

# MHC TIMES

NAMA

Corporate Migration to Ireland

Examinership and the Zoe Case

Charities - Getting in on the Act

To tweet or not to tweet?



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Incorporating Arthur O'Hagan



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## Editor's Welcome



Ailbhe Gilvarry

Welcome to issue 26 of MHC Times. So much has happened in the global and Irish economy we decided to feature a comprehensive article on the much debated National Asset Management Agency (NAMA) which is being proposed by the Irish Government as a remedy to the current banking crises and as a means to restoring normal business. While our Irish readers are likely to be "NAMA'd out" we know our international readers will be interested to know more.

On a positive note, this issue of MHC Times examines the reasons why many corporates are choosing Ireland to migrate their headquarters. Recent developments in asset finance and the transport sector, at home and internationally, are explored by Christine O'Donovan and Niamh Farrelly on page 7 and Maurice Phelan gives readers an account of the

much publicised Zoe examinership that had the Irish courts in the limelight for many weeks. The new addiction for some "Twitter" is examined by Peter O'Neill in his practical article titled "To tweet or not to tweet?" and the usual round up of news and events gives a good flavour for the many events and initiatives the firm has most recently been associated.

And finally, the Closing Argument takes a very thorough review of the world of golf with a little court humour thrown in for good measure!

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# MHC TIMES

## Contents

Managing Partner's Diary	3
National Asset Management Agency Kevin Hoy	4
Corporate Migration to Ireland Cormac Brown	6
Asset Finance - Planes and Trains... Christine O'Donovan and Niamh Farrelly	7
Examinership Applications Refused to Zoe Maurice Phelan	8
Company Directors. Take Note. Maurice Phelan and Judith Riordan	9
Charities – Getting in on the Act Kevin Hoy and Edward Gleeson	10
To tweet or not to tweet? Peter O'Neill	11
Mason Hayes+Curran News and Events	12
Closing Argument	15

# Managing Partner's Diary

## Introduction

Welcome to the 26th edition of MH+C Times. As we approach the end of 2009, there continues to be uncertainty as to when Ireland might begin to emerge from its economic difficulties. Evidence of stabilisation and possible recovery in the global economy is helpful, but the problems in Ireland are more deep-rooted than in most other economies. That reflects the fact that, the building boom in Ireland - both in terms of values, and, particularly, volume - was more pronounced than anywhere else.

There is no doubt that our country has been on the receiving end of significant criticism on the international stage. However, the international financial community has come, increasingly, to view Ireland in a more favourable light. This is reflected in a significant reduction in borrowing costs for the government and a slightly increased appetite to invest in Irish banking stocks. Recent indicators also suggest that the pace of decline has slowed. Furthermore, downward adjustments in prices, wages and rents leave the economy on a much better competitive footing.

## Moving On

In the last edition, I reported on government policy in creating the National Asset Management Agency (NAMA). This is an important element in the government's overall battle to stabilise the Irish economy, and, with it, the Irish property market. We believe that it will speed up the rebuilding of bank balance sheets, and help the recovery in our economy. Its strategy will also directly assist the Irish property market over both the medium, and longer terms.

MH+C's Financial Services Department has been instrumental in advising many bank and financial institutions on the impact of NAMA. In the pages that follow, Kevin Hoy, our Head of Financial Services, explains the establishment process and the anticipated objectives of NAMA.

In addition, the international funds industry in Ireland has weathered the credit crisis, and we are fortunate to be involved in the servicing of that industry as part of our financial services offering here at Mason Hayes+Curran.

Further evidence of the laying of building blocks for a regenerated economy lies in the fact that Ireland continues to be the jurisdiction of choice for foreign direct investment. In recent times, the number of high-profile international corporate inversions into Ireland has underscored the confidence that many international companies place in our jurisdiction and in the way we conduct our business.

## MH+C Strategy

Our emphasis on efficient and straightforward delivery of quality advice allows us to continue our strategy of growth within the legal services market in Ireland. Some of the firm's practice groups have been adversely affected over the past year, but others have actually seen a positive impact arising from the changed conditions. Examples include Financial Services regulatory work, Investment Funds, Aviation Finance, Education and Intellectual Property. Growth has also been reported in Commercial and Public Law Litigation, as well as in contentious work in the Labour Law, Insolvency and Construction sectors.

Mason Hayes+Curran continues to attract a large and steady proportion of foreign direct investment, and overall, the firm's activity shows solid growth, following both a calibration of practice areas, and an investment in new and expanding practice areas.

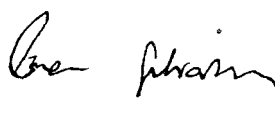
## The MH+C Reach

Mason Hayes+Curran has always worked hard with clients to understand their businesses and to form close business relationships with them. This is all the more important in challenging times. As part of our efforts in this area, we have created fora for discussion, and idea-sharing, and we continue to host the regular "meet-to-motivate" series, which has been an overwhelming success.

In parallel to this project, we have commenced a 'masterclass' series aimed exclusively at in-house counsel. This allows in-house counsel to meet, to learn and to develop different aspects of business law. It also provides a platform for them to move outside the arena of pure law, and to bring business and law together in a professional development and networking environment, with a view to shaping and influencing the future direction of business.

## Conclusion

In summary, we continue to monitor developments and opportunities in the economy and carefully manage our business, with a firm focus on sustainable and market-sensitive growth.



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# National Asset Management Agency



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## Introduction

Ireland has been hit harder than most by the global recession. As an open economy with a reliance on foreign direct investments and international trade one would have expected hard times, but a national fascination with property has compounded the problem for Ireland in general and Irish banks in particular. The National Asset Management Agency, or NAMA as it is commonly known, is the latest in a number of measures taken by the Irish Government to prevent the banking system from collapsing and then to encourage the restart of normal prudent banking business.

## NAMA

In September 2008 the Irish Government introduced the Bank Guarantee Scheme whereby depositors and certain debt providers got a State guarantee. Subsequently Anglo Irish Bank was nationalised and substantial state investments have been made in it and in Allied Irish Banks and Bank of Ireland. Now NAMA will take all land, development and associated loans aggregating more than €5 billion from Irish banks. In return the banks will get a combination of government securities, NAMA securities and NAMA subordinated debt. This will enable the banks to trade the paper with the European Central Bank or others, thereby generating cash to provide extra capital and funds for lending.

## Draft Legislation

The Government produced draft legislation for NAMA in a consultation process last July and the formal NAMA Bill was published on 10 September. NAMA published a draft business plan on 13 October which details the scale of the challenge it faces, the approach it proposes to take and estimates that over the 10 year life of NAMA it may make the Irish State a profit of in excess of €5 billion.

## Size of the Loan Book

NAMA estimates that the total loan book eligible for transfer will amount to €77 billion of which €49 billion will be land and development loans and €28 billion will be associated loans. The loan to value originally used when the loans were advanced approximated to 77%. The estimate of current market value of the assets is €47 billion.

## Valuation

The estimated purchase price is €54 billion which is based on a long term economic value rather than current market value. The premium to market value will be approximately 15% and the discount to loan book value will be approximately 30%. NAMA estimates that asset values will have to increase by 10% over the 10 year period of NAMA to avoid any loss to the Irish tax payer.

## Location

67% of the NAMA portfolio is located in the Republic of Ireland. A further 27% is in the UK, 2.7% in the USA with the remainder being in Germany, Portugal, France, Czech Republic, Italy, Spain and other countries.

## Levels of Debt

The bank with the largest exposure being taken over is Anglo Irish Bank (which has already been nationalised) (28%) followed by AIB (24%), Bank of Ireland (15%), Irish Nationwide (a small building society) at 3% exposure and EBS with less than 1%.

## Political Context

Consultation on the NAMA Bill has been taking place in a period of political uncertainty with a second referendum on the Lisbon Treaty (it was passed), the junior coalition Government party putting ongoing participation in government and the NAMA proposal to a vote of its membership (both were approved) and an extremely tough budget to be navigated through the Oireachtas (Irish parliament) starting in December. There is an absence of political and economic commentator consensus on NAMA. Some doubts have been expressed about the potential for litigation arising from the legislation. The possibility of constitutional challenge could be removed by a Presidential referral of the Bill to the Supreme Court. This would delay the implementation of the legislation for some months.

## Bank Levy

If NAMA makes a loss then the State plans to recoup the money from the banking sector by way of a levy. This will now be put into the NAMA legislation. A penal capital gains tax rate will be imposed on windfall profits from rezoned land.

## Structure

NAMA will be an independent public body with its own board of directors and chief executive. An interim chief executive has been appointed but the identity of the board members have yet to be decided. NAMA will have the usual powers of a corporate entity as well as being subject to special provisions given its unique role. For example there will be a presumption that gifts or advantages passing from NAMA debtors to NAMA staff or advisors are corrupt.

There is a theme throughout the draft legislation that NAMA will be put in a special position vis a vis third parties given the importance of the task which it is to perform. Any right of set off which the participating bank had will continue even though NAMA will now own some of the assets. If a third party wants to allege that the bank made a representation which is not recorded in the loan documentation or the banks records then the third party will not be able to make that allegation against NAMA. Instead it will only have a right of action against the bank.

While NAMA will succeed to all the rights of the participating institution it will not be succeeding to its obligations in respect of any breach of contract or similar negative event. NAMA will be relieved of certain registration requirements which apply to all other parties. NAMA is given extensive statutory receiver powers and power of entry to land. NAMA will be able to overreach equitable interests (including those in private residential property).

NAMA will also have a right to acquire land on a compulsory basis in certain circumstances to protect the value of the security. The amount to be paid for any such compulsory acquisition will be determined in accordance with the usual compulsory acquisition legislation i.e. not the long term economic value (used for the bank assets).

## Acquisition Process

NAMA will have the power but not the obligation to acquire land, development and associated loans from any bank which the Minister for Finance has designated as the participating institution. The acquisition process is likely to include detailed due diligence, valuation and then NAMA serving an acquisition schedule on the participating institution. All contracts which are relevant to the loans and security will automatically transfer to NAMA as will the benefit of rights such as certificates of title, undertakings, valuation reports and warranties. This statutory transfer will override any contractual limitation which might previously exist. Third parties such as the borrower and any guarantor must be notified by the participating institution within 60 days of NAMA acquiring a bank asset but failure to notify does not invalidate the transfer.

## Impact outside Ireland

While two thirds of the assets which are likely to go into NAMA are located in the Republic of Ireland and therefore subject to statutory intervention of this nature, one third of the assets are located outside the State. The NAMA legislation will require that the participating bank will do everything required by the applicable law to give effect to the acquisition. If the law of the relevant jurisdiction does not permit the transfer or assignment of the foreign bank asset then the participating bank will be obliged to transfer the greatest interest possible in the foreign bank asset, holding that asset for the benefit of NAMA and acting to the greatest extent possible as a trustee of that asset with NAMA as the beneficiary.

## Conclusion

The NAMA legislation will result in the creation of one of the largest property holding entities in the world. While doubts have been expressed about whether this is the best solution to Ireland's banking difficulties, it is likely to be the approach which is taken and therefore it must be made to work.

# Corporate Migration to Ireland



Cormac Brown

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There have been a number of high profile international corporate migrations to Ireland recently, including Shire Pharmaceuticals, WPP, Hendersons, UBM, Ingersoll Rand, Accenture and James Hardie. The initial wave of migrations, in the first part of 2008, by UK companies was largely attributed to the uncertainty over proposed UK legislative change to the rules governing the taxation of overseas profits.

The recent spate of US announcements seems to be attributable to the proposed changes to the taxation of overseas profits. The inclusion of Ireland on the white list for the purposes of the US Stop Tax Haven Act may also be a factor.

## Why choose Ireland?

Ireland has always been a leading location for companies expanding their global operations. The advantages include:

### 1. 12.5% corporation tax rate

The 12.5% rate is available where a company has a trade that is managed and controlled from Ireland. While the rules of the 12.5% rate require a physical Irish presence they also enable aspects of the activity to be outsourced to external service providers.

### 2. No transfer pricing or Controlled Foreign Corporation ("CFC") legislation

Ireland does not have any general transfer pricing or thin capitalization legislation. Accordingly there is no Irish requirement to produce costly transfer pricing reports and documentation.

Additionally Ireland does not have CFC rules that seek to attribute Irish taxation to foreign subsidiaries.

### 3. Pro-business tax authority

Ireland has been using tax as a major instrument of industrial policy for over 50 years. Accordingly a pro-business attitude has evolved in government that seeks to minimise the regulatory burden for business.

### 4. Inward and outward withholding taxes

Ireland currently has 51 double tax agreements (DTA) with all major EU/OECD jurisdictions, 46 of which are in effect (October 2009). Many of the Irish treaties provide for 0% rate of withholding tax on interest and royalty payments to Irish residents.

Irish domestic tax law does not impose withholding taxes on most outward bound interest, dividend and royalty payments especially to EU or DTA entities.

### 5. Financing costs and structures

Such costs are generally tax deductible.

### 6. Ireland - a cost neutral holding company location

Ireland's tax legislation has evolved to render Ireland as a holding company location of choice. The combination

of exemption from capital gains on the disposal of trading subsidiaries from treaty jurisdictions and EU Members, no additional tax on dividends paid into Ireland, no outward bound withholding taxes on dividends or interest and a good treaty network make Ireland stand out as a holding company location.

### 7. Ireland - Good Global Citizen

Ireland is a fully participative member of the EU and OECD

### 8. Common Law Jurisdiction

Ireland is a common law jurisdiction like the UK, Australia and the USA and has a similar system of corporate law.

## What is the procedure for migration?

Migrations can be achieved in a number of ways

- **Central management and control moves to Ireland**

Moving its central management and control to Ireland is a key method. This is done by holding board meetings in Ireland and making key strategic business decisions here. This model is most likely to be used by smaller private companies. The company remains on the statutory register of the jurisdiction of incorporation.

- **Scheme of Arrangement**

Companies in common law jurisdictions can migrate using a scheme of arrangement approved by the local courts whereby shareholders in the parent company agree to the cancellation or exchange of their shareholding in exchange for shares in a new Irish holding company. Both Shire Pharmaceuticals and Ingersoll Rand have used this method to migrate.

- **Societas Europaea (SE)**

An EU incorporated company can convert to an SE and then simply move its registered office to Ireland. James Hardie is currently using this method.

- **Cross-Border Mergers**

The recent enactment of the EU Cross-Border Mergers Directive in Ireland (May 2008) allows an Irish company to merge with a non-Irish EEA company. The Regulations provide for a new pan-European procedure and applies where there is

- Merger by acquisition - an existing company acquires all the assets and liabilities of another;
- Merger by absorption - an existing parent company acquires all the assets and liabilities of its wholly-owned subsidiary; or
- Merger by the incorporation of a new company - newco acquires the assets and liabilities of two or more existing companies.

In each case, the merging company dissolves automatically without going into liquidation.

## Asset Finance – Planes and Trains...

As we approach the midpoint in Q4 2009, the financial crisis continues. There is limited access to and availability of capital; low risk appetite by lenders; and an increased focus on security and regulation across all industry sectors including asset finance. We have been monitoring recent developments in Ireland and abroad which should contribute to the ignition of the asset finance and transport sectors, including the proposed consolidation of the regulatory functions for land and air transport; and increased flexibility and access to funding by port companies.

### AVIATION: Role of National Transport Authority?

The Public Transport Regulation Bill 2009 (the "Transport Bill 2009") as published on 8 September, 2009. One objective is the amalgamation of a number of regulatory bodies of land-based transport under the umbrella of the new National Transport Authority ("NTA") to facilitate a cohesive approach to regulation and a greater level of transparency for the public and industry participants.

The legislation was published after the Report of Special Group on Public Service Numbers and Expenditure Programs, (the "McCarthy Report" issued 16 July 2009) which recommended the creation of a single transport safety body comprising the Road Safety Authority, the Railway Safety Commission, the Irish Aviation Authority and the Maritime Safety Directorate.

While the draft bill concentrates on land transport, on 1st October 2009, the Minister for Transport Mr Noel Dempsey announced his intention to amalgamate the Commission for Aviation Regulation ("CAR") and the regulatory functions of the IAA within the NTA, stating that "the decision to bring together the key transport regulators in this way is a very tangible example of the Government's commitment to ensuring the effectiveness of Ireland's economic regulatory environment".

The proposed amalgamation of CAR and IAA supports the ethos of the Government Statement on Economic Regulation (October 2009) recognising that "effective economic regulation is central to economic competitiveness". It remains to be seen how the consolidation of the existing aviation entities will be implemented and also what impact the NTA will have on the role of the Commissioner for Aviation Regulation.

Industry participants in the Aviation, Maritime, Rail and Road sectors will be advised to monitor the progress of this legislation; the development of the NTA and the proposed new regulatory regime for companies and their assets as we go forward into 2010.

### RAIL – Registry of International Interests

The Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on matters specific to railway rolling stock was signed on 23 February 2007. The Final Act of the diplomatic Conference passed resolutions relating to (amongst other things): (1) the establishment of the Supervisory Authority and the International Registry for railway rolling stock; (2) technical assistance with regard to the implementation and use of the International Registry for railway rolling stock; and (3) the preparation of an official commentary on the Protocol.

Encouraged by the success of the Protocol specific to Aircraft Equipment (Cape Town; 16 November 2001); recognising the economic environment of reduced risk appetite and increased awareness and advantage to international recognition of security interests to facilitate financing for this asset class; Unidroit, OTIF and the Rail Working Group (RWG) are prior to the entry into force of the Protocol - which may be some time away - working to establish the rules and procedures and methods of working of the International Registry for railway rolling stock. We are pleased to be involved with and participate in the RWG in this exciting project.

### MARITIME – Enactment of the Harbours (Amendment) Act 2009

The Harbours (Amendment) Act 2009 came into effect on 21 July 2009. It contains a number of provisions designed to enhance the commercial ethos of State owned port companies and to facilitate the continued growth of the ports. The Act gives effect to and builds on the Government's policy as set out in the 2005 Port Policy Statement which issued from the Department of Communications, Marine and Natural Resources in January 2005.

The Act provides a clear legislative basis for investment by port companies outside their current harbour limits and increases their ability to borrow by raising the thresholds of permitted borrowing level (subject to Ministerial consents) and also encourages the development of additional port capacity facilities, with the aim of increased competition within and between the various port companies.

While the objectives of the Act are admirable and progressive, in the current economic climate, it is difficult to assess the timetable in which results will be achieved. A review of the Port Policy Statement scheduled for 2010 may well provide the first indications of any progress.



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## Examinership applications refused to Zoe



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*Examinership applications refused as Zoe fails to present convincing and objective evidence of a reasonable prospect of survival.*

The Zoe companies' failed bid for court protection has highlighted the requirement to present, in support of any application for examinership, convincing and objective evidence that a company and the whole or any part of its undertaking as a going concern has a reasonable prospect of survival.

In dismissing the first petition, the High Court and subsequently the Supreme Court on appeal, commented on the nature and quality of the evidence presented by the petitioner and, in particular, the projections relied upon by the independent accountant in forming his opinion that the companies had a reasonable prospect of survival.

The High Court held that the evidence presented was insufficient to enable a proper evaluation of the prospects of survival to be carried out. In its judgement, the court expressed grave reservations about the projections on which the independent accountant relied in forming his opinion. It criticised the projections for:

- lacking in reality given the extraordinary collapse that had occurred in the property market;
- failing to address the future direction of the property market; and
- being seven months out of date and not being truly independent.

The court was also critical of the fact that the valuations relied on were not presented to it and that the independent accountant did not consult with or get an independent view in relation to the management assumptions on which the projections were formulated.

The Supreme Court upheld the decision of the High Court on appeal. It held that the petitioner had not established that its strategy for a future orderly disposal of key assets of the company was credible or reasonably viable.

The Supreme Court emphasised the fact that in order for a court to be satisfied that a company has a reasonable prospect of survival it must have before it sufficient evidence or material which will permit it, following an objective appraisal of the evidence, to arrive at such a conclusion.

In presenting the second petition to the High Court, the Zoe Group attempted to remedy the evidential deficiencies identified by the High Court and Supreme Court in the first petition. Their efforts in this regard failed and the petition was again dismissed.

In criticising the new independent accountant's report, the High Court concluded that the survival plan in the report did not stand up to analysis. In particular, the court noted that:

- there was an overstatement of commercial rental income up to July 2011;
- the projected figures made no allowance for a rise in interest rates over the course of the next two years; and
- there did not appear to be any real basis for believing that rent receipts would rise sufficiently to cover the additional interest due on higher rates.

The court did however comment that if it had been satisfied that the companies and the Zoe Group generally had a reasonable prospect of survival it would have exercised its discretion in favour of the appointment of an examiner.

The Zoe Group sought to appeal that decision to the Supreme Court but the appeal was never heard as ACC Bank had successfully appealed the High Court's decision to allow a second petition at all, thereby rendering Zoe's appeal moot.

As a major player in the property market, it is not surprising that Zoe's misfortunes and its bid for court protection attracted such unprecedented media attention over the last couple of months. However, leaving aside the wider implications the Group's collapse might have on the property sector and the economy generally in this country, the judgements handed down by the High Court and the Supreme Court underscore the importance of being able to demonstrate an objective rationale and analysis for the belief that a company to which the appointment of an examiner is being sought has a reasonable prospect of survival as a going concern. If that test is not met the court can not grant the petition and appoint an examiner.

*Mason Hayes+Curran represents the Official Liquidator appointed to the two senior holding companies in the Zoe Group.*

## Company Directors. Take Note.

*Directors who keep good records of their participation in management are better placed to prove they acted honestly and responsibly.*

In August 2003, the once successful and prominent advertising agency, Doherty Advertising Limited collapsed with debts in the region of €6million.

In proceedings issued by the receiver against the company's executive directors, it was alleged that there had been improper payments to various parties, improper opening and use of a bank account and that invoices had been created for the purpose of fraudulently obtaining additional funding through the company's invoice discounting facility.

The proceedings were against the two executive directors who managed the day to day business of the company and whose actions were not known to the three non-executive directors. Because of these issues the non executive directors, who had no involvement in the alleged wrongdoing, had reason to believe that their own conduct would be scrutinised and so it transpired.

When a company goes into insolvent liquidation, the liquidator is obliged to investigate the conduct of the directors of that company and report his findings to the Director of Corporate Enforcement.

Unless the Director of Corporate Enforcement decides otherwise, the liquidator must apply to the High Court seeking to restrict anyone who was a director of the company within twelve months of the date of liquidation. In order to avoid being restricted, a director must be able to show that he acted honestly and responsibly in relation to the affairs of the company during his entire tenure as a director of the company. Therefore, the making of a restriction order can inflict significant reputational damage on a director as it facilitates media comment that a director has not acted honestly or responsibly.

While the non executive directors of Doherty ultimately had to face restriction proceedings, they demonstrated to the court that they had acted honestly and responsibly and no order was made against them.

They were able to do this because they had good records of their attendances at and contributions to board meetings. These records showed their prudent and rational response to the company's deteriorating position as it became known to them. It allowed them to show what they knew and when and to demonstrate that their actions were responsible in that context.

Their experience underscores the importance not only of good conduct, but of keeping a record of such conduct.

In this regard, it is generally helpful if directors:

- Ensure that the company is maintaining proper books and records and that all annual returns and Revenue returns are made up to date. If the accounts are not being properly kept and up to date, ensure that all necessary and appropriate steps are being taken to do so
- Insist on frequent board meetings. If board meetings are not being held on a regular basis, a non executive director should 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
- Attend all board meetings and ensure that attendance at and any contribution to the meeting is duly noted
- Ensure board packs are received in advance of meetings
- Ensure up to date and accurate financial information is being received on a regular basis
- Maintain and document all contact with fellow directors on an on-going basis
- Obtain legal advice prior to sanctioning any significant transactions
- Make sure that there is proper distribution of responsibility within the company
- Supervise any functions delegated to other individuals
- Ensure records and systems are sufficient to ensure it is possible to track cash receipts through the records of the company
- On resignation, ensure the resignation is duly notified to the Companies Registration Office

Finally, if a company is encountering financial difficulties, the directors should seek professional advice as soon as possible to assist them in trying to identify the cause of the difficulties and to put in place suitable remedial measures. Any decisions made for remedial action should be fully minuted or otherwise documented by memorandum which should then be circulated to all of the company's directors.



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# Charities – Getting in on the Act



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The Charities Act, 2009 (the "2009 Act") has been part of Irish law since February but most of the legislation awaits commencement and no Charity Regulator has been appointed as yet. Indications are that the 2009 Act will be brought into force over the next 2 years or so. In the meantime, all charities should take the opportunity to review existing operations and structures so that when regulation does start, it is a benefit, a confidence builder that the activities and finances are in order.

## Interaction with the Revenue Commissioners

The 2009 Act will run in parallel with the tax code as applied by the Revenue Commissioners. Inevitably there will be confusion because there will be two possible registrations, one with the Charity Regulator and the other with the Revenue Commissioners. However, it is important to remember that these are separate systems and that the Revenue Commissioners will continue to deal exclusively with tax matters. An entity with a CHY number will automatically be placed on the new register.



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## Registration – no exemptions

One's presence or the carrying on of activities in Ireland triggers the obligation to register. Where the entity is incorporated is irrelevant. Therefore many organisations which are based outside Ireland will be obliged to register under the 2009 Act.

The legal form, whether a trust, unincorporated association or corporate entity, is irrelevant. Every organisation must register. The title of those in charge will have no bearing on the individual responsibility for ensuring compliance. The directors, trustees and officers of the entity are the persons with responsibility for ensuring registration.

## What activities are charitable?

Section 3 of the 2009 Act sets out various purposes which are recognised by the State as being charitable. Traditionally there were four heads of charitable purpose; relief of poverty, advancement of education, advancement of religion and purposes of benefit to the community. The 2009 Act gives twelve examples of activities which the law (through the 2009 Act) will recognise as coming within the community benefit category, such as civic responsibility, protection of the environment and conflict resolution. The definition of "charitable purpose" deserves close attention and should be carefully and thoughtfully explored.

## "Charitable Trust"

Trusts can arise in many different circumstances and given the equitable nature of the origins of the concept, in general law no document is required for a trust to arise. However, the definition of "charitable trust" requires that the trust be established by deed for it to come within the 2009 Act. Whether the Charity Regulator will refuse to allow trusts which are not under deed to register remains to be seen.

## "Charity Trustee"

If the entity is a company then the directors and other officers of the company are included within this term. If the legal form is on some other basis (for example an unincorporated association) then any officer or person performing the functions of an officer comes within the term.

## Information in the Public Domain

A charitable organisation will have to disclose detailed information about its operations in particular regarding its financial affairs. All charities will have a duty to keep proper books of account. The precise nature of the degree to which financial information will be disclosed or must be audited will depend on the legal structure (companies will be dealt with under the Companies Acts as is currently the case) and the level of turnover.

When the charitable organisation is registering with the Charity Regulator for the first time (i.e. it does not have a CHY number), then it must provide information about the charity trustees and where they live, the places where the charitable organisation operates, its bank accounts, the ways in which it is realising its charitable objects, its fundraising activities and its risk management processes when dealing with vulnerable people. The expectation is that all information provided to the Charity Regulator will be made available on the regulators website.

## Conclusion

Preparing for regulation requires meticulous work in:

- reviewing current operations;
- clarifying existing structures;
- deciding on fundamental policy matters; and
- carrying out appropriate restructuring in advance of the 2009 Act applying.

There is time to review current activities and plan for any changes required. While new requirements under the 2009 Act might be regarded as onerous, the overall benefit of improved transparency and better governance will cancel out the costs and effort to comply.

## To tweet or not to tweet?

### Points to consider when social networking

The explosion over the last number of years of social networking websites such as Facebook, Bebo, LinkedIn and more recently Twitter has redefined the development of the Web from primarily an information resource to a more complex space where interpersonal relationships can be developed and which more closely resembles the “real” world. It is not uncommon these days to overhear new acquaintances promising to “facebook” each other in order to stay in touch. Just as “google” stopped being the name of a search engine and turned into a verb, this development shows that social networking is here to stay.

Many businesses are therefore looking closely at the marketing potential of social networking, but need to be aware of legal and other risks. A principal legal risk is the fact that the actions of any employee who social networks on behalf of his or her employer could attract liability for that employer under established rules of employer’s liability. Such an employee would generally be deemed to be acting in the course of his or her employment while engaged in the social networking activity and the employer could therefore become liable for, say, defamatory content posted by an employee about a rival business on his or her Facebook page. Similarly, if an employee has a work-related blog, it would be important to ensure that any content posted on that blog does not infringe third party copyright or other intellectual property rights.

Business concerns about social networking are not only legal. Reputation management is a key concern as social networking often involves instant publishing, i.e. posting to the relevant platform immediately upon completion. When coupled with the informality of certain social networking sites, there is a risk that an employee may post material that is not consistent with or indeed lowers his employer’s reputation.

However, if your business is considering availing of the marketing opportunities presented by social networking, it would be very important from a legal and business risk management perspective to develop a well thought out social networking policy that addresses the following issues

1. The policy should clearly distinguish between using social networking resources for work related purposes and the use of social networking for personal and purely social reasons. The two purposes should not be mixed, for example, a personal Facebook page should not also be used as a business marketing tool.
2. Employees should at all times maintain a level of formality and appropriateness consistent with their employer’s professional image. Obviously the level of

formality required may change depending on the type of organisation involved.

3. Employees should ensure that any content posted on the Web is not defamatory, illegal and does not breach any intellectual property laws. This would be particularly important where an employee operates a work related blog. A good rule of thumb here is to leave publications lie for at least an hour or two after drafting before publishing online – in other words, employees need to think before they post!
4. The privacy implications of social networking sites should also be made clear to employees. In particular, employees need to recognise that privacy settings on social networking sites are not foolproof and security breaches may occur or other users may make content available to others without consent. Employees should therefore only make available such information as they would be comfortable to release into the public domain. Adhering to this rule should also reduce the risk of an employee releasing information into the public domain that might have a negative reputational effect for his employer.
5. Blogging and tweeting should only be pursued when an employee has enough time to keep the blog or Twitter page up to date. A dormant or little updated blog or Twitter page can damage business reputation as much as badly written or ill considered material.
6. Use of social networking sites and resources should always be subject to sign off by managers/supervisors.

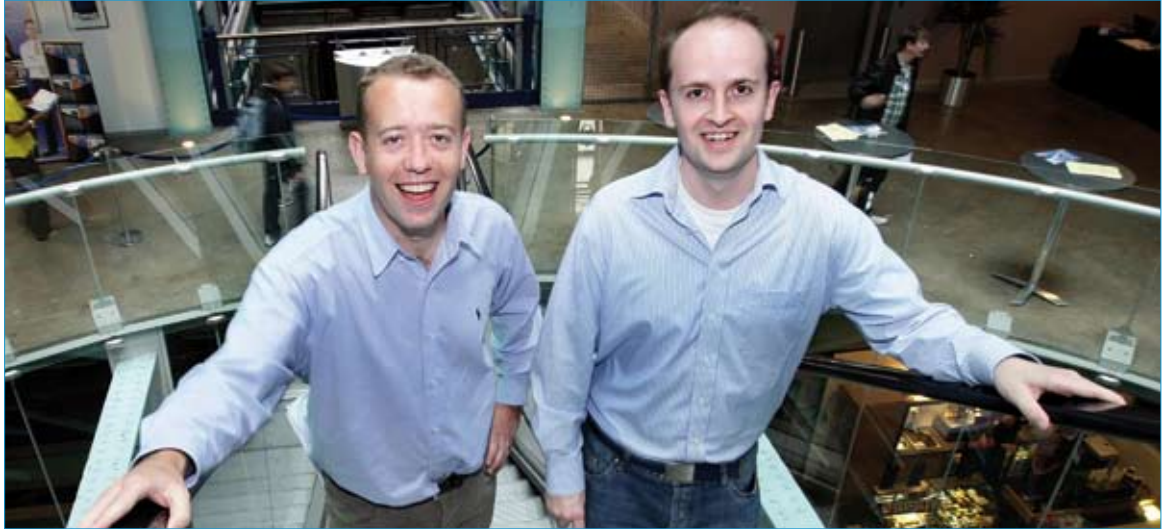
Social networking resources are neither a marketing panacea nor something to be avoided at all costs. A common sense attitude towards the use of social networking websites, which above all views them as additional marketing tools, coupled with a measured internal policy should allow your business to enjoy the marketing and networking benefits of social networking resources, while reducing business and legal risks.



Peter O'Neill

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## Mason Hayes+Curran News and Events



### Conference for Start Ups supported by MH+C

On Saturday 19th September 2009, over 300 entrepreneurs gathered at the Guinness Storehouse in Dublin to get free advice on starting a business taking the opportunity to attend presentations, network and share experiences on the ups and downs of starting and establishing a business. The conference also provided the chance for entrepreneurs to meet members of the business community, VCs and investors, and representatives from the relevant state agencies.

What is most novel about this conference is the way it is organised, it is a user generated conference. Essentially a website [www.bizcamp.ie](http://www.bizcamp.ie) promotes the event primarily through viral marketing, delegates register and individuals put themselves forward as speakers. The venue, catering and other costs are supported by a small number of sponsors. The idea is based on the Barcamp concept which started in the US and is now being used in every continent in the world.

As a business law firm that has a special focus on supporting high potential Start Ups we fully supported the invitation to sponsor and collaborate from volunteer organiser and client of the firm Keith Bohanna of dbTwang. On the day we provided Legal Clinics, giving entrepreneurs a chance to put their questions directly to MH+C's lawyers, offering a follow up meeting if required.

Attendees were able to choose from four streams of talks with advice ranging from using Twitter as a marketing tool to talks from IBM, Microsoft's Bizspark programme and Enterprise Ireland. Dan Barry a lawyer in the commercial department of MH+C gave a talk on "Legal issues for Start Up Businesses".

The highlight of the day was a panel discussion which was chaired by MH+C corporate partner, Martin Kelleher. The theme of the discussion was "Making it through tough times" and the panellists were Jerry Kennelly (co-founder of Kerry-based Stockbyte), Kevin Traynor (CEO of Sonic academy), Colm Lyon (CEO of Realex Payments) and Asheesh Dewan (founder of Jaipur Restaurants and co-founder of Segala).

During the panel discussion, Colm Lyon, CEO of RelaxPayments.com, gave a positive insight into forging customer relationships. "Every time I got rejected I went back to the office and made two more appointments," he said. Today, his company processes more than €6 billion annually for 3,000 businesses.

The mood was upbeat, the idea very smart. Entrepreneurs swapping successes and failures, with lawyers in the wings! A good day had by all.

Gavin O'Flaherty, pictured left, is a corporate partner at Mason Hayes+Curran. Email: [goflaherty@mhc.ie](mailto:goflaherty@mhc.ie)

Dylan Latimer, pictured right, is a lawyer in the corporate department in Mason Hayes+Curran. Email: [dlatimer@mhc.ie](mailto:dlatimer@mhc.ie)



### Education for Lawyers in South Africa

Daragh O'Shea, Senior Associate in the Financial Services department at MH+C recently participated on a commercial law education project in South Africa.

The initiative is a collaboration between the Law Society of Ireland, the Bar Council of Ireland and the Law Society of South Africa (with part funding from Irish Aid). The purpose of the course is to provide practical commercial law training for black South African lawyers.

The perception prevails in South Africa (rightly or wrongly) that the large established commercial law practices are still the preserve of white lawyers with black lawyers being concentrated in smaller practices or else being taken on by the large commercial firms mainly for the purpose of helping the firms meet qualifying criteria for participation in government contracts set out in South Africa's black economic empowerment legislation. The course is an attempt to address this problem through the acquisition of knowledge.

Broadly speaking, the course comprised of an introduction to South African corporate structures, an in-depth examination of a share purchase transaction (including due diligence (legal and financial), a review of a share purchase agreement, disclosure letters and consideration of warranty issues), an introduction to accounting concepts and basic company accounts and an overview of the black economic empowerment legislation.

The course was delivered primarily by a team of four Irish lawyers and one Irish accountant with specific South African input by South African lawyers from the large South African commercial practices such as Webber Wentzel and Eversheds. The black economic empowerment legislation lectures were provided by lawyers from DLA Cliffe Dekker Hofmeyer.

Student participation and feedback was excellent. Participation in this programme is just one of the many pro-bono initiatives of this type at Mason Hayes+Curran.

**Daragh O'Shea is a Senior Associate in the Financial Services department at Mason Hayes+Curran.**

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### Canadian Bar Association comes to Dublin

Dublin was the location of choice for the 2009 Canadian Legal Conference which took place in August 2009. Delegates got the chance to learn, debate, and connect with leaders in law from Canada and Europe. The programme included many high profile speakers including a talk on international law and human rights from former Irish President, Mary Robinson.

MH+C sponsored the event, hosting a reception for Council members at its offices as well as a large reception in the magnificent setting of Dublin Castle.

From left CBA Past President Guy Joubert Q.C. , Emer Gilvary, Managing Partner, MH+C and Kevin Carroll Q.C.,CBA President 2009.

## Mason Hayes+Curran News and Events



### Masterclass for In-House Counsel

MH+C held a Masterclass for In House Counsel on the topic of Company Investigations. Speakers included the Director of the Office of Corporate Enforcement, Paul Appleby, Chairman and partner of MH+C, Declan Moylan and Head of Investment Funds and Regulatory Unit and partner, Fionán Breathnach. In House Counsel were welcomed by Emer Gilvarry, Managing Partner who acknowledged the award winning journalist Sam Smyth who Chaired the event. This series of Masterclass events will continue in 2010.

Pictured above are: Sam Smyth, Journalist with Declan Moylan, Chairman, MH+C. Pictured below are: Fiona Forde, In House Counsel, Arup Consulting Engineers. Sam Smyth, Journalist, Paul Appelby, Director, ODCE and Fionán Breathnach, partner, MH+C.



### Philip Nolan represents Ireland in World Triathlon Championships

Well done to Philip Nolan, head of the commercial department at MH+C, who represented Ireland recently in the World Triathlon Championships in Australia. Philip competed in the Olympic distance race.

Philip has a competitive bike racing and duathlon background and took up triathlon in 2007 having quickly moved up the Irish rankings since then to secure the opportunity to represent his country at the championships.



### Deborah McHugh appointed to Pensions Council

At the recent AGM of the Association Of Pensions Lawyers in Ireland (APLI), Deborah McHugh, Senior Associate in the Employment and Benefits Department of MH+C was proposed and co-opted onto

the Council by the existing APLI Council members for the 2009-2011 period.

The Council is responsible for the management and direction of the day-to-day business of the APLI and Deborah's appointment presents a great opportunity for MH+C to be represented at this level and to become more involved in the pension industry generally over the coming years.

## Closing argument...

Mark Twain said that "golf is a good walk spoiled" and I am in total agreement with him. However, mindful of the obsession that many have for the game, I thought you might find these comments insightful:

*Golfer:* "I think I'm going to drown myself in the lake."

*Caddy:* "Do you think you can keep your head down that long?"

*Golfer:* "I'd move heaven and earth to break 100 on this course."

*Caddy:* "Try heaven sir, you've already moved most of the earth."

*Golfer:* "Do you think my game is improving?"

*Caddy:* "Yes sir, you miss the ball much closer now."

*Golfer:* "Do you think I can get there with a 5 iron?"

*Caddy:* "Eventually."

*Golfer:* "You've got to be the worst caddy in the world."

*Caddy:* "I don't think so sir. That would be too much of a coincidence."

*Golfer:* "How do you like my game?"

*Caddy:* "Very good sir, but personally, I prefer golf."

*Golfer:* "Do you think it's a sin to play on Sunday?"

*Caddy:* "The way you play, sir, it's a sin on any day."

"I have a tip that can take 5 strokes off anyone's golf game. It's called an eraser."  
- Arnold Palmer

"I know I'm getting better at golf because I'm hitting fewer spectators."  
- Gerald R. Ford

"The reason they call it 'golf' is that all the other 4 letter words were used up."  
- Leslie Nielsen

"In primitive society, when native tribes beat the ground with clubs and yelled, it was called witchcraft; today, in civilized society, it is called golf."  
- Anonymous

"If you watch a game, it's fun. If you play it, it's recreation. If you work at it, it's golf."  
- Bob Hope

"The only time my prayers are never answered is on the golf course."  
- Billy Graham

"Golf appeals to the idiot in us and the child. Just how childlike golf players become is proven by their frequent inability to count past five."  
- John Updike

"If profanity had an influence on the flight of the ball, the game of golf would be played far better than it is."  
- Horace G. Hutchinson

"The reason the pro tells you to keep your head down is so you can't see him laughing."  
- Phyllis Diller

"When I die, bury me on the golf course so my husband will visit."  
- Author Unknown

"I'm not saying my golf game went bad, but if I grew tomatoes, they'd come up sliced."  
- Lee Trevino

"Drugs are very much a part of professional sports today, but when you think about it, golf is the only sport where the players aren't penalized for being on grass."  
- Bob Hope

"Real golfers, no matter what the provocation, never strike a caddy with the driver. The sand wedge is far more effective."  
- Huxtable Pippet

"I've spent most of my life golfing - the rest I've just wasted."  
- Author Unknown

"They call it golf because all of the other four-letter words were taken."  
- Raymond Floyd

"If you're caught on a golf course during a storm and are afraid of lightning, hold up a 1-iron. Not even God can hit a 1-iron."  
- Lee Trevino

"I'm hitting the woods just great, but I'm having a terrible time getting out of them."  
- Harry Toscano

"I would like to deny all allegations by Bob Hope that during my last game of golf, I hit an eagle, a birdie, an elk and a moose."  
- Gerald Ford

"I'll shoot my age if I have to live to be 105."  
- Bob Hope

"[Golf] is like chasing a quinine pill around a cow pasture."  
- Winston Churchill

"A 'gimme' can best be defined as an agreement between two golfers, neither of whom can putt very well."  
- Author Unknown

"If I'm on the course and lightning starts, I get inside fast. If God wants to play through, let him."  
- Bob Hope

"What's nice about our tour is you can't remember your bad shots."  
- Bob Bruce, about the senior tour

"Men who would face torture without a word become blasphemous at the short fourteenth. It is clear that the game of golf may well be included in that category of intolerable provocations which may legally excuse or mitigate behavior not otherwise excusable."  
- A.P. Herbert, *Misleading Cases, 1935*

### Court Humour

*Judge:* Is there any reason you could not serve as a juror in this case?

*Juror:* I don't want to be away from my job that long.

*Judge:* Can't they do without you at work?

*Juror:* Yes, but I don't want them to know it.

*Defendant (after being sentenced to 90 days in jail):* Can I address the court?

*Judge:* Of course.

*Defendant:* If I called you a son of a bitch, what would you do?

*Judge:* I'd hold you in contempt and additional five days in jail.

*Defendant:* What if I thought you were a son of a bitch?

*Judge:* I can't do anything about that. There's no law against thinking.

*Defendant:* In that case, I think you're a son of a bitch.

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