

MHC TIMES

Judicial Review

Focus on Commercial Litigation

Due Diligence

Budget 2008



Mason Hayes+Curran



Mason Hayes+Curran

Editor's Welcome



Ailbhe Gilvarry

Welcome to issue 22 of MHC TIMES. In this issue, a profile on our commercial litigation unit introduces you to the key people and outlines some developments in this area.

Niall Michel and Catherine Allen explain the process involved in judicial review and describe some of the cases in which they are involved. Gerard Ryan and Sinead Power of the corporate department give us their thoughts on due diligence and Cormac Brown, director of taxation, reviews the main implications of the 2008 Budget.

Declan Moylan writes his last managing partner's diary, after 9 years at the helm. From April, Declan will become chairman of the firm and Emer Gilvarry will be our managing partner. The firm is greatly indebted to Declan for his commitment, vision and good humour over all the years and I wish both Declan and Emer every success in their new roles.

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MHC TIMES

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Managing Partner's Diary

Transition

As I said in the last issue of MHC Times I am approaching the end of my third period as managing partner of Mason Hayes+Curran. My term ends on 31 March, a date which I'm greatly looking forward to. Leading a vibrant firm like MH+C has been stimulating and rewarding, but as nothing in life comes for free, also exhausting! So I look forward to the change.

Nine Years

Spending nine years leading the development of MH+C was more fulfilling than I could ever have expected. In 1999 our business was full of potential, populated with first class lawyers with great ambitions for the future. Our idea was to uncompromisingly hold onto our standards of legal excellence, and also to market and develop our business at home and abroad. We needed an effort of communication and investment, to match and do justice to our legal expertise. While much more remains to be done, I believe that a huge amount has been achieved, moving MH+C to its existing unique position in the Irish legal market.

Unique Position

Too many law firms define themselves by reference to size. We at MH+C could have taken the obvious route and raced for growth at the expense of many more interesting features. Instead, we concentrated on quality lawyering, quality clients and careful recruitment of the best people. The result of that, coupled with a fresh and open attitude to the market and the business media, has marked us out as the legal advisers of choice for so many Irish and international buyers of legal services.

Since 1999 we've started and established within our business a large number of new units, departments and service offerings. In every instance we have remained true to our core commitment to legal rigour, also keeping our characteristics of approachability, openness and zest for innovation. It's no coincidence that MH+C is the only Irish firm to disclose its annual turnover, and to be outstandingly frank and open about its market intentions. We have a unique approach, which creates our unique position.

Domestic and International

Realising that a modern Irish law firm must appeal to and serve both overseas as well as domestic clients doing business in Ireland, MH+C has positioned itself to serve both sectors. This alignment with Ireland's economy is Mason Hayes+Curran's approach to market. The majority of our activity obviously serves an Irish client base, but we also advise increasing numbers of international business enterprises when they enter Ireland, or do business here.

The establishment of our representation in New York, and subsequently in London demonstrates our commitment to serving overseas business. Also, our i-law alliance with Carson McDowell in Belfast lets us give an all-island service in co-operation with our Northern Ireland allies.

Successor

As you'll see in the MH+C Appointments section of this issue, my successor as managing partner is to be Emer Gilvarry who has latterly served as our Head of Litigation. Emer will bring great gifts, energy and insight to her new role, and MH+C will develop new strengths under her guidance and leadership. I could not wish for a more suitable successor, and our business will benefit hugely from her appointment.

I shall leave it to Emer to set out her own vision of the future of the firm when she writes her Managing Partner's Diary in the next issue. I have every confidence that her judgment about the direction of the firm will be second to none.

The Future

I was very happy to accept my partners' nomination to act as chairman of Mason Hayes+Curran from April 2008. It gives me huge pleasure to continue to contribute to the development of my favourite law firm! As chairman, I intend to continue to do my level best to promote the interests of our clients, this business and our fine lawyers. I shall take a special interest in our international policy, and I shall continue to advise my loyal clients, domestic and foreign.



Declan Moylan

Declan Moylan
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Judicial Review



Niall Michel

Readers may be familiar with the term, “judicial review” - if only because of its frequent appearance in the media. A search for the term on the Irish Times website alone, for example, brings up over 3,000 hits. That frequency of appearance, in turn, is due to the variety of issues of importance that can be the subject of judicial review proceedings, often involving issues of principle between the individual and what we might call “the State”.

At the time of writing, for example, Cardinal Desmond Connell has just withdrawn judicial review proceedings against a Commission of Investigation into the handling of complaints of child sexual abuse against members of the clergy. In his proceedings, the Cardinal sought to restrain the examination by the Commission of documents obtained by it, but claimed by him to attract legal professional privilege.

Apart from matters of this type, however, many readers might not, perhaps, have a clear idea of what, or who, else might be the subject of a judicial review action, or what such an action might be able to achieve, or might involve. In particular, readers may not appreciate how much ‘commercial’ judicial review takes place.



Catherine Allen

What is judicial review?

Judicial review is a procedure which enables persons to challenge decisions or omissions of public bodies, made in the course of exercising public functions.

In general terms, therefore, judicial review is not the type of action to bring if - to take random examples - you have been run over by a Department of Agriculture van, or if you believe that the Irish Sports Council has breached a contract it has with you. Whilst the issue you have in each of these cases is with a public body, the respective issues concern private, as opposed to public law, matters.

Why do I need to know about judicial review?

If you interact in any important way with public bodies, you need to know the basics of judicial review, given the critical impact decisions or omissions of such bodies will have.

Where you are aggrieved by a decision or omission of such a body, you may bring judicial review proceedings in relation to that decision or omission. However, it should be noted that any other procedures that are available to remedy the matter must usually be exhausted before bringing judicial review proceedings.

Against whom can I bring judicial review proceedings?

Any person or body – usually set up by means of legislation - exercising a public function is susceptible. Accordingly, judicial review will lie in respect of decisions of Government departments, licensing, disciplinary or planning authorities (as well as An Bord Pleanála [the Planning Appeals Board]), contracting authorities (in respect of contract award processes under public procurement rules), tribunals, inferior courts, regulators, or other persons or bodies making decisions by public or statutory authority.

Judicial review may lie against a private body if it is carrying out a public function. For example, judicial review proceedings were issued against the Irish Coursing Club Limited, in circumstances where that company had been given certain statutory functions under the Greyhound Industry Act 1958.

What can judicial review achieve?

Judicial review is a comparatively speedy and effective type of action that is brought to:

- stop a public body from doing something it ought not to do;
- make it do something it has a duty to do;
- stop it from doing something in an incorrect and/or unfair way;
- set aside decisions made on foot of an incorrect and/or unfair process;
- set aside decisions made without authority, irrationally or without supporting material; or
- have the court declare the position at law regarding the above matters, and, in some cases, award damages.

The courts can also grant interim relief, such as an injunction or a “stay” (or freeze) on a decision, pending further order, or the outcome of the proceedings as a whole.

A decision that has been set aside by the courts is one that is void and of no legal force or effect, and thus leaves a ‘vacuum’. It is important to note that the court will not ‘re-make’ any decision, but will send it back to the original decision-making authority, so that the decision-making can be conducted in a proper fashion.

As you will see from the above list, the Superior Courts, in judicial review proceedings, can examine both procedural and substantive aspects of decision-making.

It is important to note, however, that judicial review proceedings do not challenge the merits of decisions. Rather, judicial review proceedings are brought on grounds that particular decisions are being, or have been, made beyond the powers of the body. In this regard, public bodies

must apply the relevant law, as well as exercising only those functions conferred on them, and do so in a procedurally correct and fair way.

You cannot, therefore, challenge a decision simply because you do not like it, or believe it to be ‘wrong’, or capable of improvement. However, it is possible to challenge decisions that “plainly and unambiguously fly in the face of fundamental reason or common sense”, or in respect of which the decision-maker had before him “no relevant material that would support his decision.”

What do I need to look out for?

Judicial review has its own particular rules, practices and legal principles which include the following:

- it involves a two-stage process, including an initial, ‘filtering’ stage, involving an application for “leave” (or permission) first being made to the Court. A reasonably significant battery of documents needs to be prepared, even before the case gets underway – including documents setting out the facts, the grounds for bringing the proceedings, reliefs sought and the evidence and documentation relied upon. In addition, if the case does not pass through the leave stage, it will not progress at all.
- the timeframes for judicial review are much shorter than in ordinary proceedings, and are quite strictly observed. Judicial review proceedings must be launched promptly or at the earliest opportunity after grounds for bringing proceedings first arose, and, in any event, within three months of the grounds arising. The overriding obligation is promptness in the particular circumstances. Some types of judicial review proceedings must be brought even earlier than the general, three-month limit. For instance, judicial review of a public procurement decision needs to be sought particularly quickly, whilst in certain planning matters, it must be brought within 8 weeks, in immigration and refugee matters, within 14 days, and in Irish Takeover Panel matters, within 7 days.
- judicial review proceedings are ‘paper-based’, in other words, are heard and determined on affidavit. This means that, usually, no witnesses are called, and there is no examination or cross-examination.
- judicial review proceedings normally pass through the court system more quickly than ‘ordinary’ proceedings, and, moreover, can be heard in the High Court’s ‘fast-track’ Commercial List, if the judge in charge of that list is of the view that the proceedings meet the criteria for entry into that list.
- judicial review proceedings can only be commenced in the High Court.

Give me some examples of recent judicial review proceedings

MH+C is, or has been, involved in many sets of judicial review proceedings. For example, we have been involved in:

- a Commercial Court challenge relating to the North/South Natural Gas Pipeline project;
- judicial review proceedings brought by the State’s universal postal services provider, An Post, regarding proposed price increases for standard letters in Ireland, which resulted in the price being the current 55c;
- judicial review proceedings relating to the award of the State’s third mobile telephony licence;
- the challenge to the health insurance risk equalization scheme introduced by the Minister for Health and Children; and
- the challenge to the constitutionality of laws under which a statutory minimum wage and working conditions were fixed for some 25,000 hotel workers.

Finally, we instance a particularly stark example arising in the public procurement context, in which a tenderer for a several million Euro roads contract was held, in judicial review proceedings, to have been unlawfully and wrongly excluded from the tender process. Having established this, as well as the fact that it would necessarily otherwise have been awarded the contract (as it had put in the lowest price, and had been accepted as qualifying on all other criteria), it was in effect paid for building the road, without having to build it, as the contract had been awarded to, and was already being performed by, a rival bidder.

Niall is a partner and Catherine is a senior associate in the administrative and public law unit. Email: nmichel@mhc.ie or callen@mhc.ie

Mason Hayes+Curran Appointments



1 April, 2008, marks an important day in Mason Hayes+Curran's history. Our managing partner of nine years, Declan Moylan, will stand down from the helm as managing partner and hand over the reins to Emer Gilvarry. Emer, currently the firm's head of litigation, will assume the role from this date and we would like to take this opportunity to wish her well as she guides Mason Hayes+Curran through the next stages of its development.

As part of this transition process at the firm, Declan Moylan will take over as chairman of Mason Hayes+Curran, a role that will see him, amongst other things, continue to develop the firm's special international policy.

With Emer's appointment as managing partner, Richard Woulfe (pictured below left) will become head of the employment law and benefits department. Declan Black (pictured below right), currently head of the commercial litigation unit, will become head of the litigation department.





Mason Hayes+Curran

Commercial Litigation

Introduction

Commercial litigation is not an everyday need for most businesses. But when it is needed, the issues at stake for clients can be strategically or operationally critical. The very survival of businesses can depend on the outcome of commercial disputes.

Some businesses, however, need commercial litigation as a matter of routine; disputes being an unavoidable feature of their dealings. These businesses need a different type of service.

Therefore, MH+C's commercial litigators strive to deliver a proportionate and results' driven service to clients. In practice, this means the early assessment of the strengths or weaknesses of a client's position and the deployment of appropriate strategies, including mediation or other forms of ADR, as is tactically advisable.

The articles included in this feature give some flavour of our diverse practice. Common themes are high value and international disputes, shareholder disputes and post acquisition warranty claims. Insolvency related litigation and fraud recovery are also features of our work.

Having regard for both dispute avoidance and dispute resolution, we have tried to identify some practical steps for clients in the following articles.



Declan Black
Head of Litigation

The Commercial Litigation Unit



The Commercial Court: the Choice of Plaintiffs?



Sinead Durcan

In the four years since its introduction, the Commercial List of the Irish High Court has been an effective forum for the efficient resolution of high value commercial disputes.

Plaintiffs and defendants seeking the prompt resolution of proceedings and high quality decision making continue to benefit from the accelerated processes of the Commercial Court and its robust case management system.

The old tactics of delay by defendants and the issuing of spoiling litigation by opportunistic plaintiffs are simply not available in the Commercial Court. This is because of the readiness of the presiding Judge to grant judgment within days where there is no stateable defence, and his encouragement of applications to strike out unmeritorious claims.

This has been seen recently in the Court's granting of judgment in numerous cases against solicitor Michael Lynn, and in related proceedings.

The message for contracting parties who may become prospective plaintiffs or who would want to be pro-active defendants is that choosing the jurisdiction of the Commercial Court seems preferable to the escalation procedures or mandatory mediation clauses common to many commercial agreements. And certainly, it is preferable for such parties to the comparatively slow, expensive and inflexible process of many arbitrations.

Of course, the converse is true for those who may become reluctant defendants or spoiling plaintiffs!

Sinead is a solicitor in the commercial litigation team at Mason Hayes+Curran. Email: sdurcan@mhc.ie

Dishonest Solicitors



Peter Johnston

The dishonest acts of solicitors are currently newsworthy. Where a client has suffered a loss as a result of the dishonesty of a solicitor the client can of course sue the solicitor involved. However, this is not always a realistic option as there may be no assets available to satisfy any judgment and because the solicitor's professional negligence cover may not cover fraudulent acts or may be voided by the insurer.

The remedy of last resort for such clients is the Solicitors' Compensation Fund which is administered by the Law Society of Ireland. The fund was set up to provide some protection to solicitors' clients who have suffered a loss as a result of the dishonest acts of a solicitor.

In order for a claimant to be eligible for a grant from the fund he must prove that he is a client of the solicitor. While this may appear to be a simple proposition, solicitors often handle money on behalf of parties who might not strictly speaking be their clients. Given the current controversy regarding solicitors Byrne and Lynn, the issue of who is a client for the purposes of the Fund may receive some scrutiny.

The Fund does not extend to the personal dealings of solicitors. Therefore persons involved in commercial ventures with solicitors as their business partners are not eligible to claim.

The time limits for making a claim against the Fund are short. A claimant must notify the Law Society within three months from the date the loss first came to the claimant's knowledge. He must set out the particulars of the loss and his intention to seek a grant from the fund.

Within six months from the date the claimant became aware of the loss, he must deliver an application form to the Law Society applying for a grant from the fund. No grant can be made unless notice is received by the Law Society in the prescribed manner and within the prescribed time periods.

The maximum amount of a grant that the Law Society will award in respect of a loss arising from the relationship between the client and the solicitor is €700,000. Again this limitation may be the subject of scrutiny where there is a series of dishonest acts by a solicitor relating to a series of client transactions.

The Law Society may also require the applicant to bring proceedings against the solicitor in respect of the loss and to exhaust all other remedies against the solicitor prior to making a grant.

The message therefore for potential claimants is to make claims promptly but to realise that the operation of the Fund is open to conservative interpretation which, if adopted, results in the Fund providing modest recompense to a narrowly defined category of persons.

Peter is a solicitor in the commercial litigation team at Mason Hayes+Curran. Email: pjohnston@mhc.ie

Right to Fly?

An easement of avigation, or a right to use a particular flight path for the passage of aircraft, is an established right in the United States. However, the right has not yet been recognised by the Irish courts nor does it appear to have been recognised by the UK courts. The existence of the right in Ireland arose in recent commercial court proceedings.

The plaintiffs operated a commercial charter helicopter business and claimed a declaration from the Court that they were entitled to fly to and from their helipad over certain lands owned by the defendant, a developer.

The plaintiffs claimed that, historically, a third party had given them permission to (a) construct a helipad on his lands and (b) to fly over his other lands for the purposes of using that helipad. The plaintiffs subsequently purchased the lands on which the helipad had been built from that third party. They argued that, at the time of the purchase, the third party was aware that the plaintiffs were purchasing the lands for the purpose of facilitating the helicopter business and therefore that in order to land and take off from the helipad, the plaintiffs would require to continue to fly over his other lands.

The third party subsequently sold those other lands to the defendant who sought planning permission for a large residential development. The plaintiffs maintained that the effect of any such development would be to put them out of business due to the requirement that a safe fly, or obstacle free, zone be maintained within a certain distance from their helipad. The plaintiffs therefore sued the developer and claimed that any obstruction or interference with the flight path by the construction of dwelling houses would be an unlawful interference with right to fly over the lands.

In particular, the plaintiffs claimed that it was the common intention of the parties, when the lands were conveyed to the plaintiffs, that the lands would be used as a helipad and that, therefore, a flight path to and from those lands would be exercised over the adjacent lands. The plaintiffs therefore claimed to have acquired, by implication, an easement of avigation from the original landowner. They further claimed that any obstruction or interference with that flight path would constitute an impermissible derogation from the grant made by the original landowner as it would have effectively rendered the lands unfit for the purposes for which the plaintiffs purchased them.

Reliance was also placed by the plaintiffs on old legislation which essentially provides that, unless a contrary intention appears, a conveyance is deemed to include any easements or rights relating to the land at the date of transfer. The plaintiffs claimed that they had enjoyed the right to fly over the vendor's lands on approach and departure from the helipad prior to purchasing the lands on which the helipad was built and, as that right was not expressly excluded when they bought the land, that right was deemed to have been conveyed to them at the date of transfer of the lands.

The proceedings commenced in the Commercial Court in February 2007 and were listed for trial less than one year later in January 2008. After the first day of evidence, the matter was resolved by way of negotiation between the parties.

Comment

The case demonstrates the importance of considering the purpose for which lands are being sold and whether that purpose could have any consequences for any adjacent lands retained by the vendor. If any rights could possibly be said to attach to lands prior to transfer, and if it is intended that such rights are not to pass with the lands, those rights should be expressly excluded in the contract and conveyance.

For further information, contact partner, Tanya Colbert who, assisted by solicitor, Sinead Durcan acted for the plaintiffs in the proceedings. Email tcolbert@mhc.ie



Tanya Colbert

Supreme Court Identifies Non-executive Directors' Responsibilities



Judith Riordan

The Supreme Court recently upheld an appeal which has helped clarify the responsibilities of non-executive directors.

The appeal involved the consideration of whether or not a director had acted "responsibly" in the context of a liquidator's application for a restriction order.

The Supreme Court decision

The Supreme Court endorsed the following traditional criteria for evaluating responsibility:

- The extent to which the director has complied with any obligations imposed by the Companies Acts;
- The extent to which his conduct could be regarded as so incompetent as to amount to irresponsibility;
- The extent of his responsibility for the insolvency of the company;
- The extent of his responsibility for the net deficiency in the assets of the company disclosed at the date of the winding up or thereafter; and
- The extent to which he, in his conduct of the affairs of the company, has displayed a lack of commercial probity or want of proper standards.

The Supreme Court recognised a distinction between the nature and extent of a non-executive director's responsibility and that of an executive director.

Notably, the Supreme Court also recognised that the nature and extent of a non-executive director's responsibility could vary depending on the size of the company.

However, in addition to the well established considerations outlined above, the Supreme Court also held that a non-executive director has a general overriding duty to supervise and control the affairs of the company.

Non-Executive Directors' Responsibilities

What does the Supreme Court's ruling mean?

A non-executive director should ensure that there is continuity in his supervision of the company's affairs. He must satisfy himself that he is kept informed of what is going on in the company and, in particular, that he has adequate and up to date information in relation to the financial affairs of the company.

Top Tips for Non-Executive Directors

Having regard to the judgment of the Supreme Court, the following are some suggestions for non-executive directors who wish to show they adequately supervise and control the affairs of a company:

- Attend all board meetings and ensure that attendance and any contribution to the meeting is duly noted;
- Ensure board packs are received in advance of the meetings;
- If board meetings are not being held on a regular basis, write to the executive directors seeking explanations and, if unsatisfactory responses are received, pursue the matter in writing until it is resolved. Any reasons offered for lack of board meetings should be considered carefully and responded to critically;
- Maintain and document all contact with both executive and non executive fellow directors on an ongoing basis;
- Ensure up to date and accurate financial information is being received on a regular basis;
- Ensure there is adequate supervision of those individuals to whom particular functions have been delegated; and
- If on the board to give the benefit of a certain skill or expertise, ensure that any contributions in this regard are duly noted in minutes of meetings.

Judith is a senior associate in the commercial litigation team at Mason Hayes+Curran. Email: jriordan@mhc.ie

Mason Hayes+Curran News



Society of Young Solicitors Ireland

Mason Hayes+Curran is delighted to be a sponsor of the Society of Young Solicitors Ireland, the 2007/08 Chairperson of which is Catherine Allen, senior associate with MH+C's administrative and public law unit.

The SYS Autumn conference was held in the Mount Juliet Estate, from 16 – 18 November, and was attended by over 180 delegates. The speakers at the lectures included Deborah McHugh, from the pensions law team of Mason Hayes+Curran, who gave an overview on pensions law. Catherine is assisted by her able committee, pictured above.

The SYS Spring 2008 Conference, was held in conjunction with the Northern Irish Society of Young Solicitors in the Slieve Russell Hotel Golf and Country Club from 29 February to 2 March, 2008 and was attended by a large number of lawyers from Ireland, Northern Ireland and the UK.

Speakers at that conference included Northern Ireland High Court judge, Mr. Justice Treacy, Mr. Donald Elkin, President of the Law Society of Northern Ireland and Ben Rigby, Past President of the European Young Bar Association.



New Chair for LES

Jeanne Kelly, a partner in the commercial department of Mason Hayes+Curran, has been elected as the new Chairman of the Irish Chapter of the Licensing Executives Society (Britain and Ireland).

The LES is a professional society comprised of over 6,000 members

worldwide engaged in the transfer, use, development, manufacture and marketing of intellectual property (patented inventions, software, copyright and trade marks).

The LES membership includes a wide range of professionals, including business executives, lawyers, licensing consultants, engineers, academics, scientists and government officials. For further information, please do not hesitate to contact Jeanne Kelly at jkelly@mhc.ie

Energy Success

MH+C's energy group has been recognised by the Infrastructure Journal as one of the top ten European legal advisors in wind energy and in the top twenty legal advisors for renewable energy finance projects for the period between 01/07/2007 and 31/12/2007. No other Irish law firm is represented in either of these league tables and this reflects MH+C's position as a market leader in the Irish renewable energy sector. In the last 12 months the energy group has acted for lending institutions such as Barclays, Nord LB, AIB, Bank of Ireland and Ulster Bank and for wind farm development company Airtricity advising on projects with an aggregate power output of approximately 250MW and a combined funding value of approximately €400 million.

This achievement, combined with MH+C's recent role in advising the Commission for Energy Regulation and Northern Ireland Authority for Utility Regulation on the development and drafting of the new all-island Single Electricity Market, places MH+C in the top tier of Irish law firms for energy related legal services.



Best Marketing Campaign 2007

On 10 October, 2007, Mason Hayes+Curran became the "European Winner" of the Managing Partners' Forum (MPF), "Best Marketing Campaign", at the prestigious MPF European Practice Management Awards held in London.

Mason Hayes+Curran's winning campaign highlighted the firm's efforts to use the move from six Georgian office buildings to one, purpose-built, state-of-the-art Head Office building, as not just a logistical exercise, but rather as an opportunity to get to know clients better and to allow clients to understand the breadth and depth of the firm's offering as well.

The marketing campaign turned its back on traditional and costly initiatives, such as advertising and company announcements and focused more on building the client experience through a series of well targeted events, innovative client communications and topical receptions held throughout the year following the move to South Bank House. An integrated public relations plan was also executed in order to keep all relevant stakeholders advised of the changes taking place at South Bank House.

Due Diligence



Gerard Ryan

What is due diligence?

Due diligence is the process of investigating a company or business before buying it. It is an important process for any buyer in establishing that the acquisition of the asset or company (the "Target") they intend to acquire makes commercial sense and to assist in planning for the full integration and future operation of the Target.

A proper due diligence into the Target should serve to verify the value of the Target, identify and clarify what is being acquired and anticipate and mitigate the risks involved. This may result in the Buyer returning to the negotiating table in some situations or even deciding not to proceed with the acquisition. The first question to ask before commencing due diligence is "what is the purpose of the deal?"

A Buyer may sometimes wish to bypass the due diligence process and rely completely on contractual representations and warranties in the acquisition agreement. However, these contractual provisions may be limited by disclosure or require expensive litigation to enforce and are therefore no substitutes for a thorough pre-deal investigation.

By gathering information, the Buyer can also focus its mind on planning the post completion integration of the Target. A recent survey found that it took an average of nine months for companies to feel they had control of the significant issues facing the business post deal. A Buyer cannot start post deal planning early enough. Intimate knowledge of the Target will inform decisions on how to deal with employees and management, IT and finance systems and differences in business culture. Leaving contemplation of these decisions to the post completion period will delay integration and threaten the financial success of the acquisition.

Scope

The scope of due diligence naturally varies with each transaction. A share purchase, where the Buyer will assume the liabilities of the Target, will involve a more detailed review than in an asset purchase. Practical constraints such as time, expense and the scale of the transaction will also affect the scope.

Due diligence, as a whole, is effectively an audit of the Target's legal, business and financial affairs. The Buyer may engage accountants to investigate the financial affairs of the Target and to assess the financial risks and opportunities of the deal. Some areas requiring diligence may only arise in particular industries or types of transactions, for example, environmental due diligence will be appropriate to determine whether there are any significant environmental issues in certain transactions involving particular industries or assets.

Legal due diligence will aid the Buyer in establishing:

- That the Target has title to the assets being sold.
- The extent of liabilities of the Target.
- Any legal issues facing the Target.
- Issues or consents that need to be addressed in the acquisition agreement or before signing it.

Confidentiality

The amount of information a Seller is prepared to give to a prospective Buyer always has its limits, particularly where the Buyer is a competitor of the Seller. The risk of losing trade secrets, or unsettling customers and employees by advertising an imminent sale, will prompt Sellers to demand that prospective Buyers enter into confidentiality agreements.

Breach of a confidentiality agreement could lead to the Seller obtaining injunctive relief or damages. A well advised Seller will not blindly rely on the confidentiality agreement but will put in place practical measures to protect confidentiality.

A Buyer is advised to take advantage of a site visit of the premises and conversations with management to get a feeling for how the business is run in practice. Management may be more candid than the Seller!

Steps in legal due diligence

- A questionnaire is sent to the Seller with a list of enquiries tailored to the specific transaction and Target.
- Replies to the questionnaire and documentation will be provided by the Seller to the Buyer's legal team.
- Supplemental queries often arise on receipt of the replies.
- Anything onerous or unusual will be communicated to the Buyer on an ongoing basis.
- A written report will be produced which is usually addressed to the Buyer and sometimes may be addressed to a lender which is financing the acquisition.

The key is to identify the issues while there is time to solve them and, if necessary, to re-negotiate or re-structure the deal. The questionnaire itself will normally enquire into the following areas of the Target:

- Corporate data and structure
- Banking/Finance/Tax
- Corporate and Commercial Agreements
- Business Assets
- Property
- Environment
- Employees

- Pensions
- IP/IT
- Litigation and Disputes
- Insurance
- Key consents e.g. Enterprise Ireland, Banks
- Competition and Regulatory Issues

If the Target is to be sold through an auction process, the due diligence exercise may be carried on through a Data Room. With numerous potential Buyers, conventional due diligence procedure is impractical. A Data Room will literally be a room full of data and documents relating to the Target business which is usually hosted in a neutral venue or at the offices of the solicitors acting for the Seller. The Buyer and its advisors will visit the Room at certain prescribed times and review the information. Online data rooms have become popular in recent times and in this situation documents are accessed online.

Due diligence is a process that requires efficient project management, co-operation and communication between the various advisors and the client.

Focus

The following are some of the areas focused on during legal due diligence:

1. Corporate

With a share purchase, the statutory books, company accounts, subsidiaries, memorandum and articles, register of members, charges and minutes etc will be examined. The presence of any charges should be highlighted, whether they are over the Target shares or over the Target's assets.

On an asset purchase, a search against a corporate Seller or guarantor may be helpful as well as a search for any mortgages/charges over the asset in question.

2. Material Agreements

Agreements material to a business could be customer contracts, supply agreements for crucial raw materials, distribution agreements, IP licences, contracts with key employees as well as leases of important equipment and real estate.

Such agreements will be examined to determine the contracting parties, involved, whether they have been properly executed, the presence of a 'change of control' clause, how and when they can be terminated and whether they result in any contravention of competition or regulatory law.

3. Employees, Management and Pensions

The number of employees, their salaries, benefits and rates

of pay and contractual entitlements should be examined not only with a view to establishing compliance with employment legislation but also to get a feel for the culture of the Target.

The Target's pension scheme should be investigated by lawyers working closely with pension advisors and actuaries.

4. Real Estate

Any real estate held by the Target, be it leasehold or freehold, should be examined to ensure that there is proper and marketable title. With regard to leasehold property, the consent of the Landlord may be required before the change of ownership/control of the property is permitted.

5. Intellectual Property/Information Technology

Any intellectual property owned by the Target (such as trademarks, patents and designs) should be reviewed to ensure the Target has property enforceable title to the IP rights.

Contracts providing essential information technology services should be examined to ensure continuity of services, for instance, if the Seller provides such services, a transitional services agreement may be needed.

Common mistakes in due diligence

- Assuming that the Target has title to the assets being sold.
- Ignoring competition or regulatory issues.
- Failing to properly review the results of the diligence exercise while negotiating the transaction.
- Breakdowns in communication between advisors and clients.
- Failure to properly define the scope of due diligence.
- Not allowing for sufficient time and resources to carry out a proper review.
- Ignoring or underestimating people problems.

Conclusion

Due diligence is a crucial tool in any transaction and will assist in framing negotiation and the acquisition agreement as well as going some way to minimise any nasty surprises arising after the deal is done. It is not a substitute for proper contractual protection but should be seen as complementary to it.

An acquisition does not stop on the day the legal agreements are signed and a well managed acquisition process, including due diligence, will play a major role in the success of any acquisition.

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Budget 2008



Cormac Brown

There were a number of topics featured in the 2008 Budget speech delivered by the Minister for Finance Brian Cowen. As expected, he took the opportunity to tackle stamp duty reform and the influence of Green party coalition partners was manifest from the so called “green taxes”.

Reform to stamp duty

The existing stamp duty system for residential property was simplified into progressive rate bands with immediate effect:

- Transactions not exceeding €125,000 will be exempt from stamp duty.
- Transactions above this level and below €1,000,000 will attract a rate of 7% but only on the amount that exceeds €125,000.
- The excess over €1,000,000 will be liable at 9%.

The existing reliefs for first time buyers of residential properties and buyers of new residential properties will continue to apply.

Owner occupier claw back period

Currently if first time buyers or new house buyers rent out their dwellings within 5 years the stamp duty relief is clawed back. This 5 year limit has been reduced to 2 years.

Commercial Property

No changes have been made to stamp duty arising on non-residential property. The current 9% rate will continue to apply to all such transactions over €150,000.

VAT changes

New VAT on property rules will be contained in the Finance Bill 2008 and are set to take effect from 1 July, 2008.

The main features of the new system will include:

- The supply of buildings will be taxable only where the building is considered “new”.
- The sale of “old” buildings will be exempt from VAT, with an option to tax.
- The option to charge VAT on tax rents on “old” buildings will apply only where the parties are not connected and by agreement.
- The treatment of the supply of building land will remain unchanged.
- In general all commercial leases will be exempt from VAT with the election to charge VAT in certain circumstances.
- A reverse charge mechanism is to be introduced in the construction industry for supplies from sub-

contractors to principal contractors (similar to that of the VAT Form 4A/B procedure) from 1 September, 2008.

Vehicle Registration Tax (“VRT”)

The Minister announced a change to a new CO2 emission based VRT system from 1 July, 2008 as follows:

- Whereas the existing VRT rates are based on engine size, the new rates will be determined on the basis of a seven band CO2 emission classification, ranging from 14% to 36% of the original market value of the car. The CO2 emissions will be determined by the manufacturer’s specifications.
- The Department of Environment, Heritage and Local Government will introduce a CO2 emission labeling system similar to that for white goods.
- The 50% relief which is currently available on hybrid and flexi-fuel vehicles will be extended until 30 June 2008. After that date, the new VRT system will apply, but in addition a relief of up to €2,500 will be available.
- Electric cars and electric/battery-assisted bicycles will be exempt from VRT from 1 January, 2008 until 31 December, 2010.
- The scheme for capital allowances and leasing expenses for business cars is also set to change, with certain cars with lower CO2 emissions to benefit from higher capital allowances or higher deduction in respect of leasing expenses.

Motor Tax

Motor tax rates will be increased by 9.5% for cars below 2.5 litres, by 11% for cars above 2.5 litres and by 9.5% for goods vehicles and all other vehicles but with no increase for electric vehicles.

Excise on Electricity

Excise tax on electricity to be introduced under EU regulations from 1 October, 2008. The excise duty will be 50 cent per megawatt hour for business use and €1 per megawatt hour for non-business use. Electricity used by households will be exempt.

Bio Fuels

From 1 March, 2008 the VAT rate on the sale of the certain agricultural inputs used for the agricultural production of bio fuels will be reduced from 21% to 13.5%.

For further information please contact Cormac Brown, director of taxation at Mason Hayes+Curran on cbrown@mhc.ie or +353 1 614 5099

Closing argument... Who is the weakest link?

Quizmaster: What was Gandhi's first name?

Contestant: Goosey Goosey

Quizmaster: We're looking for an occupation beginning with a T.

Contestant: Doctor

Quizmaster: No, it's T. T for Tommy. T for Tango, T. for Tintinnabulation.

Contestant: Oh right Doctor

Quizmaster: Which French Mediterranean town hosts a famous film festival every year?

Contestant: I don't know....I need a clue.

Quizmaster: Ok. What do beans come in?

Contestant: Cartons

Quizmaster: Where do you think Cambridge University is?

Contestant: Geography isn't my strong point

Quizmaster: There's a clue in the title.

Contestant: Leicester

Quizmaster: What is the capital of Italy?

Contestant: France

Quizmaster: France is another country, try again.

Contestant: Oh, um, Benidorm

Quizmaster: Wrong, sorry, let's try another question. In which country is the Parthenon?

Contestant: Sorry I don't know.

Quizmaster: Just guess a country then.

Contestant: Paris.

Quizmaster: For \$10 what is the nationality of the Pope?

Contestant: I think I know that one. Is it Jewish?

Quizmaster: Who had a worldwide hit with "What a Wonderful World"?

Contestant: I don't know

Quizmaster: I'll give you some clues: what do you call the part between your hand and your elbow?

Contestant: Arm.

Quizmaster: Correct. And if you're not weak, you're?

Contestant: Strong.

Quizmaster: Correct - and what was Lord Mountbatten's first name?

Contestant: Louis.

Quizmaster: Well, there we are then. So who had a worldwide hit with the song "What a Wonderful World"?

Contestant: Frank Sinatra.

Quizmaster: What happened in Dallas on November 22 1963?

Contestant: I don't know I wasn't watching it then.

Quizmaster: In what year was President Kennedy assassinated?

Contestant: Erm...

Quizmaster: Well, let's put it this way - he didn't see 1964.

Contestant: 1965?

Quizmaster: Name a famous brother and sister?

Contestant: Bonnie & Clyde

Quizmaster: Name something that flies that doesn't have an engine?

Contestant: A bicycle with wings

Quizmaster: Name a famous bridge?

Contestant: The bridge over troubled waters

Quizmaster: Name something slippery

Contestant: A conman

Quizmaster: Name a part of the body beginning with 'N'

Contestant: Knee

Quizmaster: - Oscar Wilde, Adolf Hitler and Jeffrey Archer have all written books about their experiences in what: - Prison, or the Conservative Party?

Contestant: The Conservative Party

Quizmaster: What's 11 squared?

Contestant: I don't know.

Quizmaster: I'll give you a clue. It's two ones with a two in the middle.

Contestant: Is it five?

Quizmaster: Which American actor is married to Nicole Kidman?

Contestant: Forrest Gump.

Quizmaster: What is the world's largest continent?

Contestant: The Pacific

Quizmaster: Name a film starring Bob Hoskins that is also the name of a famous painting by Leonardo da Vinci?

Contestant: Who Framed Roger Rabbit

Quizmaster: What was signed, to bring World War I to an end in 1918?

Contestant: Magna Carta

If you have any suggestions for the next Closing Argument, please email closingargument@mhc.ie and we will try to include it in a future edition.



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