

In Brief



Tughans



Anna Beggan, Partner and Head of Employment Law at Tughans and an accredited mediator.

Welcome to In Brief



Grahame Loughlin, Senior Partner

Welcome to the February 2011 issue of In Brief.

In this issue we have again included articles on areas of law which we trust will be of interest to you. Details of some of the events and sponsorships with which we have been, or continue to be, involved are also featured along with information on recent staff appointments. In relation to the latter, I am delighted to welcome five new members of staff to the firm; Deborah Archer (Banking), Chris Diamond (Corporate), Kenny Caldwell (Property), Jayne Knox (Litigation) and Sally MacAdie (HR Manager). Further details are given on the final page of this newsletter.

I feel it is also appropriate at this point to congratulate Ian Coulter, Managing Partner, on his appointment as Vice Chairman of CBI Northern Ireland at the beginning of January. He is the first solicitor to be nominated for the role and we wish

him well during his period in office.

At Christmas we chose to make donations to our two nominated charities, the Buddy Bear Trust and Macmillan Cancer, each very highly regarded organisations that provide essential support to those who are suffering and their families. Staff from within the firm also contributed generously to the annual Family Appeal with food hampers and toys having been distributed to those less fortunate in our community.

Finally, I would like to thank you for your continuing business during the past year and to wish you and your colleagues a very Happy and Peaceful 2011.

Directories' Recommendations for Tughans

We are delighted to advise that in each of the two leading legal directories, the UK Legal 500 2010 edition and Chambers, a client's guide to the UK legal profession 2011, Tughans was again ranked highly across a range of practice areas.

The rankings are based on feedback from clients, business advisors such as accountants and the legal profession and also on interviews with heads of practice areas across the firm.

Commenting on this year's results Managing Partner, Ian Coulter said, "We were very pleased with our rankings. We are the only Northern Irish firm in Chambers to be ranked in Band 1 across the core competencies of Corporate/M&A, Real Estate and Dispute Resolution. We have also been recognised in emerging sectors such as intellectual property and environment. In addition, many of our solicitors have been individually mentioned as leaders in their specialist areas."

He continues, "Such results could not have been achieved without the support of our clients and the quality of work they allow us to do. We hope that our rankings are a reflection of the firm's overriding aim - to provide all of our clients with direct, affordable and pragmatic legal advice."

Senior Partner, Grahame Loughlin added, "If you were approached by either of the directories for your feedback, we would like to thank you, firstly for taking the time to respond to the researchers and secondly, for your comments."



Mediation – what's involved?



Anna Beggan,
Partner, Head of the
Employment Team

Anna Beggan, Partner and Head of the Employment Team at Tughans is an accredited Mediator, having been assessed through a Workplace Mediation Skills Programme in accordance with the standards required for a certified member of the Mediators Institute of Ireland.

Anna has acquired substantial experience and expertise over a number of years in advising employers on all aspects of the employer/employee relationship and is well aware of the types of disputes

that can arise between individuals in the work place.

Mediation is increasingly seen as a means of early dispute resolution in which parties are encouraged to take responsibility for resolving their own issues as opposed to decisions being made for them by a third party. It is a form of Alternative Dispute Resolution (ADR) wherein a Mediator, as an impartial trained facilitator, assists parties to freely negotiate their own resolution of the issues in dispute between them. Mediation is a voluntary process and can only work if the parties enter freely into it. It is important that ground rules are put in place at the outset of any mediation so that the parties are

clear about the management of the process. In particular it is important that agreement is in place that the mediation process is confidential and that there is agreement on what information, if any, about the mediation is to be relayed, passed on or reported to any third party.

Employers have noted many benefits of mediation and statistics show a compelling argument for the use of mediation in resolving disputes.

For any further information please contact Anna Beggan on 028 9055 3300 or by email, anna.beggan@tughans.com.

Energy matters – rewarding the best of the best

We are delighted to be sponsoring the 2011 Action Renewables Association Awards.

Now in their third year, the awards aim to recognise and reward businesses who are leading the way by identifying the importance of renewable energy and sustainability, as well as embracing renewable technologies within the fast developing 'green' industry in Northern Ireland.

A total of seven awards are up for grabs including the Action Renewables Award for Outstanding Work in the Renewable Energy Sector in Northern Ireland which will be presented by Tughans.



Pictured at the launch of the 2011 Action Renewables Association Awards are: Action Renewables Green Goddess Dearbhla Hogan with Andrew Ryan, Partner, Environment & Planning Department at Tughans.

For further information on the awards and to enter visit www.actionrenewables.org.uk

ESB buys NIE

Tughans advised ESB (Ireland's leading electricity utility) on the Northern Ireland aspects of its acquisition of Northern Ireland Electricity (NIE) from the Viridian Group in one of the largest corporate transactions to take place in Northern Ireland in recent years.

The team at Tughans was involved in all aspects of the Northern Ireland legal due diligence and additionally provided regulatory/compliance advice.

John-George Willis, Head of Corporate at Tughans, led a team of six including colleagues from the property (James Pringle, Partner), environment (Andrew Ryan Partner), insurance (Kathy McGillie, Partner), and employment (Anna Beggan, Partner) departments.

NAMA joins drama over personal guarantees



Orla Brennan
of William Fry Solicitors
in Dublin

NAMA has joined the increasing number of institutions successfully obtaining judgments against individuals in respect of liabilities arising under personal guarantees.

NAMA sought judgment in the Commercial Court against Patrick Shovlin and Patrick and Anthony Fitzpatrick in respect of personal guarantees the three had granted in favour of Bank of Ireland for the liabilities of Landmark Enterprises (now in receivership) in respect of the Beacon South Quarter development in Sandyford. Bank of Ireland is a participating institution for the purposes of the NAMA legislation.

Proceedings also related to personal guarantees the individuals had given in respect of the part finance of Bank of Ireland's own headquarters in Baggot Street, Dublin 2, and in respect of funding granted to Deileon Limited. The defendants are directors of both Landmark Enterprises and Deileon Limited.

Press reports note that the Fitzpatricks and Mr Shovlin had successfully negotiated a low "cap" to the personal guarantees they had given in the Beacon South Quarter matter (which had involved a

substantial bank loan in sum of €280,000,000), meaning that the bank had recourse to the three individuals for only a very small portion (5%) of the total debt due by Landmark Enterprises,

A summary judgment of circa €38.5 million against Mr Shovlin and circa €22 million each against the Fitzpatricks was entered in favour of NAMA. Ulster Bank subsequently successfully secured additional judgments against the three.

Earlier this year, Ulster Bank obtained a summary judgment against property developer Eugene O'Neill in respect of a personal guarantee he had given in respect of the debts of his company Apex Estates Limited. Ulster Bank more recently achieved the same result against Mr O'Neill's wife, who had given a personal guarantee in respect of the same liabilities, but who had been considered by the court to have an arguable defence on the grounds that she had not taken, nor had she been advised by Ulster Bank to take

independent legal advice. Ms O'Neill did not ultimately continue her defence of proceedings.

With the courts appearing increasingly willing to find against personal guarantors, individuals who have entered into such a commitment would do well to review in detail the terms of the personal guarantees under which they are liable.

Orla is a Partner in the Banking & Financial Services Department of William Fry, one of Dublin's leading law firms. Tughans has an established link with William Fry and staff from both firms often work closely together to provide a seamless All-Ireland service to clients.

Tughans supports BII's masterclass series

Tughans is delighted to be one of the sponsors of Belfast Insurance Institute's (BII) Premium Masterclass Series. There will be a total of seven CPD seminars taking place up until May 2011 with keynote speakers drawn from a range of sectors.

Pictured at the first seminar are L-R: Stephen McAnee, President of Belfast Insurance Institute, JJ Lynch, Managing Director of Leading Edge

Partnership and Neil Cahill, Director, Defence Litigation at Tughans. In his talk at this event, Neil addressed the subject of fraudulent/exaggerated claims.

Paddy Connolly from Tughans will be reviewing recent developments in civil litigation at the seminar scheduled for Thursday 19th May. Further details about these events can be found at www.podiem.com



Holidays – what standards to expect?



Neil Cahill,
Director,
Dispute Resolution

With Summer now a distant memory and Winter upon us, one thing that will be on many people's minds is booking their winter ski holiday. Under the Package Travel, Package Holidays and the Package Tour Regulations 1992 many people who are dissatisfied with their holiday or have sustained personal injury whilst on holiday have sought redress in their local courts despite the accident occurring in foreign climes. However, just because the case has been commenced in the UK does not necessarily mean that the claimant

will be able to rely on the standards of care that one would expect to receive in the UK.

A stark example of this is the case of **Gouldbourn v Balkan Holidays & Another**. In that case Mrs Gouldbourn and her husband had booked a package holiday with the Defendants to the Bansko ski resort in Bulgaria. As part of the holiday Mrs Gouldbourn booked a six day 'learn to ski' pack as she had never skied before. On the third day of the holiday Mrs Gouldbourn slipped whilst skiing and fell sustaining injury.

The central allegation in the case was that the ski instructor had failed to adequately assess Mrs Gouldbourn's skiing ability having taken her on a slope that was too difficult for her and failing to maintain sufficient instruction and dialogue with her whilst on the run so as to ensure her safety. The Instructor was a grade C Instructor (the highest grade in Bulgaria) with six years experience. The incident occurred on the first occasion that Mrs Gouldbourn was off the nursery slopes and she alleged that she was given no instruction at the top of the run before she went down. The judge at first instance

concluded that the instructor had probably failed to properly assess Mrs Gouldbourn's ability and was too quick to take her up to the slope. However, it was successfully argued by the Defendants that the proper test was whether the instructor had exercised reasonable care and skill as expected of a ski instructor in Bulgaria. This required analysis of the local i.e. Bulgarian standards, rather than the standards applicable in any other country. The Court of Appeal upheld the decision to dismiss Mrs Gouldbourn's claim having taken account of the prevailing local standards.

This is a pleasing decision for Insurance Companies and Tour Operators alike as it demonstrates and reinforces the principle that cases brought under the Package Travel Tour Regulations should have regard to the local standards of the country in which the incident occurred and not the country where the claim was ultimately commenced.

Should you have any queries in respect of this area please feel free to contact Neil Cahill on 028 9055 3324 or by email, neil.cahill@tughans.com.



'Suggest a Caption' Competition Winner



Thank you to everyone who entered the competition in our last edition of In Brief.

The winning entry was from Brian Kennedy of O'Connor Kennedy Turtle with his caption, 'Tell me again about the right of way under Maritime Law!'

Many congratulations to Brian who receives a £50 voucher for Mourne Seafood Bar in Belfast.

University of Ulster Prizewinner

Kelly Hardman, winner of the Tughans' sponsored Company Law Prize at The University of Ulster is congratulated by James Donnelly, a partner in the firm's corporate department.



Unmasking the Significance of Waste Law and Regulation in Northern Ireland



Andrew Ryan
Partner and Head of
Environment and Planning

Tughans was delighted to co-sponsor a half day seminar on waste management issues in association with the UK Environmental Law Association, the Environmental and Planning Law Association for Northern Ireland and Landmark Chambers. Held in early October 2010, the theme of the seminar was developments in waste regulation in Northern Ireland. The event was chaired by Professor Sharon Turner of Queen's University and presentations were made by a number of high profile figures from the waste management and legal sectors.

John McMillen, Chief Executive of the Northern Ireland Environment Agency gave his perspective on the Agency's role in waste regulation. He set out how the Agency was actively enforcing environmental legislation, with some 40 convictions secured in court in 2009. Greater emphasis was also being placed on the seizure of assets alongside imposing fines for criminal penalties. Other measures such as the repatriation to Ireland of illegal waste deposits were also being used to counteract serious criminal activities. John also recognised the need for the Agency to work with business in Northern Ireland. He outlined continuing steps that were being taken under the "Better Regulation" programme to improve how the Agency interacts

with businesses, along with targets to reduce consultation times on planning applications.

Partner and Head of the Environment and Planning Team at Tughans, Andrew Ryan reviewed proposed changes to waste regulation set out in the Waste and Contaminated Land Order (Amendment) Bill plus other future developments in waste law. Changes proposed by the Bill include increased powers of investigation and prosecution for local councils and the ability to serve fixed penalty notices for relatively minor waste offences. Andrew noted that with the new powers came a need for detailed guidance that would allow both the Environment Agency and the local councils to understand their roles and responsibilities within this new regulatory framework. He also commented on proposed changes to the Northern Ireland Landfill Regulations that would further restrict the types of waste that could be landfilled. This will lead to significant opportunities for the local waste industry to provide the new facilities required for increased recycling and recovery. Andrew also highlighted the continuing delays that are seen in the planning system, which must be addressed to enable the timely development of new waste management facilities.

Chief Executive of waste management group Arc 21, John Quinn, set out his views on the challenges facing the development of major waste management infrastructure. In particular, John noted the need to both expedite planning applications but also ensure public "buy in" for major projects such as energy from waste facilities. John highlighted Belfast City Council's recent consultation on the development of an energy from waste facility in Belfast. Whilst the proposal was ultimately rejected by Belfast City Council, the consultation itself was an excellent example of broad public engagement that –

perhaps surprisingly – indicated substantial public acceptance of the proposal.

David Elvin QC of Landmark Chambers provided a detailed paper on Waste Regulation from a European perspective. David highlighted the changes that will be brought about by the new 2008 Waste Framework Directive. David noted how the issue central to waste regulation - the definition of waste, remains a complex issue that defies an all-encompassing definition. The recent case law of the European Court of Justice that David reviewed showed, if nothing else, that whether a material is waste or not still must be judged on a case-by-case basis. Helpfully, general principles for end of waste criteria have now been incorporated into the new Waste Framework Directive. However, detailed end of waste guidance must still be developed for specific waste streams to provide the certainty that manufacturers of recycled or recovered products require.

Finally, a contrasting view on waste regulation and resource efficiency was provided by James Orr, Director of Friends of the Earth Northern Ireland. James put forward the view

that much more needed to be done to minimise waste production and increase the recycling and recovery of viable materials. In particular, James considered that a focus on large scale energy from waste facilities was directing resources away from much more efficient reuse of waste materials.

So did the conference unmask the significance of waste law and regulation Northern Ireland? The answer to that could well be yes. Nobody would question the need to put into place further regulatory measures and improved infrastructure to deal with waste in Northern Ireland. However, significant problems and barriers still remain, for example the timely delivery of waste infrastructure; the need for clarity on end of waste criteria; and, a regulatory framework that balances environmental protection and crime prevention against encouraging legitimate business operations.

Should you have any queries in relation to the aspects mentioned above, please contact Andrew Ryan on 028 9082 0527 or by email, andrew.ryan@tughans.com.



Pictured above are L-R: James Orr (Director, Friends of the Earth), John McMillen (Chief Executive, NI Environment Agency), John Quinn (Chief Executive, Arc 21), Professor Sharon Turner (Queen's University, Belfast), Andrew Ryan (Tughans) and David Elvin (QC, Landmark Chambers).

The new competition rules – increased flexibility for distributors?



Kerry McCorkell,
Associate Director,
Corporate Department

The European competition rules which regulate distribution agreements have changed. This article provides a brief outline of some of the current competition law prohibitions which apply to the most commonly used form of distribution agreement, together with a summary of the main changes introduced by the new rules.

Background

The European competition rules prohibit agreements, decisions and practices between entities which have as their object or effect the prevention, restriction or distortion of competition, with the result that any such agreements will be held void and unenforceable.

To avoid this, suppliers need to take care regarding restrictions imposed

on their distributors. A limited “safe harbour” is provided for those agreements which fall within certain exceptions. These exceptions are however very limited and, as a result of recent changes, there is now arguably further scope for distributors to avoid/overcome competition restrictions.

Current Restrictions

The following restrictions, if included in a distribution agreement, will render the entire agreement void:

- resale price maintenance (also known as price fixing); and
- restricting the territories into which, or the customers to whom, the distributor may sell (subject to certain limited exceptions).

The following restrictions, whilst not rendering the entire agreement void, will be unenforceable:

- any non-compete obligation which exceeds 5 years, or is indefinite;
- any obligation preventing the distributor, after termination of the agreement, from manufacturing, purchasing or reselling the goods or services (subject to certain exceptions).

Changes introduced by the new rules

As a result of the new rules (which came into effect on 1 June 2010, though transitional arrangements run until 31 May 2011), further conditions must now be met for a distribution agreement to remain exempt from the general competition law prohibition.

Key changes

1. Market Share

An agreement will only qualify for exemption if both the supplier and distributor hold market shares of less than 30%. Prior to June 2010, only the market share of the supplier was considered relevant. The effect of this is that fewer agreements are likely to be classed as exempt and the assessment of whether an agreement falls within the exception will be more complicated.

2. Internet sales

In principle, every distributor must be permitted to use the internet to sell goods. This requirement is undoubtedly as a result of the increased importance of the internet as a sales channel.

The following restrictions are now prohibited and, if included in a distribution agreement, will render that entire agreement void:

- requiring that a distributor prevent customers located in another territory from viewing its website or automatically re-routing customers to the supplier's or other distributors' websites. (Note that it is acceptable to require the distributor to display links to the supplier's or other distributors' websites);
- requiring that the distributor must terminate its transaction with a customer online if the credit card information supplied by that customer reveals an address outside of the distributor's territory;

- restricting the number of sales a distributor may make online (although note that it is permissible to require the distributor to sell a specified number of products off line to ensure efficient operation of its bricks and mortar shop); or
- requiring that the distributor pay a higher price for products intended to be sold online (although it is acceptable for the supplier to agree to pay a fixed fee to support the distributor's off line or online sales efforts).

Note that the above restrictions are designed to address passive selling outside the distributor's allocated territory. Restrictions preventing a distributor from actively selling a supplier's products via the internet in territories not allocated to him are still permitted. For example, restrictions on advertisements addressed to specific customers outside the territory can still be prohibited.

Recommendation

In light of the above, all suppliers with distributorship arrangements in place would be well advised to review current arrangements, and in particular take care when seeking to control online sales.

If you have any queries or questions please contact Kerry McCorkell on 028 9055 3300 or by email, kerry.mccorkell@tughans.com.



Tughans' Bikers!

With the ever improving cycle network, a number of staff from Tughans now choose to travel to work on two wheels. Pictured enjoying a moment of relaxation outside Belfast City Hall are L-R: Naomi Dawson (Commercial Litigation),

Andrew Ryan (Environment and Planning), Andrew Anthony and Alastair Wilson (both Professional Discipline), Fearghal O'Loan (Banking), Toby McMurray (Insolvency) and David McDonnell (Property).

Staff Appointments



Deborah Archer

Deborah Archer has recently joined the banking department of Tughans as a director. A graduate from the Queen's University of Belfast with a degree in Common and Civil Law with Hispanic Studies, Deborah previously worked in another large Belfast firm.

She has extensive experience acting for both local and international banks and borrowers on refinancings, restructurings, secured and unsecured lending and acquisition finance.



Chris Diamond

Chris Diamond graduated in Law from Queen's University Belfast and went on to complete the Legal Practice Course at the Bristol Institute of Legal Practice.

Having trained with a recognised corporate law firm in south west England, Chris joined the corporate department at Tughans as a solicitor in September 2010. He is involved in a range of corporate law matters, including sales and acquisitions of companies and providing advice on commercial law issues.



Kenny Caldwell

Kenny Caldwell has joined Tughans as an associate solicitor in the commercial property department. Having graduated from University College Dublin with a degree in Law (B.Comm) in 2005, he previously worked for a large legal practice in Dublin and has a background in construction and projects, and commercial property.

Kenny has a broad range of commercial property experience. He advises on all aspects of commercial property transactions including negotiating commercial leases, bank lending and advising in relation to construction, projects and property development.



Jayne Knox

Jayne Knox has been appointed to the litigation department at Tughans, where she will specialise in insurance defence litigation. Jayne graduated from Queen's University Belfast in 2004 with a degree in Law with Politics. She joined Tughans in May 2010.

Jayne has broad experience in insurance defence litigation in both County Courts and High Court to include handling claims arising from road traffic accidents, employers' liability, public liability and in insured loss recovery claims.

Congratulations to...

- Peter McGrath on his marriage to Tess Parker
- David McDonnell on his marriage to Sinead Lappin
- Ciara Dooris on her marriage to Aaron Fulton
- Neil Smyth and his wife Oonagh on the birth of their son Oisín Michael James.
- Patrick Brown and his wife Susie on the birth of their son, Rowan Patrick.
- Amanda Magee (employment department) who graduated from the Institute with a Distinction in the post-graduate Certificate in Professional Legal Studies .
- John McGuckian (corporate department) who played in the St Brigid's Cloughmills hurling team which recently won the Antrim Junior Hurling final.



Sally MacAdie

Sally MacAdie has recently joined Tughans as HR Manager. A graduate

of the University of Edinburgh and a Fellow of the Chartered Institute of Personnel and Development, Sally has considerable Human Resources and Change Management experience having worked with the John Lewis Partnership, Rolls-Royce plc, Babcock International Group and most recently as HR and Change Director with the support services company, Serco plc.

Additionally Sally has been an external practitioner examiner for the Human Resources Department of the University of Strathclyde for the last three years.

Contact Us

If you require further information on any of the topics covered in this newsletter or would like to see specific areas covered in future issues, please contact Pamela Brown on 028 9055 3355 or email, pamela.brown@tughans.com

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