Seizing Data – A new protocol for Dawn Raids

Helen H. Whelan, Dept. Head,
Corporate/Commercial Law - Dublin

The European Commission recently published an information note on the conduct of dawn raids. Businesses should note the approach by the Commission under the explanatory guidance and recent decisions, particularly in the conduct of IT searches.

What happened to my smartphone?

The growing reliance on the use of smartphones, blackberries and tablet devices is reflected in the new guidance which contains a non-exhaustive list of IT storage media including all those 'must haves' for the busy executive. Business executives need to be prepared to handover all of these devices during an inspection including passwords. They should be prepared to manage their work schedule without these devices for several hours and possibly until the end of the dawn raid (which may last as long as three days!). Forensic copies of all of these devices as well as desktop PCs, laptops, USB keys and other IT storage devices may be made by the Commission during the raid.

The Commission uses advance methods for identifying data in electronic form using not only built in keyword search tools on devices themselves but also their own dedicated software and/or hardware. In practice, inspectors may image data from a company's hard drive, place it on a PC and run searches using their own forensic software. At the end of the inspection, all forensic IT tools that contain data from the business will be sanitised by the inspectors. Hardware supplied by the business will not be cleansed.

Assistance and Co-operation

It is important for businesses to ensure that all relevant staff are trained appropriately to deal with dawn raids to ensure full co-operation. This includes your receptionist, IT, security and cleaning staff. In a decision of March 2012, the Commission imposed a fine of €2.5 million for refusal to submit to an inspection where Czech businesses obstructed a dawn raid. During the raid, the inspectors requested access to email accounts be blocked to prevent tampering with the emails during the raid. However, one email account was modified by the business to allow access by staff. In addition, the IT department diverted all incoming emails to certain blocked accounts to a server which prevented the Commission from accessing these emails for review. The responsibility for ensuring non-interference with such instructions during an inspection lies with the business, hence the recent fines.

In the case **KWS**, Commission inspectors were refused entry to a business for 47 minutes pending the arrival of its external lawyers. The General Court recognised the right to seek the presence of a legal advisor and this is reflected in the Commission's recent guidance. However, the General Court said the inspectors should have at least been able to enter the premises to serve the inspection decision and to ensure there was no destruction of evidence or communication with other dawn-raided businesses. The amount of the fine on KWS was increased by 10% to reflect KWS's obstruction of the dawn raid.

The presence of a legal adviser is not a legal condition for the validity of an inspection and an inspection may proceed without a lawyer being present. Only a short delay to consult with legal advisors will be acceptable. Best practice would be to admit the inspectors to your premises when requested and to permit them to take charge of communications.

Breaking the seal

If in the course of an inspection, business premises and books or records are sealed, the business must ensure that seals are not broken until removed again by the inspectors. Under the guidance, inspectors will prepare a minute at the time the seals are removed to record the states of the seals. In the **E.ON case**, the European Court of Justice rejected E.ON's arguments about why a Commission seal had been broken, upholding a €38 million fine. Businesses are responsible for ensuring seals are not broken – do your security staff and cleaners know what to do?

Clearly communicated procedures and training are vital for businesses to ensure full co-operation during a dawn raid and to ensure a competition law compliance programme is in place.

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Bookmark

A Question of Talent? Women on Boards in Ireland

Is the lack of Irish women directors a question of talent or simply a lack of demand from male dominated board?

O'Rourke Reid Law Firm co-hosted a British Irish Chamber breakfast on Wednesday 27th February at the Ballsbridge Hotel, Dublin 4 which aimed to spotlight the low representation of Women on Boards in Ireland.

The Irish Government has committed to achieving a minimum of 40% representation of women on State Boards however this contrasts with the response to a recent European Union Commission consultation which noted

"Ireland has not yet adopted a firm position in relation to gender quotas for corporate boards"

Ireland has no female board Chairman, no female CEOs and women hold just 8.7% of directorships in the ISEQ 20. In contrast 17.3% of board positions in the FTSE 100 are held by women.

The seminar was followed by a lively Q&A session and preceded by a networking breakfast for all participants.

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In Excess

Noelle McDonald,
Solicitor/Compliance Officer - Dublin

A recent High Court case in Ireland *Yun Bing Hu v Duleek Formwork Limited (In Liquidation) and Aviva Direct Ireland Limited t/a "Aviva" [2013] IEHC 50* highlights how an injured party can be deprived when bringing a personal injury claim against an employer where the employer has failed to pay a policy excess under a contract of insurance.

In the case, Mr. Hu (the plaintiff) was a carpenter and while working for his employer on a building site in Spencer Dock, sustained a serious injury to his thumb. He commenced proceedings against his employer for negligence and sought compensation as he believed that his employer had insurance. Mr. Hu obtained judgment in default of appearance before he became aware that his employer's insurer, Aviva, had repudiated liability under the insurance contract because the employer had not paid the policy excess of €1,000. Payment of the excess was a condition precedent to the insurance contract.

The plaintiff succeeded in adding Aviva as a defendant to the proceedings. He sought to rely on Section 62 of the Civil Liability Act, 1961 ('the Act'). The Act provides that when a company is being wound up, any monies available under an insurance policy must be held to pay out on claims made under the policy. Such money cannot be transferred to a general fund for the benefit of other creditors.

Aviva brought a motion seeking to strike out the proceedings on the grounds that they did not disclose a reasonable cause of action. Mr. Justice Peart was satisfied that the plaintiff had no privity of the contract with Aviva. Accordingly, the Judge could not enforce a contract of insurance between the first named defendant and Aviva, especially in circumstances where he did not dispute that the excess payment was a condition precedent to liability under the policy. Peart noted the excess payment was requested prior to proceedings being served but had not been paid.

The Judge held that Aviva had no duty to inform the plaintiff whether or not the insured had complied with the condition precedent. It is interesting to note that when granting the order to strike out the proceedings against Aviva, Mr. Justice Peart commented that the Court's jurisdiction to dismiss such a claim should be exercised sparingly and only used when the case was clear. Otherwise the Court risked depriving a plaintiff of the benefit of a cause of action in which they might succeed.

Mr. Justice Peart also commented that it would be fairer if insurance policies were drafted in such a way as to allow the excess payment, if unpaid by the insured, to be deducted from any payment paid out to a claimant. At present the injured party loses as the entire contract is repudiated when an excess is not paid once notification of the claim has been made.

Update on Parental Leave

Killian O'Reilly, Partner/Dept. Head, Employment Law - Dublin

The Minster for Justice, Equality and Defence has implemented new regulations relating to Parental Leave. The Regulations give effect to EU Council Directive 2010/18/EU.

The key changes implemented by the regulations are:

- An increase in the amount of Parental Leave available to each parent per child from 14 weeks to 18 weeks.
- The parent returning to work following Parental Leave has the right to ask for a change in their work pattern or hours for a set period. An employer is obliged to consider this request but is not required to grant the request.

Currently in Ireland, Maternity Leave is paid for 26 weeks with an additional 16 weeks unpaid leave also being available. In addition, a further 14 weeks unpaid Parental Leave is available for both mothers and fathers until the child reaches 8 years of age. The Regulations extends that period from 14 weeks to 18 weeks.

Parents can avail of the leave for each child under 8 but they are limited to 18 weeks per year if they have more than one child (except in the case of twins or triplets).

While both parents have equal rights to Parental Leave, the leave cannot be transferred between them unless they work for the same employer.

Is it all about the money or the access?

Olivia Treston, Solicitor,
Defendant Litigation - Dublin

The Minister for Justice, Equality and Defence, Mr. Alan Shatter T.D., recently announced the publication of the Courts Bill 2013 ('the Bill'). The first purpose of the Bill is to increase the monetary jurisdiction limits of the Circuit and District Courts in civil proceedings. These limits have remained unchanged since the enactment of the Courts Act 1991.

It is argued that the present monetary limits have rendered the District and Circuit Courts redundant in respect of some classes of civil proceedings. The jurisdiction level of the Circuit Court means that actions exceeding €38,092 must, in the absence of agreement between the parties, be instituted in the High Court.

The Bill proposes to change the monetary limits on the jurisdiction of the Circuit Court to €75,000 and the limit of the District Court from the current level of €6,384 up to €15,000 in civil proceedings.

The aim of these changes is a reduction in legal costs for individuals and companies involved in litigation. They also seek to relieve the high level of appeals before the Supreme Court which has a current waiting time of up to four years.

To counteract concerns relating to the possible inflation of awards due to the increase in the Circuit Court's jurisdiction and the consequential knock-on effect on insurance costs, it is proposed that the jurisdiction of the Circuit Court be increased to only €60,000 (and not €75,000) in respect of personal injury actions.

However, many commentators have serious concerns that the District Court, and more particularly the Circuit Court, will not be given sufficient resources to deal with this dramatically increased workload. Additional Judges, clerks and court staff will almost certainly be required to avoid increasing existing delays in both Courts which may be greatly exacerbated by proposed changes in jurisdiction.

It is also intended to amend the *in camera* rule which prevents the public and the media from being present in court when family law and child care proceedings are being heard. The *in camera* rule is an exception to the fundamental principle of law in that court proceedings should be held in public.

Minister Shatter argues that the nature of the *in camera* rule has led to a lack of uniformity and consistency in the manner in which they such cases are administered. Regulations already exist under the Civil Liability and Courts Act 2004 that allow certain persons to attend family court sittings, albeit subject to Ministerial approval. In 2006 the Courts Services introduced a Family Law Reporting Service in order to draw up and publish reports for the Courts Service on such cases but the Government believes that further reform is required to explain the workings of these courts to the general public.

The Minster also expressed the view that lawyers need clarity to advise their clients in such cases and that if the legislature is to operate correctly, it needs to discover and understand how the law is being applied by these courts to evaluate whether the current laws are adequate or require change. The Bill seeks to balance the differing needs for privacy with the need for public access.

The Courts will retain the power to exclude media representatives and can restrict or prohibit the publication of evidence given in the proceedings in certain circumstances. The sanctions imposed on any member of the press covering such proceedings are up to three years' imprisonment and/or a €50,000 fine for breaking the rules on anonymity.

British Irish Trade in a New Era of Co-operation

O'Rourke Reid Law Firm hosted a Seminar on Tuesday, 23rd April 2013 in conjunction with the British Irish Chamber of Commerce and AIB (GB).

After a warm welcome from Mr. John Reid, Managing Partner of O'Rourke Reid Law Firm, Mr. Michael Keaveney for the British Irish Chamber introduced the guest speaker for the evening Mr. Eugene Forde, Counsellor for Economic Affairs at the Irish Embassy in London.

In his opening address, Mr. Keaveney highlighted the long-standing integration between Britain and Ireland and the high level of trade between both countries. He commented that each country was a natural extension of its own domestic market with a shared language, legal and financial systems and above all, business ethos. Mr. Forde detailed recent developments in the Irish economy in light of the Joint Statement from the British Foreign Secretary, Mr. William Hague and the Tánaiste, Mr. Eamon Gilmore on behalf of the British Prime Minister and the Irish Taoiseach.

Mr. Forde gave a brief overview of the Irish economy pre – Celtic Tiger, the boom, the bust and expressed his view of an improved economic outlook with a return to the financial markets by the end of 2013 with the market confidence that this would bring.

Mr. Forde went on to discuss the similarities between Yorkshire and Ireland – size, population, GDP, economy and commerce but highlighted that ¾ of Yorkshire businesses do not consider exporting, predominantly due to perceived difficulties such as language. Ireland is therefore a natural business partner. Business partnerships are a way forward and he remarked on the success of businesses through partnership from both Britain and Ireland during the 2012 London Olympics. Mr. Forde also commented on what he called 'The Tesco Effect'; Ireland has a huge export market through which British investment and trade could capitalise to reach newer markers further afield.

Mr. Forde closed the proceedings with a stimulating and positive question and answer session with the guests.

What does a Power of Attorney mean?

Rehana Bakhat, Associate,
Real Estate and Banking – Leeds

When a person loses their mental capacity, they may not be able to cope with some matters such as legal, financial or health affairs. The Mental Capacity Act 2005 ('the Act'), which came into force on 1st October 2007 in England and Wales, has made provision for such an event. A person, known as a donor, can appoint someone to manage their finances and property and/or deal with their health affairs. This procedure is called a Lasting Power of Attorney (LPA).

Prior to the Act, an Enduring Power of Attorney (EPA) could be granted provided the person consented. EPAs still remain valid, provided they were signed before October 2007. The attorney(s) have to register the EPA with the Office of the Public Guardian. The EPA is used for minor financial purposes such as paying for food or bills. However it cannot be used for transactions such as selling property, until it is registered.

Lasting Power of Attorney - (LPA)

Under the Act, any person aged 18 or over with mental capacity issues can grant two specific LPAs, appointing one or more attorneys to make decisions on their behalf.

These are known as Property and Affairs LPA and Personal Welfare LPA.

Property and Affairs (including financial matters) LPA

This LPA is very similar to the previous EPA. A donor can enter a LPA by enabling someone they trust (the attorney) to make decisions on their behalf concerning their property and affairs at a time when they are unable to make such decisions for themselves. The measure contains wide ranging powers to operate bank accounts, pay bills, receive income or benefits and the buying or selling property. This can be subject to restrictions that may be included in the LPA. It can only be used once it has been registered with the Office of the Public Guardian.

Personal welfare LPA

The Personal Welfare LPA is also only valid upon registration with the Office of the Public Guardian. However the donor must have lost mental capacity before this LPA can be used. Unless restrictions or conditions are included in the Personal Welfare LPA, the attorneys have the power to make decisions such as where the donor should live and who they should live with, their day-to-day care including medical care, social activities and their personal correspondence and papers.

Who can be appointed Attorney?

Anyone can be an attorney provided they are 18 years old or over and not bankrupt at the time they sign the form. The minimum number of attorneys is one and replacement attorneys can also be appointed in the event that by the time the LPA comes into play, the nominated attorney is not available.

When two or more attorneys are appointed, there is an option available to allow them to act jointly, independently or together for some decisions and independently for others. They must follow the principles set out in the Act while carrying out their duties. Attorneys must act in the best interest of the donor and not take advantage of the LPA for personal gain. The donor's money and property must be kept separate from the attorneys and other people.

Accounts must be kept of all dealings and all affairs connected to the LPA must be kept private and confidential unless otherwise stipulated on the LPA form. Failure to comply with this provision could lead to the LPA being cancelled and the attorneys could be taken to court on charges of fraud or negligence.

How to enter an LPA

There are separate forms available for both types of LPA and there is a separate fee for registering each LPA. There are exemptions to the fee structure on the grounds of means capacity, whereby a fee will not be payable.

A certificate of capacity will also be required. The certificate provider must be an independent third party e.g. a solicitor or doctor who has known the donor personally for at least two years. It cannot be a family member, an attorney or relative of an attorney. The prescribed form must be completed and signed in the presence of a witness and each attorney must sign to confirm they have read the explanatory information and understand the duties imposed upon them.

If one or more named persons are not listed for notification of the application to register the LPA, then an additional certificate of capacity must be provided. The form must be registered before it comes into operation.

Deputies

In the event that a person lacking mental capacity does not have a Power of Attorney (POA) in place, an application can be made to the Court of Protection to appoint a deputy. This process can be expensive and therefore it would be advisable that an LPA is entered into while the person still has the mental capacity to do so.

Give Invention Light? Or not as the case may be

Simon Rea, Dept. Head,
Real Estate and Banking – Leeds

The Law Commission in England opened a consultation and review process in February 2013 asking for views on the current law on rights to light, including their creation, enforcement and extinguishment. The aim of the Law Commission's project is to examine the balance in the current law between the rights of landowners and the public interest in accommodating appropriate development and the efficient use of land.

In a recent review of easements, covenants and *profits à prendre*, the Law Commission identified the right to light as an area in need of further attention; in the way in which the right is acquired and the potential consequences that can arise when a new development fails to take the right into account.

The right to light causes particular difficulties in planning, as it is rarely registered as an easement over land and usually only arises by way of prescription. This can happen if light comes through a window over a neighbour's land for 20 years or more. Rights to light are private property rights that benefit buildings, both residential and commercial but not all buildings have the right to them. Rights to light are sometimes created deliberately, but more often on a prescriptive informal basis.

Problems can arise when a neighbour wants to erect a building that would interfere with a right to light. Under the current law, there is uncertainty as to when a Court will order building works to be prevented, a building pulled down, or award a payment of damages instead. This means that disputes can drag on for years, even after a development has been built. This can result in a great deal of uncertainty for the landowner, the developer and their advisors.

Due to the fact that the majority of rights to light cases are unregistered, they are rarely picked up at an early stage of the Development Consent Order (DCO) process such as the land referencing stage prior to consultation. This may result in an incomplete consultation exercise and omissions from key documents such as the Book of Reference where rights are to be acquired. If discovered during the Planning Inspectorate examination process, this could lead to the application being rejected due to a failure to adequately consult.

The Law Commission was seeking views on the state of the current law and on its provisional proposals. These include:

- Bringing greater transparency and certainty to disputes by introducing a statutory notice procedure. This would require landowners to tell potential developers within a specified time if they intend to seek an injunction to protect their right to light.
- Simplifying and clarifying the law by introducing a statutory test to determine when Courts may order damages to be paid, rather than halting development or ordering demolition.
- Helping to guard against future disputes by ensuring that, for the future, rights to light can no longer be acquired by prescription.

The consultation process closed on 16th May 2013 and it will be interesting to see what suggestions materialise from the process. If the project receives Government backing, a final report of the draft would be anticipated at publication in earlier 2015.

Employment Changes – Definitely, Maybe?

Ian Steel, Dept. Head,
Employment Law – Leeds

The Enterprise and Regulatory Reform Act 2013 ('the Act') came into force in England and Wales on 25th April 2013. The Act introduces various changes to employment law, aimed in particular at the dispute resolution process between employers and employees.

The key sections with implementation dates are as follows:-

25 June 2013

- The new Tribunal procedural rules come into force. The final version of these rules is not yet available.
- The introduction of changes to whistle blowing laws; includes a public interest element; and removes the requirement that any disclosure must be made in good faith; and imposes vicarious liability on employers for detriments by employees on other workers.
- The removal of the 2 year qualifying period for unfair dismissal where the main reason for the dismissal was the employee's political opinions or affiliations.

No scheduled dates have been allocated for the remaining key sections, but some anticipated dates have been provided.

Summer 2013

The HM Courts Tribunal Service have announced that from 29th July 2013, there will be a fee to issue an Employment Tribunal claim, to appeal a judgement of an Employment Tribunal case or to list a case for hearing.

- Confidential termination negotiations for unfair dismissal cases.

This will be introduced following concerns expressed by employers that having frank discussions with employees about their lack of ability to do their job can result in claims being made against them, it is proposed that such discussions are inadmissible. How this would work in practice remains unclear as it is difficult to see how employees can be prevented from repeating discriminatory comments.

- Proposed new caps on compensatory awards for employees.

This measure limits the compensation element to one year's pay or up to a limit of £74,200.

October 2013

- Proposed changes to TUPE.

In January 2013, the Government produced a consultation paper on removing the obligation to provide employee liability information. This would amend the provisions restricting changes to terms, giving protection against dismissal and giving the right to resign in response to a substantial change in working conditions.

A financial penalty of between £100 and £5,000 may be imposed if an employer is found to have breached an employee's rights provided that there is an aggravating factor.

2014

- ACAS early conciliation.

This is a proposal for one month's binding conciliation before issuing a Tribunal case.

- Financial penalties for employers who lose at the Employment Tribunal.
- Proposed changes to the Equality Act.

British Ambassador Supports Second "Doing Business In Britain Seminar"

On Thursday 16th May, The British Ambassador, H.E. Dominick Chilcott welcomed over 120 delegates to the second annual joint seminar entitled "Doing Business in Britain". Many of the attendees were either planning to or already operating in Britain.

Leading professional firms joined forces to coordinate the event including: RSM Farrell Grant Sparks; UK Trade & Investment (UKTI); O'Rourke Reid; Ulster Bank; London & Partners; RSM Tenon; and the Enterprise Europe Network Office at the Dublin Chamber of Commerce.

The event included an expert panel of national and international speakers from the above organisations, who gave an overview of the current business landscape in Britain, highlighting recent challenges and opportunities as well as technical advice on legal, tax and banking matters.

Practical experience of operating as an Irish company in Britain was provided by Realex Payments and Sword Security Ltd who spoke of lessons learned and how they were supported by agencies such as London & Partners and UKTI.

Commenting on the event, the British Ambassador said, "I am delighted to support this important seminar, now in its second year. It sets out the practical steps required, from a legal and financial viewpoint, to doing business in the UK. It also explains the help, advice and support that is available from UK Trade & Investment together with agencies such as London & Partners, when making this move. The interest by Irish companies in doing business in and with Britain was shown by the significant increase in the number of attendees for this years' seminar and I hope to see this increased interest continue."

(Don't) Pass the Portal

Philip Adams, Litigation Executive,
Litigation - Leeds

A portal in place for dealing with road traffic claims is to be extended to include the majority of personal injury claims brought under English Law. The introduction of this portal to the areas of Employers' and Public Liability claims within England and Wales will potentially benefit defendants and compensators in fixing the amount of legal costs that a claimant can seek to recover for dealing with a claim, as well as encouraging a swift resolution.

Implementation of the first portal on 30th April 2010 was limited to road traffic accident ('RTA') claims with a value of £1,000 to £10,000 which encompassed the lion's share of RTA cases. The perceived success of the portal in terms of providing a swift, cost-effective resolution process led to proposals to extend the portal, not only to increase the limit to those RTA claims to a value of £25,000, but also to allow for the portal to deal with Employers' Liability ('EL') and Public Liability ('PL') claims.

The claims portal provides a secure medium to allow representatives for both sides to transfer information between one another with a view to disposing of a claim quickly while incurring minimal cost. At the heart of the portal is the Government's desire to see low value claims dealt with proportionately.

The portal requires the inputting of mandatory information, the absence of which would ordinarily hinder speedy resolution of a claim. The most important aspect of the portal is the strict timetable that governs usage of the portal and the penalty for failing to comply with the schedules involved is extraction from the portal process.

In view of the restrictive fixed legal costs in cases settled within the portal, such extraction is to the detriment of defendants. The portal provides swift disposal of claims together with a requirement to pay only modest fixed legal costs to the claimant. Unlike traditional compensation claims, one can reserve for the costs due to the transparency of the figures. It is often difficult to guess how much a claimant will seek to recover for their costs at conclusion.

The Ministry of Justice has confirmed the commencement date for the introduction of EL & PL claims into the portal scheme will be 31st July 2013. The same date will see the ceiling raised in respect of RTA claims dealt with under the portal to £25,000.

It is important that defendant insurers, brokers and self-insured companies alike familiarise themselves with the workings of the portals if they are to benefit from the potential cost savings that a proactive, responsive approach can bring. The benefit of concluding a claim within the portal should not be underestimated but there is no doubt that both parties must act in a timely manner to avoid the removal of the claim from the portal. For the most part, claimant solicitors may welcome increased costs but would be restricted should a claim settle within the portal process.

The portal extension happens at a time of significant change in the English claims process. The Legal Aid, Sentencing and Punishment of Offers Act 2012 ('LASPO') introduced a considerable number of changes to the claims arena which already alters the landscape and potentially ignites an alternative tactical approach to claims. The introduction of Qualified One way Costs Shifting ('QOCS') gives the defendant little hope of recovering any costs in a successfully defended claim, except in limited circumstances. This may cause commercial considerations to feature ahead of vehemently disputed claims solely on the basis that a successful defence could be vastly more expensive than a modest settlement, even in the most unmeritorious of cases.

The face of English personal injury claims is changing. The benefits to defendants and compensators will be lost unless they deal with claims promptly and utilise the opportunities afforded under the new rules due to the extension to the portal in both RTA claims and EL/PL matters.

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