

MHC TIMES

Corporate Insolvency:
Considering the Options

Entrepreneurship Seminar
for Public Servants

UCITS: Opportunities for Hedge Fund
Managers

Non Taxable Benefits in Kind



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Editor's Welcome



Ailbhe Gilvarry

Welcome to issue 25 of MHC Times. The magnificent photograph on the front cover comes courtesy of Dun Laoghaire Golf Club, where MH+C hosted one of their golf outings this year. This club recently moved to its new location which sits dramatically between mountains and sea in a uniquely picturesque valley on the borders of County Dublin and County Wicklow. See page 12 to view the winning team!

This issue of MHC Times covers a variety of topics including an update on UCTIS: Opportunities for Hedge Funds by Fionán Breathnach, a report on current trends in insolvency by Declan Black and property and tax articles by Cormac Brown and Declan Curran.

Details of the launch of the Irish Chapter of NAWIC, an association for women professionals in construction is covered on page 4. We also hosted a visiting group of Kosovo lawyers organised as part of the Rule of Law Project being co-sponsored by the Law Society of Ireland and the Irish Bar Council.

Pages 11–14 give a round up of new appointments and other recent news and events in the firm. The back page provided the usual challenge to find suitable publishable material!

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MHC TIMES

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Managing Partner's Diary

Introduction

Welcome to the 25th edition of MH+C Times. Our publication extends over twelve years, and tells the story, in its own way, of this firm's growth, the phenomenon that was the Celtic Tiger, and, in the past year, how we as a country and we as a law firm have learned to adjust and adapt to a dramatically different economy and dramatically different ways of providing legal services.

Moving on

Like all successful businesses, we quickly got used to the changed environment, and have now moved on in terms of our business to concentrate on staying strong and, indeed, seeking out the opportunities that can come with an economic downturn. The firm's balanced practice has proved itself in this climate, and we work towards remaining resilient so that we will emerge as a fit and robust practice. This year, we reported a 12% increase in revenues, largely due to the very successful merger with Arthur O'Hagan, which went live last October. The merged firm settled very quickly, and the enhanced benefits for clients have been clear and tangible. We have sought out other opportunities to further the growth of our firm, and have developed existing, successful, practices – for example, by recently recruiting another partner to join our leading Financial Services team.

In addition, we recognise the need to provide support for our clients in these difficult and challenging times, and to reciprocate for choosing us as their legal advisers. We achieve this in a number of ways. For instance, last year, we commenced a programme of "Meet to Motivate" seminars, choosing topical subjects of interest to our clients. These seminars have been very successful, and they have prompted us to commence a new type of master class, running alongside the Meet to Motivate programme, aimed specifically at in-house counsel. The first of these master classes took place during the month of April, and we intend to run a series with different topics on a number of dates during the course of this year. As a consequence of this, our clients get the opportunity to obtain useful information, discuss relevant topics and experiences, exchange ideas, and identify areas of mutual interest in order to advance the interests of their businesses and organisations in these difficult times.

Unique position

All of these initiatives allow us to maintain a unique position as a law firm. Concentrating on training and recruitment of quality lawyers, aligning our practice with current needs, having a uniquely open and fresh attitude to the media and our own constituency by publishing annual results, working

alongside our clients to assist in improving their businesses in these times, and providing added 'give-something-back' benefits, such as our master class series, all help us to distinguish ourselves from our competitors, and continue to be the law firm of choice for the particular international and domestic clients we serve.



Emer Gilvary

State of the Economy

In common with other countries, Ireland is experiencing particular issues in its banking and financial sector. At the core of this is the concern of capital markets with regard to the adequacy of banks' existing capital to cover possible future loan impairments. Fortunately, the Irish Government has recently announced decisive action to deal with the banking issues in Ireland to ensure the flow of credit to the real economy. The creation of the National Assets Management Agency (NAMA) was announced in April, and it is expected to operate as an agency which will stabilise and strengthen the Irish banking system. While the plight of the banks is well documented, and has been the subject of international comment, there is no doubt that Ireland as a country, given its entrepreneurial spirit, its well-educated workforce, and its commitment to 'Ireland Inc.', will continue to attract foreign direct investment and to create the required level of new start-ups, while tenaciously bringing itself back to a centre stage position in international commercial activity.

Conclusion

'Green shoots' is the new phrase used for 'light at the end of the tunnel.' Some shoots are already visible, but it is still too early to estimate when we, as a country will come out of the recession. However, MH+C continues to look towards strategic growth, continued alignment with clients, and a positioning that will help us to emerge even fitter and stronger from the current downturn.

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Launch of NAWIC in Ireland



Susan Bryson

If you would like more information about NAWIC please contact: sbryson@mhc.ie

Susan Bryson, a partner in the MH+C construction department joined the UK committee of the National Association of Women in Construction in December and set about launching the Irish chapter of the organisation. NAWIC was established in the US over 50 years ago and has over 6,000 members worldwide representing all of the various professions across the construction industry. Susan put together a committee in Ireland consisting of two lawyers, two architects, two engineers and two quantity surveyors and Susan is currently the chairperson.

MH+C hosted an event on the evening of 10th March to officially launch NAWIC in Ireland. Those in attendance represented all of the professions in the construction industry including lawyers, architects, engineers, quantity surveyors and project managers. Pictured at the launch of NAWIC Ireland are, Susan Bryson, partner, MH+C, Dr Nael Bunni and Rory Kirrane, partner and Head of Construction Litigation, MH+C.

We were delighted to have Dr Nael Bunni as our guest speaker on the evening. Dr Bunni gave us the benefit of his fifty years experience in the construction industry in analysing and explaining the dispute provisions in the new Irish government contracts. Welcome messages were received and read out on the night from NAWIC chapters across the globe who are delighted to have the Irish on board.



NAWIC provides a forum in which members from all of the different professions in the construction industry can get to know one another in a relaxed and enjoyable setting and participate in a variety of interesting events.

Rob Leech of the Rail Procurement Agency who is leading Metro North, the largest infrastructure project in Ireland, arranged for the Metro North senior project team to give a presentation to NAWIC on 27th May and Jerry Mehigan, Chairman of Arup hosted the event at the Arup offices. SIAC have kindly agreed to host the summer event which will involve a bus trip along the M3 site with a presentation and drinks afterwards in the Ardboyne Hotel in Meath. Martin Maher, newly appointed MD of SIAC will be hosting the event.

Kosovo Lawyers trip to Ireland



Daragh O'Shea

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MH+C recently hosted a delegation of lawyers from Kosovo Chamber of Advocates (KCA). The KCA delegation was visiting Dublin as part of a Rule of Law Project being co-sponsored by the Law Society of Ireland and the Irish Bar Council.

The KCA delegation was on a fact finding mission and particularly interested in learning about the Irish approach to professional legal education for solicitors and barristers and how multi-lawyer practices in Ireland operate.

During an earlier visit to Ireland in May 2007, the KCA had the opportunity to see the professional training programme run by the Law Society. This led to the KCA contacting the Law Society with a view to getting some technical assistance from the Law Society and the Bar Council to develop the KCA's own professional training programme.

The KCA delegation had met Kevin Hoy (MH+C partner and head of Financial Services) and Daragh O'Shea (senior associate, Financial Services) when they had visited Kosovo in October 2008, in order to lead an American Bar Association/ USAID sponsored 3 day strategic planning retreat for the KCA. While in Dublin the KCA had the opportunity to visit MH+C's headquarters and meet with our chairman Declan Moylan. Declan gave the delegation a short talk on the



evolution of the firm from a 3 to 124 lawyer practice and the impact this had on how the firm was structured internally. Declan also spoke about the marketing efforts of the firm to grow the practice's footprint domestically and by international referral work.

During the rest of their week in Dublin, the delegation visited the Law Society's Education Centre in Blackhall Place, the Courts Service, and the Four Courts as well as attending tutorials at the Kings Inns. They took part in teacher training sessions and spoke with both trainee and senior Irish barristers and solicitors. They also had the opportunity to meet with Peter Power TD, then Junior Minister for International Development and discuss the delegation's visit to Ireland and the future of Kosovo and its legal system.

UCITS: Opportunities for Hedge Fund Managers

One of the most interesting developments arising from recent market difficulties has been the increased demand by investors for regulated products. More and more, this has led hedge fund managers to move into the regulated fund arena, either as a result of their investor base wishing to move away from unregulated hedge funds or as those managers seek to attract new money.

UCITS funds, in particular, are seen as the product of choice, due to their liquidity, transparency, high level of investor protection and distribution opportunities. Also, flexibility: the UCITS product now enables hedge fund managers to mirror many of their hedge fund strategies through the use of an appropriate mix of leverage, shorting and derivatives.

UCITS III

UCITS III extended the range of assets in which a UCITS is permitted to invest beyond just listed transferable securities, to now include money market instruments, bank deposits, financial derivatives and units of other collective investment undertakings. After implementation of UCITS III in 2003, the question then arose as to whether and to what extent some financial instruments could be considered “eligible assets” for investment by UCITS. This led to the publication of the Eligible Assets Directive in March 2007. The key to the flexibility of UCITS, in terms of innovative trading strategies, lies in these initiatives.

Product Opportunities

Many of the opportunities arise from the UCITS's ability to invest in financial derivative instruments (FDIs). Through use of FDIs, UCITS can now gain exposure to a variety of asset classes which would not have been permitted under the original incarnation of UCITS. Examples of the types of strategies that may now be pursued by UCITS funds include the following:

- Long/Short Equity – UCITS can now create a long/short exposure to eligible assets through the use of FDIs. The long/short strategy can be structured subject to certain counterparty exposure limits and provided that the overall global exposure through the use of FDIs does not exceed 100% of the fund's net asset value. That said, some further flexibility may be achieved through a sophisticated measurement of risk such as VaR. The long/short equity strategy will accommodate long extension funds (eg 130/30) and absolute return funds.
- Index Hedge Funds – although UCITS are generally not permitted to invest directly in hedge funds, they can gain exposure to hedge funds by investing in broadly diversified hedge fund indices through FDIs.

- Credit Derivatives - Credit derivatives are considered eligible assets in which UCITS may invest provided that they comply with the rules that apply to eligible derivatives under UCITS III and that the UCITS receives only eligible assets on termination of the credit derivatives.
- Commodities Indices – a UCITS may not invest directly in commodities but it may gain exposure to commodities by investing in recognised commodities indices through FDIs.

UCITS may also pursue strategies in convertible bonds, synthetic ETFs, fund of funds (including funds of ETF funds), enhanced fixed income funds and structured financial instruments.

UCITS are also permitted to invest up to 10% of their assets in unlisted transferable securities and money market instruments. The Irish Financial Regulator has interpreted this to permit a UCITS to invest up to 10% of its assets in aggregate in any type of unlisted security and unregulated investment fund, including hedge funds, provided the investment complies with the eligibility criteria for UCITS.

Distribution

UCITS are now recognised as the most marketable collective investment product in the world. Not only are they freely distributable within the EU but also regulators in Asia, Africa and Latin America permit UCITS products to be sold in their jurisdictions. This is because those regulators recognise the UCITS brand as representing a well-regulated, liquid, transparent product with a strong emphasis on investor protection and coming from a stable environment.

Conclusion

The combination of this acceptability of the UCITS product for sale in so many jurisdictions and the flexibility as regards investment strategies has led many hedge fund managers to establish UCITS funds. Perhaps the greatest advantage of the UCITS product is the freedom of choice. Investors can decide to invest in funds that are more aligned to their risk/reward profile. Managers can pursue strategies within UCITS to maximise returns and can manage their investments with a greater degree of sophistication, if required. Of course, hedge fund strategies that invest in relatively illiquid assets or require significant leverage may not be capable of being replicated within UCITS, however, we are increasingly seeing hedge fund managers who are prepared to adapt their strategies to comply with the UCITS limitations.

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Fionán Breathnach

Non Taxable Benefits in Kind



Cormac Brown

Is there anything left after the April 2009 Budget?

The introduction of the new income levy, the doubling of the health levy combined with the substantial increase in the employee PRSI ceiling has greatly increased the focus on the provision of tax free benefits. These benefits, while obviously exempt from income tax, should also exempt from PRSI (including employers) and the levies – income and health. For an employee facing an increased marginal rate of anything up to 52% any saving in tax/levies will surely be welcome

Generally, income tax is charged on all benefits in kind. However, there are a number of exceptions to this general rule and we have set out below some of the more generally applicable benefits. This is not a complete list and other benefits may be provided tax free.

1. Canteen meals

Where an employer provides free or subsidised meals, for staff generally, in a staff canteen, and the facility is available to all staff, a taxable benefit does not arise. Provision of meal vouchers, however, does amount to a taxable benefit.

2. Travel passes

Where an employer provides a monthly or annual bus, train, ferry or Luas pass for an employee, or an integrated pass covering more than one operator, a taxable benefit will not arise. The travel pass must be issued by or on behalf of CIE, a subsidiary of CIE, or a licensed passenger transport provider under the Road Traffic Act 1932.

In addition, salary sacrifice arrangements, for the provision of such passes, will also not give rise to a taxable benefit on the remuneration sacrificed where the following conditions are met:

- there must be a bona fide and enforceable alteration to the Terms and Conditions of Employment (i.e. exercises choice of benefit instead of salary);
- such alteration must not be retrospective and be evidenced in writing;
- there must not be an entitlement to exchange the benefit for cash;
- the choice can only be made with the consent of the employer once a year.

The obvious benefit for the employer is that there is no employer PRSI regardless of whether the benefit is supplied “free” or under a salary sacrifice scheme. The benefit for the employee in the salary sacrifice scheme is that the employee effectively buys the travel pass out of gross income.

3. Business mobile phone

Where an employer provides an employee with a mobile phone for business use and pays for the use of this phone, a taxable benefit will not arise where private use of the phone is incidental.

4. Home high-speed internet connection for business use

Where an employer provides an employee with a home high-speed connection for business use, and bears all costs for installation and use, a taxable benefit will not arise where private use is incidental. The same exemption applies to the provision of a home telephone for business use where the private use is incidental.

5. Computer equipment for business use

Where an employer provides an employee with computer equipment, i.e. a laptop, printer, scanner, modem, disc, disc drive, or computer software, for business use, a taxable benefit will not arise where private use of this equipment is incidental.

6. Medical check-up

Where an employer requires employees to take medical check-ups, the cost of providing the check-ups will not give rise to a taxable benefit. In addition, PAYE will not apply to any benefits arising from employer contributions to an in-house medical plan, or the retention, by the employer, of the services of a GP for the benefit of the employees.

7. Once-off small benefit

A once-off small benefit, with a value of up to €250, can be given to employees and no taxable benefit will arise. This can be given once in any tax year.

Other tax exempt benefits

There are also a number of other tax exempt benefits that may be provided to employees. (For full details see the Revenue’s PAYE Guide.) These include in-house sports facilities, provision of crèche/childcare facilities, provision of certain security assets and services, staff discounts, Christmas parties, e-workers home expenses, provision of newspapers, periodicals etc., examination awards, long service awards and certain removal and relocation expenses.

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Rent to Buy

Introduction

Rent to buy schemes, which are essentially letting agreements with an option for the tenant to buy, are a new departure in the real estate market in Ireland.

The altered economic landscape means that developers are now prepared to offer such schemes to interest prospective purchasers. From the purchaser's perspective it is a way of trying out a property before committing to buy and also a way of saving for a deposit.

How does it work?

A purchaser rents a property from the developer under standard rental terms. The purchaser pays a security deposit and signs a letting agreement which will also contain an option for him to buy the property within a certain timeframe. Then, if he decides to buy, all the rent paid (or in some cases a percentage of it) is allowed against the agreed fixed purchase price. The money paid in rent can be used as the deposit thereby facilitating the tenant in occupation to borrow the balance of the purchase price from a lending institution.

There are a number of variations on the rent to buy theme but a good example is the scheme on offer from our client, Rhatigan Commercial Developments at Heuston South Quarter ("HSQ"). At HSQ the tenant will sign a three-year letting agreement for an apartment and will have the right to purchase it at any stage during that time at the fixed 2009 price. If the tenant does not elect to purchase the apartment, he will be refunded his security deposit at the end of the term in the normal way, but will not be refunded the rent paid.

The Residential Tenancies Act 2004

All of the protections usually afforded to a tenant under the terms of the Residential Tenancies Act 2004 apply to such schemes. It is not possible to contract out of the provisions of the Act. The letting agreements must be registered with the Private Residential Tenancies Board. Tenants will have security of tenure in accordance with the terms of the Act. A concern for a developer arises when a tenant who decides not to buy the property nevertheless refuses to vacate at the end of the term and seeks to rely on the security of tenure provisions in the Act. The developer should, subject to serving the appropriate notice, be able to secure vacant possession in order to sell the property. This is one of the criteria specified in the Act which enables landlords to terminate tenancies and recover possession.

The Consumer Credit Act 1995

Care needs to be taken not to fall foul, however unintentionally, of the provisions of the Consumer Credit Act 1995. Credit is defined in the Act as including "a deferred payment, cash loan, or any other form of financial accommodation." The provisions of the Act however, do not apply to "credit granted or made available without payment of interest... other than by a seller of goods who has invited by advertisement consumers to avail of such credit." As most of these schemes are advertised it would be important to ensure that there is no form of deferred payment, cash loan or other financial accommodation whether interest bearing or not.



Declan Curran

Stamp Duty

If the rent is less than €19,050 then no stamp duty is payable. If rent exceeds €19,050 per annum, stamp duty is payable by tenant at rate of 1%. If the option to purchase is contained in the letting agreement it should not give rise to an extra charge to stamp duty. An option agreement is stampable based on the consideration paid or its market value. In this case, as the purchase price paid of the apartment will be market value, there will be no consideration for the grant of the option.

The subsequent notice of intention to purchase the apartment will not give rise to a charge to stamp duty.

On the purchase of the property, stamp duty may be payable, depending on whether the purchaser is an owner occupier. The Revenue's view is that notwithstanding that the apartment has been occupied, in such rent to purchase schemes, they will regard the property as being "new" for the purposes of owner occupier relief. If the purchaser does not intend to occupy the property then full stamp duty rates will apply.

VAT

On the letting of the property, the developer will be required to make an annual payment of 1/20 of the VAT recovered on acquisition and development of the property. Therefore if the property is let for a period of 3 years, the total VAT repaid to the Revenue should be 3/20 of the VAT recovered on acquisition and development.

The developer should be able to recover 50% of the VAT incurred on costs of the letting and sale of the property. On the sale of the property, the developer will have to account for VAT at the rate of 13.5% in the usual manner.

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Corporate Insolvency: Considering the Options



Declan Black

Directors of companies which are at risk of insolvency face a range of management and strategic options unfamiliar to many of them. Managing for growth has become managing for survival. Directors face a range of duties to stakeholders in such circumstances but their primary duty is to protect the interests of their creditors as a whole. Seeking to discharge this duty but at the same time managing in the interests of other stakeholders – shareholders, employees and customers – is extremely challenging.

In this context, directors need to understand the consequences of the legal options available to them in order to make the best (or least worst) choices particularly when scarce financial resources need to be deployed as a consequence of any particular choice. Essentially, the options are:

- New investment
- Consensual compromise with some or all creditors
- Statutory arrangement with creditors
- Examinership
- Receivership
- Liquidation

Each of these options carries different consequences for the stakeholders. Key features of each option are:

New Investment

- No court involvement.
- Relatively inexpensive.
- Usually involves disposal of a significant portion or majority of equity participation.
- No legal effect on employees or creditors.
- Often drives management and work practice change.

Consensual compromise with creditors

- No court involvement.
- Relatively inexpensive.
- Very significant time commitment as involves individualised agreements with all creditors.
- Can significantly damage creditor relations if some creditors are treated differently than others.
- Very difficult to achieve agreement with all creditors on an individual basis.
- Better managed through an external professional.
- No affect on employees.

Statutory arrangement with creditors

- Court involvement but much cheaper than examinership.
- Does not usually affect shareholders.
- Can be targeted at unsecured creditors only. Therefore is particularly suitable for a company which has the support of its bankers and/or the Revenue Commissioners and wishes to reach a compromise with unsecured creditors only.

- Requires three quarters in value of the affected creditors to vote in favour of the scheme.
- Once process is initiated, the court may stay all other creditor action thereby giving the company some breathing space.
- Can be used in conjunction with a negotiated new investment.
- Does not affect exposure on personal guarantees.

Examinership

- Significant court involvement and relatively expensive.
- Necessary to show reasonable prospect of survival of company and all or part of its undertaking.
- Usually involves total divestment of original shareholder interests to new investors.
- Can on occasion involve retention of some or all of original shareholders' interests but usually only where new money is made available.
- Provides breathing space for company from its creditors.
- Does not prohibit bank (or other party) exercising a right of set off.
- Usually requires the company to be able to demonstrate that it has the cash resources to survive for the 70 or 100 day examinership period.
- Often requires the support of key creditors such as invoice discounters, bank or Revenue Commissioners.
- Usually requires the identification of a new investor.
- No immediate effect on employees but often leads to redundancies in any reorganisation affected during the examinership period or as a result of the new investment.
- Does not affect exposure on personal guarantees provided holder of personal guarantees follows mandated notice procedures.
- Usually reduces the risk of directors being exposed to claims that they failed to take action in the interests of the creditors as a whole.
- Directors usually remain in executive control during examinership period but may lose office as part of any investment deal and/or scheme of arrangement.

Receivership

- Only available where a secured creditor has a charge which allows it to appoint a receiver.
- Usually results in total loss of executive control on the part of the directors.
- Does not address to any extent the claims of unsecured creditors. The receiver's primary function is to collect the debt due to the secured creditor which has appointed the receiver.
- Receiver's aim will be to dispose of the assets either piecemeal or as a going concern to a new investor and use the proceeds to pay the secured creditor.
- In a disposal of a business by a Receiver, employees and their accrued rights usually transfer to the acquirer.

- Does not affect the exposure to personal guarantees.
- Often followed by appointment of a liquidator to deal with the interests of other creditors.

Liquidation

- Total loss of control for directors.
- Fairly immediate redundancy for the vast majority of employees.
- Liquidator converts the assets of the company into cash to distribute amongst the creditors in accordance with insolvency rules. This process is lengthy and dividends for creditors may not be paid for years and prospects for unsecured creditors usually are poor.
- Directors are exposed to potential claims taken by the liquidator and/or applications for restriction

or disqualification dependent on the contents of the liquidator's report to the Director of Corporate Enforcement.

- No affect on personal guarantees.

Because the debt profile and prospects for survival of each company are different, the legal options available need to be considered carefully, and at an early stage, by directors. Specialist legal and financial advice should be sought so that the best option for a company given its particular circumstances can be identified.

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Entrepreneurship Seminar for Public Servants



On Friday 24 April, MH+C hosted a seminar on "Fostering Entrepreneurship: Where to From Here?". Chaired by Managing Partner Emer Gilvarry, the event was attended by over 80 civil and public servants. This was the fifth in our series of seminars for senior ranking public servants. For example, the seminars to date have focused on the theme of regulation; post-Celtic Tiger Ireland; change management; and accountability in the public sector.

The event was opened by Denis O'Brien, entrepreneur and founder of Communicorp who spoke of the culture which he engenders in all elements of his businesses as being the "98FM" culture. He explained that establishing 98FM was one of his first ventures into the world of media and the success of the station in the early days was due to the leanness and efficiencies of its operations. Denis encouraged entrepreneurs who have achieved success in Ireland to replicate the success in other countries where there are greater opportunities and bigger markets.

The second speaker was Asheesh Dewan, founder of the Jaipur restaurants and Ethnic Entrepreneur of the Year 2008. Whilst Asheesh was resolute in saying that Ireland was a good place to do business, he also spoke of the challenges of being an entrepreneur in Ireland, chief among those being

the lack of any co-ordinated policy or thinking on the provision of work permits for ethnic restaurants.

The seminar was then addressed by Dr. Thomas Cooney, research fellow at Dublin Institute of Technology and a specialist in entrepreneurship. He discussed statistics which suggest R&D activity in Ireland tends to be concentrated in large, international firms and in terms of R&D spend, Ireland did not fare well when compared to other EU countries.

The final speaker was Patricia Callan, Director of the Small Firms Association. Patricia spoke of the need for Ireland to be more competitive. In terms of creating the right environment in which entrepreneurship can be fostered, Patricia believed that there is a need to reconfigure the National Development Programme so as to ensure that it is biased towards measures which support enterprise. In common with Dr Cooney's presentation, Patricia felt that Ireland needs a cohesive policy on entrepreneurship.

A podcast of some of the speakers at the event is available for download on the Mason Hayes+Curran website – www.mhc.ie/podcasts

Pictured above are from left: Asheesh Dewan, founder of Jaipur, Emer Gilvarry, Managing Partner, MH+C and Denis O'Brien, founder of Communicorp Group.

Challenging Times for Company Directors



Gerard Ryan

A trend in recent legislation and regulatory laws is the extension of criminal liability of corporate entities behind the corporate veil to impose liability on a company's directors and officers where a company has committed an offence. These director liability provisions allow the side-stepping of the faceless corporate personality and the holding of the real persons behind the company accountable for acts of the company that they control. We therefore see an erosion of the doctrine of separate corporate personality, limited liability and the company and only the company being responsible for its acts and omissions. There is obviously an increased deterrent effect in giving extra teeth to a piece of legislation by being able to hold the real persons behind the veil (and who may in fact be responsible for the acts or omissions of the company) responsible for a breach.

With ever increasing amounts of legislation and regulation and a likely move away from "light touch" regulation all directors of companies need to be mindful of the complex regulatory and legal regime that their company and its particular business operates in and keep themselves informed and up to date with the regime and with the activities of the company and its compliance or otherwise.

Criminal liability of directors for the criminal acts of a company is now a common provision of Irish legislation. The legal and regulatory framework sets out specific statutory criminal offences and an offence if committed by a company can be visited upon the director or officer of the company. It is likely that this legal risk for directors will only increase as time goes by. It is also noteworthy that criminal liability often may attach to officers of a company which may include an auditor of a company. Criminal liability may also attach to members of a company where the affairs of a company are managed by its members.

The legislation generally adopts a common formula the key features of which are set out below:

The provision applies to any person "being a director, manager or other similar officer of the undertaking, or a person who purports to act in any such capacity". Shadow directors and de facto directors are included. Manager is not defined in the legislation but has been held in case law to mean a person who is entrusted with the power to transact the whole of the affairs of the company.

The doing of the acts that constituted the offence must have been "authorised, or consented to by, or is attributable to connivance or neglect" by the person before personal criminal liability will attach. There is a rebuttable presumption that "the doing of the acts by the undertaking which constituted the commission by it of the offence concerned under any of the relevant statutory provisions was authorised, consented to or attributable to connivance or neglect on the part of that person". The presumption applies to a person who was "a director of the undertaking concerned or a person employed by it whose duties included making decisions that, to a significant extent, could have affected the management of the undertaking, or a person who purported to act in any such capacity".

Consent seems relatively simple in that it involves knowledge and agreement to the commission of the offence. It requires some deliberate and conscious complicity in the act constituting the offence and may be express or implied. It is not necessary to know the act is criminal as ignorance of the law is no defence.

Connivance can be said to be tacit agreement but not actively encouraging a course of conduct reasonably likely to lead to the commission of an offence.

Negligence requires a breach of duty. This entails the failure to perform a duty which a person knows or ought to know should be performed. It is not neglect if a director or manager properly delegates his duty to another. However, there are clearly limits to the extent to which directors may delegate the exercise of their duties.

Companies face an ever growing burden of laws and regulations to comply with in carrying on its business. Directors now face an increasing risk of being held to be personally liable for the wrongdoings of companies that they control. It is important that professional advice is taken and appropriate training and compliance programmes initiated to prevent companies and directors facing sanction.

Gerard Ryan is a partner in the corporate department at MH+C and has a focus on governance issues among other specialties. Email gryan@mhc.ie

Mason Hayes+Curran News and Events



New Partner for Financial Services Department

MH+C is delighted to announce the appointment of Daragh Bohan as a partner in its Financial Services Department. Prior to joining Mason Hayes+Curran, Daragh previously worked as a senior partner in the Financial Services Department of another large Dublin corporate law firm. He is pictured left with Emer Gilvarry, Managing Partner, MH+C.

Daragh is widely recognised as a leader in the financial services field and will bring additional strength to our financial services practice, particularly at a time when PPP structures are likely to be essential in dealing with Ireland's infrastructural challenges. This appointment reflects our continued commitment to increasing the quality of services available to our corporate and government client base.



New Head of Commercial Department

Philip Nolan has been appointed head of Mason Hayes+Curran's Commercial Department. Having studied at University College Dublin, De Paul University, Chicago and at the University of Oxford, Philip joined Mason Hayes+Curran where he completed his training.

Philip advises both public and private clients in relation to communications, information technology, intellectual property and competition law. Philip has also developed a focused regulatory advisory practice which includes public procurement law, data protection law and energy law.



Tony Burke appointed to Irish Consumer Law Review Group

Tony Burke, Partner in the Commercial Department at MH+C has been appointed by the Irish Government to form part of an expert group to examine and update Irish Sales Law. This group was established in light of the recent initiative from the European Commission to modernise and consolidate EU consumer law, and prompted by the publication of an EU Directive aimed at enhancing cross-border consumer rights.



New French Desk

MH+C has a focused international strategy and is committed to serving international corporations when they do business in Ireland. We also have significant French connections and long standing commercial links with France. To this end we recently established a French desk composed of Irish and French lawyers who will offer a complete range of business law advice in French or English. Pictured above is French native Jérôme Dupuy who joined MH+C from another Irish law firm. Jérôme will develop the firm's relationships with clients and other law firms in Europe.

Mason Hayes+Curran News and Events



Charities Act Seminars

As the Charities Bill was passing through its final stages in the Houses of the Oireachtas, Irish Charities Tax Research (ICTR) and Mason Hayes+Curran shared ideas and lobbied for important improvements in the legislation. Out of this collaboration and the introduction of the Act on 28 February 2009 came a series of seminars on The Charities Act 2009. The seminars focused on the agenda beyond the introduction of the legislation and asked “Where to From Here?” Pictured above from left is Sheila Nordon, Executive Director, ICTR, Jonathan Irwin, CEO, Jack and Jill Foundation and Niamh Callaghan, partner, Mason Hayes+Curran each of whom spoke at one of the series of seminars.

The purpose of the Act is to establish a regulator for the sector, to reform the law of charities by ensuring greater accountability and to protect against fraud and the abuse of charitable status. The Act provides a wonderful opportunity for charities to showcase their great works to the community at large. Although now law, the provisions of the Charities Act will not become effective until the Minister for Community, Rural and Gaeltacht Affairs introduces commencement orders. Charities should use the time available between now and the introduction of the commencement orders to ensure that their governance and structures are in good shape. Charity trustees should become familiar with the filing requirements of the Act and ensure that they are aware of their statutory and general duties. Attendees at the seminars were particularly interested to learn of the annual filing requirements that all charities will have and of the ability of a charity to put in place, and pay for, insurance cover for its charity trustees.



Real Estate Golf Day

The Real Estate Department hosted their 2009 Golf Outing at the new location of Dun Laoghaire Golf Club. This was the largest outing to date with 15 teams, each captained by an MH+C representative. This was the first time many guests on the outing had played at the club’s new home. Congratulations to team 15 captained by MH+C’s Tom Davy with fellow team mates Conor Whelan, Dave Moreau and Aaseem Mulji who won the competition.



Victory for MH+C in the Ambassador's Cup

Congratulations to Gavin O’Flaherty corporate partner, pictured 2nd left who was the winner of the Ambassador’s Cup with an impressive score of 40 points. The Ambassador’s Cup was hosted by German Ambassador Christian Pauls as part of the German-Irish Chamber Golfing Society’s Ambassadors Cup outing to the PGA National in Johnstown, Co Kildare. Gavin’s team who were overall winners of the competition are pictured above and include from left Mark Gibbs, DHKN Corporate Finance, Gavin O’Flaherty, MH+C, Leslie Roycroft, MH+C and Pat Hanley, ACC Bank.

Financial Services Golf Day

The Financial Services department hosted their 2009 annual golf outing at the Royal Dublin Golf Club. Despite poor weather conditions, everyone enjoyed the day and managed to get around in good time before being seated for dinner by 8.30pm. The course was in great condition, with greens fast and true. Congratulations to the winning team, pictured left, hosted By MH+C’s Paul Convery, with fellow team mates Pat Hanley (ACC), Andrew Bowan (Barclays) and Trevor Murphy (Bank of Scotland, Ireland).



Public Sector Accountability

Emer Gilvary, Managing Partner, MH+C is pictured above with Mr James Hamilton, the Director of Public Prosecutions who spoke at a seminar on Accountability in the Public Sector. The seminar for senior public servants examined accountability from a number of perspectives. Delegates also heard from Professor Niamh Brennan, Academic Director of the Centre for Corporate Governance at University College Dublin, Dr Tracey Cooper CEO, Health Information and Quality Authority and Bernard McDonald Assistant Ombudsman for Children.

with a talk from partner in the corporate department, Gerard Ryan who spoke on the very topical issue of Corporate Governance.

Cloud Computing Seminar

Mason Hayes+Curran were delighted to host a breakfast briefing in their offices in association with the Irish Software Association. The topic of the briefing was “Cloud Computing - the reality of doing business in the cloud”.

Pictured below from left are speakers Philip Nolan, Partner at Mason Hayes+Curran, Joe Drumgoole, CEO and Founder of Putplace Limited and seminar Chairperson Pat Brazel, Chairman of the Irish Software Association and Chairman of Polarlake.

Cloud computing has generated quite a buzz in IT circles and beyond over the past year and the event was well attended. Topics included the growth of cloud-based services both in terms of range of services and their viability, and the promise of reduced costs, both of which are leading many businesses to consider a move towards the cloud to meet their IT needs or to deliver services to their customers.



Masterclass series for In House Counsel

MH+C launched a masterclass series for In House Counsel as part of its programme Meet to Motivate. The theme of the first masterclass was “Current Challenges for In-House Counsel”. The guest speaker was Tony Wales, General Counsel, AOL International and past president of the Association of Corporate Counsel Europe. Tony spoke about the changing role of In-House Counsel in the current economic environment. Delegates also heard from Richard Woulfe, MH+C partner and head of the firm’s fourteen strong employment and benefits department. Richard spoke about current issues in Employment Law. The event concluded



Mason Hayes+Curran News and Events



5th edition Dictionary of Irish Law

The launch of the fifth edition of Murdoch's Dictionary of Irish Law marks the transition of authorship from Henry Murdoch to Dr Brian Hunt of Mason Hayes+Curran, who is responsible for this edition and will also be responsible for future editions. The Attorney General Paul Gallagher SC launched the book and is pictured above with Dr Brian Hunt. Published by Tottel Publishing this book continues to be the only legal dictionary in Ireland. The fact that this book has made it to the stage of fifth edition is not only indicative of the demand for the book, but of the esteem in which it is consistently held by law students and practitioners.

Pictured above left at the launch of Dr Brian Hunt's book are his wife and daughter Natallia and Ryisa.



Keeping the music alive

The partners and staff of MH+C were entertained at the monthly office drinks by local traditional Irish musicians playing a host of traditional Irish instruments including fiddle, harp, banjo, bodhrán, concertina, guitar and wooden flute. The jigs and reels got toes tapping and provided a jovial atmosphere to the end of month gathering.



Irish Takeover Legislation publication

Partner in the Corporate department, Justin McKenna's recently published his book Irish Takeover Legislation. The publication is a compendium of legislation regulating the takeovers of public companies in Ireland. It also provides commentary outlining the application and operation of the Irish Takeover Rules and identifies other legal issues relevant to takeovers in Ireland.

Closing argument...

If you had to specify, in one word, why the human race has not, and will never achieve its full potential, that word would be meetings.

It is a fine line between "hobby" and "mental illness."

I'm writing an unauthorized autobiography.

Regardless of the temptation, don't lick a steak knife.

Better to remain silent and be thought a fool, than to speak and remove all doubt.

You should never say anything to a woman that even hints that you think she's pregnant.

Men are like a fine cheese. They start out as milk, and it's up to women to mold them until they turn into something acceptable to have dinner with.

I hate it when my foot falls asleep during the day because that means it's going to be up all night.

Campers: Nature's way of feeding mosquitoes.

A bank is a place that will lend you money, if you can prove that you don't need it.

Right now I'm having amnesia and deja vu at the same time. I think I've forgotten this before.

If you think nobody cares if you're alive, try missing a couple of payments.

Do not argue with an idiot. He will drag you down to his level and beat you with experience.

He who smiles in a crisis has found someone to blame.

How is it one careless match can start a forest fire, but it takes a whole box to start a campfire?

Light travels faster than sound. This is why some people appear bright until you hear them speak.

I got a new shadow. I had to get rid of the other one . . . It wasn't doing what I was doing.

Every so often, stick your head out the window, look up, and smile for a satellite picture.

It's a small world, but you wouldn't want to have to paint it.

If the pen is mightier than the sword, in a duel I'll let you have the pen.

Hook Talk

"The only way Italy will get to 20-14 is if they put Tony Soprano at out-half."

- *George Hook at half time in the Italy-England rugby game.*

"You can add Thomond Park to Fatima, Knock and Lourdes. The lame will come here and walk, they'll be selling water here, because this defies logic."

- *George Hook after Munster beat Gloucester 33-6 in the European Cup.*

The wit of John Giles

Bill O'Herlihy: "So you think they (Arsenal) can score, even in Spain?"

John Giles: "Well I don't know what you mean by 'even in Spain', I mean the goals there are the same size and all that..."

John Giles: "I've not time for the UEFA Cup at all."

Bill O'Herlihy: "Hold on a second John. We've got the final on Wednesday."

John Giles: "It should be a great final Bill. It always is on RTE."

Eamonn Dunphy

On Ronaldo: "What they saw tonight was an impersonator, a clown, a self-indulgent idiot really, doing crazy things."

"He's a petulant brat Bill, poncing around all night."

"I go back to Maradona, Pele, Bobby Charlton, John Giles, Ronnie Whelan, Liam Brady, Roy Keane, would you have seen Roy Keane do that? No way baby."

"If you say that's showbiz, this is showbiz Bill (points at self). If you really want to make it showbiz, take your gear off."

Last word to Bill

Bill O'Herlihy: "We'll draw the winners out of a hat a little later in the programme."

John Giles: "A top hat, Bill?"

Bill (quick as you like): "Yes, a top hat, John. We got it out of your wardrobe."

ATTORNEY: "How was your first marriage terminated?"

WITNESS: "By death."

ATTORNEY: "And by whose death was it terminated?"

WITNESS: "Take a guess."

ATTORNEY: "Can you describe the individual?"

WITNESS: "He was about medium height and had a beard."

ATTORNEY: "Was this a male or a female?"

WITNESS: "Unless the Circus was in town I'm going with male."

ATTORNEY: "Is your appearance here this morning pursuant to a deposition which I sent to your attorney?"

WITNESS: "No, this is how I dress when I go to work."

ATTORNEY: "Doctor, how many of your autopsies have you performed on dead people?"

WITNESS: "All of them. The live ones put up too much of a fight."



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