

---

# Contents

---

|  | <b>Page</b> |
|--|-------------|
| 1. Introduction                        | 3           |
| 2. Choosing a Business or Legal Entity | 4           |
| 3. Registrations                       | 6           |
| 4. Taxation                            | 10          |
| 5. Finance & Security                  | 14          |
| 6. Legal Agreements & Contracts        | 18          |
| 7. Premises                            | 21          |
| 8. Trading Laws                        | 24          |
| 9. Employees                           | 27          |
| 10. Other Legal Concepts               | 32          |
| 11. Further Information                | 35          |
| 12. General References                 | 37          |

---

---

# 1 Introduction

---

The purpose of this publication is to provide a general guide to the law as it applies to a small business. It must be emphasised that every business will have different legal obligations and requirements, regardless of the many similarities certain businesses may have. Because of the generality of this publication, it should not be relied upon exclusively – the law can be very specific and even the slightest variation in circumstance could change the legal position enormously.

All small businesses will need specific legal advice, if only to confirm that you are operating in compliance with the law. Employing a solicitor may seem an unnecessary expense for a business that is only beginning when you may seem to have an endless list of outgoings. However, without doubt, it will be money well spent, as it should prevent the occurrence of legal problems in the future. The alternative option may be difficulties that might require considerable legal services to resolve.

That being said, it is hoped that this publication will provide you with much-needed information on the various legal aspects of running a business. In

particular, it is hoped that reading this publication will:

- ◇ Give you an understanding of the law applying to small business.
- ◇ Supplement and give you a better understanding of the advices received from your professional advisors.
- ◇ Enable you to give clearer instruction to your professional advisors.
- ◇ Enable you to discuss and understand fully the legal implication of all transactions.
- ◇ Ensure that you maximise your use of professional advisors.
- ◇ Equip you with information on the law in general which will direct you to those areas of particular relevance to your business.

While every attempt has been made to ensure the accuracy of the information contained in this publication, neither the author nor the Enterprise Board can accept liability for any loss occurring as a result of reliance upon any of the information and, as stated above, both strongly advise the reader to obtain appropriate professional advice.

---

## 2 Choosing a Business or Legal Entity

---

Once you have decided that you have a viable business that you wish to develop, one of the first decisions that should be made is to decide on the legal body or vehicle through which you intend to carry on the business.

### Your Options

In this regard, there are the following options for small business:

- ◇ **Sole trader** – This is a person carrying on a business in his/her own name.
- ◇ **Partnership/Limited Partnership** – This is where two or more persons are carrying on a business in common with the intention of making a profit.
- ◇ **Limited Company** – This is where a group of persons with limited liability is formed for the purpose of the business to be carried on in the name of the group.
- ◇ **Co-operative** – These are associations, which tend to do business principally with their own members with the object of providing goods or services at minimal cost. While profit can be made by such an organisation (and distributed to the membership by way of dividend), it is not generally their main intention.

#### Forms of Limited Liability

There are 2 forms of limited liability, namely:

- Where the liability of members is limited to the amount, if any, unpaid in the shares respectively held by them, known as a company limited by shares, generally referred to as a limited company.
- Where the liability of members is limited to the amount, which the members undertake to contribute should the company be wound up, known as a company limited by guarantee. As the latter form is usually only used by non-profit concerns, you will see that the former is more appropriate for a profitable business venture

You will see from the above that if you intend to operate the business with a view to making a profit then your options are really either a sole trader, partnership or a company limited by shares.

Deciding on whether you operate as a sole trader or a partnership is easy, as the number of persons involved will readily determine it.

### Sole Trader or Limited Company?

The decision on whether you should incorporate or form a limited company is more difficult and should be very carefully considered before reaching a final decision. The following factors should be considered in the context of your particular business:

- ◇ **The type of business** – There are some professions, for example solicitors, which can only operate as sole traders or partnerships.
- ◇ **Customers** – The nature of your business may require you to operate as a sole trader/partnership in order to meet your customers' expectations, i.e., they may want to deal with you directly rather than through a company. Clearly the reverse can also apply.
- ◇ **Risks involved** – If your business is a high-risk venture you may want to limit your liability. A sole trader is liable to the extent of his business and private assets. Similarly, partners generally have unlimited liability with respect to debts incurred while being a member of the partnership. In contrast, the liability of a shareholder is limited to the amount, if any, unpaid on their shares. This is often considered the main advantage of incorporation as it limits the liability of the shareholders. .

- ◇ **Statutory restrictions and obligations** – Whichever entity you select, you will have to adhere to and abide by the appropriate statutory regulations. These have become particularly onerous for companies and can lead to increased risk and administration costs (to include such things as secretarial fees, auditor's fees, corporate governance, etc.).
- ◇ **Size of the business** – If it is anticipated that ownership of the business will increase in size, then a company may be the preferred vehicle as its structure easily facilitates widening of the ownership base, which in turn can permit third party investment, employee share option schemes or the possibility of raising Business Expansion Scheme finance.
- ◇ **Management** – Sole traders clearly manage the business themselves and partners are generally entitled to take part in the management of the partnership. In contrast, shareholders are not entitled to take part in the management of the company, unless they are directors. This would not be a problem for a small concern where usually all shareholders are directors but it is important to be aware that, if you are not a director, then you will not be involved in the running of the company.
- ◇ **Tax implications** – At present, personal tax rates greatly exceed corporation tax rates, making the latter appear more attractive. However, on

the negative side of this, the profits would be retained by the company and, therefore, to obtain the profits, the director would have to take a salary or a dividend, both of which would be subject to income tax. There might also be taxation costs on the incorporation of a company. For example, capital gains tax and stamp duty could arise on the transfer of assets to the company or if the business is already a going concern the individual could incur additional personal income tax costs under the rules for cessation of trade. The tax implications are complex and will differ in every case, so it is essential that professional advice is taken in all cases to ensure that you choose the most tax-effective vehicle for your business.

## Take Time To Think

Once you have considered your proposed business and all of these factors, it may immediately be clear which legal entity is most appropriate. More often, however, the business could suit several options and it will be a matter for you to decide on balance which is most suitable.

It is important to take time when making this decision as, while it is likely that you would be able to reverse your decision, to do so could be costly (from both an administrative and tax perspective) and leave your business in limbo for a time.

---

## 3 Registrations

---

Having decided on the legal entity most suited to your business, it must then be put in place.

The following is a general outline of the procedures involved in each case.

### Sole Trader

This is the one-person business run by the owner usually in his or her own name and with his or her own funds. It is possibly the most common business structure and examples of its use include farmers, shopkeepers, publicans and small manufacturers. There are few legal formalities affecting the sole trader as our law permits any individual to engage in business activity. If the business makes a profit, this profit (less tax) belongs to the sole trader and conversely, if the business flounders, then the debts and liabilities belong to the sole trader to the extent of his/her business and private assets. A sole trader can employ others but as long as he/she alone runs the business he/she remains a sole trader.

If, however, a sole trader decides to carry on his/her business using a name other than his/her own, he/she must register that name and certain other particulars in the Companies Registration Office by completing and filing a form RBNI together with the fee of €30.00. All correspondence, catalogues, etc., used in trading with the business name must also give the name of the owner, any former names and his/her nationality if not Irish. The Certificate of Registration of the business name must be displayed conspicuously in the place of business and any changes subsequently must be registered. Failure to comply with the Business Names Regulations can lead to the imposition of penalties. However, possibly more importantly, contracts entered into using the unregistered business name only may not be enforceable against another party. Similar provisions apply to partnerships, companies and newspaper publishers.

A sole trader will also be subject to any other restrictions or regulations that apply to his/her particular business. For example, a publican must comply with the licensing laws, a pharmacist must have the necessary qualifications, and licences or permits are needed for many activities, including bookmaking, moneylending, animal slaughter or storage of petrol.

A sole trader should also register with the tax office both for income tax and VAT (if it is anticipated that his/her annual income will exceed a certain amount set by the Revenue Commissioners (being €5,500 for services and €51,000 for goods for the year 2004). It is also advisable that a sole trader opens separate bank account(s) for the purposes of the business.

### Partnership/Limited Partnerships

The legal definition of a partnership is found in Section 1 of the Partnership Act, 1890, which describes it as “the relation, which subsists between persons carrying on business with a view of profit”. It is effectively an agreement by two or more people to go into business together with a view to making a profit. In this context, we must also mention a special type of partnership known as a “limited partnership”, which was introduced by the Limited Partnership Act, 1907. A noticeable feature of such partnerships is that they can have what are commonly known as “sleeping partners”, who have no power to bind the firm but contribute a specified amount in money or money’s worth and enjoy an immunity from liability beyond this amount. However, as such partnerships rarely arise in practice, it is not intended to go into any further detail here other than to say that such a partnership must be constituted in a particular way and must also be registered.

<sup>7</sup> Like a sole trader, there are no legal formalities for the formation of a partnership and all trades, occupations or professions can create one. A partnership can arise when the parties make an express agreement (for example, when they execute a partnership agreement), or by implication where their conduct indicates the existence of a partnership agreement. It is clearly strongly advisable that a written partnership agreement is put in place which specifies the rights and responsibilities of all partners. A schedule of the usual clauses in such an agreement is included in Chapter 6 of this publication and is a useful reference. In the absence of a written agreement, the provisions of the Partnership Act, 1890 are used as the basis for solving any difficulties which might subsequently arise.

It is important for partners to trust each other, as each partner can make the other liable for his/her acts. The process of negotiating and preparing a partnership agreement will ensure that there is an agreed process for dealing with contentious issues in the future and that all parties are clear on their position from the start.

Logically, the minimum number of persons who can form a partnership is two, while the maximum number for an ordinary business intending to profit is 20 (there are, however, exceptions for solicitors, accountants and bankers). As with a sole trader, if the business name does not represent the real names of the partners, then it will be necessary for registration of the business name in the Companies Registration Office (however, the appropriate form is RBNIA rather than RBNI as used by the sole trader) and the names of the partners must also be similarly disclosed on all correspondence or other paperwork issued by the partnership. The partnership should also notify the tax office and register for VAT (if it is anticipated that the annual income of the business will exceed a certain amount set by the Revenue Commissioners (being €25,500 for services and €51,000 for goods for the year 2004). In relation to taxation, each partner is taxed on the profits from his/her share of the partnership trade.

Finally, as per the sole trader, separate bank accounts should be opened for the partnership business and the business will also be subject to any statutory restrictions or regulations pertinent to the particular business.

## Limited Company

A limited company is similar to a partnership with one fundamental difference – an incorporated company is an entity distinct or separate from its members. As a separate legal body, the limited company can own property, issue legal proceedings and be sued, make contracts, etc, just like any other person. However, an incorporated company is a legal creation and, as such, its powers are also controlled and regulated by law. As the private company with limited liability is the most appropriate to most small businesses, it is the formation of such a company which will now be outlined. The normal method of incorporation is by registration under the Companies Acts. In order to register a private limited company, the following documents must be prepared and filed in the Companies Registration Office:

- ◇ Memorandum of Association, which outlines the purpose(s) of the company and its proposed activities. It also specifies the initial shareholders and how much they have subscribed.
- ◇ Articles of Association, which specifies the rules for governing internal procedures in the company and the rights of the shareholder.
- ◇ Form A1, which includes a statement of First Secretary and Directors and the situation of the registered office, a Declaration of Compliance and the Companies Capital Duty Statement.
- ◇ Bank draft for the registration fee (currently €60.00).

It is usual for businesses to instruct solicitors or accountants to deal with incorporation and for them to do so they will need the following information:

- ◇ Proposed company name.
- ◇ Registered office of the company.

- ❖ Particulars of Secretary (to include full name, former name, if any, and address).
- ❖ Particulars of Directors (as per Secretary, but also including date of birth, nationality, business occupation and other directorships).
- ❖ Draft objects clause, which describes the purpose(s) of the company and all activities, or works, which it intends to get involved in.

On receipt of this information, the solicitor/accountant will then arrange to have all the necessary documents executed and filed in the Companies Registration Office.

Once the application is accepted by the Companies Registration Office, a Certificate of Incorporation will be issued. The Certificate of Incorporation is an important document as it is conclusive proof of the company's existence – its production is likely to be required by banks prior to opening accounts in the name of the company and it will also be required to register property in the name of the company. The Certificate of Incorporation also specifies the company number, which will be needed in all future correspondence with the Companies Registration Office.

Once the Certificate of Incorporation issues and the first meeting of the board of directors is held, the company can begin to trade.

The company is also obliged to comply with any statutory restrictions or regulations pertinent to the particular business as mentioned previously in connection with sole traders and partnerships (although form RBNIB is the appropriate form for registration of any business names).

In relation to Corporation Tax, every company is obliged to supply specified information to the Revenue Commissioners within 30 days of commencement of trading. In practice, the Revenue Commissioners are notified by the Companies Registration Office of the company's registration and will then send out a form for completion and return in order for the company to register for Corporation Tax.

## Co-operative

As co-operatives are not usually the vehicle for profit-making enterprises, it is not intended to go into too much detail on their formation here.

Co-operatives, formally known as “a co-operative society” or “an industrial and provident society”, can be formed and registered by any group of 7 or more citizens over the age of 18 years. Co-operatives can be registered either as a company in the Companies Registration Office or as a society with the Registrar of Friendly Societies.

On registration, the Co-operative Society becomes a corporation with limited liability. A co-operative is therefore similar to a limited company – however, there is one main difference which relates to shareholding. In a company, there is no limit to the shareholding interest which a member may have in the company, whereas in a co-operative a member's shareholding is restricted by statute. This restriction tends to keep co-operatives democratic in nature and to attract members because the society will help meet practical needs rather than benefit the owners of capital.

## Registration of an Internet Domain Name

The Internet has become an essential part of most businesses and the idea of conducting all or at least part of your business through a website is an increasingly common phenomenon. Website design is a business in itself – however, all websites must have a distinct and unique domain name.

The domain name system helps users to find their way around the Internet. Every computer has a unique address and the goal of the domain name system is for any Internet user, any place in the world, to reach a specific website address by using the domain name.

If you intend to use the Internet in your business, you will first need to register your domain name. This can be done in several ways. Some businesses deal directly

with a selected domain name registry, while others use their Internet service provider to register the domain name on its behalf (making sure that the registration is effected in the name of the business and not that of the Internet service provider).

If you wish your domain name to be associated with a particular country, such as, for example, Ireland, it is necessary to go to the National Registry designated with responsibility for administering the domain in that region. In Ireland, this is the IE Domain Registry Ltd ([www.domainregistry.ie](http://www.domainregistry.ie)). Alternatively,

you can register generically in domains such as .com or .net and to do so you should contact the Internet Corporation for Assigned Names and Numbers (ICANN) for a list of accredited registrars who can be used for this purpose ([www.org/registrars/accredited-list.html](http://www.org/registrars/accredited-list.html)).

In relation to the choice of name, the basic principle of “first come, first served” applies. However, as the name will form an important part of the image of your business and its accessibility on the web, the various possibilities should be fully considered before making a final choice.

---

## 4 Taxation

---

All business must be compliant with the current tax regime. To ensure compliance, you must be aware of the provisions applicable to you and make arrangements to ensure you will be in a position to meet these requirements. This will involve clear planning in both an administrative and budgetary capacity from the beginning.

The following is a general outline of the various matters that might affect your business, however the advice of your professional financial advisor should be taken and followed from the start.

### Registration & Tax Number

As soon as you intend to start your own business, you should advise your local tax office. This is done by filing the appropriate registration form. The options are:

- ◇ Form STR – The registration form for an individual or sole trader whose anticipated turnover is less than €126,974 per annum.
- ◇ Form TRI – The registration form used by an individual or sole trader whose anticipated turnover exceeds €126,974 per annum. It is also used for registering a partnership.
- ◇ Form TR2 – The registration form used by a company.

All of the above forms can be used to register for Income/Corporation Tax, Employer's PAYE/PRSI and VAT.

Income Tax is payable at the following rates:

|                               | 20%       | 42%     |
|-------------------------------|-----------|---------|
| Single/Widowed                | €1-28,000 | Balance |
| Married couples – one income  | €1-37,000 | Balance |
| Married couples – two incomes | €1-56,000 | Balance |
| One-Parent Family             | €1-32,000 | Balance |

On registration, you will be given a new tax number if you were not previously registered. If you were previously registered, the same tax number will be used. This number is important, as it will be needed in filing all returns and correspondence with the tax office.

### Income Tax

Income Tax is payable by individuals on the annual profit or gains from your business, and any other income (for example, rental income) you might have. As a self-employed person, you are responsible for filing your own returns through the self-assessment system. The tax year begins on 1 January and ends on 31 December each year. If your annual accounts are not made up to the end of each calendar year, you will be taxed on the profits of your accounting year. Key dates in the payment of Income Tax are:

- ◇ Preliminary tax must be paid by 31 October each year.
- Your tax return must be filed after the end of the tax year but not later than the 31 October in the year following the tax year.
- ◇ Payments of the balance of tax due, if any, must be made by 31 October in the year following the end of the tax year, provided the requirements regarding the payment of preliminary tax have been met. Failure to file the return by the required date will result in the imposition of surcharges, which are calculated on the full tax payable for the year and do not take into account any payments on account. The surcharge is calculated as follows:
- ◇ 5% of the tax due, subject to a maximum of €12,695, where the return is filed within 2 months of the specified date.

- ◇ 10% of the tax due, subject to a maximum of €63,458, if the return is not filed within 2 months of the specified date

Note, however, that for new businesses the surcharge provisions apply from the second filing date only.

## Corporation Tax

Corporation Tax is payable by a company on its profits, which will include both income and capital gains. The self-assessment system also applies to companies, which means that the company is responsible for filing its own returns in respect of each accounting period. This return must be submitted to the Revenue Commissioners within 9 months of the end of the accounting period to which it relates.

If the return is not filed in time, surcharges will be imposed, as in the case of Income Tax. In addition, however, the company's use of allowances and reliefs will be restricted.

There are various Corporation Tax rates and the applicable rate is determined by the nature of the income. The rates range from 10% (payable on the trading profits of manufacturing companies and certain IFSC and Shannon Airport Zone companies) to 25% (payable on certain income, including that from certain land dealing activities and working mineral and petrol activities). The standard rate for trading income is currently being reduced on a phased basis from 20% to 12.5%.

A new regime for the payment of Corporation Tax is currently being phased in pursuant to the Finance Act, 2002. Under the new provisions, companies will pay their preliminary tax one month prior to the end of an accounting period. The Act also includes transitional provisions to facilitate compliance with the new provisions, which will apply from 1 January 2002 to 31 December 2005.

Once you have settled on your "accounting period", your accountant or financial advisor will advise on the key dates applicable to you.

## Employer's PAYE & PRSI

Once you employ a person and pay them either:

- ◇ €7.62 per week (€33 per month) or more to a person who has only one employment, or
- ◇ €1.27 per week (€5.71 per month) or more to a person who has several employments,

then you must register for PAYE and PRSI.

This is done when you are registering with the tax office (see above). Note that a company must register as an employer and operate PAYE/PRSI on the pay of directors even if there are no other employees.

Operation of the PAYE (Pay As You Earn) system is where the employer calculates the tax due on an employee's income and deducts it each time a payment of wages is being made.

The PRSI (Pay Related Social Insurance) is similar and is where the employer deducts the PRSI contribution due on an employee's income each time a payment of wages is made.

The total PAYE and PRSI deduction must be paid to the Collector General within 19 days from the end of the month in which the deductions were made. A form P30 should be filed (even if there is no PAYE/PRSI liability for a particular month). Alternatively, you can arrange to pay your PAYE/PRSI through the direct debit scheme and make an annual return on the form P35 at the end of the year.

To assist in the deduction of PAYE and PRSI, each employer is issued with a Certificate of Tax Credits and Standard Cut-off Point or Tax Deduction Card for each employee. The employer should then be able to deduct the correct amount of tax on each payday, which should meet the employee's liability for the year. At the end of each tax year (31 December), the employer must give each employee a form P60, which certifies details of each employee's pay, tax and PRSI contributions for the tax year. This should be done before 15 February in the subsequent tax year.

At the end of the tax year, the employer must also complete end of year P35 forms which will be sent to them by the Employers' P35 Unit. These must be completed and filed by 15 February also – penalties arise on late returns.

## VAT

VAT, which stands for “Value Added Tax”, is chargeable on the supply of goods and services within Ireland by any individual/partnership/company, etc., that supplies taxable goods and services, in excess of a specified limit, in the course or furtherance of business. It is also chargeable on the acquisition of goods by a VAT-registered person within the EU and goods imported into the State from outside the EU.

At present (2004), the specified limit per annum is €51,000 in respect of the supply of goods and €25,500 in respect of the supply of services. Therefore, if your annual turnover exceeds, or is likely to exceed, either of these limits you must register for VAT. Again, this should be done when you are registering with the tax office, as described above.

Once you are registered for VAT, it must be charged on your bills and you will be allowed credit against this liability for tax due on business purchases and other inputs as vouched by correctly prepared invoices. VAT is payable at several rates. The standard rate is 21%, which applies to all goods and services that are not exempt or liable at the zero or reduced rates. Your accountant or local tax office will advise on the VAT rate appropriate to your business.

**Exempted** goods and services include financial, medical and educational activities – for example, admission to sporting events and certain childcare services.

**Zero-rated** goods and services include exports, certain food and drink, oral medicine, certain books (including atlases) most clothes and footwear suitable for children under 11 years old.

**Reduced** rates of VAT, one of which is 13.5% and applies to certain fuels, hotel and holiday accommodation, buildings and construction services, some entertainment admissions, certain newspapers and periodicals, etc.

Once you are registered for VAT, a form VAT3 must be filed every 2 months together with any VAT due. This must be filed by the nineteenth day after the end of the 2-month period in question. Even if there is no VAT due, the return must be returned marked Nil. As with PAYE/PRSI, there is provision for making an annual return and payment of the VAT due by direct debit.

Finally, it should be noted that, even if you are not obliged to register for VAT (because your turnover does not exceed the specified limits), you can still choose to register for VAT, which can be beneficial in certain businesses.

## Records, Payments & Penalties

### *Records*

It is imperative for all businesses that proper records and books of account are kept. The nature of these records will clearly be determined by the type and size of the business – however, for all businesses, it is essential that they are accurate and as easily managed as possible. Your accountant or professional financial advisor will advise on the system best suited to your particular business, be it a manual or computerised system.

These records will be essential in determining your tax liability. They will also be needed if you wish to evaluate your business or consider expansion (most financial institutions will seek at least 3 years' accounts when considering an application for further borrowings). In addition, all companies will need proper books of account when preparing and filing their annual return in the Companies Registration Office.

The business books and records that you keep should vouch and confirm all of the information given in your tax return. These books and records will include Sales Books, Purchases Books, Cash Books, Cheque Payment Books, Invoices, Bank Statements and other supporting records, such as Diaries, Till Rolls, Cheque Stubs, and Receipts. You must then keep all of the books and records for at least 6 years.

## *Payment*

The Revenue Commissioners have several options for payment of tax in order to simplify the procedure and make it as convenient as possible for all taxpayers.

These options include:

- ◇ **Direct Debit** – Where you authorise an agreed monthly payment for credit to your tax account. This can be an effective way of budgeting for payment of the preliminary tax due (rather than paying by one lump sum).
- ◇ **Post** – Where you send payment in the pre-paid envelope enclosed with the tax form.
- ◇ **Personal Attendance** – Where you call to the Collector General's offices at Dublin or Limerick.
- ◇ **Bank Giro Payment** – Where you send payment by credit transfer through the bank (in this case, 5 working days should be allowed for payment to reach the Collector General and be credited to your tax account).

## *Penalties*

As indicated above, if the appropriate Income Tax and Corporation Tax returns are not filed by their due dates, surcharges will be imposed.

However, if the tax due is not paid by its due date, the following penalties will arise:

- ◇ **Income Tax** – Interest is payable at the rate of 0.0322% per day or part thereof on all late payments from 1 September 2002 onwards.
- ◇ **Corporation Tax** – Interest is chargeable at the rate of 1% per month on the balance of tax due.
- ◇ **PAYE/PRSI** – Interest is payable on the unpaid tax and PRSI at a rate of 1% per month from the date on which it should have been paid.
- ◇ **VAT** – The rate of interest on overdue tax is 0.0322% per day, or part of a day, since 1 September 2002. In addition, interest at the rate of 0.0322% per day, or part of a day, will be charged where VAT deductibility is over-claimed.

---

## 5 Finance & Security

---

Money is needed to set up a business, whether it is for equipment, premises, working capital or an income while the business is being established. It is vital to ensure that adequate funds are available from the start, as insufficient funds will adversely affect the running of any business and may lead to the demise of what could have been a viable venture, if properly financed.

Money can be lent and credit may be given in a variety of different ways and subject to a range of terms. For example, a specified sum may be lent for a fixed term at a stated rate of interest with the entire sum being payable on a fixed date or by instalments. Alternatively, a creditor might allow a borrower to draw varying sums on a current account up to a stated limit, as on a bank overdraft. Some credit is for a specific purpose – for example, where the supplier of goods allows his customers to pay for them by instalments or where a bank lends money to a developer in return for a mortgage on the lands. In other cases, there may be no definite arrangement as to how the money is to be used, such as where a company issues debentures to the public. Increasingly, the lender will require some form of security and the following is a general outline of some of the possibilities.

### Goods As Security

When a customer requires goods, they often also need credit and there are various options. If the seller allows payment to be deferred or made by instalments and makes no provision for when ownership is to pass, the contract is a credit sale.

Ownership passes to the buyer once they are in possession of the goods and, if the buyer defaults on the payments due, the seller can only pursue the buyer for the amount outstanding and cannot repossess the goods.

If a seller wishes to have the option of recovery of the goods and thereby give himself/herself security for payment,

he/she can do so by stipulating that ownership is not to pass to the buyer until certain conditions are fulfilled (usually full payment). This is known as a “reservation of the title” clause and means that the seller can recover the goods until the conditions are met.

Alternatively, the supplier may allow the customer to possess and use the goods in return for a rental payment, with an option for the customer to buy the goods after a specified number of payments have been made. This is known as a Hire Purchase agreement.

A Hire Purchase agreement can be made between a supplier and a customer – however, quite often, a supplier will prefer payment immediately and will have arrangements for a finance company to provide the credit. In such a triangular situation, the customer negotiates with the supplier and, if the customer requires credit, the supplier requires him/her to complete an application form for the finance company. If the finance company is satisfied with the creditworthiness of the customer, it then buys the goods from the supplier and leases them on Hire Purchase to the customer (the Hire Purchase price being higher than the cash price, the difference being the profit for the finance company). The customer obtains the goods direct from the supplier and the finance company rarely sees them.

If someone who already owns goods wishes to use them as security, there are two options:

- ◇ He/she can transfer ownership to the creditor but retain possession, with the creditor undertaking to re-transfer ownership on repayment of the money secured. In practice, this form of credit will be in writing and is known as a bill of sale. Every bill of sale must be acknowledged and registered within 7 days of execution.
- ◇ The borrower can transfer possession of the goods to the lender while retaining ownership, the reverse of a bill of sale

situation. This is known as a pawn or pledge. The goods can be redeemed on repayment or, on default, can be sold by the creditor. The use of bills of sale or pawns/pledges is now almost obsolete.

Goods can also be subject to a lien, which is a right to hold the property of another as security for the performance of an obligation, and in this case is the right of a creditor to retain possession until a debt has been discharged.

Examples include retention of a car by a garage until the cost of the repairs has been paid, or a dry cleaners retaining a customer's clothes until the bill is paid.

## Personal/Business Loans

Most banks and financial institutions provide personal/business loans for the acquisition of goods.

Once the creditor has been satisfied in relation to the borrower's creditworthiness and security, the money is provided to the borrower/customer, who then purchases the goods in a separate transaction.

The agreement normally includes a repayment schedule, with the entire debt becoming due if there is default on any one payment.

Usually, the provision of credit by way of personal or business loans will include a requirement that the borrower provide security for the repayment of the debt.

For instance, the bank could require the borrower to furnish a bill of exchange, which, if there is default, can be negotiated and used as a convenient method of pursuing the borrower for the amount due.

More often, the lending institution will require additional security such as a right against property, a personal right of action against or an indemnity from another person in addition to the borrower, or the assignment to the lender of a life policy.

## Guarantee As Security

Another method of providing security for borrowings is for the lender to require the borrower to include a third party who will become liable for the debt if the borrower fails to pay – this third party will be required to execute a guarantee.

A guarantee is where a person called either the "guarantor" or the "surety" gives a collateral promise to answer for the debt, default or miscarriage of another – in a debt situation, the guarantor undertakes to pay the debt if the original borrower fails to do so.

As with the original borrower, before accepting a person as guarantor, a lending institution will need to satisfy itself as to their creditworthiness and security. The contract of guarantee must be in writing or be evidenced in writing. Once in place, it will not be activated if the borrower adheres to the agreed repayment schedule. If, however, the borrower defaults, the lending institution can call in the guarantee and the guarantor becomes liable.

In order to minimise his/her obligations, the guarantor should, where possible, ensure that the amount covered by the guarantee is clearly stated (including the possible costs and interest) and that it is for a limited time period only.

It should also be noted that, if a guarantor discharges a debt when required by the lender to do so, he is entitled to pursue the borrower for the amount paid or, if there was more than one guarantor, to pursue his fellow guarantors.

## Land As Security

The most popular way of using land and buildings as security is by creating what is known as a "mortgage". A mortgage is the transfer of an interest in land or other property to the lender as security for a loan. The borrower agrees to make periodic payments to the lender in respect of the loan and interest and, provided these payments are maintained, is allowed to remain in possession of the property.

---

The amount of finance that can be raised by a mortgage of property is directly related to the value of the property – however, the lender will be equally concerned to ensure that the borrower has the ability to repay.

There are two forms of mortgage which can be used to secure loans namely:

- ◇ **A legal mortgage**, where the borrower transfers the legal estate in the property to the lender. To do this, mortgage deeds are executed, stamped and registered in the appropriate registry (Land Registry or Registry of Deeds). The costs involved will include stamp duty (mortgages up to the value of €254,000 are exempt, thereafter stamp duty is payable at the rate of 0.1% up to the maximum payable of €630) and registration fees (€125 in the Land Registry and €44 in the Registry of Deeds). There will also usually be legal fees, as the lender will require either their own legal department or the borrower's solicitor to investigate the title and certify it to be in order, with the borrower usually being responsible for the respective legal fees.
- ◇ **An equitable mortgage**, where, in return for a loan, the landowner agrees to deposit the title deeds to the property with the lender. Without the title deeds, the owner will find it virtually impossible to sell or mortgage the property to another party. This is also known as an equitable deposit of title deeds. This form of mortgage is less formal and cheaper as no legal fees or outlay arise – however, lenders are becoming increasingly less likely to accept this form of security as it can take longer and be more expensive to enforce.

Most people will already be familiar with the legal mortgage, as this is the standard method of raising the necessary finance to purchase a house. Similar procedures apply when mortgaging a business property, as described above.

In addition, it is not uncommon for people to take out a second mortgage on a property to fund either a new venture or the expansion of an existing business. The lender will apply similar criteria as in the first mortgage when assessing such an application – the borrower's ability to

repay and confirmation (by way of professional valuation) that the value of the property exceeds the total borrowings.

However, either a mortgage or extension of a mortgage on a family home to fund a business venture, however positive its prospects, should be approached with extreme caution and is generally inadvisable for the simple reason that, if the business gets into difficulties, then the family home is also jeopardised.

There is also legislative protection for a non-owning spouse, in that the Family Home Protection Act, 1976 provides that there can be no disposal, including a mortgage both legal and equitable, of a family home without first obtaining the prior consent in writing of the non-owning spouse.

## Companies & Finance

As with sole traders and partnerships, a limited company also requires funds to set it up in business. A company has 2 main ways of raising capital.

First, in companies with a share capital, money can be raised by issuing shares in the company. A shareholder must pay the company for each share allotted to him/her and the shares that have been paid for are known as the "issued capital". The Memorandum of Association of the company will specify the company's "nominal capital", which is the face value of the total number of shares which the company has authorised itself to issue. This does not mean that the company has issued all of these shares, but means they can do so and, by so doing, raise finance.

The second way a company can raise funds is by borrowing – however, a company's capacity to borrow is determined by the objects clause in its Memorandum of Association. In the absence of an express power, a trading company is assumed to have an implied power to borrow for a purpose incidental to that trade. There are also usually limits or restrictions on the amount the directors can borrow without the prior sanction of a General Meeting. As in the previous section on personal and business loans, loans to a company can be

secured or unsecured and, similarly, lenders will generally insist on security for a loan of any size. Usually, the company will issue a “debenture”, which is a deed issued by the company as evidence of a debt or security for a loan and, where a company intends to use debentures, an express power to do so is usually included in the Memorandum of Association. It is important to note that a debenture holder is not a member of a company but merely a creditor.

The company has generally 2 options in furnishing security, either a **fixed charge**, where the loan is charged on a specific asset of the company, or a **floating charge**, where the loan is charged on such property as the company has from time to time.

As a fixed charge can tie up an asset (in that it cannot be dealt with without the consent of the debenture holder), the latter is usually the preferred option. Where a floating charge is in place, the company can change assets, which will still be covered by the charge, without executing further documentation. In addition, assets can be charged which would not be acceptable or suitable for a fixed charge – for example, debtors and stock.

A floating charge becomes a fixed charge (this is called “crystallisation”) when the company is wound up, a receiver is appointed or a lender intervenes when entitled to do so (for example, when the company has defaulted on loan repayments). Until then, the charge remains dormant or “floats” over the assets.

Once a charge has been put in place, particulars of it must be registered in the Companies Registration Office within 21 days, otherwise it will be void as against the liquidator and any creditor of the company. Normally this is done by the lender or, if not, they will seek confirmation from your solicitor that they will see to it. Similarly, once a charge has been discharged you should ensure that an entry of satisfaction is recorded in the Companies Registration Office.

Finally, if the company defaults on the loan, the debenture holder can appoint a receiver (if allowed by the terms of the debenture) to take over the management of the company, to bring an action for the sale of the asset or assets charged or, in some circumstances, to apply to have the company wound up.

---

## 6 Legal Agreements & Contracts

---

In this section, we look at how a binding contract is made and consider those types of contract that frequently arise in the course of a business.

In simple terms, a contract is an agreement which the law will recognise or enforce. However, in order for an agreement to be a contract, over time the law has laid down that certain essential elements must attach to it.

### Essential Elements

In summary, the criteria for establishing the existence of a contract are:

- ◇ Offer.
- ◇ Acceptance.
- ◇ Consideration.
- ◇ Capacity.
- ◇ Legality.
- ◇ Legal intent.
- ◇ Format.

### Offer

A contract must begin with an offer. It can be made to one person or several but it must be communicated.

It is very important to distinguish an “offer” from an “invitation to treat”, as the former can be accepted whereas the latter cannot.

Examples of “invitations to treat” are goods in a shop window or on display, in response to which customers can make an offer.

### Acceptance

Acceptance of an offer must be absolute and unqualified.

If it is not, then the original offer is rejected and can only be reinstated if made afresh.

### Consideration

This requirement means that each party must give something, or do something, for the other. It must be two-way and must be of value.

In business transactions, the consideration from one of the parties is usually money in return for either goods or services.

### Capacity

Both parties to the agreement must have the legal entitlement to do so, that is, the law makes sure that certain persons who might be disadvantaged by their age or mental condition are not necessarily bound by contracts into which they enter.

### Legality

The agreement must be legal – for example, an agreement to commit a crime will not be recognised.

### Legal intent

A binding contract will come about only if the parties intend there to be a binding relationship between them. This is normally presumed in commercial transactions.

### Format

Many contracts need not be in writing – however, there are some contracts which will not be recognised unless they are in the correct form – for example, a Hire Purchase agreement must be in writing.

Once an agreement contains all of the 7 elements listed above, it will be legally binding. However, you should also note the following 3 matters which, if present, are likely to invalidate the contract:

- ◇ **Mistake** – This can operate to nullify consent, but this concept of mistake does not include where one party has an error of judgement, or underestimates his or her own ability to

perform under a contract, or has a general misunderstanding of the law.

- ◇ **Misrepresentation** – Where one party to the agreement makes a statement of fact which is untrue.
- ◇ **Duress** – Where one party to the contract claims he/she was forced into entering into the contract or changing a term in it.

As you can imagine, most commercial transactions will give rise to the existence of a contract – and it is important to remember that many contracts are oral and do not need to be in writing.

However, regardless of whether the contract is oral or written, it is essential that you are on notice of all of the terms of a contract. Where the entire contract is written, this merely involves a careful perusal of the document – however, in all other cases, the contract will comprise both express terms (those on which the parties have specifically agreed) and implied terms (those which will be imputed, even though the parties have not specifically agreed to their inclusion or even considered them). Express terms should be obvious – however, you should also put yourself on notice of implied terms. Implied terms can be implied through the operation of statute (for example the Sale of Goods and Supply of Services Act, 1980) or to give the contract business efficacy.

## Types of Contract

You will now appreciate that you will be a party to many contracts in the course of your business. The following is a short outline of the various forms of contract that most commonly arise in business.

### *Contract for the sale of goods*

This is a contract where the seller transfers, or agrees to transfer, ownership in the goods to the buyer for a money consideration called the price. It may be in writing, or partly written and oral, or implied from the conduct of the parties. As mentioned earlier, some of these contracts must be in writing to be valid – for example, a contract for the sale of an interest in land.

### *Hire Purchase agreement*

A further contract, which is a development of a contract for the sale of goods, is a Hire Purchase agreement. Such an agreement is subject to particular statutory requirements:

- ◇ It must be in writing.
- ◇ It must specify the cash price and the Hire Purchase price, the amount of each instalment and the date payable.
- ◇ It must include a statutory notice on the rights of the hirer to terminate the agreement and on the restrictions on the owner's right to recover the goods (Consumer Credit Act, 1995).
- ◇ A copy of the agreement must be furnished to the hirer and the agreement must provide for a "cooling-off" period.

Further implied conditions and limitations are also specified by statute.

### *Contract for services*

A contract for services is a contract with an independent contractor (as opposed to an employee) for the performance of a service. The law has not laid down any hard and fast rules for establishing what constitutes an independent contractor but rather the circumstances of each case must be considered. The distinction is important, as an employer's obligations to an employee are significantly different from their obligations to an independent contractor.

### *Contract of employment*

Following on from this is another form of contract – the contract of employment. This is a contract of service or of apprenticeship and may be created by deed, in writing or verbal. In certain employments, the employee must be given a written statement setting out the terms and conditions under which he/she is employed (Terms of Employment (Information) Act, 1994) – see Chapter 9 of this publication, which deals with contracts of employment in greater detail.

### *Contract of insurance*

These are commonplace in both our personal and business lives and are particularly important in business, given that the potential loss can be greater.

---

What then is a contract of insurance? It is a contract where one party (the insurer) undertakes in consideration of the payment of a premium to pay money to another (the insured) on the happening of a particular event, such as a death, a fire, a theft, etc. Most businesses will have several insurance contracts.

Examples include:

- ◇ Buildings Insurance.
- ◇ Contracts Insurance.
- ◇ Product Liability Insurance.
- ◇ Professional Indemnity Insurance.
- ◇ Public Liability Insurance.
- ◇ Key Man Insurance.
- ◇ Life Assurance.

The forms of insurance required by any particular business are clearly determined by the nature of the business.

There is, however, a particular feature of insurance contracts which must be highlighted – insurance contracts are said to be “of the utmost good faith”, which means that there has to be full disclosure and frankness between the parties. When seeking insurance, all facts and circumstances which might influence the insurer in deciding whether to accept the risk and grant cover must be furnished to the insurers. This includes disclosure of convictions, a previous refusal by another insurer or any material change in circumstances since the last renewal. If an insured fails to fully disclose a material fact, the insurer may be able to avoid liability when a claim is made.

### ***Partnership agreement***

Another form of contract arising in business is the “Partnership Agreement”. This agreement includes all the terms and conditions of the partnership and will usually cover matters such as:

- ◇ The place and nature of the business.
- ◇ The name of the firm.
- ◇ The date of commencement and the duration of the partnership.
- ◇ The capital of the firm and the proportion being contributed by each member.
- ◇ The salary, if any, to be paid to each partner.
- ◇ The ratio in which losses and profits are to be divided.
- ◇ The accounting methods and preparation of the annual profit and loss account and balance sheet.
- ◇ The amount of drawings which each partner may take from the business.
- ◇ The death, retirement or bankruptcy of a partner.
- ◇ The dissolution of the partnership.
- ◇ The admission and expulsion of partners.
- ◇ The calculation of goodwill in the event of the death or retirement of a partner.
- ◇ The powers and duties of each partner.
- ◇ The procedure to be used in solving disputes.

While a partnership agreement can be a complex document, the time spent preparing it usually proves very worthwhile as, should any difficulties or disputes arise in the future, all parties can refer to this one document to ascertain their position and confirm procedures.

### ***Shareholders’ agreement***

A similar type of contract is used by the shareholder in a company and is called a “Shareholders’ Agreement”.

Together with the Articles of Association, it will govern the procedures and rules to apply as between the various shareholders.

## 7 Premises

Virtually all businesses require a premises or some form of permanent base. Many businesses may begin and survive in the spare room of the owner's home – however, many more require a separate and specific space, if they are to thrive and maximise their potential. In addition, it can be preferable to keep your working life and personal life distinct.

In any event, if you are considering moving premises (and the decision as to whether it is necessary for you to do so is not a legal question but rather a business and/or personal decision), you should take into consideration the following matters.

### Title

What is title? Title is essentially the right to ownership of property or evidence vouching such ownership. Therefore, whatever your type of premises, it will be necessary for you to have title to it.

Forms of title can loosely be divided into freehold and leasehold interests, the latter being a lesser interest.

Unfortunately, many of the terms used to describe interests in property are archaic and unfamiliar – however, the following is a short summary of the main terms and will give you a general indication of the various interests involved.

### Freehold Estates

Essentially, there are three forms of freehold estate:

- ◇ **The fee simple absolute** – This is the most extensive interest in land you can have and includes not only rights to the land surface, crops and buildings but also the airspace above and minerals below. The modified fee simple is a slightly lesser interest in that your interest may be subject to other rights, such as a right of way or fishing rights.

- ◇ **The fee tail estate** – This was devised as a way of keeping property in the family but is rarely found nowadays.
- ◇ **A life estate** – This is a freehold estate which lasts for the life of the holder or some other named person – on their death the estate ends. Of these three, the fee simple is clearly the most valuable and appealing – fortunately, it is probably also the most common form.

### Leasehold Estates

A leasehold interest is, as the term implies, property held on foot of a lease. Most people will have come across the term “lease”, which is a grant of property from a landlord to a tenant for a definite period. The tenant is usually required to pay rent and, in some instances, a once-off premium on creation of the lease (often called “key-money”).

A lease can be created orally – however, more often, particularly with business premises, it is in writing and the conditions on which the property is held by the tenant are clearly specified. Provided the tenant complies with the terms of the lease, he is entitled to possession of the property. For this reason, it is vitally important that careful consideration is given to a lease agreement before executing it.

The terms of a lease will vary depending mainly on whether it is a short-term business letting (usually any term up to 5 years) or a long lease, the latter having much more onerous terms and conditions.

In considering either lease, the following matters should be clear:

- ◇ The term or length of the lease, noting that you will be liable for the rent, etc., for the duration of the lease, regardless of whether you remain in occupation of the premises.
- ◇ Is there a break clause – the right to terminate the lease early?

- ◇ And, if so, what are the conditions that must be complied with in order to avail of it?
- ◇ Is there a renewal clause and again, if so, what are the terms that must be complied with in order to avail of it. This can be particularly important if you are making a considerable investment in order to adapt the property to your needs.
- ◇ The user clause, which outlines the uses to which the premises may be put – it should be expansive enough to cover all of your proposed business.
- ◇ The description of the property and the map – it is important to ensure that they correspond with your understanding of the property on the ground.
- ◇ The outgoings for which you will be responsible apart from the rent, such as rates, water rates, ESB, service charges, insurance, etc.
- ◇ The position on assignment and subletting – often either prohibited or permitted only with the landlord's written consent.
- ◇ The terms on which any alterations may be carried out.
- ◇ What signs are permitted?
- ◇ Are any contents included?
- ◇ The amount of any security deposit.
- ◇ What are the tenant's obligations in relation to repairs? Usually the longer the lease, the higher the likelihood that the tenant will be responsible for both internal and external repairs – in shorter leases, the tenant may be only responsible for internal repairs. In addition the lease may include "special conditions", which have been inserted to specifically cover the circumstances of the case. Obviously, these should also be carefully considered. All of the conditions, many of which will be standard, should be viewed in the context of the proposed business.

## Acquiring A Property

Once you have decided that you need a premises, you will then need to sit down and decide what attributes the property will require to ideally suit your business.

Possible needs will include:

- ◇ Size and space.
- ◇ Suitability – does it need modification or can it be used immediately?
- ◇ Access to services.
- ◇ Location and frontage – does your business require street-front exposure?

These needs will have to be balanced by the potential cost and the funds available to you for acquisition. Once you have determined the type of property you require, you will then need to consult all of the auctioneers and estate agents covering the area to see what properties they have on offer which might meet your criteria. Occasionally, you may know of an ideal premises not on the market and, if so, you can approach the owner direct to discuss a possible sale and you could be lucky. More often, however, it will be necessary to persevere through the auctioneers. The auctioneer will take you to view any properties that have the potential to meet your needs.

Once you have settled on a property, you will negotiate with the auctioneer to agree a final price. This agreement will usually be subject to contract (which will now be issued by the seller's solicitor to your solicitor) and survey, which means that you will not usually be legally bound until contracts are signed and you have received a satisfactory structural survey. A survey is not obligatory but will be recommended by your solicitor when advising you in relation to the contracts as a purchaser is usually deemed to acquire the property as it stands and will have no recourse against the seller for any difficulties that may arise later.

Once you are satisfied with all of the terms of the contract, the results of the survey and have the necessary finances in place, you will be in a position to sign contracts. Usually a 10% deposit is payable at this stage, with the balance being due on the date of completion. Once you sign unconditional contracts, you are obliged to complete the transaction.

On the completion date (which is specified in the contract), you will pay over the balance of the purchase monies and, in return, will be entitled to receive the deeds of the property and to enter into occupation. If you are mortgaging the property, this will be done simultaneously and while you will still be entitled to enter into occupation, the lending institution will be entitled to the deeds until the loan has been repaid.

Other factors that need to be considered in the course of acquiring property are:

- ◇ Costs.
- ◇ Planning Permission and Building Regulations.
- ◇ Other statutory requirements.

## Costs

In addition to the purchase price, your budget will need to include provision for:

- ◇ Surveyor's fees.
- ◇ Stamp duty, payable at the rates shown in the panel on the purchase price or premium payable on the granting of a lease for commercial property.
- ◇ A lease is also subject to further stamp duty on the rent at the rate of 1%.
- ◇ Legal fees plus outlay (registration fees, search fees, etc.).
- ◇ Mortgage costs.

| Rates of Stamp Duty  |   |        |
|----------------------|---|--------|
| Up to €10,000        | - | Exempt |
| €10,001 to €20,000   | - | 1%     |
| €20,001 to €30,000   | - | 2%     |
| €30,001 to €40,000   | - | 3%     |
| €40,001 to €70,000   | - | 4%     |
| €70,001 to €80,000   | - | 5%     |
| €80,001 to €100,000  | - | 6%     |
| €100,001 to €120,000 | - | 7%     |
| €120,001 to €150,000 | - | 8%     |
| Over €150,000        | - | 9%     |

## Planning Permission & Building Regulations

On completion of a straightforward sale, the seller will produce evidence that the necessary Planning Permissions are in place and that the construction, as sold, is in compliance with both these and the relevant Building Regulations.

In circumstances where this is not the case, the position will have been covered in the Special Conditions in the contract for sale and it will be necessary for you to regularise the position, either by obtaining retention permission, carrying out outstanding works, or removing the unauthorised development.

In addition, if you intend to change the use or alter the property, it will be necessary for you to obtain the appropriate permissions and you should only sign conditional contracts until the necessary permissions have issued (which will allow you to withdraw and get a refund of your deposit, if you fail to get the required permissions).

## Other statutory requirements

As with Planning Permission and Building Regulations, if your business requires you to comply with other regulations, such as environmental, health and safety regulations, then you should ensure that you will be in a position to procure compliance before proceeding with the purchase. You should also note that, if compliance requires you to adapt or alter the property, you might also require Planning Permission as per the previous paragraph.

---

## 8 Trading Laws

---

As we have already seen, the structure of your business must comply with the relevant laws. However, the operation of your business must also be legally compliant. Naturally, the ease or difficulty with which you can become legally compliant will be determined by the nature of your business – some businesses will have specific legal regulations and criteria that must be met if they wish to remain in business. Others will merely be subject to the general law.

A broad outline of the relevant law is as follows.

### Common Law Position

This is the law as handed down by the courts (in contrast to statute law, which is prescribed by the legislature). Common law rules are made by the judges and can be changed in accordance with the current policies of the courts.

There are two areas of common law which are of primary importance in the world of business:

- ◇ Contract law.
- ◇ Law of tort.

#### *Contract law*

As we have seen in **Chapter 6** of this publication, a contract is an agreement which the law will enforce. Clearly, therefore, if either party to a contract is in breach or fails to perform in accordance with the contract, the other party will have a cause of action through the courts.

#### *Law of tort*

A “tort” is a civil, as opposed to a criminal, wrong, independent of contract, for which the injured party will have a cause of action through the courts for damages. Common torts include negligence, nuisance, trespass, libel and slander.

In general terms, to be successful in such a claim, the plaintiff must prove that the

defendant has infringed a right of theirs recognised by law and, further, that some damage was caused to the plaintiff as a result of the defendant’s action.

As the tort of negligence is the one that most frequently arises in business, we will look at it in a little more detail. In legal terms, **negligence** is the breach of a legal duty of care, which causes loss or injury to the person to whom the duty is owed. It can arise in various circumstances – for example, by a manufacturer to the consumers of his/her product, or by an employer to his/her employees.

To succeed in such a claim, the injured party must prove:

- ◇ That the other party owed them a legal duty of care – this only arises where the other party would reasonably foresee that the injured party would be affected by their acts or omissions.
- ◇ That the other party has breached that duty – proven, if it can be shown that they did not do all that a reasonable person would have done.
- ◇ That they suffered injury, loss or damage as a result.

If the injured party is successful in their claim, they will be entitled to either **damages** (a sum of money to compensate them for the damage caused or to restore them to their original position) or an **injunction** (which is an order of the court either requiring a person to do something or to refrain from doing something).

If the injured party contributed in some way to the cause of the harm – i.e., was also negligent themselves – it may be a case of **contributory negligence** and their claim will be reduced accordingly (unless it is a case where “strict liability” applies – for instance, the escape of a non-natural agent from the defendant’s lands, such as water, gas or fire).

In this context, employers, in particular, should also be aware of another concept known as “**vicarious liability**”, where one

person may be held liable for the acts of another. Examples include an employer being liable for the actions of an employee or agent committed in the course of their employment. However, an employee or agent will be personally liable for his/her own negligent actions.

## Statutory Intervention

As with other areas of law, various Acts have been passed by the Government which regulate and govern the area of business. Many of these are particular and relate to a specified area only, and it will be necessary for you to make your own enquiries as to whether there are any specific laws affecting the operation of your particular business.

The following Acts, whose provisions will be outlined in general terms, will however affect many small businesses and manufacturers and for that reason will be included here.

### *Sale of Goods and Supply of Services Act, 1980*

As its title suggests, this Act applies to both the sale of goods and the supply of services.

The primary aim of the Act is to imply certain terms into all relevant contracts. This means that the following terms will be implied into most contracts for the sale of goods or supply of services:

- ◇ **Sale by description** – The goods or services must correspond to the description. This is a question of fact and can be hard to determine when goods or services are not as described. The purchaser must also rely on the description for liability to arise.
- ◇ **Merchantable Quality** – The goods must be fit for the purposes for which they are intended and as durable as can be reasonably expected, unless a defect is specifically drawn to the attention of a purchaser or the purchaser examines the goods and the defect was apparent prior to purchase.
- ◇ **Sale by sample** – Where a sample is used to represent the bulk, then the

bulk must correspond to the sample – the sample must be representative of the bulk.

- ◇ **Sale of motor vehicles** – The vehicle must be free of any defects, which would render the vehicle unsafe or dangerous to its occupants, to road users or to the public in general.

The Act does provide that these implied terms could be excluded by agreement between the parties, but only in limited circumstances. If the purchaser is a consumer (it is a private, rather than a business, transaction), the terms of the Act cannot be excluded. If, however, the purchaser deals as a non-consumer, the terms of the Act can be excluded by agreement where it is “fair and reasonable” and the Act specifies some reasons, which would be acceptable, such as the goods being made to special order for the customer.

### *Liability for Defective Products Act, 1991*

This legislation was enacted as a result of our membership of the EU and the EC Products Liability Directive (85/574).

In essence, it provides that “a producer of a product is liable to pay compensation for death or personal injuries caused by a defect in his product” (Section 2). Compensation may also be claimed in respect of loss, damage or destruction of property used for private use or consumption.

Raising and answering a few simple questions will quickly illustrate the broad scope of this legislation.

#### **What is a defective Product?**

Section 5 states that a product is defective if it fails to provide for safety which a person is entitled to expect, taking all circumstances into account, including:

- ◇ The presentation of the product.
- ◇ The use to which it could reasonably be expected that the product would be put.
- ◇ The time when the product was put into circulation.

Therefore, it appears that a product will not be considered defective just because a superior product is subsequently put into

---

circulation – however, it does place a responsibility on the producer to ensure compliance with the appropriate safety standards at the time the product is produced.

**Does the term producer include all the parties involved in the distribution process?**

This is dealt with in Section 2 and essentially includes all persons involved in the distribution chain, such as:

- ◇ The manufacturer.
- ◇ The manufacturer of a component part or raw material.
- ◇ If there was initial processing of products from the soil, stock farming, fisheries or game, the person who carried it out.
- ◇ Any person who puts his/her name, trademark or other distinguishing feature on the product and as such identifies him/herself as its producer.
- ◇ The importer of goods into the EU.
- ◇ Where the producer of a product cannot be identified, the supplier will be treated as the producer.

As you can see, Section 2 is comprehensive and attempts to include all possible persons involved in the distribution chain.

**Then what is a product?**

Again, the definition is broad and includes all movables, with the exception of primary agricultural products which have not undergone initial processing – farmers will not come within the terms of the legislation unless their produce has undergone some form of initial processing.

As both the definition of “producer” and “product” are broad, it can be seen that most manufacturers and suppliers of goods will come within the terms of this legislation.

It is, therefore, imperative that all such manufacturers and suppliers take all necessary steps and precautions to ensure their products are not defective.

***Occupier’s Liability Act, 1995***

As the majority of businesses will operate from a premises, this Act is relevant as it specifies the responsibilities of the occupier (note, not owners) of a premises to entrants to that premises.

The Act distinguishes between different types of entrant – namely, visitors, recreational users and trespassers.

The highest level of care is due to visitors and the occupier must ensure that their visitors do not suffer injury or damage as a result of any danger existing on the premises. The occupier’s liability to recreational users and trespassers is lesser, in that the occupier cannot injure them intentionally or act with reckless disregard for them and their property.

However, the Act does provide that occupiers can reduce their duty of care to visitors by express agreement or notice, but not below the minimum threshold set for trespassers. In addition, Section 5 of the Act provides that, in all cases, warnings from occupiers may be sufficient to absolve them from liability.

***Other relevant statutes***

These are just a few examples of statutory interventions, which may be relevant to your business. As stated earlier, there may be other pieces of legislation directed either particularly or generally at your business. You should ensure that you are aware of all legislation that might affect your business so that you can in turn ensure compliance.

Finally, it is also very important to understand that the legislation does not replace your obligations under both the law of contract and tort. If a potential claim arises, the customer/client may have:

- ◇ A cause of action on foot of the contract.
- ◇ A claim pursuant to the relevant legislation.
- ◇ A claim for negligence (the law of tort) – all three possibly arising from the same incident.

## 9 Employees

The employment relationship arises when one person (the employee) provides skill and labour to another (the employer) in return for payment.

The relationship between an employee and their employer is a voluntary one arising from negotiation and agreement, and is known as a contract of employment. As such, it is governed by the law of contract (see Chapter 6 of this publication).

However, unlike other contracts, legislation (particularly since Ireland has been a member of the EU) has imposed numerous stipulations and restrictions on the freedom of the employer and employee to negotiate terms of employment and has required many provisions to be implied into a contract of employment.

Another aspect of an employment contract worth noting is that it is what can be called “dynamic” (as opposed to fixed), as the parties can regularly alter it or it can be altered by legislation.

### Employment Contracts

#### *Formation*

There is no requirement that an employment contract is in writing – it can be in writing, may be oral, or partly written and partly oral. As with other contracts, the provisions of the employment contract will consist of express terms and implied terms (which can be implied by statute, by custom and practice, by common law or the incorporation of terms from collective agreements, such as one made between the trade unions and an employer).

The usual forms of contract which are in writing are:

- ◇ Formal contract of employment.
- ◇ Letter of appointment.

While a contract of employment need not be in writing, however, it should be noted that, pursuant to the Minimum Notice and Terms of Employment Acts, 1973-1994, an

employer is obliged to furnish a new employee, within 2 months of taking up employment, with a written statement of the following particulars of the terms of employment:

- ◇ Full name of the employer and employee.
- ◇ Address of the employee.
- ◇ Place of work.
- ◇ Job title or nature of the work.
- ◇ Date of commencement of employment.
- ◇ Details of pay, including overtime, commission and bonuses, and the methods of calculating them.
- ◇ Whether pay is to be weekly, monthly or otherwise.
- ◇ Details of hours of work and overtime.
- ◇ Holiday entitlements.
- ◇ Sick pay entitlements and pension schemes, if any.
- ◇ Period of notice of termination to be given by each party.
- ◇ Expiry date of contract, if employment is for a fixed period of time.

Clearly, if there is a written contract, all of these matters should be covered in it. Alternatively, the statement issued to the employee can direct the employee to an easily accessible document where all of this information can be found.

#### *Terms*

As indicated above, an employment contract will consist of express and implied terms.

The express terms are those which are agreed orally or in writing between the employer and employee. The express terms will usually cover those matters listed above, as required by the legislation, but will often also include provisions dealing with:

- ◇ Preconditions – for example, subject to receipt of satisfactory references or a medical examination.
- ◇ Probationary period.

- ◇ Expenses.
- ◇ Miscellaneous benefits, such as a company car.
- ◇ Maternity leave.
- ◇ Grievance procedure.
- ◇ Disciplinary procedure.
- ◇ Trade union membership.
- ◇ Arbitration in the event of a dispute.
- ◇ Resignation and retirement.

There may also be additional provisions, which are relevant to the particular business involved, such as a confidentiality clause or clarification of the position in relation to inventions, copyrights or patents.

There will also be **implied terms**, which will include:

- ◇ Terms implied by statute, such as the right to minimum notice or the right to fair procedures, or the right to holidays and public holidays.
- ◇ Terms implied by collective agreements.
- ◇ Terms implied by custom and practice in the trade, industry or locality, provided those terms are well-known and reasonable.
- ◇ Terms implied by common law (those recognised through case law), which include employees having a duty to give personal service, to act in good faith to maintain secrecy and to exercise reasonable care and skill. Common law has also imposed duties on employers, including the duty to pay wages and to provide for the safety of employees.

Ultimately, it is always advisable for both the employer and employee that a **written contract** is in place which deals with all matters relevant to the particular employment. Such a contract does not need to be long, complicated or legalistic but it should be clear and succinct so that both parties are clear on their position.

It is worth noting that the Department of Enterprise, Trade and Employment publishes a booklet, *Terms and Conditions of Employment*, which you might find useful – alternatively, you can consult the Department’s website at [www.entemp.ie](http://www.entemp.ie) for further information.

While the contract is probably the most important issue to be covered in the context of employees, as an employer you should also be aware of the following matters.

## Recruitment & Equality

An employer cannot discriminate against any employee or prospective employee – that is, he/she cannot treat one person less favourably than another.

The Employment Equality Act, 1998 provides for 9 grounds of discrimination, to include gender, marital status, family status, sexual orientation, disability, race, age, religion and membership of the travelling community.

The Act also has certain exclusions – for example, it shall not be discrimination on the grounds of age if the person is under 18 or over 65 years.

It is important for the employer to ensure that equal treatment prevails in all phases of the recruitment process, including deciding on the form of recruitment (whether it should be internally within the business or beyond), advertising, specifying the job title, preparation of the application forms, interviews and finally offering the job to a successful applicant.

## Health & Safety in the Workplace

The primary piece of legislation in this area is the Safety, Health and Welfare at Work Act, 1989 and subsequent regulations. Prior to this Act, there were numerous other Acts that related generally to industry and thus all employments were not covered. The 1989 Act changed this and clearly reinforced the common law position for all employments by stating in Section 6(1) that “it shall be the duty of every employer to ensure, so far as is reasonably practicable, the safety, health and welfare at work of all his employees”.

The Act goes on to state that the employer’s duty will extend to cover:

- ◇ The place of work.

- ◇ Access to and egress from the place of work.
- ◇ Plant and machinery.
- ◇ Provision of systems of work.
- ◇ Provision of instruction and training.
- ◇ Provision of protective clothing and equipment.
- ◇ Preparation and revision of emergency plans.
- ◇ Prevention of risk from any article or substance.
- ◇ Provision of facilities for employees' welfare.
- ◇ The use of a competent person, if necessary, to ensure provision of all of these matters, all of which should ensure the health and safety at work of his/her employees.

There is also a general duty on employers (and the self-employed) towards persons who are not employees (visitors or independent contractors, for instance) to ensure that they are not exposed to risks to their health and safety.

In addition, all employers have a general obligation to provide a safety statement, which is the management's written programme for safeguarding health and safety in the workplace. This statement should include the employer's assessment of all potential hazards to workplace health and safety and should detail the appropriate safety measures which have been put in place.

Employees also have a role to play in ensuring the health and safety of their workplace – they are obliged to take reasonable care for the health and safety of their fellow employees and others, by making proper use of machinery, tools and any personal protective equipment supplied for their safety.

Responsibility for enforcement of the health and safety laws and regulations lies with the National Authority for Occupational Safety and Health (the Health and Safety Authority). The Authority has considerable powers of enforcement and its inspectors may enter premises and inspect all documents and the actual workplace itself. Breach of the statutory provisions can give rise to a criminal prosecution but not a civil action,

which still relies on the common law position (albeit the provisions of the Act may be used as a good summary of the general duties of care).

## Trade Unions

A trade union is legally defined in the Trade Union Act, 1913. However, it can loosely be described as an association of persons whose main objective is the regulation of the relationship between employer and employee. A trade union can be registered, unregistered, certified or authorised. However, only an authorised trade union can hold a "negotiation licence", which permits it to negotiate on wages and other conditions of employment. In addition, only an authorised trade union benefits from the protection and immunities conferred by the Industrial Relations Act, 1990.

An employee has the constitutional right to join a trade union (Article 40.4.1 of the Constitution). But there is no duty placed on an employer to negotiate with a trade union.

However, collective bargaining and its voluntary nature has been a cornerstone of Irish industrial relations. The collective bargaining process generally results in a collective agreement, which can be registered with the Labour Court, making it legally binding on the parties.

## Transfer of a Business

Before 1980, an employee had no rights on the transfer of a business. When a business was sold (transferred to a new employer), the contract of employment with the employee was terminated. However, legislation, particularly that arising as a result of Ireland's membership of the EU, now attempts to protect and preserve the employee's rights, arising from both statute and contract, if the business is transferred as a going concern.

In brief, the legislation (originally the EC Safeguarding of Employees' Rights on Transfer of Undertakings Regulations, 1980: SI No. 306 of 1980, repealed in 2003 by the EC Protection of Employees on

Transfer of Undertakings (Amendment) Regulations, 2003: SI No. 131 of 2003) provides that all of the rights and obligations attaching to the selling company arising from contracts of employment (including any obligations arising from collective agreements or union management agreements) which are in existence on the date of the transfer shall be transferred and attach to the purchaser. Therefore, if the employee is employed on the date of the transfer, his employment will continue on exactly the same terms and conditions as previously – there will be no break in the employee’s service or in continuity of service and all of the employee’s entitlements, both under contract and statute, are automatically transferred. This would include not only wages/salary but also service, as required by the various pieces of legislation, and matters such as seniority.

The employer and prospective employer (purchaser) have a duty to inform the employees of the reasons for the transfer, the legal, economic and social implications of the transfer for the employees, and the measures envisaged in relation to employees. Usually, the information furnished in this regard is very general. This information is required to be given to the employees within 30 days of the proposed transfer.

It is very important for employers to be aware of these provisions, which will apply if they are either disposing of a portion or all of their business, or expanding by the acquisition of another going concern or even transferring a business from one location to another.

## **Maternity & Parental leave**

While both of these matters should be specifically covered in the contract of employment, more often the statutory provisions apply which, in general, are as follows.

### ***Maternity leave***

Maternity leave is the leave, of at least 18 consecutive weeks, given to a pregnant employee provided the employee:

- ◇ Gives her employer notice of her intention to take the leave at least 4 weeks before the commencement of the maternity leave.
- ◇ Provides the employer with a medical certificate confirming the pregnancy and the expected date of birth.

There is no obligation on the employer to pay the employee while she is on maternity leave, although she will usually be entitled to payments from the Department of Social and Family Affairs, provided she has paid sufficient PRSI.

The maternity leave can be extended by a further 8 weeks at the end of the maternity leave.

The employee is also entitled to time off work, without loss of pay, for antenatal or post-natal care.

On the expiration of the maternity leave, provided the employee has notified the employer at least 4 weeks beforehand, the employee can return to her job with the same employer and on the same terms as previously. The employer can alter the employee’s work, provided it is suitable for the employee and is not on substantially less favourable terms than the previous employment.

### ***Parental leave***

Parental leave can be availed of by either parent and is an entitlement to 14 weeks leave without pay, to enable the parent take care of the child. The leave must be taken before the child’s fifth birthday (unless the child is adopted, in which case different time limits apply). It can be taken as one continuous period of 14 weeks or, subject to the employer’s agreement, it can be taken by a number of periods of leave each of which comprises hours off or days off or a combination of either.

The employee must have 1 year’s continuous service to be eligible for the full 14 weeks’ leave – however, if the employee has over 3 months’ continuous service, they will be entitled to 1 week for each month of continuous employment. The employee must give the employer at least 6 weeks’ notice of his/her intention to take parental leave.

## Dismissal

Unfortunately, despite even the most scrupulous recruitment procedures, sometimes it might be necessary to terminate an employee's employment contract.

If an employer is contemplating dismissing an employee, whether it is because of competence, qualification, conduct or other substantial grounds, the employer should be aware that:

- ◇ The employer is obliged to warn the employee that dismissal is being contemplated and why.
- ◇ The employee is entitled to know that his/her job is in jeopardy.

If, within a reasonable time, the employee fails to remedy the situation in response to the warnings given, the employer may opt to proceed with the dismissal. In doing so, however, the employee may be entitled to a specified minimum or reasonable period of notice. If the contract of employment specifies a notice period, this might apply. If, however, the employee has continuous service of 13 weeks or more, the Minimum Notice and Terms of Employment Act, 1973 provides for the following basic notice periods, based on length of service, which an employer must give:

- ◇ 13 weeks' to 2 years' service = 1 week.
- ◇ 2 to 5 years' service = 2 weeks.
- ◇ 5 to 10 years' service = 4 weeks.
- ◇ 10 to 15 years' service = 6 weeks.
- ◇ 15 years' service or more = 8 weeks.

If there is a contract of employment, the employee is entitled to the longer of the contractual notice or the statutory minimum notice.

It is worth noting that the Act also permits an employee of 13 weeks or more continuous service to terminate the contract by 1 week's notice, unless the employment contract provides otherwise – another good reason for the employer to ensure a formal employment contract is in place.

**Summary dismissal** (which is without notice) may be justified in certain circumstances – for example, misconduct by the employee is one cause of dismissal which need not be prefaced by a series of warnings. Examples of misconduct include acts of violence in the workplace, thefts, or abuse of sick leave. In these cases, the employer is primarily concerned to establish that the misconduct has occurred.

If the employment contract clearly specifies matters of misconduct leading to summary dismissal, it can help the employer in dealing with such a situation.

In any dismissal, it is essential that the employer follows the correct procedure and also applies the principles of "natural justice" (which essentially require the employer to hear the employee on the matter and to make an impartial judgement). If the employer fails to do this, the employee may have redress either under the contract of employment or arising from the legislation, which could result in re-instatement, or compensation being paid to the employee.

---

## 10 Other Legal Concepts

---

### Agency

This is the relationship which arises when one person, called the agent, has authority to act on behalf of another person, called the principal. It effectively means that the agent can enter into agreements on behalf of the principal, which agreements will be binding on the principal but not on the agent.

Agency arrangements consist of 2 contracts, that between the agent and the principal and that between the principal and another independent party. A common example is when an auctioneer is instructed to sell a house. The auctioneer is acting as the seller's agent and there will be a contract between them in this regard. When the auctioneer finds a buyer, there will then be a second contract between the seller and the buyer (but not involving the auctioneer/agent). Numerous other examples of agency will arise in business.

If you are dealing with an agent, it is important to ensure that they are acting within the authority given to them so that any agreement reached will be binding on their principal. Similarly, if you have employed agents to act on your behalf, it is important that the extent of their powers to bind you are clearly specified.

### Cross-Border Trade

While there may be many similarities between the legal system in the Republic of Ireland and other European countries (particularly those in the European Union), there are also many differences and any businesses involved in cross-border trade should ensure they have full and comprehensive information. In particular, where EU countries are concerned, they should be aware of any variation in the implementation of EU law.

The business should be clear on the tax (particularly VAT) and legal position (for instance, whether it is Irish law or the law

of the other jurisdiction which will apply in any dispute).

Clearly the best advice in this instance is to obtain full advice from professionals in each state.

### Debt Collection

Unfortunately, in all businesses there will be customers who fail to pay, or at least do not volunteer payment without strenuous prompting. Often, when the debt remains outstanding despite repeated reminders, you may have little option but to pursue the matter through the courts. The following is a general outline of the legal debt collection procedure.

On receipt of instructions, the solicitor will usually write again to the debtor seeking payment. There may either be no response or an unsatisfactory response and the next step is to issue court proceedings. The appropriate court will be determined by the amount of the debt due. These proceedings will then be served on the debtor, who has an opportunity to reply. If he fails to do so, judgement may be obtained in default. If the debtor contests the matter, it will be heard by a judge who will determine whether the debt is due and, if so, the amount of the debt.

Once judgement is obtained, there are various options of enforcement:

- ◇ Sending it to the County Sheriff for execution (who will call to the debtor and seize any goods in payment of the debt).
- ◇ Obtaining an Examination, Instalment and ultimately a Committal Order, if there is continued default, in the District Court.
- ◇ Publication.
- ◇ Registration as a judgement mortgage on any property owned by the debtor.

Obviously whether it is practical to proceed with collection of the debt through the

courts will be determined by the size of the debt, the likelihood that payment can be got and the costs involved.

## FRANCHISING

A franchise extends from the right to trade under the name of another to a package of rights, including trade marks, trade names, shop signs, copyrights, patents, inside knowledge and information, etc., all of which are to be used for the sale for goods or supply of services.

Franchising is commonly used in business for the large-scale distribution of goods or services. Instead of the supplier selling the goods to a distributor who sells them on in whatever manner he/she chooses, the supplier not only sells the goods but also provides the distributor with a standardised and highly detailed framework which must be followed. In this way, the supplier can ensure that his goods are distributed in a uniform manner of his choosing by all franchisees. Fast-food chains often operate by franchise agreements, which ensures that there is little difference between the many outlets.

## Indemnity

This arises where one person makes good a loss which another person has suffered as a result of the act or default of another. A popular example is a contract of insurance, where the insurance company indemnifies the insured against loss which might arise on the occurrence of a specific event. The employer-employee relationship also gives rise to a form of indemnity, as normally the employer will indemnify the employee against all losses incurred by the employee in carrying out his/her employment.

## Intellectual Property

### Rights

#### *Copyright*

Copyright is a property right, which is now governed by the Copyright and Related Rights Act, 2000.

Section 17 of this Act provides that copyright subsists in:

- ◇ Original literary, dramatic, musical or artistic works, including computer programmes.
- ◇ Sound recordings, films, broadcasts or cable programmes.
- ◇ The typographical arrangements of published editions.
- ◇ Original databases.

Copyright is essentially a negative right to prevent the copying of physical material. Section 37 of the Act confirms that the acts restricted by copyright are the copying of the work, the making of the work available to the public and the making of an adaptation of the work.

The author of a work is the first owner of the copyright. However, there are exceptions – for example, where the work is done by an employee in the course of employment.

Copyright lasts for the author's life plus 70 years (except for sound recordings and typographical arrangements, where the copyright lasts for 50 years from the date that the work was lawfully made available to the public).

#### *Patents*

A patent is another property right and is governed by the Patents Act, 1992. A patent can be granted in respect of any invention and confers on the holder the sole and exclusive right to make, use and sell the invention in this country.

The 1992 Act provides that any invention shall be patentable if it is susceptible of industrial application, is new and involves an inventive step. It also specifies matters which will not be regarded as an invention – including a discovery, a scientific theory or a mathematical method, an aesthetic creation, a programme for a computer or the presentation of information.

The area of patents is very complex and it is usual to instruct a Registered Patent Agent (who specialises in this area) to deal with any application for a patent (which is made to the Controller of Patents, Designs and Trade Marks).

---

The normal length of a patent is 20 years. However, the Act also provides for short-term patents with a life of 10 years – more appropriate for inventions with a short lifespan.

### ***Trade mark***

A trademark is a further property right which is regulated by the Trade Marks Act, 1966. The purpose of a trade mark is to indicate the origin of goods or services on which it is used. The Act defines a Trade Mark as any sign capable of being represented graphically, which is capable of distinguishing goods or services of one undertaking from those of another undertaking. It usually consists of words, designs, letters, numbers, or the shape of goods or their packaging.

As with copyrights and patents, a trade mark can be registered and, once registered, has the rights and remedies specified in the Act (in contrast an unregistered trade mark, if infringed, only has a common law cause of action as it is not a property right).

Registration of a trademark lasts for 10 years and is renewable for subsequent periods of 10 years. As it is another complex area, it is usual to employ a professional trade mark agent when making any application for registration of a trade mark.

### ***Industrial design***

A design is a new idea or a conception of the external appearance intended to be assumed by any article through the use of artificial means. Until recently, the legal definition was found in Section 3 of the Industrial and Commercial Property (Protection) Act, 1927. However, in 2001, new legislation was passed (the Industrial Designs Act, 2001) which redefined the word “design” in simpler terms as “the appearance of the whole or a part of a product resulting from the features of, in particular, the lines, contour, colour, shape, texture or materials of the product itself or its ornamentation”.

In Section 11 of the 2001 Act, there is provision for registration of designs with the Controller of Patents, Designs and Trade Marks by the proprietor of the design, provided the design is new and

has individual character. Registration confers a copyright in the design for 5 years from the date of registration, which can be extended for 4 further periods, each of 5 years. Copyright in this context means the exclusive right to apply the design to any article in any class in which the design is registered. The new legislation, the Industrial Designs Act, 2001, also confirmed that a registered design is a property right.

### **Letter of Credit**

In business, a letter of credit is a letter, usually given by a bank, undertaking to pay, if necessary, a certain sum of money to the person to whom the letter is addressed. The sale of goods worldwide is normally arranged by way of letters of credit. For example, the buyer can instruct his/her bank to open a credit in favour of the seller, which is a promise by the bank to pay money to the seller on compliance with specified conditions, such as receipt of shipping documents.

### **Licence**

A licence is an authority or permission to do something which would otherwise be illegal or wrong.

There are a range of licences and examples include:

- ◇ A landowner permitting another to cross his/her land.
- ◇ An intoxicating liquor licence, which is required if you wish to sell alcohol.
- ◇ The licence between an oil company and an operator of one of its petrol stations.
- ◇ A short-term occupation of a business premises where it is not intended that a formal landlord and tenant relationship is created.
- ◇ An auctioneer or bookmaker cannot operate as such without the appropriate licence.

Given the wide variety of licences it is not proposed to go into any further detail here other than to say that it is essential for any business to ensure that they obtain and maintain the required licences for the operation of their business. Failure to do so could shut down the business.

# 11 Further Information

## Professional Advisors

The importance of professional advisors, for example, solicitors and accountants, cannot be overstated. Most professional advisors have immense experience in both the formation and running of a business and, as a result, will be an invaluable source of information and guidance – their experience can help steer you clear of the usual pitfalls encountered by a new business. However, it is up to you to ensure that you benefit fully from the experience of your professional advisors – ask questions and be sure that you understand fully any advices received.

## Government Agencies

Most of the government agencies provide a wealth of information that is not always well used. Obviously, you can make contact with the various offices and obtain information and advice by calling. However, many of the Government Agencies publish information which can be accessed by phone or online if you cannot call to the appropriate office. Useful contacts in this regard for a new business include:

### Revenue Forms & Leaflets Service

Inspector of Taxes, Warehouse Unit,  
Shanowen Road, Santry, Dublin 9.  
Phone: 01 878 0100  
Website: [www.revenue.ie](http://www.revenue.ie)

The Revenue's publications include:

- ◇ CG1 – Tax Clearance Scheme.
- ◇ CG2 – Collector General – Due Dates, Payments and Returns.
- ◇ IT1 - Income Tax Allowances, Reliefs and Tax Rates.
- ◇ IT10 – Guide to the Self-Assessment System for the Self-Employed.
- ◇ IT15 – The Seed Capital Scheme: Tax Refunds For New Enterprises.
- ◇ IT32 – Revenue Audit – Guide for Small Business.

- ◇ IT48 – Starting in Business.
- ◇ IT49 – Guide to VAT for Small Business.
- ◇ IT50 – PAYE/PRSI For Small Employers.
- ◇ IT59 – Revenue Job Assist.

### Companies Registration Office

Parnell House, 14 Parnell Square, Dublin 1.  
Phone: LoCall 1890 220 226  
Website: [www.cro.ie](http://www.cro.ie)

The CRO's publications include the following leaflets:

- ◇ No. 1 Company Incorporation.
- ◇ No. 2 Duties of Directors.
- ◇ No. 7 Companies/Business Name Letterheads.
- ◇ No. 14 Business Name Registration.
- ◇ No. 16 The Company Secretary.
- ◇ No. 22 Filing an Annual Return in the CRO (New Companies).
- ◇ No. 23 Filing an Annual Return in the CRO.

### Department of Enterprise, Trade & Employment

Kildare Street, Dublin 2.  
Phone: LoCall 1890 220 222  
Website: [www.entemp.ie](http://www.entemp.ie)

The Department's publications include booklets on:

- ◇ Terms and Conditions of Employment.
- ◇ Health and Safety.
- ◇ Anti-Discrimination Laws.
- ◇ Disabled Workers.
- ◇ Redundancy.
- ◇ Insolvency.
- ◇ Transfer of business – rights of employees.

A further useful website, Business Access to State Information & Services ([www.basis.ie](http://www.basis.ie)), is run by the Department of Enterprise, Trade & Employment with the aim of providing business with a single access point to Government information and services.

---

**City / County Enterprise Board**  
www.empower.ie

**Competition Authority**  
Parnell House, 14 Parnell Square, Dublin 1.  
Phone: LoCall 1890 220 224  
Website: www.tca.ie

**Office of the Director of Consumer Affairs**  
4-5 Harcourt Road, Dublin 2.  
Phone: LoCall 1890 344 424  
Website: www.odca.ie

**Office of the Director of Equality Investigations** 3 Clonmel Street (off Harcourt Street), Dublin 2.  
Phone: LoCall 1890 344 424  
Website: www.odei.ie

**InterTradeIreland: Trade & Business Development Body**  
The Old Gasworks Business Park,  
Kilmorey Street, Newry,  
Co. Down BT34 2DE  
Phone: 048 3083 4100  
Website: www.intertradeireland.com

**The Equality Authority**  
3 Clonmel Street (off Harcourt Street),  
Dublin 2. Phone: LoCall 1890 245 545  
Website: www.equality.ie

**The Food Safety Authority**  
Abbey Court, Lower Abbey Street,  
Dublin 1.  
Phone: 01 817 1300 Website: www.fsai.ie

**Health and Safety Authority**  
10 Hogan Place, Dublin 2. Phone: 01 614  
7000 Website: www.hsa.ie/osh

**Patents Office**  
Government Buildings, Hebron Road,  
Kilkenny.  
Phone: LoCall 1890 220 223  
Website: www.patentoffice.ie

**Office of the Director of Corporate Enforcement**  
16 Parnell Square, Dublin 1.  
Phone: LoCall 1890 315 015  
Website: www.odce.ie

## Trade & Other Organisations

Trade organisations or professional bodies can be an excellent source of information on legal matters that are particularly pertinent to your area of business. Examples include:

- ◇ Irish Farmers' Association.
- ◇ RECI (Register of Electrical Contractors in Ireland).
- ◇ Construction Industry Federation.
- ◇ Institute of Professional Auctioneers and Valuers.
- ◇ Irish Printing Federation.
- ◇ Small Firms Association.
- ◇ Restaurants Association of Ireland.

It is not possible to list all such organisations, however you are probably aware of those that are involved in your own business area.

---

## 12 General References

---

- Callanan, G. (2003). *An Introduction to Irish Company Laws*, 2 nd edition, Dublin: Gill & Macmillan.
- Clark, R. (1998). *Contract Law in Ireland*, Dublin: Round Hall Sweet & Maxwell.
- Doolan, B. (1989). *A Casebook on Irish Business Law*, Dublin: Gill & Macmillan.
- Ellis, H. (1998). *Irish Company Law for Business*, Bristol: Jordan Publishing.
- Friel, R.J. (2000). *The Law of Contract*, Dublin: Round Hall Sweet & Maxwell.
- Keenan, A. (1997). *Essentials of Irish Business Law*, 2 nd edition, Dublin: Gill & Macmillan.
- Lawson, R. and Smith, D. (1997). *Business Law for Business and Marketing Students*, 3rd edition, Oxford: Butterworth Heinemann.
- Light, H.R. (1967). *The Legal Aspects of Business and General Principles of Law*, 6 th edition, London: Sir Isaac Pitman & Sons.
- Marsh, S.B. and Soulsby, J. (1985). *Business Law*, 3 rd edition, London: McGraw-Hill.
- Meenan, F. (1999). *Working Within the Law: A Practical Guide For Employers and Employees*, 2 nd edition, Dublin: Oak Tree Press.
- Murdoch, H. (2000). *Murdoch's Dictionary of Irish Law*, Dublin: Topaz Publications.
- Murphy, E. (2000). *Irish Legal Framework for Business Students*, 2 nd edition, Dublin: Gill & Macmillan.
- O'Kane, B. (2003). *Starting a Business in Ireland*, 5 th edition, Cork: Oak Tree Press.
- O'Malley, L. (1982). *Business Law*, London: Sweet & Maxwell.
- Price, T. (1989). *Mastering Business Law*, London: Macmillan.
- Schmitthof, C.M. and Sarse, D.A.G. (1984). *Mercantile Law*, London: Stevens & Sons.
- Ussher, P. (1986). *Company Law in Ireland*, London: Sweet & Maxwell.