folio will also be amended to reflect the fact that ownership of the charge is now being transferred to the subsidiary register. The entity registered on the subsidiary register is "National Asset Loan Management Limited".

Apartments Law Enacted

The Multi-Unit Developments Act 2011 ('the Act') was signed into law on 24 January 2011.

The legislation essentially provides a statutory framework for the operation and governance of multi-unit developments. The duties and obligations of developers are clearly defined, while the rights and obligations of owners have been established and a framework for dispute resolution is provided for in the Act.

The Act establishes a new category of company called Owner Management Company (OMC's), which must be set up at the developer's expense. The Act also requires that common areas be transferred to the OMC prior to the sale of the first residential unit.

It is hoped that the Act will assist in remedying some of the many problems which have plagued property management companies in recent years.

Breaking New Ground - The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010

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The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 ('the Act') became law on 1 January 2011. This act legislates in two entirely separate areas; first, civil partnership and second, cohabitation. The latter relates to unmarried cohabitants, whether of the same or opposite sex.

Civil Partnership

The Act provides for a registration scheme of same-sex partnerships. The registration ceremony takes place in the presence of a registrar and two witnesses in the same way as a civil marriage ceremony and subject to the requirements of the 2004 Civil Registration Act.

This civil ceremony creates a new legal relationship that ends only on death or a Court ordered dissolution. Obligations include the responsibility of the couple to live together, support and maintain each other financially, inherit from each other's estates and ancillary rights.

However there are some differences to marriage. To avoid a dilution of the special status afforded the family in the Constitution, the term "family" does not feature in the legislation. Subtle differences in time periods and terminology are utilised to keep the two areas of law separate and distinct.

The most substantive difference arises in relation to children. One of the main criticisms levelled at the Act by its proponents is that the relationship between a civil partner and their partner's children is not recognised. Children have the usual rights with regard to their biological parents but not with regard to their parent's civil partner. However, the non-biological parent does not have obligations towards that child in relation to a number of important financial matters arising on death or dissolution.

Cohabitation

This portion of the Act merits more considered analysis as it introduces many new concepts into law. There are two main components - a redress scheme and a contract model.

The Act defines a "cohabitant" as one of two adults (whether of the same-sex or opposite sex) who live together as a couple in an intimate and committed relationship and who are not related to each other.

The Act does not apply to home-sharers outside of committed intimate relationships. For example, it does not apply to siblings or those who live with or care for relatives or friends on a long-term basis. As with both marriage and civil partnership, there are prohibited degrees of relationship.

Cohabitation Redress Scheme - An Overview

Broadly speaking, the Act provides for a redress scheme that shall retrospectively give financial protection to a financially dependent person at the end of a long-term cohabiting relationship, whether ended by bereavement or break-up. There are no automatic rights or entitlements to relief, each case shall be determined on its own merits.

To be deemed a "qualifying cohabitant", the relationship must have been intimate, committed and of at least 5 years in duration (2 years where there are children). Redress shall not apply where either party was married to someone else and would not qualify for divorce.

If eligibility to redress is established, a full spectrum of reliefs is potentially available including property orders, maintenance, pension and inheritance rights. The Court's discretion applies in determining the degree of relief, the main criteria being the degree of financial dependence. On death, the rights of a cohabitant rank below the rights of a spouse or civil partner.

Cohabitation - Contract Model

Rather than leave themselves or their estates open to the possibility of a claim for redress, cohabitants should be proactive and consider entering a Cohabitation Agreement. Both parties must get independent legal advice and comply with the general law of contract. This contract model allows cohabitants to opt out of the redress scheme to achieve financial certainty.

The Act will be relevant to cohabiting couples in Ireland, many of whom have children. Many such unmarried couples living together for a long time assumed that they had a degree of legal protection as "common law spouses" but no such status has ever existed in Irish law. Many such couples have lived together for years and inter-mingled their finances on an informal basis. The legislation may also be of relevance to couples in long term second relationships where one or both are informally or legally separated or divorced but have no intention of re-marrying.

We would recommend cohabitants to consider meeting with their solicitor to review their situation with a view to drawing up a Cohabitation Agreement. When instructing your solicitor on any property or wills matters, you should disclose any parties that may potentially have an interest in your assets by virtue of the Redress Scheme.

A Cohabitation Agreement can regulate property rights at the end of the relationship and stipulate what arrangements might be made in matters such as mutual financial support, dealing with debt and caring for children.

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