

## Advice from in-house corporate lawyers may not create privilege

The Advocate General of the European Court of Justice (ECJ), Ms Juliane Kokott has delivered a judgement which may lead to a loss of privilege for communications between a company and its in-house lawyers, in the context of European Commission investigations at least. Communications between solicitors and our clients has long been held to be confidential and protected from disclosure in court or elsewhere. In the case of Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v European Commission, Advocate General Kokott delivered her opinion that legal professional privilege does not extend to cover communication with an in-house lawyer, who "does not enjoy the same degree of independence from his employer as a lawyer working in an external law firm does in relation to his clients". Although this opinion is not binding on the ECJ, in practice it tends to follow opinions issued by the Advocate General. Decisions of the ECJ on European Commission investigations do not set a precedent in Irish law, although they can have a persuasive effect on future proceedings. Companies, even those with in-house solicitors would be well advised to engage an independent solicitor if they wish their deliberations to remain confidential.



**PROFILE: Anne Cunningham, Solicitor**

In this issue of our newsletter we profile Anne Cunningham, Solicitor. We are pleased to have had Anne with us as a consultant since 2004, specialising in the area of Wills, Probate and Administration of Estates. She is a member of the Society of Trust and Estate Practitioners (STEP), an international

professional body for trust and estate practitioners worldwide.

Anne holds a certificate in legal education and is a Tutor/Examiner, in her specialised area, with the Law Society of Ireland.

Anne's other areas of expertise include issues of mental capacity affecting vulnerable and elderly clients, Enduring Powers of Attorney, Ward of Court Applications and the appointment of care representatives under the Nursing Homes Support Scheme Act 2009.

You can also consult Anne for advice on succession issues under the Succession Act 1965 and the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 which was recently signed into law on the 19th of July.

## State and local authorities must charge VAT on services

The Finance Act 2010 has given effect to a ruling from the European Commission which will have an effect in many areas of Irish life. A complaint to the Commission involved a private car park operator who complained that it was unfair that its state-owned competitors did not charge VAT on parking. The European Commission found that Ireland had failed on 3 counts to implement EU VAT legislation and that the state's non charging of VAT created a significant distortion in the market. The European Court of Justice (ECJ) ruled that state and local authority activity should be subject to VAT where (a) the state entity engages in activities outside of its state function, or (b) a state entity is in competition with the private sector and the activity causes significant distortion of competition.

## Directors' names need not be pre-printed on notepaper

Although Section 196 of the Companies Act 1963 requires that the names of company directors be printed on all business letters, there is no legal obligation for the directors' names to be pre-printed on company stationery. In addition, while such information must be legible, there are no rules as to the format, font or text size, as long as the text is legible. The Office of the Director of Corporate Enforcement issued an information notice to this effect in June 2010, advising that cost savings could be made by printing stationery without directors' names and using the footer feature of word processing software packages to add names when the letter is printed out.

Whereas every effort is made to ensure that all information contained in this newsletter is accurate, it is intended as a general guide only and the information herein may not apply to your individual circumstances. Professional advice should be taken before acting or refraining from acting as a result of any information contained in this newsletter. Always consult your legal advisors first. © McArdle Associates 2010. www.mcardle.ie

# NEWSLETTER

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Solicitors

Personal and Professional Legal Developments

Autumn 2010

## Welcome

We are pleased to present our latest newsletter. This, our summer edition, includes a number of articles which we hope will be of interest to you.

Since our last edition and as part of our continuing commitment to service, we are proud to announce that we have launched our first website. You can now visit us at [www.leahy Wade.ie](http://www.leahy Wade.ie) for more information about our firm and what we can do for you.

Maurice Leahy Wade and Co are also ready to assist you with additional information and advice about anything in our newsletter, on our website or in the public domain that you may want to discuss with us.

Finally, may I wish you all the very best for the remainder of our summer. I look forward to hearing from you soon.

Maurice Leahy  
Managing Partner



## New Arbitration Act allows judges to send parties out to mediation

The Arbitration Act 2010 was passed into law on 8 June 2010, bringing Ireland's Alternative Dispute Resolution (ADR) regime into line with international standards by applying the UNCITRAL (United Nations Commission on International Trade Law) Model Law. The UNCITRAL Model Law is used in 64 countries worldwide.

The Arbitration Act 2010 allows the High Court and the Circuit Court to adjourn court proceedings and to send the parties out to mediation or arbitration, essentially instructing the parties to go away and sort out their differences outside the court. This approach has been used to great effect in Ireland's Commercial Court since 2004 and the High Court and Circuit Court are now set to emulate this success. Mediation has been used in several high profile cases such as Charlton V Kenny when Ms Justice Clarke suggested to Pat Kenny and the Charltons that they mediate their dispute

over Gorse Hill in Dalkey. Then, the judge could only suggest or encourage mediation, the new Act now allows a judge to compel the parties to engage in ADR. The new Act gives greatly increased powers to arbitrators and mediators and limits the ways in which the courts can intervene. Disputing parties can agree in advance how the costs of the dispute resolution will be allocated and when and how the costs are to be paid. The new Act requires arbitrators to give reasons for their decisions and awards, unless the parties expressly agree otherwise. Every business should review any arbitration clauses in its contracts in light of the new legislation. We strongly advise that no individual or company goes to ADR without good legal representation. The opposing side will be sure to have their solicitor present. You should have yours present too. Be sure to contact us before engaging in mediation, arbitration, conciliation or any form of ADR.

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## A brief overview of debt recovery

In the current economic environment, many individuals and businesses are finding it hard to collect debts that are owed to them. If you are having difficulty getting paid or recovering a debt that is owed to you, you should contact this office immediately. In most instances, if you're seeking to recover monies owed to you, the sooner you act the better, as delay can often frustrate an action for debt recovery. We will send one or more demand letters before issuing proceedings. A solicitors' letter will focus the debtor's attention and let them know you are serious about collecting the money. Often this is all that is necessary to secure payment of the debt.

If further measures are required we will choose the course of action best suited to the circumstances and the amount

in question. We can obtain and register court judgements and / or mortgage judgements. We can send the judgement to the sheriff who will seize goods to the value of the judgement. A garnishee order requires a third party who owes money to your debtor to pay that money directly to you. Receivers can be appointed by the courts to companies in debt and bankruptcy orders can be made against individuals. The court can instruct debtors not to dispose of assets pending resolution of the case. There are many options open to you if you are owed money, but it is extremely important not to delay. The longer you let a debt stand, the lower your chances of recovering the full amount. Contact us today for some practical, friendly and confidential assistance.



## Contributory negligence and personal injury

The Supreme Court has upheld the decision of the High Court in the case of *Hussey Vs Twomey*, reducing the damages payable to Ms Cynthia Hussey from €83,000 to €50,000 for lower back injuries sustained in an accident while she was a passenger in a car driven by someone she knew, or should have known was intoxicated. The High Court held that it was reasonable to reduce the compensation payable by 40% on the basis of contributory negligence saying that the passenger knew or ought to have known that the driver was incapable of driving safely, or had a reduced capacity to control the vehicle. The Supreme Court upheld this decision on appeal. Mr Justice Nicholas Kearns said that any tolerance towards intoxicated drivers or passengers "is very much a thing of the past".

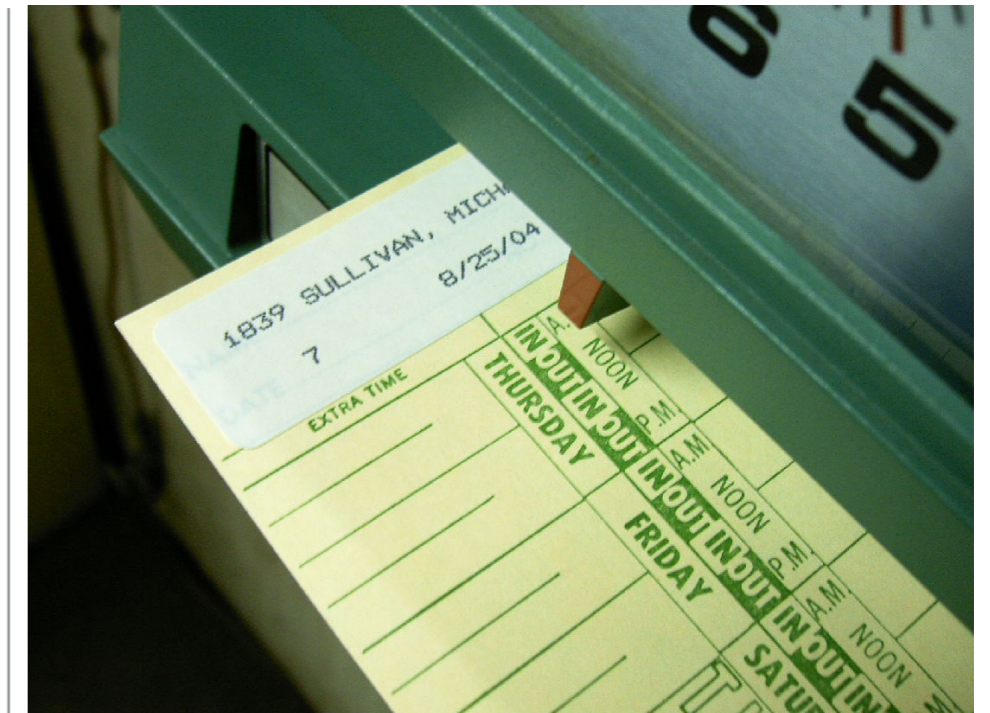
## PRSI 'holiday' for new employees hired in 2010

A new scheme which will give employers a PRSI "holiday" when they hire new employees is expected to save businesses around €3,000 per new employee. To be eligible, new jobs must be full-time and must be new and additional – employers will not be allowed to substitute existing employees to avail of the scheme, and the employee concerned must have been unemployed for at least 6 months. Participation in the scheme will be limited to 5 per cent of the employer's existing workforce or to five jobs, whichever is greater. The exemption will last for 12 months from the date of approval. New jobs must last for at least six months, if a job lasts less than six months, the PRSI exempt amounts will have to be repaid by the employer. The scheme is expected to create 10,000 new jobs in 2010.



## Audit exemptions

Surprisingly few Irish companies have availed of recent changes to company law that would free them from the obligation to include an audit with their annual returns. Legislation enacted in 1999 made an exemption possible in limited circumstances but more recent changes to the rules mean that many more small businesses will qualify. The main requirements are as follows: The company must be a private limited company; its turnover must not be more than €7.3 million; its average number of employees must not exceed 50; the company's assets must be less than €3.65 million; it must not be part of a group of companies; its filing requirements must be up to date. If a company has met these requirements in the current year and the preceding year and is not one of the 19 classes of companies listed in the 1999 Act, it can apply for an audit exemption.



## Record award for unfair dismissal

The former manager of a software company who was unfairly dismissed was awarded €175,000 by the Employment Appeals Tribunal. The claimant had worked with the company since it was a start-up in 1999, progressing through the ranks to become general manager. In 2007 the company was subject to a takeover and following the takeover his title changed from general manager to sales manager. Assurances were given that there would be no redundancies. Even though his division significantly exceeded its target for the first quarter of 2008, he was made redundant. The EAT ruled that he had been unfairly selected for redundancy, that important company information had been

kept from him and that the redundancy was in part engineered by moving him into a division that would make a loss due to the size of his salary and that this was a "device or contrivance to bring about the claimant's redundancy." If unfair selection criteria are used in selecting employees for redundancy, or if the redundancy is not genuine, the maximum penalty of two years remuneration can be awarded under the unfair dismissals legislation. It is also worth noting that all dismissals are deemed to be unfair until the employer can prove otherwise. If you face any employment law issues, please contact us immediately. It is important to act without delay in this type of case.



## Mr Justice McKechnie nominated to the Supreme Court

Mr Justice Liam McKechnie has been nominated to the Supreme Court to replace Mr Justice Hugh Geoghegan who retired in May 2010. Mr Justice McKechnie is 59 years old and was made a judge of the High Court in 2000. He holds a master's degree in European law and earlier this year he was elected to the presidency of the Association of European Competition Law Judges.

The Supreme Court is the highest judicial authority in Ireland and the court of final appeal. It's current composition is as follows: the Chief Justice of Ireland is Mr Justice John L. Murray, and the seven ordinary members are; Mrs Justice Susan Denham,

Mr Justice Adrian Hardiman, Mr Justice Niall Fennelly, Mr Justice Donal O'Donnell, Ms Justice Fidelma Macken, Mr Justice Joseph Finnegan and Mr Liam McKechnie. Mr Justice Nicholas Kearns, the President of the High Court is an ex officio member. Supreme Court judges are appointed by the President of Ireland following binding advice from the Government, which acts on the (non-binding) advice of a judicial advisory board. Earlier this year, three new District Court judges were appointed. The three new District Court Judges are Mr. Olann Kelleher, Solicitor, Ms. Patricia McNamara, Solicitor and Ms. Catherine Staines, BL.

## Court fines can now be paid by instalment

New legislation which allows court fines and civil debt to be paid by instalments was signed into law by President Mary McAleese on 2nd June 2010. The Fines Act 2009 will also allow the courts to set a fine in accordance with a person's ability to pay, introducing the concept of "equality of impact" for the first time. Offenders who do not have the means to pay a fine all at once can be given up to 24 months to pay in instalments. Judges will also have discretion to sentence people to community service instead of prison for non-payment. The number of people sent to prison for non-payment of fines increased significantly to 4,806 in 2009, up from 2,154 in 2008 and 1,335 in 2007. The Fines Act also outlines a new system of categorised fine for minor offences which will lead to some significant increases in fines, particularly in the case of fines which were set some decades ago and haven't been amended since. The new categories are as follows: Class A: maximum fine of €5,000; Class B: maximum fine of €4,000; Class C: maximum fine of €2,500; Class D: maximum fine of €1,000; Class E: maximum fine of €500.