

MHC TIMES

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THE DEVELOPMENT OF OUR NATIONAL
INFRASTRUCTURE: AN ONGOING PROJECT

Mason Hayes+Curran
Incorporating Arthur O'Hagan

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FOR NON-IRISH INDIVIDUALS

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THE NEED FOR GOOD CORPORATE
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TECHNOLOGY TRANSFER
IN EUROPE

“Mason Hayes+Curran is getting it right at the moment, and its corporate practice is extremely well-rounded. Collectively its team really shines”.

Chambers Global, 2010

Mason Hayes+Curran represented

Kerry Group plc

in its acquisition of Breeo Foods Limited

Mason Hayes+Curran representing

Berkshire Partners, LLC; Advent International & Bain Capital Partners, LLC

in their recommended offer for Skillsoft plc

Mason Hayes+Curran represented

Treasury Holdings

in its sale of Eco Wind Power Limited to Viridian Power and Energy Holdings Limited

Mason Hayes+Curran represented

Dragon Oil plc

in the recommended offer by Emirates National Oil Company for Dragon Oil plc

Mason Hayes+Curran represented

FL Partners

in the acquisition of Tomsburg Limited

Mason Hayes+Curran represented the

Shareholders of Biotrin Group Limited

in its sale to DiaSorin S.p.A

Mason Hayes+Curran represented

Milliman, Inc.

in its acquisition of Life Strategies Limited

Mason Hayes+Curran represented

Simpson Strong-Tie Ireland Limited

in its acquisition of part of the business and assets of Liebig Group

Mason Hayes+Curran represented

Orangold Limited

in its acquisition of Donegal Highland Radio plc and Highland Media & Communications Investment Limited

Mason Hayes+Curran represented

ABO Wind Ireland Limited

in its acquisition of Gortahile Wind Farm Limited from GW Energi A/S

Mason Hayes+Curran representing

Activision Blizzard

on the integration of Activision Inc and Vivendi Games

Mason Hayes+Curran represented

Calypso Soft Drinks

in its acquisition of the Mr Freeze brand

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Mason Hayes+Curran
Incorporating Arthur O'Hagan



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EDITOR'S NOTE

Welcome to issue 27 of MHC Times. We hope you like the new look which carries on our tradition of presenting information in an attractive style yet keeps us looking fresh! We are delighted to highlight our enhanced offerings in Tax and have a focus in this issue on our Projects and Charities teams. Take a close look at page 15. We think it is particularly good this time!

If you have any comments or suggestions for MHC Times, please do contact me.

Ailbhe Gilvary
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MANAGING PARTNER'S DIARY



Emer Gilvary is Managing Partner at MH+C

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INTRODUCTION

By now, there are few who are not familiar with the remarkable story of Ireland's economic performance over the past number of years. Throughout the early part of the last decade, Ireland was the fastest-growing economy in Europe, and experienced unprecedented economic success. However, in the last two years, the country has suffered from the compounded effects of the global economic recession as well as from admittedly overdue corrections to certain aspects of its own economy.

There is general agreement that Ireland needs to redefine and refresh its international value proposition. The Government is expending considerable time and effort in developing and determining the elements of its new strategy in this regard. For example, its "Smart Economy" framework for economic renewal has amongst its objectives the development of Ireland as an innovation and commercialisation hub in Europe, while continuing to foster a sustainable and effective infrastructural and regulatory environment in which modern, growth-area activities can flourish and prosper.

Up to €500m will be generated to create a venture capital fund known as Innovation Fund Ireland. The multinational community will be given incentives to intensify innovative, skill-intensive and high-value activity in technological conversions in order to enhance and materially advance Ireland's global reputation in the science arena by 2013. Science Foundation Ireland will attract a premium cohort of world class researchers. All of this is good news. Ireland is positioning itself for future growth and a return to better economic times.

MH+C TAX OFFERING

In January of this year, we announced a strategic initiative to expand our tax offering through the hiring of a new Head of Tax, John Gulliver. John has extensive international experience in advising multinational businesses on using Ireland's corporation tax system to optimise and manage their groups' effective tax rates. John's appointment underpins our determination to grow the firm strategically, and in line with our commitment to servicing enterprises that wish to use Ireland as a platform for international expansion, or as part of their global structuring generally.

John and his team work closely with our corporate department on all major deals. As the international corporate finance market reopens, John is increasingly advising on the advantageous international tax synergies that can occur through structuring cross-border acquisitions through an Irish BidCo.

MH+C FINANCIAL SERVICES

Our Financial Services offering continues to expand. Recent company law changes provide a new, clear and efficient framework to facilitate the re-domiciling of funds to Ireland. This has been complemented by the new Finance Bill, which introduces measures designed to enhance Ireland's attractiveness as a location for regulated funds and for UCITS IV management companies in particular, thus creating an environment in Ireland where demand for legal services for funds remains buoyant.

MH+C CORPORATE

The redefining of Ireland internationally has resulted in significant business wins for our Corporate Department. MH+C acted as sole Irish legal adviser for Dragon Oil plc in the recommended st£1.2b offer by way of scheme of arrangement by Emirates National Oil Company. MH+C is also currently acting as sole Irish legal adviser for Berkshire Partners, LSC, Advent International Corporation and Bain Capital Partners, in their recommended st£1.1b offer by way of scheme arrangement for SkillSoft plc.

CONCLUSION

Whilst bank-funding remains an issue, and commercial and property-based activity in Ireland will remain modest in the coming year, amongst other things, the state's fresh concentration on attracting new businesses to Ireland, on continuing an attractive tax regime, on making Ireland an attractive location for regulated funds and on the "Smart Economy" will ultimately take 'Ireland Inc.' to its next level. This will translate into significant business wins for Mason Hayes+Curran, and will underscore the wisdom of our commitment to continuing the enhancement and development of our Tax, Financial Services and other relevant legal services offerings that are aligned with the future trajectory of our economy.

EMER GILVARRY

THE DEVELOPMENT OF OUR NATIONAL INFRASTRUCTURE: AN ONGOING PROJECT

PROFILE OF MH+C PROJECTS TEAM



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INTRODUCTION

The Projects unit in Mason Hayes+Curran is an integrated cross departmental practice group drawn from the Financial Services, Construction, Real Estate and Commercial Departments. The firm acts for sponsors, financiers, contractors and public procuring authorities on Projects work undertaken by both the private and public sector.

As Ireland seeks to move up the value chain in attracting economic investment it is essential that investment in infrastructure continues. Investors (both domestic and international) know that an inefficient national infrastructure will contribute significantly to their cost base. Effective road and rail transport, sea ports, energy generation and distribution and telecommunication networks are essential if Ireland is to build on the gains made in the last 15 years.

CONSTRUCTION INDUSTRY

It is no secret that we are currently facing a very challenging economic environment, and this is particularly so for the Irish construction industry. At the end of 2007, the output of the construction industry in Ireland had reached a value of €38.5 billion, which represented 24% of GDP and accounted for almost 19% of total employment. It is estimated that in 2010, however, output will shrink to about €12.3 billion and, by 2011, will have shrunk to below €10 billion.

INVESTMENT – PUBLIC AND PRIVATE

Despite the challenging economic environment, however, there has been progress in delivering infrastructure in Ireland. Government has identified the development of infrastructure as a priority. Minister for Finance Brian Lenihan recently said that it was committed to exploring and utilising the European Investment Bank for investment in Public Private Partnership ("PPP") projects. The involvement of the public sector in procuring national infrastructural development is clearly demonstrated through the PPP programme and high profile projects such as the inter-urban motorway programme, the National Convention Centre, the Courts of Criminal Justice complex and the Schools Programme.

In recent years private sector investment has also increased, for example the development of private hospitals, nursing homes, wind energy and other renewable energy projects and conventional power generation stations has demonstrated the contribution private sector investment can make to essential infrastructural development in the State. Certain stages of the next phase of the Luas light rail system will be funded fully by landowners and developers through whose lands the new lines will run, greatly enhancing their value.

The development of the Croke Park and Landsdowne Road stadiums is an example of private sector projects developed, procured, managed and delivered by the private sporting organisations involved, but with significant public monies contributing to (but not fully funding) the projects. These projects are examples of a hybrid type of project model, having been instigated and planned by the private sector, with the benefit of a significant contribution of public funds. The assets will be owned by the private sporting organisations, and having benefited from public funds, will contribute valuable sporting facilities to our national infrastructure.

Ireland's ability to attract significant inward investment in the past was underpinned initially by the availability of well educated, low cost labour combined with attractive tax incentives and membership of the European Union. These factors on their own are no longer sufficient to provide the necessary competitive advantages which Ireland needs to demonstrate to both retain and win economic investment.

Whether through PPP or non-PPP investment by the public or private sectors, significant investment in infrastructure projects is required to cure Ireland's major infrastructure deficit, which remains even after years of investment. Following through on further planned projects such as Metro North, the DART Underground, the 2nd Roads PPP Programme and the next Schools and Third Level Programmes are essential for maintaining Ireland's international competitive position.

Legal issues requiring advice arise at every stage of the development of these projects, from initial planning, tendering and procurement, to financing, and negotiation of construction, operation and maintenance contracts.

PROJECT FINANCE

Few projects, whether procured by a national government through a PPP or wholly developed by private investors, are able to proceed without finance. Many procuring authorities now require bidders to demonstrate that they have sufficient financing for their project at the initial stage of lodging an expression of interest.

The current climate of depressed economic growth together with the continued uncertainty in the international financial markets makes securing project finance funding extremely challenging. In these times of severely restricted credit and pressure on all banks to minimise risk and maximise return, legal and financial due diligence by project finance funders has become increasingly stringent.

Project finance funding involves lending significant sums of money to special purpose companies which, particularly at the construction stage, hold very little in the way of assets for security for these loans.

Regulatory focus (both national and international) on past lending practices has attracted commentary around whether or not funders should be forced



The Projects team at MH+C includes from left: Robert McDonagh, Micháel Grace, Rory Kírrane, Philip Nolan, Eoin Cassidy, John Kettle, Kevin Hoy, Elizabeth Roche, William Carmody and Susan Bryson

to accept higher capital reserve requirements in respect of project finance lending, particularly in light of the limited recourse nature of the lending. In this environment, funders are under increasing pressure to carefully select those projects to which they will commit their scarce resources of capital. Previously, funders competed for projects, now projects compete for funding.

In this financing environment it will be necessary to look at more innovative financing structures. The funding of the Limerick Tunnel project in 2007 through a conduit bond, the first capital markets financing of a PPP structure in Ireland (and one of the first in the world for funding at the financial close stage), may prove to be more common in the future.

LEGAL ISSUES

Funders and sponsors require legal advisors who not only understand the legal issues but who are also able to provide legal advice in the context of many other project considerations. Dedicated construction and engineering lawyers are often required to provide advice on the standard form construction contracts that may be employed in infrastructure projects, including GCCC, FIDIC, IEI and RIAI and to advise what form of construction procurement, such as turnkey, design & build or traditional employer design, would be appropriate for the particular project. They may also be called upon to advise on and draft bespoke contracts where necessary.

The recent reform of public sector construction procurement through the Capital Works Management Framework has seen the adoption of a new suite of standard form documents that were introduced by the Government Construction Contracts Committee. These "GCCC Contracts" must be implemented on all public sector capital construction projects and, consequently, are relevant for a great number of infrastructure projects occurring in Ireland. These contracts are robust and employer friendly, however, they are relatively new, with Pillars 3 and 4 having only been published in November 2009 and their efficacy has yet to be properly tested.

In addition, there are number of contractual and risk management issues which will need to be addressed in almost all infrastructure projects. In particular the interface between the various different contractors, suppliers and service providers involved in modern infrastructure projects at the tendering and award stages needs to be addressed through the use of memoranda of understanding and interface agreements.

The role of the design team in infrastructure projects cannot be underestimated and whether or not the project is being procured on the traditional procurement model of employer design, or on a design & build basis, legal advice at the initial stages of the project can prevent complications at a later stage. Collateral warranties from the project contractors and design team to the project funders, sponsors and interested third parties are ever present in Irish infrastructure projects. The collateral warranties create a

contractual nexus between the parties and in most circumstances provide for step-in rights to the relevant party. The ability of the funder to step-in to the employer's position and take control of a project can be of utmost importance to a funder.

Performance security is an essential consideration for all projects and legal advice should be sought by employers, main contractors and sub-contractors on the form of performance security required which can include parent company guarantees, on demand performance bonds, secondary guarantees and retention bonds.

As well as advice on the contract structure, adequate legal due diligence is required on all projects to identify any environmental, planning, health and safety and insurance risks and to ensure these risks are eliminated, or mitigated to the extent possible, in advance of project financing.

In order to properly advise on infrastructure projects, however, lawyers cannot contain their advice to legal issues. An understanding of the project risk matrix and knowledge of as the particular project technology, financial structure and markets, regulatory, political and policy risks are essential to provide considered, rounded and informed legal advice. As well as demonstrating an understanding of the varied issues at play, it usually falls to the projects lawyer to marshal the various parties, including technical and insurance advice, to negotiate a position that resolves the competing interests and organise the steps to completion of the legal process, or "financial close".

CONCLUSION

There is no denying that the current economic environment presents problems for those wishing to advance the infrastructural framework in Ireland. The importance of a well developed infrastructure cannot be underestimated and this fact is recognised by government and investors alike. It is clear that while the market is not as buoyant as it once was, this has by no means halted the development of infrastructure in Ireland, which can very much be described as an ongoing project. The importance of expert legal advice cannot be underestimated in order to ensure that such projects run as smoothly and efficiently as possible.

IRELAND'S TAX EXEMPTION FOR NON-IRISH INDIVIDUALS



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INTRODUCTION

The world's financial turmoil of 2008/9 has forced many governments to increase rates of personal tax. For example, the UK is in the process of raising its marginal income tax rate to 50%, whilst Ireland has lifted its effective marginal tax rate to 54%. These draconian increases in taxation caused taxpayers to consider relocating to countries that offer fiscal incentives. Whilst much attention has been given to Ireland's 12.5% corporate tax regime, Ireland, similarly to the UK, continues to have a virtual blanket tax exemption for foreigners including UK individuals residing in the State. This article highlights the key features of Ireland's remittance basis of taxation and other opportunities for incentivising non-Irish staff to relocate to Ireland.

REMITTANCE BASIS OF TAXATION

A non domiciled individual may move their tax residence to Ireland and be taxed on a self-assessment remittance basis. Where an individual relocates to Ireland with accumulated capital and uses such capital to pay for his/her Irish day to day expenses, unremitted income and gains can accrue free of Irish tax. Foreign income and gains can be spent outside of Ireland free of Irish tax. A charge to Irish tax only arises in respect of income and gains remitted into the State except for income from foreign employments. From 1st January 2008 UK source income qualifies for the remittance basis, hence UK citizens can relocate to Ireland and live in Ireland tax-free.

THE KEY TO DETERMINING DOMICILE

For tax purposes, an individual's domicile is separate from his or her tax residence. An individual's domicile is a question of law. Typically, an individual is regarded as acquiring a domicile of origin at birth which is derived from the domicile of the father. There is a strong rebuttable presumption that an individual retains their domicile of origin unless facts and circumstances demonstrate that an individual has acquired a domicile of choice in another territory. Hence, a UK domiciliary coming to Ireland for an indefinite period and not severing all links with the UK will automatically be regarded as UK domiciled unless the Irish Revenue can prove to the Courts that the individual never intended to return to the UK – dead or alive.

INVESTMENT INCOME, FOREIGNERS AND EMPLOYMENT IN IRELAND

One of the attractions of Ireland for multi-nationals has been an ability to relocate staff to Ireland in a tax efficient manner. In the Finance Act [2006] the remittance basis of tax was significantly curtailed for employment income. This year's Finance Bill extends a limited remittance basis for employment income of taxation for residents of the EU Member States and countries with which Ireland has a double tax treaty.

The Finance Bill provides an option for executives relocating to Ireland to cap their Irish tax liability on employment emoluments by limiting the amount of such income that is deemed to be subject to tax. The limit is the greater of the amount of emoluments actually remitted into Ireland or an amount equal to €100,000 plus 50 percent of the individual's emoluments in excess of €100,000. For example, an executive relocating from the UK to Ireland would only be liable to tax (before any other allowances) on a package of say €300,000 on the greater of amount spent in Ireland and €200,000. If the executive lives in Ireland on say €100,000 of income and does not bring any other part of his employment income into Ireland, his taxable income is decreased by about 30%.

Additionally, the executive will be able to live in Ireland and avail of the remittance basis of taxation so that all income and gains made that are not Irish source or from Irish situate property are tax exempt, unless income or gains are brought into Ireland. Careful drafting of employment and benefit contracts is key to exploiting valuable tax rates.

CONCLUSION

For many years foreigners have targeted Ireland's tax regime to minimise overseas taxes. At MH+C the tax department regularly works with overseas counsel to advise, document and implement tax strategies for the benefit of entrepreneurs and high net worth individuals. This includes the use of structures located in low or low-tax territories. Where an individual does not wish to relocate to Ireland, consideration should be given to structuring their affairs through a company liable to tax at 12.5%.

Finally a note of caution; many individuals are taking on directorships in respect of Irish corporates that are inverting into Ireland. A directorship is an Irish office and therefore attracts Irish income tax on the directors fees regardless of where the director is resident. Double tax treaties do not protect against this tax charge.

Careful drafting of directors' contracts in respect of corporate relocations is key to ensuring that the benefits of corporate migration are not undone by the director's individual arrangements.

DCC PLC DECISION REINFORCES THE NEED FOR GOOD CORPORATE GOVERNANCE



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The report by Bill Shipsey SC, the High Court appointed Inspector who investigated the affairs of DCC plc, S&L Investments Limited and Lotus Green Limited, was published on 19 January 2010 (the "Report").

There is no doubt that the findings in the Report will have an impact on governance issues in respect of ongoing inquiries involving the banking sector and many other sectors. The findings in the Report have raised the question as to what weight should be given to the fact that legal advice was given, both in deciding whether charges should be brought in a particular case and in any court hearing that might occur.

BACKGROUND TO THE REPORT

Mr. Shipsey was appointed in 2008 to investigate suspected wrong-doing in the three companies following the 2007 Supreme Court finding of unlawful insider dealing by DCC Plc ("DCC") and Jim Flavin in the Fyffes Plc ("Fyffes") share sale.

The Supreme Court case concerned a decision to move DCC's large shareholding in Fyffes to a DCC subsidiary called Lotus Green Limited and also the decision of DCC to sell shares in Fyffes in February 2000 for €106 million at a time when, Mr. Flavin, the then chief executive of DCC, was in possession of insider information on Fyffes, by way of his being a non-executive director of that company.

DCC sold its shares in Fyffes in early February 2000 and, when Fyffes issued a trading statement to the market on 20 March 2000, the share price fell by 25 per cent.

FINDINGS OF THE REPORT

In his report, Mr. Shipsey reached the following conclusions regarding the three companies:

- The companies (DCC, S&L Investments Limited and Lotus Green Limited) took their corporate responsibilities very seriously;
- The directors, officers and employees, from the then Chief Executive down, placed a high value on legal and regulatory compliance;
- The companies had good and effective corporate governance procedures and controls at board level;
- The officers and executive directors of the companies were qualified, competent and careful individuals;
- DCC attracted and retained highly experienced and quality non-executive directors; and
- The companies took legal advice when it was appropriate to do so and followed such advice when it was proffered.

POTENTIAL IMPACT OF LEGAL ADVICE

A key component which brought Mr. Shipsey to his decision was that Mr. Flavin had received legal advice in respect of the decision to move DCC's large shareholding in Fyffes to Lotus Green Limited and also the decision of DCC to sell shares in Fyffes

In respect of the decision to move DCC's large shareholding in Fyffes to Lotus Green Limited, DCC's legal advisors informed DCC that it was their view that the transfer of the shares to Lotus Green Limited did not trigger an obligation under section 67 of the Companies Act to notify Fyffes.

Mr. Shipsey in his report concluded that Lotus Green Limited had in fact an obligation to notify Fyffes but said it was correct for DCC to have sought advice, which was given in good faith. Mr. Shipsey concluded that it was not unreasonable for the directors to follow the legal advice they received. He also found DCC and its employees, from the chief executive down, placed a high value on legal and regulatory compliance.

In relation to the decision of DCC to sell shares in Fyffes in February 2000 for €106 million at a time when Mr. Flavin was a non-executive director, Mr. Flavin had informed his legal advisor that he was not privy to any price-sensitive information and he did not give his legal advisors details of the trading information he had at his disposal. On foot of this, DCC's legal advisors decided that there seemed to be no legal obstacle to DCC proceeding with a full disposal of the shareholding.

In the Report, Mr. Shipsey found that Mr. Flavin held a genuine belief that the information he had was not price-sensitive. On this basis, Mr. Shipsey felt that Mr. Flavin did not deal without considering whether he or DCC were free to sell the shares.

RESPONSE FROM THE DIRECTOR OF CORPORATE ENFORCEMENT

Following the findings of the Report of the court appointed inspector, the Director of Corporate Enforcement, Paul Appleby, told the High Court that he did not propose to take any proceedings arising from the Report.

There is no doubt that this Report has significant implications for corporate governance spanning numerous industries. However, one has to believe that if companies can demonstrate that they adhere to good governance practice and procedures and obtain legal advice in respect of proposed action they would be seen as being compliant.

THE MH+C CHARITY TEAM



The Irish charity and not for profit sector is facing many challenges as a direct result of the economic downturn, the pressure on Government spending and the drop in disposable income. The Irish Charities Tax Reform group reports that charities are facing a drop in revenue of up to 20% in the current year at the very time when there is an unprecedented surge in demand for services. Meanwhile, organisations prepare and await the commencement of the Charities Act 2009, with an as yet incomplete picture as to what regulation will mean for them.

MH+C CHARITY TEAM

MH+C has the largest and most experienced charity team operating in Ireland. We work with leading not for profit organisations especially those in the religious, education and healthcare sectors.

Our merger with Arthur O'Hagan brings a 150 year tradition of serving the individual needs of clients, based on insight, knowledge and experience. Our team of more than 20 lawyers spans the full spectrum of relevant specialties and draws upon all of the resources available within a full service firm.

We take a special interest in the work and ethos of our clients and believe that our many years of experience equip us with know how, knowledge and understanding to meet their wide and varied needs.

WHAT WE DO

As lawyers we are asked to get involved in many areas of advice from the most basic to the most complex.

As clients prepare for the implementation of the Charities Act, many are asking us to review their structures, approaches to governance and compliance in general. Some are looking at merging with other like minded organisations while others wish to streamline their activities and hand over non core functions.

Charities are working organisations and require advice on the day to day matters of running an organisation such as employment related advice, commercial agreements, property related queries and ongoing interaction with Government Departments and State Agencies. When the Charities Act comes into effect, regulatory compliance will become more important. Our Company Secretarial team is already helping many incorporated charities to comply.

Some clients, especially those in the religious sector, require specific advice related to how best their apostolates can be structured in order to ensure they continue to thrive.

Those in the education sector require specialist assistance on the particular governance issues which arise, such as Articles of Management, trust instruments and enrolment policies.

From left: Niamh Callaghan, Ian O'Herlihy, Kevin Hoy, Liam Brazil, John Minihane, Liam Riordan, David Cox, Edward Gleeson, Paul McDonald, Desmond Rooney, Catherine Allen, Declan Curran, Orlean Dyar, Anne Confrey

Our Healthcare Team advises many of Irelands leading healthcare institutions. When advising clients on governance and compliance issues, the team draws on the expertise within the MH+C Charities Team.

Our clients in the arts, sports and cultural sectors frequently require assistance on copyright and other forms of intellectual property rights, sponsorship deals and internet commerce. For these particular issues the Charity Team can tap into the expertise and resources within the Commercial department.

Our particular experience with charity clients includes:

- Structural reviews, mergers and reorganisations
- Dispute resolution (Mediation, Arbitration and Courts)
- Advising on the legal structure most appropriate to the objects of the charity
- Formation of charitable companies and ongoing company secretarial support.
- Establishing trusts and other non corporate governance structures
- Regulation of fundraising
- Data protection and information law
- Employment law
- Governance (corporate, trust and clubs)
- Interaction with the State (e.g. grant agreements, service level agreements)
- Intellectual property
- Preparation for compliance with the Charities Act 2009
- Property and construction advice
- Tax planning and Probate

CONTACTS US

If you would like to meet with one of our Charity Team or would like to be included on our mailing list to receive regular bulletins on this topic please contact any of the Partners below:

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CHARITIES AND EXEMPTION FROM LOCAL AUTHORITY RATES



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INTRODUCTION

A charity registered with the Irish Revenue is generally entitled to exemption from various taxes. There are two taxes for which charities often remain liable: VAT and local authority rates.

THE LAW

The exemption from local authority rates for 'charitable organisations' is set out in the Valuation Act 2001 and applies to: "any land, building or part of a building which is occupied by a body, being... a charitable organisation that uses the land, building or part exclusively for charitable purposes and otherwise than for private profit".

OCCUPIED BY A CHARITABLE ORGANISATION

"Charitable Organisation" is defined in the Charities Act 2009 and can be either a company or an unincorporated body. Its main object must be a charitable purpose with ancillary objects and powers stipulating that its income and assets will be applied towards its main object. Registered charities with the Irish Revenue will usually meet these requirements.

USE OF THE PROPERTY EXCLUSIVELY FOR CHARITABLE PURPOSES

Historically the courts and now the Act recognise the following as charitable purposes:

- Relief of poverty
- Advancement of education
- Advancement of religion
- Other works of a charitable nature beneficial to the community

There are a number of court decisions on what constitutes 'use exclusively for charitable purposes'. Many were decided prior to the enactment of the Valuation Act 2001 which substantially revised and consolidated Irish rating law and as such the High Court recently noted that some caution should be exercised in relying on the old cases.

OTHERWISE THAN FOR PRIVATE PROFIT

Minister Cullen when introducing the Act stated "buildings used by a charitable organisation for commercial use, such as charity shops, are engaged in a commercial activity for profit, despite the final use to which the profits are put. Therefore, such premises, like other commercial premises, are subject to rates".

RECENT CASE LAW

In February 2009, the High Court overturned a decision of the Valuation Tribunal on the basis that the Tribunal had incorrectly applied tests when establishing whether a rates exemption should be granted. The case involved a hospital car park from which the hospital derived income.

The Valuation Tribunal held that the car park was not exempt for the following reasons:

- (i) That the car park was not used for the purposes of caring for sick persons.
- (ii) While car parking may be desirable, it was not essential to the provision of medical services.
- (iii) That the car park (being available to all comers) had all the elements of a commercial activity and was remote from the provision of medical services.
- (iv) The fact that surplus monies from operation of the car park were paid to the hospital is not sufficient to qualify for exemption.

The High Court disagreed, holding that the correct test is not whether the use of the car park was essential to the provision of medical services, but whether the occupation of the car park was for the purpose of the hospital. The High Court found that:

- (i) Although it would be necessary to show that the hospital was non-profit making, this did not preclude it from receiving commercial charges for particular services.
- (ii) The fact that the car park was a separate structure did not prevent it from being regarded as part of the hospital. The use of a building does not cease to be for charitable purposes by reason only that its use, if treated in isolation, would not be regarded as caring for the sick. It is necessary to ask not only what the nature of the actual user is, but why such use is made by the occupier.
- (iii) The Valuation Tribunal had been wrong to require that the user must be inextricably linked, as a matter of necessity, to the functioning of the hospital.
- (iv) The purpose of the hospital in using the structure as a car park was consistent with hospital user and that the car park existed because of the hospital and not the other way around.
- (v) The fact that a charge is made does not, of itself, warrant the conclusion that the car park was operated as a commercial venture.

SUMMARY

If a property is used exclusively for charitable purposes, in most cases, it can be exempted from liability for local authority rates.

TECHNOLOGY TRANSFER IN EUROPE



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INTRODUCTION

Jeanne Kelly and Peter Bolger of our Commercial Department are co-authors of a recently published study for the European Commission on legal issues in technology transfer and intellectual property in Europe, the USA and Japan. The study aims to foster the development and use of European IP systems from a research policy perspective.

THE STUDY

The study, carried out between 2006 and 2009 covers many issues identified by the European Commission as important to the European Research Area. These included benchmarking of national IP/TT systems in the EU, surveying IPR awareness and training activities among students in higher education institutions across the EU and a comparative analysis of several legal topics. Two case studies and a researcher guide were prepared as part of the study for training and policy making purposes.

BENCHMARKING OF NATIONAL IP/TT SYSTEMS

Our study resulted in national summaries of the domestic laws of Member States, the USA and Japan on key IP laws from patents to plant breeders' rights. These summaries are intended to be used by everyone with a need for a fast and easy to use way to find out the legal position on IP/TT laws in other countries.

AWARENESS AND TRAINING ISSUES

479 faculties of 223 institutions were surveyed in relation to undergraduate, graduate and PhD courses. The point of the survey was to determine if and how IP/TT issues are taught to students of business, engineering, chemistry and medicine. The data gathered showed that almost 60% of responding faculties do not provide any form of IPR/TT awareness. There is a strong indication that students in business schools are most likely to be educated about IPR/TT, followed by engineering and chemistry students. Medicine was somewhat behind the others.

On a positive note for Ireland, Northern Europe, Poland and Ireland were the frontrunners in IPR/TT education.

COMPARATIVE ANALYSIS OF LEGAL TOPICS

Seven specific research related topics were investigated with a view to contributing to the improvement of the regulatory environment for R&D in Europe and the strengthening of the European Research Area. These topics included professors' privilege (ownership of public research results), prior user rights, the experimental use exception, publishing v patenting, legislation applicable to technological know-how and IPR co-ownership provisions. Throughout our study, we conducted stakeholder meetings in conjunction with the European Commission and in finalising our recommendations we interviewed stakeholders from industry and academia for their input.

GENERAL TRENDS AND CONCLUSIONS

We found that there were similarities between the national regimes only when examined at a very high level. These similarities arise, in part, due to common legal traditions between (civil and common law) Member States, international treaties and EU law. However, the devil proved to be in the detail and significant divergences were found when Member States laws were analysed at a detailed level. These included divergences in both statutory wording and interpretation of national laws.

It is difficult to escape the conclusion that this lack of uniformity and general divergences in Member States' law may impede the development of a European Research Area by creating unnecessary obstacles to cross-border research such as additional complexity and uncertainty, unnecessary transaction costs and lack of transparency, impeding common TT policies and guidelines and impeding access of SMEs to cross-border research due to a lack of resources to deal with the IP/TT issues arising.

We recommended harmonisation for many of the legal topics, recognising the need to increase legal certainty for all stakeholders and reduce the current obstacles to legal fragmentation and interpretation differences between Member States. Harmonisation was also recommended by many stakeholders.

We were also conscious that the study was conducted in the context of the Open Method of Coordination and the level of direct and measurable impact of the legal topics was relatively low. Therefore, a common set of principles set out in guidelines and similar measures introduced at EU-level through the Open Method of Coordination process may, to some extent, align the diversity between Member States' national applicable laws and provide for some degree of harmonisation.

The study provided the firm with a unique opportunity to gain a deeper insight into EU policy, the practical impact of IP/TT laws, both nationally and in a cross-border context, and to hear stakeholder opinions on the operation of IP/TT laws in Europe.

MASON HAYES+CURRAN APPOINTMENTS



Emer Gilvary, Managing Partner appointed to State Board

The Tánaiste and Minister for Enterprise, Trade and Employment, Ms. Mary Coughlan, T.D. announced on Thursday, 21 January 2010 that she had appointed a new board to FÁS, the State's Employment and Training Agency which includes the firm's Managing Partner, Emer Gilvary. Before her appointment as Managing Partner in April 2008, Emer was head of the Litigation department at MH+C. She is also part of the firm's Employment Law and Benefits Group.



John Gulliver appointed as new Head of Tax

Mason Hayes+Curran has commenced a strategic initiative to expand its tax offering through the hire of a new Head of Tax, John Gulliver from a top boutique independent tax practice.

John's experience includes advising Vodafone on its original €4bn acquisition of its mobile business in Ireland, advising on the tax consequences of winding up one of the largest licensed captives in Ireland, advising on the tax consequences of numerous structures for blue chip commercial property acquisitions and disposals, advising in respect of various renewable projects and frequently advising on establishing and expanding business operations in Ireland to minimise foreign tax.

The appointment supports the firm's growth strategy and ambition to be the most progressive Irish law firm through taking initiatives that benefit our clients and keep us ahead of the market.



Robert Henson, Senior Associate, Tax

Robert is a Senior Associate in the taxation department of Mason Hayes+Curran. Prior to joining Mason Hayes+Curran, Robert worked in the financial services tax department of KPMG where he completed both the Chartered Accountants' and Irish Taxation Institute's examinations. Robert also worked in a leading Dublin based tax and business advisory boutique firm.

Robert has advised a wide range of clients in leasing, funds and structuring investments. Robert has significant experience in advising clients on cross border transactions and structuring inward investment into Ireland. Robert has a keen interest in the tax efficient structuring of non-Irish domiciled key executives.

MASON HAYES+CURRAN NEWS & EVENTS



Business to Arts

MH+C has one of the best known and curated contemporary art collections among Irish professional service firms. The Atrium includes a stunning Corban Walker sculpture which transforms the space into a most attractive venue for business receptions. The firm was delighted to accept the invitation of Business to Arts to host a very special event for senior business people to explore why the arts and business should work together.

Speakers who are pictured above, from left were: Stuart McLaughlin, CEO, Business to Arts, actor Gabriel Byrne, Declan Moylan, Chairman, MH+C and Peter Keegan, Country Executive of Bank of America Merrill Lynch.



US Executive Circle Club

MH+C has deep and long-standing links with the United States. Every year MH+C becomes the law firm of choice for major American corporates commencing business in Ireland.

Declan Moylan, Chairman of MH+C had the recent pleasure of addressing members of the US Executive Circle Club at a reception in the Royal Hibernian Academy Gallery, hosted by Mason Hayes+Curran.

The reception was attended by Ambassador Rooney and his wife who met with the many guests present, members of the American Chamber of Commerce in Ireland. Ambassador Rooney is widely known for his connections with the Pittsburgh Steelers.

Pictured above: Declan Moylan, US Executive Circle Club and Ambassador Rooney.



The Irish Public Sector - Adjusting to Change

Mason Hayes+Curran were delighted to present a focused, half-day seminar for senior public servants which examined some recent positive initiatives that have produced effective change.

In a response to the current adjustments, and as a continuation of our invitation seminars to senior public servants, we assembled a series of speakers with public sector success stories, who discussed their ability to keep going in the midst

of adversity. We hope the seminar demonstrated positively to delegates the important changes that must be made to survive now, and into the future.

Pictured from left to right are: Fiach MacConghail, Director and Chief Executive Officer, The Abbey Theatre, Niall Michel, Partner and Head of the public and administrative law unit, Mason Hayes+Curran, Tom Savage (centre), Chairman RTÉ Authority and of The Communications Clinic, Lisa Manselli, Head of Change and Talent Management, Accenture and David O'Connor, County Manager, Fingal County Council.

Semantic Web draws in the crowd

Mason Hayes+Curran were delighted to host in association with the Irish Software Association and the Digital Enterprise Research Institute (DERI) a business breakfast on Wednesday 25 November 2009 that explored, demystified and explained some of the legal challenges and commercial possibilities of the Semantic Web, the next evolution of the World Wide Web. The event was attended by 100 delegates across the technology sector as well as those in business and the public sector who use the World Wide Web to interface with their clients and the customers they serve.

Pictured above contributing to the seminar are from left Liam O'Morain, DERI and Philip Nolan, Partner at MH+C and Head of Commercial Department.

MASON HAYES+CURRAN NEWS & EVENTS



A 'RendezVu' with Success!

Two entrepreneurs who developed a 'gaming approach' to help students learn foreign languages have won the 2009 David Manley Emerging Entrepreneur Awards! Pictured at the ceremony with MH+C Corporate Partner, Gerard Ryan are Paul Groarke and Garrett Hussey who established their company, RendezVu in January 2008 with the aim of attracting and maintaining students' interest in learning through Virtual World technology.

RendezVu's prize is €10,000 in cash and over €100,000 worth of mentoring and consultancy services from a variety of the top professional advisors in Ireland. The legal Mentor is Mason Hayes+Curran. The aim of the Awards is to nurture and recognise the enterprising spirit in Business, the Arts and in Social/community. It has become the premier award in Ireland for emerging enterprises. For more information about this company visit www.rendezvu.co.uk



Client's Collaborative Award

"LocalSocial", a collaboration between NDRC, Rococo Software Limited and UCD, recently won the prestigious Irish Software Association 'Collaboration of the Year Award'. LocalSocial provides a software infrastructure to integrate location, proximity, events and social network information on a mobile device. MH+C advised on the template agreement that governs all NDRC collaborations and enables a unique approach to collaborative research."

Pictured above from left: Sean Murphy UCD, Ben Hurley NDRC, Peter Bolger and Philip Nolan, MH+C.

St Pat's CY Victory

MH+C supports local soccer team St Pat's CY who were victorious in the Under 15 league final. Pictured left with Willo Flood of Celtic and Ray Houghton, former Ireland International are back row left to right: Jordan Mitchell, Jason Flood, Robert Lacey, Richard Dowling. Front row: Ross Kemple.



CLOSING ARGUMENT

NO MATTER HOW FAR OUR EXAMS ARE DUMBED DOWN, IT SEEMS IT'S NOT FAR ENOUGH FOR TODAY'S PUPILS. BUT RATHER THAN ADMIT DEFEAT IN THE FACE OF TRICKY QUESTIONS, SOME DECIDE TO TAKE A MORE CREATIVE APPROACH TO THEIR ANSWERS. AFTER SCOURING EXAM PAPERS AND SPEAKING TO TEACHERS, HUMORIST RICHARD BENSON HAS COLLECTED THE WORST STUDENT HOWLERS IN A NEW BOOK.

YOU WON'T KNOW WHETHER TO LAUGH - OR CRY.

- 1) What was sir Walter Raleigh famous for?
He is a noted figure in history because he invented cigarettes and started a craze for bicycles.
- 2) What did Mahatma Gandhi and Genghis Khan have in common?
Unusual Names.
- 3) Name one of the early Romans' greatest achievements?
Learning to speak Latin.
- 4) Name six animals which live specifically in the Arctic?
*Two polar bears
~~Three~~ Four seals*
- 5) Name one measure which can be put into place to avoid river flooding in times of extensive rainfall (e.g. in Mississippi)?
Flooding in areas such as the Mississippi maybe avoided by placing a number of big dames into the river.
- 6) How does Romeo's character develop throughout the play?
It doesn't, its just self, self, self, all the way through.
- 7) Name the wife of Orpheus, whom he attempted to save from the underworld?
Mrs Orpheus
- 8) Where was the American Declaration of Independence signed?
At the bottom.
- 9) The race of people known as Malays come from which country?
Malaria
- 10) What happens during puberty to a boy?
He says goodbye to his childhood and enters adultery.
- 11) State three drawbacks of hedgerow removal?
 1. *All the cows will escape.*
 2. *The cars drive into the fields.*
 3. *There is nowhere to hide.*
- 12) What is the meaning of the word 'varicose'?
Close by.
- 13) What is the highest frequency noise that a human can register?
Mariah Carey.
- 14) What is a fibula?
A little lie.
- 15) Explain the phrase 'free press'?
When your mum irons trousers for you.
- 16) Why would living close to a mobile phone mast cause you ill health?
You might walk into it.
- 17) Joanna works in an office. Her computer is a stand-alone system. What is a stand-alone computer system?
It doesn't come with a chair.
- 18) What is a vibration?
There are good vibrations and bad vibrations. Good vibrations were discovered in the 1960's.
- 19) Give a reason why people would want to live near power lines?
You get your electricity faster.
- 20) Steve is driving his car. He is travelling at 60 feet/second and the speed limit is 40 mph. Is Steve speeding?
He could find out by checking his speedometer.

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