WHITNEYMOORE*

The Advisor

Summer 2010

CONTENTS

Commercial Leases and Corporate Restructuring

Capital Acquisitions Tax and the Finance Act 2010

Cloud Computing

How Green is Green?

Top Management Receive Top Awards from EAT

New Pension Provisions

WhitneyMoore secures Meritas Membership

MESSAGE FROM STEPHEN WALKER, MANAGING PARTNER

In these difficult economic times we in WhitneyMoore continue to adapt to the needs of our clients and the challenges and opportunities faced by us all.

Our Property Department has been involved in a number of substantial lettings recently. The length of lease terms is now more likely to be 10-15 years, rather than the traditional 25 years, and it is often common for tenant's break options to be available at one or more intervals during the lease term. Turnover rent provisions have also been negotiated for some retail premises. In addition, we have seen an increase in the re-organisation of finance with financial institutions.

Our Corporate Department works closely with our corporate clients to provide on-going advice on the issues arising in this economic climate, notably the opportunities for acquisitions, negotiating seed capital investments and advising on private placings. Our Corporate Department also assists our corporate restructuring team, which has been strengthened by the addition of Billy Parker and Michael Carney who combine their knowledge and expertise with the vast experience of Frank O'Reilly in this area.

Our Litigation and Intellectual Property Departments continue to be very busy in providing commercial litigation, dispute resolution and employment advice to our clients.

I hope you find this newsletter informative. Please contact me or any member of the team if you would like to discuss any of the issues raised.

WhitneyMoore,
Wilton Park House,
Wilton Place,
Dublin 2, Ireland.

T : +353 1 611 0000
F : +353 1 611 0090
E : ecomms@whitneymoore.ie
W : www.whitneymoore.ie

COMMERCIAL LEASES AND CORPORATE RESTRUCTURING

On the 10 December 2009 the Supreme Court held that leases, as a matter of law, are contracts to which Section 20 of the Companies (Amendment) Act 1990 could apply and that they could, therefore, be repudiated.

While the decision is welcomed by the corporate restructuring community as a valuable tool in the examinership process, it sends a clear reminder to landlords of the importance of lease guarantees and the necessity for early engagement with corporate tenants who appear to be struggling.
For further information contact Frank O'Reilly or Julie Fitzgerald.

CAPITAL ACQUISITIONS TAX ISSUES ARISING OUT OF FINANCE ACT 2010

Recent changes to gift and inheritance tax provisions simplify and modernise how Capital Acquisitions Tax (CAT) is collected and returned. The amendments are designed to bring the administration of CAT in line with the administration of other personal taxes in terms of tax filing obligations and how the tax is collected. Changes include:

- For gifts or inheritance arising between 1 January and 31 August, the tax and return must be filed on or before 31 October in the same year.
- For gifts or inheritance arising between 1 September and 31 December, the tax and return must be filed on or before 31 October in the following year.

The Act also provides for a modernisation of probate practice, to speed up the issuing of Grants of Probate, and removes the need to obtain certificates of discharge. CAT will also no longer be a charge on a property for 12 years after a date of a gift/inheritance. This will make property transactions more straightforward.
For further information contact Frank O'Reilly or Ann Harvey.

HEY! YOU! GET OFF OF MY CLOUD

Cloud computing is the provision of shared resources to computers on demand. Data, software applications and computer processing power is provided to individual users from a 'cloud' of online resources. It acts as an alternative to a server and replaces the need to install software. The obvious advantage is a considerable reduction in capital costs as software and hardware can be purchased as a utility service. Another advantage is mobility as organisations can use the cloud to store data and applications and can use any device to access it. Examples of cloud computing include e-mail services such as Gmail and Hotmail, document sharing services such as Google Docs and spreadsheet applications such as Zoho.

However, cloud computing is also fraught with security risks. Firstly, sensitive data is processed outside the organisation. The normal physical or personnel controls are bypassed and an organisation has very little influence over the people who are managing their data. Secondly, an organisation is ultimately responsible for the security and integrity of its own data, even when it is held by the cloud computing provider. In this respect it is essential that cloud computing providers are subject to external audits and security certifications. Thirdly, where is the data located? When you use cloud computing, it is unlikely you will know exactly where your data is stored. It is important therefore to know in which jurisdiction the data is located and that the cloud computing provider commits to that jurisdiction's privacy requirements on behalf of their customers.

Other security risks include:

- How data is segregated. The cloud will contain data from other customers in a shared environment. While encryption of data addresses this security concern somewhat, it comes with its own risks, for example an encryption accident can render data completely unusable.
- Whether data is recoverable by the cloud computing provider in the event of a disaster and the data being lost.
- Investigation of inappropriate or illegal activity is difficult in cloud computing. A cloud computing provider ought to be able to provide a system of investigation in such circumstances.
- The cloud computing provider may go out of business or be acquired by another company. It is essential therefore that your data be returned to you should you wish to move to a replacement

cloud computing provider and that the data be in a format that can be imported into such a replacement application.

Safety in cloud computing is an important consideration for any organisation. Best practice includes asking where data is kept and inquiring as to the data protection laws in the relevant jurisdiction, ensure access is limited to privileged users, seek an independent security audit of the cloud computing provider and find out if your own security policies will be accommodated by the cloud computing provider.
For further information contact Brendan Ringrose.

HOW GREEN IS GREEN?

While the Government views the potential of the green enterprise sector as central to the development of the smart economy and has designated it as one of Ireland's target sectors for investment and job creation, it begs the question – how green is green?

Companies advertising their services as "green", using phrases such as 'environmentally friendly', 'sustainable', 'renewable' and 'carbon neutral', must be capable of supporting those claims.

In the latter half of last year, Bord Gáis Energy made complaints to the Advertising Standards Authority of Ireland (ASAI) concerning certain advertisements of a competitor, Airtricity. The Airtricity campaign described its electricity as 'green electricity' and compared the electricity supplied by it to the electricity supplied by ESB and Bord Gáis.

Bord Gáis argued that as Airtricity has a fuel mix consisting of 79% of electricity being generated from renewable or 'green' sources and 21% from fossil or 'brown' sources, it was misleading to represent the electricity being sold in this instance as 'green'.

The ASAI held that, as not all of Airtricity's electricity was derived from renewable sources, it did not consider the unqualified claim that the electricity was "green" electricity was appropriate.

Bord Gáis also successfully challenged the Airtricity claim that its electricity would be five times "more environmentally friendly" than that of Bord Gáis. Bord Gáis argued that this comparison took no account of the type of fossil fuel used to generate the non-renewable portion, an argument which the ASAI upheld.

Airtricity has since amended its advertising and now describes itself as the "No. 1 supplier and generator of renewable electricity in Ireland".
For further information contact Cillian Balfe.

TOP MANAGEMENT RECEIVE TOP AWARDS FROM EMPLOYMENT APPEALS TRIBUNAL

Recent decisions by the Employment Appeals Tribunal have shown that the Tribunal no longer has a fear of awarding six figure sums for unfair dismissal. This trend is a cause for concern to many companies who in the current economic climate are regrettably facing situations where they have no option but to reduce staff numbers, including high ranking employees. These awards emphasize the importance of putting into place the appropriate procedures before taking steps to terminate an employee's position in an effort to reduce any exposure to high awards.

Awards such as that seen in the recent case of Tom Mulligan v. J2 Global (Ireland) Ltd., where the Tribunal awarded €175,000 to the dismissed General Manager, are made under the Unfair Dismissals Acts 1977-2007. Section 6 of the Act provides that any dismissal will be deemed to be unfair unless there are substantial grounds justifying the dismissal. A dismissal shall not be unfair if it results from one of the following;

- Capability, competence or qualification
- Conduct
- Redundancy (provided selection criteria and procedures are fair)
- Other substantial reasons
- Fixed term contracts

However Section 6 (7) provides that:
"In determining if a dismissal is an unfair dismissal, regard may be had ….. to the reasonableness … of the conduct ….of the employer …..".

The Tribunal has continuously put an emphasis on the procedures and conduct of an employer in terminating an employee's position. Regardless of the reasons or grounds for the termination, an employer must at all times ensure that it follows certain standards and procedures, or face the prospect of a six figure award against it.

The object of compensation is to make reparation fully for the loss suffered by the dismissed employee. However it should be noted that the employee is expected to seek alternative employment and will only be compensated for actual loss suffered.

The decision of the Tribunal in the case of Tom Mulligan v. J2 is a stark warning to employers to put into place correct procedures and to follow certain standards before taking steps to terminate an employee's position for any reason.
For further information contact Emma Richmond.

NEW PENSION PROVISIONS

The government recently unveiled the National Pensions Framework, which includes a rise in retirement age and an "auto enrolment" pension scheme for many employees.

The State pension age is currently 65. It will be increased to 66 in 2014, 67 in 2021 and 68 in 2028.

The State contributory pension will remain – but the current averaging system will be replaced by a "total contributions" approach. Thus the amount of pension payable will be proportional to the number of years that a person has contributed. Arrangements will also be put in place to allow people to postpone receipt of the State Pension and to make up contribution shortfalls.

All employees in Ireland will be automatically enrolled into a new pension scheme unless they are already a member of an existing employer's scheme and that scheme provides higher contribution levels or is a Defined Benefit scheme.

Contributions to the new pension scheme will be made within a band of earnings, with earnings below and above certain thresholds exempt. Employees will be required to make a fixed percentage contribution. The State will also make a contribution equal to 33 per cent tax relief and employers will have to match the State contribution.

Contributions will be collected through the PRSI system. Employees can opt out but they will be re-enrolled every two years. As an enticement to stay in the scheme – there will be a once-off bonus payment for people who remain in the scheme for more than five years.
For further information contact Roisin Caulfield.

WHITNEYMOORE SECURES MERITAS MEMBERSHIP

WhitneyMoore recently strengthened its ability to service its clients' interests outside Ireland by becoming the only Irish member law firm of Meritas.

Meritas is a world wide group of law firms whose membership includes more than 170 independent commercial law firms located in over 60 countries. It is differentiated from other legal alliances by its referral, reporting and evaluation system. A Meritas firm is invited to join the alliance not only for their high level of legal expertise, but also because of their business acumen. Each law firm is evaluated regularly to assure a uniform degree of quality and ongoing client satisfaction from pre-screened, reliable legal expertise worldwide.

Our membership of Meritas will further enhance our ability to deliver advice on any cross-jurisdictional transaction in a cost effective, timely and efficient manner.

For further information see www.meritas.org or contact Stephen Walker or Annette Kinsella.

Disclaimer: The information contained in this newsletter is provided for general information purposes only and does not constitute legal or professional advice. Whilst every care has been taken in its preparation, legal advice should always be sought before acting on information in this newsletter. © WhitneyMoore 2010