



I am delighted to bring to you another edition of Holmes News. We have had a busy start to 2024 and I hope we capture some of the exciting developments in this newsletter.

There are also a number of new starters in the firm. I extend a warm welcome to **Geoffrey Fung**, a Hong Kong and British Virgin Islands lawyer, who has joined the Commercial Litigation Team bringing considerable experience in Commercial Disputes and Arbitration. I would also like to welcome **Jacqueline Molloy** who joined our HR Team following a period of working with Arthur Cox. Retention and recruitment of key personnel is an ongoing challenge in today's Irish economy and at Holmes we are working hard to attract, retain and engage committed and productive talent necessary to develop organisational capacity in a business environment requiring fast and efficient legal response times.

We have also had a number of promotions and I would like to extend warm congratulations to both **Marguerite Seymour** and **Susan O'Reilly** who have been promoted to the rank of Of Counsel in the Commercial Litigation and Corporate Units respectively. We have a number of recently qualified lawyers. **Avril McNamara** has recently qualified and is working in the Banking Unit and congratulations to **Brian Moynihan** (Corporate) and to **Cian Clifford** (Regulatory) who qualify very shortly. We look forward to working with them for many years to come.



HARRY FEHILY, MANAGING PARTNER, PLNA CONFERENCE 2024

We work hard as a firm at ensuring continuity in the delivery of legal services and I can assure you that your business is safe in our hands.

On the 6th of June Holmes again had the opportunity to host the Professional Negligence Lawyers Association Seminar at the St. Stephens Green Club in Dublin. We had some excellent presentations, and it was a great opportunity for us to present, network and connect with both existing and potential financial lines clients.

A big thank you to **Jennifer Nolan**, who has recently taken over the Business Development role in the firm, for organising such an excellent event. A lot of work goes into these events from organising to presenting but they are a vital tool in assisting our clients to stay up to date and relevant in an evolving market.

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This edition brings you news of ongoing issues of legal interest across a spectrum of sectors and some updates on how our firm continues to make positive impacts in our communities.

I hope you enjoy the latest edition of Holmes News and as always, please feel free to contact me if there is anything I can assist you with.

Harry Fehily,
Managing Partner

July 2024



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INSURANCE LITIGATION AND DISPUTE RESOLUTION

Malicious Injuries Acts 1981 and 1986

IN BRIEF

The recent Dublin Riots of 23rd November 2023 brought back into focus a relatively unknown and obscure piece of legislation known as the Malicious Injuries Acts 1981 and 1986 (“The Acts”). The Acts provide a limited right of compensation in circumstances where damage has been caused to property, or property unlawfully taken, during a riot.

WHO TO SUE?

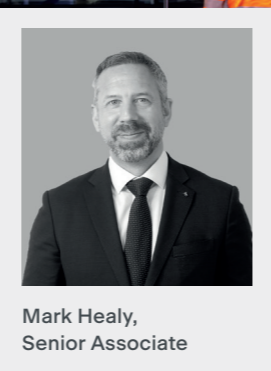
The cause of action arises against the Local Authority where the damage to, or loss of, property has taken place.

WHAT CRITERIA APPLY?

To qualify for compensation under the Acts, certain criteria must be met:

- the damage caused, or the loss of property taken, must exceed £100 pounds (now being the current euro equivalent);
- the damage caused, or the loss of property taken, must have been affected by one or more of a number (exceeding 2) of persons riotously assembled together.

The right to compensation is limited to compensation for the actual damage caused, or the actual loss of property taken. No right of compensation arises for any consequential loss arising from such damage, to include any loss of use of the property.



Mark Healy,
Senior Associate

WHAT CONSTITUTES A RIOT?

The primary authorities for what constitute a riot are set out in *Duggan v Corporation of Dublin*, which held that the five necessary elements of a riot as stated in the UK authority of *Field v Receiver of Metropolitan Police* are:

1. There must be at least 3 persons involved;
2. They must have assembled with a common purpose;
3. The execution of the common purpose must have taken place;
4. There must be an intention on the part of the number of persons to help another, by force, if necessary, against any person who might have stood in the way of the execution of the common purpose;
5. There must be force or violence not merely used in and about the common purpose but displayed in such a manner as to alarm at least 2 persons of reasonable firmness and courage.

The practical application of this test was synthesised by the Master of the Rolls (following the 2011 London riots) in the case of *Mitsui Sumitomo Insurance Company (Europe) Limited v Mayors Office for Policing and Crimes [2014] EWCA* where it was held that:

“...whatever the true motive for the use of petrol bombs to set fire to the warehouse, objectively, the use of petrol bombs evidence is wanton violence towards the property damaged or destroyed. This wanton violence towards property is a hallmark of riotous and tumultuous behaviour and is a paradigm example of the situation where the victims of the damage or destruction should qualify for compensation under the 1886 Act”.

The foregoing suggests that a relatively broad approach will be adopted by the Courts as to what constitutes a riot.

[1991] 1 IR 275 | [1907] 2 K.B. 853

It remains to be seen to what extent claims will be made under the Acts arising from the Dublin riots and the Courts’ approach to any such claims.

TIME IS OF THE ESSENCE (BUT ALL IS NOT LOST)

It is important to note that there are two relevant limitation periods imposed under the Acts. The first of these relates to the requirement to notify the intention to bring a claim under the Acts.

1. Section 8 of the 1981 Act imposes a rather draconian 14-day time limitation on the requirement to notify of an intention to claim where it states that:

“...a person seeking compensation under this act, shall within 14 days after, as the case may be, the damage is caused or the property was taken, serve, in accordance with this section, preliminary notice, in such form as may be prescribed by regulations made by the minister, of his intention to apply for compensation...”.

It is also a criterion of the notification that it must be notified to both the Local Authority and the Garda Station to which the damage or loss of property was reported. The form of notice to be served is set in SI No 41/1987–Malicious Injuries (Preliminary Notice) Regulations 1987. There are separate application forms within this SI for compensation for damage to property, or compensation for loss of property.

2. Once the matter is properly notified, proceedings must then issue within 3 years from the date of damage or loss.

The Courts will allow some flexibility if notification of the claim is not made within the 14-day time period as prescribed by the Acts. Section 14 (3) of the 1981 act allows a Court to extend time on such terms as it may think just. Significantly, the Court even has discretion to extend the 3 year limitation period; the Supreme Court in *Cork County Council v Whillock [1993]* determined that a Circuit Court Judge had jurisdiction to grant an extension of time in respect of all time limits imposed by the 1981 Act.

It remains to be seen to what extent claims will be made under the Acts arising from the Dublin riots and the Courts’ approach to any such claims.

If you require further information or advice on this topic, please contact us.

CELEBRATING EXCELLENCE: HOLMES O’MALLEY SEXTON UL LAW SCHOLARSHIP 2024

At Holmes O’Malley Sexton LLP, we believe in investing in the future by supporting bright minds who demonstrate exceptional academic performance and potential. This year, we are thrilled to announce that the prestigious Holmes O’Malley Sexton UL Law Scholarship has been awarded to Brian Daly, an outstanding student from Kilmallock, County Limerick.

This is not the first time Brian has been recognised for his academic excellence. In 2021, he received the same scholarship during his first year of college, and his continued commitment to his studies has once again earned him this distinguished accolade. Reflecting on this achievement, Brian expressed his gratitude:

“I’m delighted to have achieved the results to merit the honour of this scholarship. This financial support is really encouraging as I continue my studies and I’m very grateful to Holmes O’Malley Sexton LLP for the recognition.”
— Brian Daly, Recipient of Holmes Law Scholarship



DONAL CREATON, ANNA OWENS, BRIAN DALY, PROF. LUCY-ANN BUCKLEY AND HARRY FEHILY

MAKING POSITIVE IMPACTS

CORPORATE RESPONSIBILITY

THE GLOSS GALA FUNDS NIGHT NOVEMBER 2023

Holmes was delighted to attend the Gloss Gala annual event at the RDS on 15 November 2023.

This event is billed as the most glamorous event for professional women, and it was a truly memorable and enjoyable evening. Thanks to the Gloss Team for organising such a great event!

The theme of the event, In Women We Trust, derived from the runaway success of THE GLOSS x Goodbody Investment Club, a female-focused community created during the pandemic to promote financial feminism and the power of connection.



Moore Morning River Run 2024

Moore Limerick hosted their first Moore Morning River Run from St Michaels Rowing Club Limerick Thursday 1st February. This is a 5km route that people can run, jog or walk in aid of Limerick Suicide Watch and is followed by coffee, tea and pastries in the clubhouse where attendees can socialise and have a chat. Holmes were delighted to take part. There was a fantastic turnout and a great catch up after the Christmas and new year!



Novas Christmas Gift Appeal 2023

"NOVAS received thousands of toys, monetary donations and vouchers and ensured that Santa reached all the children and young people we work with. The families were blown away by your generosity and Christmas morning was very special for all. Thank you for bringing the magic of Christmas to so many families".

Holmes were delighted to support the Novas Christmas Gift Appeal again, spreading a little Christmas cheer. Thanks to the entire team at Holmes Law and a special thank you to Legal Secretary Emma Brewer, who organises our support each year.



UL BOHEMIAN WOMEN'S TEAM ON THEIR ENERGIA ALL IRELAND CUP WIN

January also saw UL Bohemian Women's team take on Railway Union to win the Energia All Ireland Cup in a thrilling 34-12 game. We are proud to sponsor the women's team and wish them every success in the future.

"Congratulations to captain Chloe Pearse and the UL Bohemian Womens team on their Energia All Ireland Cup win over the weekend. Bohs produced a great second half performance to come from behind to win against Railway Union on a 34-12 scoreline."

WELL DONE TO ALL INVOLVED!



St Gabriel's Foundation Christmas Luncheon November 2023

Holmes were delighted to attend St. Gabriel's Foundation Lunch at the Savoy Hotel on 25 November 2023. Founded in 1961, St. Gabriel's Foundation is a not-for-profit organisation and registered charity that provides services to children with disabilities and their families through two Children's Disability Network Teams (Treehouse and South City), Hydrotherapy, Orthotics, and a purpose-built state of the art Children's Respite House in Mungret, County Limerick.

This lunch is an annual festive fundraiser and we are delighted to continue to support this very worthy cause. *Thank you to all our guests for attending and we hope that you had an enjoyable afternoon.*



CLIFFS OF MOHER CYCLE CHALLENGE APRIL 2024

You always wonder when you sign up (or are signed up by your friends!) for a sport such as the Cliffs of Moher 80km cycle whether you have done enough training.

The bad weather over the last lengthy period and from January to April 2024 put paid to a lot of training attempts. It was so wet you wouldn't put a dog out, let alone an unprofessional cyclist. Myself and my two friends' are classed as moderate cyclists and have done sportive 60km, 80km and 100km distances. Allowing for wind, uphill, etc. a 100km cycle means an average of five hours in the saddle for us which is just a bit too much – so we have decided.

Anyway, if you have to cycle 80km on a day, you should have trained up to 60km, but the bad weather conspired that I had just done a 40km cycle before this recent attempt and a number of lesser ones. Had I done enough? For those who know the route, the drag from Lahinch to Liscannor, to the Cliffs of Moher Visitor Centre and beyond, is a difficult climb. On the way back, down from Ballyvaughan through Corkscrew Hill is another serious climb requiring gritted teeth- but I made it up and the legs held, and I didn't have to dismount, a real sense of achievement from this. With cycling events such as this, elite cyclists creep up from the rear and whirr past, all svelte lycra and state of the art cycles. We gritted on nevertheless through pained

legs with thoughts of the finish. The final three hills into Ennistymon and the end certainly tested me, with the thought – will this ever end! Anyway, the weather for the day proved very good, the sun coming out after many months, the wind was modest and that helped a lot.

I cycled this event to raise some funds for Motor Neuron Disease Research and asked for some support from my colleagues here at Holmes and some close family members. As always, I was overwhelmed with the response and support from the team at Holmes. It is never easy to ask for money and I thank my colleagues for the support you gave and your valuable contribution.

If you ever get the chance to cycle this route, you will enjoy the scenic beauty of County Clare from the raised position of a bicycle saddle. There is lots to see and enjoy, when the cycle has concluded and you have survived relatively intact, the eateries and hostleries of Lahinch are there to be enjoyed and if I can say so – well deserved.

The funds raised have gone to and have been acknowledged by Motor Neuron Disease Research.



PROMOTIONS & NEW STARTERS

Holmes O'Malley Sexton LLP is delighted to congratulate Marguerite Seymour on her promotion to Of Counsel within our Commercial Litigation Unit.

Marguerite specialises in commercial litigation and dispute resolution. She joined the firm in 2019. She has significant experience advising clients on a wide range of commercial disputes and complex litigation, regularly representing clients in the Commercial Court. Marguerite deals with professional negligence defence litigation, advising in financial lines claims involving architects, engineers, solicitors and insurance brokers. She has considerable experience assessing liability and quantum issues and advising insurers on coverage and indemnity matters particularly for regulated professions. Marguerite acts for international and domestic insurance companies, loss adjusters, financial institutions, investment organisations, SMEs, large corporate and private clients.



MARGUERITE SEYMOUR

Holmes would also like to congratulate **Jennifer Nolan** who has been appointed to the role of Business Development and Knowledge Management Executive. Jennifer joined the firm in 2017 in a support role in the Commercial Litigation Unit before moving to a Legal Executive three years later. In her recent appointment to Business Development and Knowledge Management within the firm, Jennifer will head up the Business Development Unit as it continues to grow and expand.

THE GLOSS, BEAUTY OF BEAUTY EVENT 2024

Trinny Woodall was special guest at an exclusive beauty and fashion masterclass in The Westbury, Dublin which was hosted by THE GLOSS on Tuesday, 16th April.

"One of the buzziest, most elegant soirees this season took place last night in the Grafton Suite at The Westbury, when more than 150 guests, including members of THE GLOSS Goodbody Investment Club, attended The Beauty of Beauty, a very special event with founder of Trinny London, Trinny Woodall"

"Thank you to all our clients who attended The Beauty of Beauty event with us last week, organised by THE GLOSS MAGAZINE in the Grafton Suite at The Westbury Hotel. We had a fantastic time at this very special evening which was hosted by Trinny London founder, Trinny Woodall"



SANDRA EGAN, ANNA OWENS AND LISA KILLEEN ATTENDING THE GLOSS BEAUTY OF BEAUTY EVENT

International Women's Day 2024

Thanks to all of our colleagues for helping us celebrate International Women's Day 2024. We recognise the importance of a diverse and inclusive society and the benefits to all.



COMMERCIAL LITIGATION AND DISPUTE RESOLUTION

New Scheme to Remediate Defects in Apartments and Duplexes

WHAT'S NEW

On 18 January 2023, the Government announced its approval to draft legislation to support the remediation of apartments and duplexes with fire safety, structural safety and water ingress defects constructed between 1991 and 2013.



Marguerite Seymour, Of Counsel

The legislation will provide a statutory basis for the establishment of a remediation scheme aimed at protecting the safety and welfare of those living in apartments or duplexes with such defects that occurred during construction.

Why? The scale of defects in properties built during the Celtic Tiger years is significant. It has been estimated that as many as 50% to 80% of apartments and duplexes constructed in Ireland between 1991 and 2013 may be affected by these defects. This means that up to 100,000 apartments or duplexes could be affected by these defects and would be in need of repair.

WHAT DEFECTS ARE INTENDED TO BE COVERED BY THE SCHEME?

- The scheme is intended to cover works to remediate fire safety, structural safety or water ingress defects in apartments and duplexes that were constructed between 1991 and 2013.
- Only defects that are attributable to defective design, defective or faulty workmanship, defective materials (or any combination of these) and were in contravention of the relevant Parts of the Building Regulations applicable at the time of construction will be eligible for inclusion in the scheme.
- Any defects that originate from inadequate maintenance, poor management etc will not be included within the scope of the scheme.

HOW WILL THE SCHEME WORK?

- It is envisaged that the Housing Agency (which is the government body that works in the delivery of housing and housing services and also implements the Pyrite Remediation Scheme) will play a central role in administering the scheme and that Owners' Management Companies will be funded to carry out the necessary remediation works, with specific limitations or exemptions on certain commercial owners.
- It is intended that a whole building approach will be taken under the scheme ensuring common areas and shared spaces are also remediated where required to the relevant standard.
- For homeowners who have already undertaken remediation works, the Government has approved the principle of allowing remediation costs already incurred or levied to be covered under the legacy defects scheme, within the scope and defined parameters of said scheme.

INTERIM SCHEME TO FIX FIRE SAFETY ISSUES:

Whilst the Government is preparing legislation to bring the main scheme into effect, an Interim Remediation Scheme has been launched in the meantime. This scheme provides funding for work to repair emergency fire safety issues in apartments and duplexes built between 1991 and 2013.

The purpose of this interim scheme is to ensure that there is an acceptable standard of fire safety in buildings pending full remedial works under the main scheme. This Scheme is administered by the Housing Agency on a nationwide basis and Owners' Management Companies may apply to the Housing Agency for funding.

RECENT UPDATE:

Defective Building Materials Dáil Éireann Debate on 15 February 2024:

- 79 applications had been received since the opening of applications for the interim remediation scheme representing approximately 7,500 residential units.
- It is expected that the draft legislation for the main remediation scheme will be published in the coming months.

WAIT AND SEE!

The scope and eligibility criteria and conditions of the remediation scheme will ultimately depend on the legislation enacted. It remains to be seen whether the proposed scheme will go far enough to provide the owners of affected properties with sufficient assistance to remediate their properties in a timely and effective manner.

If you require further information or advice on this topic, please contact us.

BANKING & FINANCE

Borrower Insolvency: The Implications for Lenders

IN BRIEF

With an increase of more than 45% in the number of recorded corporate insolvencies in Ireland in Q1 2024 when compared to the previous year, it is estimated that there will be in the region of 800 insolvencies in Ireland in 2024. We examine the key factors lenders need to consider when encountering insolvent corporate borrowers.

Corporate insolvency occurs when a company is unable to meet its financial obligations as they fall due or when a company's liabilities exceed its assets. Under a typical corporate loan agreement, the insolvency of a borrower (or another company in the borrower's group) is a standard event of default.

Borrower insolvency poses financial, operational and legal challenges for lenders. It requires lenders to take appropriate action to protect their interests, enforce their rights and manage the impact of the situation efficiently. Throughout the term of a loan agreement, strong monitoring systems overseeing borrowers' financial performances will assist lenders in early detection of potential default indicators.

On an event of default in commercial lending, a lender can typically terminate its commitment, cancel any part of the facility not already drawn and/or call for immediate repayment of the facility, together with all accrued interest and other sums owing under the loan agreement.

POTENTIAL IMPACTS OF AN EVENT OF DEFAULT ON LENDERS:

- 1. FINANCIAL LOSS:**
Lenders may incur financial loss which can include the outstanding principal amount due, accrued interest, and any other fees associated with the loan.
- 2. RECOVERY COSTS:**
Lenders may incur costs related to recovering the outstanding debt. These costs may include legal fees and other expenses associated with pursuing repayment. Whilst loan agreements typically require the borrower to bear these costs it may be the case that the costs are not recoverable.
- 3. TIME AND RESOURCES:**
Handling a defaulting borrower may be time consuming and likely to involve additional resourcing needs for lenders to manage the default process efficiently.

ENFORCEMENT OF SECURITY:

Lenders have an immediate right to enforce their security in the event of default by the borrower, unless otherwise provided for under the terms of the loan agreement. The below sets out our recommended steps to be taken by lenders to enforce its security and ultimately recover the debt owing:

- 1. REVIEW OF SECURITY:**
A detailed review of the loan agreement, the security documents and the corporate authorisations must be undertaken to ensure correct execution, confirm the perfection of security and priority of registration, establish the enforcement mechanisms and the powers of a receiver, and to ascertain details of the secured assets. A review will identify whether any of the security taken is limited recourse or whether any intercreditor agreements are in place. A review will ensure that any issues identified are remedied prior to the lender enforcing its security. A full review of title should also be carried out where property has been taken as security.
- 2. DEMAND:**
A lender should issue a demand letter to the borrower detailing the event of default and the amounts repayable under the loan agreement. A letter must also be issued to any guarantors where guarantees has been provided in favour of the lender for the obligations of the borrower.



Lisa Killeen,
Partner

It is crucial that any demand letter or notices are served in the correct manner as set out in the relevant security documents.

3. ENFORCEMENT:

Enforcement options available to lenders are dependent on both the provisions of the relevant security documents and legislation. The appointment of a receiver over the secured assets is the most common method of enforcement. A review of the security documents will clarify the scope of the receivers' powers over the secured assets and their rights to dispose of such assets. Strict compliance with the terms of the security documents should be observed when appointing a receiver. Deeds of appointment must be drafted and executed in accordance with the said terms to ensure that a borrower cannot apply to High Court to have the receiver's appointment deemed invalid.

By monitoring the financial health of a borrower and by closely observing relevant external market factors, lenders will be better positioned in detecting early signs of distress and dealing with the borrower efficiently to ensure optimum recovery of any debt owing under the loan agreement.

Corporate insolvency occurs when a company is unable to meet its financial obligations as they fall due or when a company's liabilities exceed its assets.

PNLA CONFERENCE 2024

The Professional Negligence Lawyers Association seminar hosted by Holmes was held on 6th June 2024 in Dublin.

There were some great presentations by Mark Connaughton, James Burke, Andrew Butler KC, Donal Friel, Daragh O' Sullivan, Denis Herlihy, Kieran McHugh ACII and Helen Kilroy.

Great to catch up with everyone and a massive thanks to all the speakers who were excellent!



EDWARD AZCEL, MICHAEL MURPHY, MARK HEALY, MARGUERITE SEYMOUR, KATY MANLEY, EDWARD KELLY AND HARRY FEHILY



MICHAEL CONNAUGHTON SC, AREAS OF PRACTICE: COMMERCIAL/CHANCERY GENERAL COMMON LAW GENERAL PRACTICE



INSURANCE LITIGATION AND DISPUTE RESOLUTION

Navigating the Depths: An Exploration of the Laws and Guidelines for Ireland's Swimming Pool Operators

IN BRIEF

There have been a number of tragic high profile drowning incidents at Leisure Centres in Ireland in recent years. When such tragic events occur, the Health and Safety Authority (“HSA”) carry out in-depth investigations of the Health and Safety protocols of the swimming pool operators (“SPOs”). In some instances, criminal prosecutions are considered.

Mark Healy and Jack Wardick examine the legal obligations of SPOs in Ireland and the recommended guidelines they should follow.

Notably, while current Health and Safety Legislation imposes certain statutory obligations on SPOs, there is no specific statutory requirement in Ireland to have a lifeguard stationed at the poolside dedicated solely to watching swimming pool users. There are several guideline documents that SPOs must consider, but these are just that – guidelines—and do not have statutory standing. Consequently, there is a lacuna in the law on the issue of pool supervision that creates a somewhat confusing and uncertain legal landscape for Irish SPOs.

WHAT ARE THE STATUTORY OBLIGATIONS?—SAFETY HEALTH & WELFARE AT WORK ACT 2005

The Safety Health & Welfare at Work Act 2005 (“The 2005 Act”) is the sole piece of legislation that imposes statutory obligations on SPOs in Ireland. This legislation is not specific to water safety; it addresses the general statutory health and safety obligations on workplace operators for both employees and non-employees. Section 12 of the 2005 Act states that:

“Every employer shall manage and conduct his or her undertaking in such a way as to ensure, so far as is reasonably practical, that in the course of the work being carried out, individuals at the place of work (not being his or her employees) are not exposed to risks to their safety, health or welfare”.

The 2005 Act therefore imposes a legal obligation on SPOs to ensure that pool users can do so in a safe manner, and where risk is minimized as much as possible. This should include an assessment on whether dedicated poolside lifeguards are required.

SPOs are obliged to complete a safety statement, and each aspect of the operation of the swimming pool must be appropriately risk assessed. The completion of regular risk assessments is a continuing obligation under the 2005 Act and risks must be reviewed and amended as necessary on a periodic basis. Staff must be appropriately trained, and their training must be kept up to date.

SPOs are obliged to complete a safety statement, and each aspect of the operation of the swimming pool must be appropriately risk assessed.

WHAT GUIDELINES EXIST?

1. INTERNATIONAL LIFE SAVING FEDERATION OF EUROPE POOL SAFETY GUIDELINES 2017 (ILSE)

These guidelines provide that a swimming pool should be managed by at least one lifeguard. The ILSE guidelines set out the minimum recommended numbers of lifeguards per pool area. The ILSE recommend that the recommended numbers of lifeguards must be considered in tandem with the results from the operator's risk assessment. The guidelines further state that if continuous supervision is not in place, the reason for this must be justified with support from the risk assessment. Swimming pool users must be clearly advised where to find pool lifeguards, and how to raise the alarm in the event of an emergency, if no continuous supervision is in place.

2. WATER SAFETY IRELAND GUIDELINES 2021 (WSIG)

These guidelines, published by Water Safety Ireland, outline the minimum requirements that SPOs require in order to ensure that appropriate measures are in place to maintain safety. SPOs are encouraged to adopt the guidelines and it is recommended that they are implemented. Significantly, WSIG recommend that at least one qualified lifeguard should be on duty at all times at poolside, regardless of the activity taking place, but concede that specific recommendations cannot be made regarding specific lifeguard numbers due to the wide variety of facilities and the many ways in which swimming pools are used.

3. POOL SAFETY OPERATING PROCEDURES (PSOP)

The Pool Safety Operating Procedures are guidance documents issued by Royal Life Saving Society UK and which commonly form part of a pool operator's safety statement. The PSOP is comprised of a Normal Operating plan (NOP) and an Emergency Action Plan (EAP). The NOP sets out how the pool operates on a daily basis, which would include the duties of lifeguards, and general supervision of the pool area. The EAP provides specific instructions on actions to be taken by all staff, in the event of an emergency.

It remains the case throughout Ireland that many SPOs consider that they do not require a lifeguard to be present at poolside and that general availability of suitably qualified staff in the vicinity of the pool is sufficient.

CONCLUSION

It is a matter for each individual SPO to consider how swimming pool risk is managed and how the recommended guidelines are implemented. SPOs should ensure that their safety statements and risk assessments incorporate the recommended guidelines and more importantly, that they are implemented, to minimize risk to the swimming pool users. It remains the case throughout Ireland that many SPOs consider that they do not require a lifeguard to be present at poolside and that general availability of suitably qualified staff in the vicinity of the pool is sufficient. However, in the aftermath of a tragic event, such an approach will be closely examined and investigated, and SPOs may run the risk of prosecution by the HSA.



MARK HEALY, SENIOR ASSOCIATE

COMMERCIAL PROPERTY

To Forfeit or not to Forfeit? – *That is the question.*



Isabel Treacy,
Senior Associate

IN BRIEF

Commercial landlords faced impossible situations during the Covid 19 pandemic. Tenants could not pay rent and losing the tenant was not an option. There was nobody to step into the breach.

Commercial tenants now face inflationary pressure with rising costs, as well as warehoused Revenue debt. This pressure is acute in the hospitality sector which saw an increase of 142% in insolvencies in Q1 2024, compared to Q1 2023.

Service of a forfeiture notice for non-payment of rent is common with landlords. However, the courts regard forfeiture as draconian, unless proper procedure is followed. It is a powerful tool, potentially allowing a landlord to terminate the lease and to reclaim possession of the property. Therefore, understanding how the forfeiture process works is critical for landlords.

The process requires a meticulous approach. Landlords should be careful that they do not waive their right to forfeiture by making a fundamental error in the process. Landlords can inadvertently waive their right to forfeiture by acknowledging the tenant's continuation post breach, e.g. by accepting a rental payment.

If a landlord serves a forfeiture notice arising out of the tenant's breach of covenant, and the breach is not

remedied within the specified time, the landlord may re-enter the premises and re-take possession peaceably. Proving peaceable re-entry and repossession is a high bar to reach. The courts lean against re-entry by a landlord on foot of a forfeiture notice. Extreme caution is necessary as the tenant has a right to both statutory and equitable reliefs against forfeiture.

If the landlord is not successful in re-entering the premises or if the re-entry cannot take place peaceably, the landlord must issue an Ejectment Civil Bill on Title, based on forfeiture and seeking an Order of possession. At this point the landlord will experience the greatest frustration. Rent continues to be unpaid. Bills on the premises are mounting. The tenant is trading and paying nothing.

The complexity of forfeiture, coupled with the length of time it can take to obtain an order for possession means that landlords are going to be at a financial loss in the process. Furthermore, if a tenant has traded into a loss, the prospect of recovering arrears of rent and legal costs is slim.

Therefore, landlords must become creative in their thinking to better protect their asset.

Creative drafting includes break option clauses, to be exercised by the landlord on breach of the tenant's covenants. That is not to say a tenant cannot, in these circumstances, resist and still seek to rely on forfeiture as an equitable remedy. The tenant can be required to pay a substantial deposit, enabling the landlord to access it, on a rent default, coupled with a right to terminate once the deposit is accessed.

Landlords should seek advice from a commercial property solicitor when contemplating forfeiture as landlords can be exposed to claims for damages for trespass and economic loss if forfeiture is not properly exercised.

Holmes provide specialised advice to landlords contemplating forfeiture and dealing with breaches of covenants by tenants.

The information contained in Holmes News is for general information purposes only and does not constitute legal or other professional advice.

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