WILLIAM FRY

Legal News

Welcome to the March issue of Legal News. For further information on any of the topics covered in this edition, please call or email any of the key contacts or your usual William Fry contact person.

Carol Plunkett

Partner

Long Awaited Mediation Bill Finally Published (13 February 2017)

The Mediation Bill 2017 obliges parties to a dispute to give serious consideration to mediation as a route to resolution.

Published on 13 February 2017, the Bill seeks to formalise what is already a popular non-adversarial method for resolving many different types of disputes. If it is enacted, for the first time, solicitors (including in-house solicitors providing legal services) and barristers will have a statutory obligation to advise clients to consider using mediation as a means of resolving their dispute. The obligation includes advising:

- The client generally to consider mediation as a means of resolving the dispute
- On mediation services, including details of qualified mediators
- On the advantages and benefits of mediation
- On the confidentiality of the process
- On the enforceability of mediation settlements

If a client decides not to mediate, the solicitor must swear a statutory declaration that they advised their client to consider mediation. Where such a declaration is not filed, the Court will adjourn any proceedings issued until such time as it is provided. In an effort to alleviate the pressure on the already over-burdened Courts' system, the Bill imposes costs sanctions on parties for failing unreasonably to engage in mediation.

It is important to note that mediation is an option at any stage of the proceedings. Equally, parties may withdraw from mediation at any time. Any agreement is voluntary and both its terms and the extent to which it may be binding is up to the parties. The fees and costs of the mediation shall not be contingent on its outcome (unlike the Court process). Mediation also has the advantage of being an entirely confidential process.

If mediation is the preferred process, the parties and the proposed mediator shall prepare and sign an "agreement to mediate" which appoints the mediator and sets out the agreed framework for the

mediation. This is a new obligation and should facilitate the reaching of an agreement between the parties on certain matters (fees and costs, location and time of mediation, right to terminate mediation etc.). From the date of signing the agreement to mediate, the time will effectively stop for bringing claims under the Statute of Limitations until 30 days after either a mediation settlement is signed by the parties and the mediator or the mediation is terminated, whichever first occurs.

While the Mediation Bill imposes an obligation on parties seriously to consider mediation, not all disputes are amenable to mediation and so long as refusal to mediate is not unreasonable, the Court process will remain the main forum for resolving disputes.

A link to the Mediation Bill 2017 can be found here.

See previous William Fry Articles on Mediation in EU cross border disputes here and in relation to insurers here.

Contributed by Rebecca MacCann.

Landlords, Get Your House in Order!

Landlords of rented houses will be required to ensure that their properties meet certain minimum standards from 1 July 2017, subject to some exceptions. The requirements (which are subject to exclusions in some cases) include:

Repair	Structure	The house is to be maintained in a proper state of structural repair.
	Installations	Installations for the supply of gas, oil and electricity including pipework, storage facilities and electrical distribution boxes are to be maintained in good repair and safe working order.
	Vermin Control	There is to be adequate provision, where necessary, to prevent harbourage or ingress of pests or vermin.
Safety	Window Safety	Window safety restrictors are to be fitted where the bottom of window opening sections in the house are more than 1400mm above external ground level.
	Fire Safety	A suitable self-contained fire detection and alarm system and fire blanket are to be provided and maintained. Houses in buildings that contain 2 or more houses that share a common access are subject to additional fire safety requirements.
	Air Safety	Adequate ventilation (specifically including the removal of water vapour from every kitchen and bathroom) is to be provided and maintained.
Facilities, Amenities and Appliances	Sanitary Facilities	There is to be adequate provision and maintenance of water closet and fixed bath shower sanitary facilities, adhering to minimum standards, for the exclusive use of the house.
	Heat	Permanent heat emitters/ systems/ appliances, independently manageable by the tenant, adhering to safety requirements including the fitting of carbon monoxide detectors and alarms are to be fitted and maintained.
	Lighting	There is to be adequate natural lighting for all rooms used or intended to be used for living or sleeping purposes (excluding a kitchen having a floor area of less than 6.5 square metres) and suitable and adequate artificial lighting for every hall, stairs and landing and every room used or intended to be used by the tenant. Every room containing a bath or shower and water closet are to be suitable and adequately screened to ensure privacy.
	Kitchen	Food storage areas and specified food preparation and laundry appliances are to be provided and maintained.
	Refuse	There is to be access to suitable and adequate pest and vermin proof refuse storage facilities.
	Information	Sufficient information is to be provided to the tenant about the rented property, the fixed building services, appliances and their routine maintenance requirements so that the occupant can operate them correctly.

Contributed by Tara Rush.

Are Interview Notes of An Investigation Protected by Legal Advice Privilege?

A recent decision of the High Court in England has shed light on the issue of legal advice privilege and in particular who can be considered to be the "client". The decision, which compelled a defendant bank to provide copies of confidential internal notes to plaintiff investors provides a reminder to give careful consideration to who the client is and to instructing external counsel early in an investigation to avail of legal advice privilege.

The RBS Rights Issue Litigation [2016] EWHC 3161

The decision in this case arose out of the discovery process in the ongoing complex litigation where the claimant shareholders of the Royal Bank of Scotland (RBS) were seeking to recover investment losses incurred further to the collapse of RBS shares on the grounds that the prospectus for the 2008 rights issue of shares in RBS was not accurate or complete. Here the Court had to consider whether legal advice privilege attached to notes of interviews with current and former employees of a corporation as part of an investigation by in-house and external lawyers.

In the previous case of *Three Rivers District Council & Ors v Governor and Company of the Bank of England (No 5)*, the English Court of Appeal held that the 'client' was the Bingham Inquiry Unit (BIU), which comprised only three bank officials responsible for liaising with and instructing the bank's lawyers. The Court rejected the argument that communications between any employee of the bank and the lawyers were privileged. The Court in RBS held that in a corporate context that meant information gathered from an employee (with no capacity to give instructions or to seek or obtain legal advice) is no different from information obtained from third parties, even if the information is collected by or in order to be shown to a solicitor to enable fully informed advice to be given to that solicitor's client, the corporate entity:

> "*the client for the purpose of privilege consists of only those employees authorised to seek and receive legal advice from the lawyer*."

Ultimately the Court found that legal advice privilege in English law is confined to communications between lawyer and client and the fact that an employee may be authorised to *communicate* with the corporation's lawyer does not constitute that employee the client or a recognised emanation of the client.

Although the decision does not change the position under English law, it nevertheless provides an important illustration of legal advice privilege and in particular the need to appreciate who is the 'client'.

It is important to note that the Court's view was that interview notes recording the lawyer's own thoughts and comments with a view to advising the client would almost certainly be privileged – but that it must contain the sort of legal input to be capable of justifying the claim of privilege. The Court relied on the following examples given in *Upjohn Co et al v United States et al* (1981) 449 US 383 case as being the sort of details that would suffice for a claim of privilege of this kind:

> "*Thomas described his notes of the interviews as containing what I considered to be the important questions, the substance of the responses to them, my beliefs as to the importance of these, my beliefs as to how they related to the inquiry, my thoughts as to how they related to other questions. In some instances they might even suggest other questions that I would have to ask or things that I needed to find elsewhere*."

As the Court was only dealing with legal advice privilege it did not deal with the question of when an investigation could become sufficiently adversarial enough to warrant litigation over this type of privilege.

What is the position in Ireland?

In general, privilege in Ireland is governed by the decision in *Smurfit Paribas Bank Ltd v A.A.B. Export Finance Limited* [1990] 1 I.R. 469. There has yet to be a decision which deals with the issue regarding the specific corporate context here, but the *Three Rivers* case has often been referred to by the Courts and certainly other aspects of that case have met with approval here. Without any cases to the contrary the *Three Rivers* decision and the consequences thereof could be persuasive in an Irish court.

Until such a time as there is a decision which finds to the contrary it would be wise to adopt a cautious approach to defining who the client is in the corporate context.

Contributed by Catherine Thuillier.

High Court Clarifies Bank to Have Actual Notice of Winding-up to Avoid Repayment of Transfers Made Subsequent to Winding-up

Background

Any disposition of a company's property made after the commencement of its winding up, without the approval of the liquidator, is void. In a 2001 case (*Re Industrial Services Company (Dublin) Ltd* [2001] 2 I.R.118), the High Court held that the transfer by an account bank of monies from an in-credit account of a company in liquidation to third parties constituted a disposition and the bank could be liable to repay the value of such transfers despite not being aware of the winding up order for the Company.

This onerous position for account banks and other third parties was addressed in the Companies Act 2014 by the enactment of Section 602 (3) of that Act. This section provides that a person effecting a disposition subsequent to a company's winding up will not be liable unless that person had actual notice, rather than mere constructive notice, of that winding up.

Case

In *MB Refrigeration and Air Conditioning Ltd (In Liquidation) -v- Allied Irish Banks Plc* [2016] IEHC 753 the liquidator of the company brought an application seeking a declaration that certain transactions carried out on the company's AIB bank account without sanction of the liquidator after the commencement of the company's winding-up constituted "dispositions" of the company's property and were void pursuant to the provisions of the Companies Act 1963. The liquidator further sought an order requiring AIB to repay the value of those transactions plus interest.

The liquidator sought to rely on the provisions of the 1963 Act which required AIB to have only constructive notice of a winding-up. AIB requested that the application proceed pursuant to the Companies Act 2014.

Acknowledging that Section 602 (3) of the Companies Act 2014 sought to resolve certain issues arising from the decision in *Re Industrial Services Company (Dublin) Ltd* [2001] 2 I.R. 118, the Court exercised its discretion under the transitional provisions of the Companies Act 2014 and held that the matter was to be decided based on the new 2014 Act.

Decision

The Court held that any payments made by AIB from the company's in-credit bank account from the date of the commencement of the winding-up up to the date AIB became aware and had actual notice of the winding-up were valid. Accordingly AIB was not liable to repay the value of any such payments.

Payments made on and from the date AIB had actual notice of liquidation were held to be void and AIB was ordered to repay to the liquidator the value, including interest, of all such payments.

Interestingly, the High Court did not order the repayment of any sum paid to AIB as a preferential creditor where the liquidator was satisfied that AIB would in any event have received such payment as part of the liquidation proceeds.

Contributed by Craig Sowman.

Turf Club Announces New 'Non-trier' Rules

The Turf Club, the regulatory body for both flat and national hunt horseracing in Ireland, recently announced new 'non-trier' rules for persons involved with the running and riding of racehorses in a race in Ireland.

The new rules have been introduced after the recent settlement of a High Court judicial review action to overturn a Turf Club Appeals Body decision. A 42-day racing ban had been imposed on the racehorse Pyromaniac and a €1,000 fine on the trainer under the old 'non-trier' rules. The trainer succeeded in obtaining a stay on the ban, thereby allowing Pyromaniac to run in the Guinness Galway Hurdle. See previous article here for more details. Following the stay, the judicial review proceedings then settled with no penalty for the trainer of Pyromaniac.

The new Rule 212A (the "**Non-Trier Rule"**) creates new offences for persons who deliberately or recklessly cause or permit a horse to run, other than on its merits and for riders who negligently misjudge the number of circuits, position of the winning post or ease their mount without good reason. The assessment of whether a racehorse has '"run on its merits" is considered from the viewpoint of a "reasonable and informed member of the racing public".

The penalty for breach of offences under the Non-Trier Rule has increased from a 60-day to 90-day suspension and from a €6,000 to a €10,000 fine. It will also be an offence for a person to lay a bet on a horse where they have knowledge of an intended breach of the Non-Trier Rule.

In addition to the new offences, Rule 212C now grants greater discretion to racing stewards and senior racing officials to report infractions to the Referrals Committee. It also allows additional evidence, which may not have been originally considered, to be used. A successful argument was raised on this point under the old rules in the Pyromaniac case.

The new rules came into effect on Friday 20 January 2017.

Contributed by Craig Sowman.

Reducing Employee Pay – Latest Case Law, and Best Practice for Employers

Recent cases have likely put to bed the long-running debate regarding "reductions" of pay versus "deductions" of pay. Confusion in the area of the Payment of Wages Act 1991 (the "Act") derived from the High Court case of *McKenzie & PDFORRA v The Minister for Finance* [2010] IEHC 462 ("McKenzie") which determined that reductions in pay were not prohibited by the Act but deductions were (subject to exceptions). The latest case law means that employers should be very wary of applying a reduction to employees' salaries in the hope of relying on the *McKenzie* line of reasoning. Instead employers should follow best practice as briefly detailed below.

Latest developments

A string of decisions from the EAT, Labour Court and High Court since 2015 (*Earagail Eisc Teo v Doherty*, *Hogan v HSE*, *McDermott v HSE, and Cleary v B & Q Ireland Limited)* started the move away from the *McKenzie* line of reasoning. Two recent events have now arguably put the final nail in the *McKenzie* coffin.

First, on 20 January 2017 the High Court gave its decision in the case of *Petkus & Ors v Complete Highway Care Limited* [2017] IEHC 12 ("CHC"). The High Court emphasised that the part of the *McKenzie* decision differentiating between "reductions" and "deductions" was *obiter* and therefore not legally binding as a precedent. The Court therefore held that the 10% reduction in wages in this case was not outside the jurisdiction of the Act and the matter was referred back to the EAT to reconsider.

Secondly, in the EAT cases of *Hogan v HSE* and *McDermott v HSE* two hospital consultants claimed that the HSE had breached the Act by withholding (i.e. "deducting" under the Act) salary agreed as part of a deal struck in 2008 with all consultants. The EAT did not apply the *McKenzie* reasoning and found in the consultants' favour, awarding them €99,876 and €14,000 respectively. Media reports suggested that extrapolating these figures and applying the principle to all affected consultants would mean a potential exposure for the HSE of up to €700 million. The HSE lodged an appeal to the High Court but then announced on 25 January 2017 that it was withdrawing its appeal. The reported insider view was that the legal advice received by the HSE was to the effect that appealing on the basis of the *McKenzie* reasoning would have been fruitless. However, the Government has indicated that it intends strongly defending other cases taken by other consultants directly to the High Court, though it is understood that those cases allege breach of contract rather than a breach of the Act.

Comment

McKenzie has been distinguished only by other High Court decisions and not yet overturned by a superior court. However, the body of cases against it means that employers now should be very cautious about reducing employee salaries or wages in the hope that such reduction falls outside the Payment of Wages Act.

Employers must familiarise themselves with the Act, and in particular Section 5, which provides, amongst other things, that deductions can be made under the Act where the contract of employment allows for this or where the employee has consented in advance to such a deduction. Aside from a potential breach of the Act, a reduction in salary or wages could also be a breach of contract or may lead to a claim of unfair (constructive) dismissal.

It is important for employers to be cognisant of these risks and understand that financial pressures in the employer's business does not provide an automatic justification for a reduction in salary or wages.

The following should be considered:

- Does the company have clear measurable reasons for the reduction? The employer should ensure it develops and retains evidence of the financial reasons and other reasons for the reduction. It should also retain minutes of discussions at Board level regarding the necessity for the reduction, in addition to the process followed regarding the consideration of alternatives (other efficiencies and cost saving measures for example) and why such alternatives were discounted.
- Has a consultation process with employees been followed? A court will expect an employer to act reasonably by engaging with employees or their trade union in advance of implementing a reduction.
- Can the consent of the employees be obtained? This is the safest manner for proceeding. If the reason for the reduction is explained, as well as the consequences for the business and jobs if cuts are not made, it may be that employee consent can be obtained.
- Does the contract allow for the reduction/deduction? Such a clause may be explicit as regards the envisaged change, or it may be a more broad 'general variation' clause. However, caution must still be exercised because using such a clause *unreasonably* may still lead to employee claims, not least under the industrial relations acts.
- Acquiescence? Where employee consent is unlikely some employers make reductions unilaterally in the hope that employees acquiesce in the situation and therefore implied consent is obtained. This is one of the more risky strategies for employers as 'acquiescence' has no set time limit, and if employees have objected in any manner (whether through course of dealings for example or by explicit statement that they are working under an objection) then that is likely to scupper the employer's reliance on the principle.

As the Irish economic recession has shown, reductions or deductions in pay can quickly become a commercial necessity for businesses. Employers should be aware of the above principles, and also consider including appropriate variation clauses now in their contracts of employment in case they are called upon in the future.

Contributed by Jeffrey Greene and Darran Brennan.

Food Safety Law and the Defence of Due Diligence

Food business operators in Ireland have a legal requirement to sell safe food and an implicit obligation to a duty-of-care toward their customers. Due diligence in terms of food safety operations means operating 'all reasonable precautions' which in practice means carrying out safety control measures and management procedures that have been set out in certain framework documents such as the Hazard Analysis and Critical Control Point (HACCP) and the Quality Management Process (QMP).

In relation to the offence of placing unsafe food on the market the defence of due diligence is available under s.5 (3) (b) of European Communities (General Food Law) Regulations 2007 (S.I. No. 747 of 2007). The defence of due diligence in a prosecution involving food safety can only be practically demonstrated by producing bona fide records of implementation and more than just verbal evidence of the precautions taken by the defendants. There must be a system in place that provides documentary proof that the checks, tests, inspections and supervision necessary to avoid the commission of the offence have been regularly carried out.

For example, in the event of a food poisoning outbreak, HACCP analysis identifies that the safety of a particular food requires appropriate temperature control at one or more stages of production, storage and distribution. Therefore presenting corresponding temperature records consistent with the HACCP risk assessment will be the only practical acceptable means along with other necessary food safety measures taken to demonstrate due diligence and that all reasonable safety measures were taken to the satisfaction of the Food Enforcement Officer and a criminal court.

The legal ability for a food business operator to demonstrate due diligence can expand over a wide range of areas such as:

- Traceability in the global supply chain
- Auditing suppliers in a global market
- Testing for pathogens
- Avoiding cross-contamination
- Labelling
- Using technology to ensure compliance
- Product withdrawals, recalls and protecting your reputation

A company's food safety culture must be evident and practised thoroughly by all members of the company. It must be reinforced through continuous training and reassessment of current food safety practices to capture and institutionalize the culture throughout the company's supply chain. The need for food safety precautions does not just cover things that may have gone wrong in the past but also those which might be reasonably anticipated. Therefore it is imperative that all food business operators include food safety practice and procedures as a vital core element of day-to-day business running.

Contributed by Cliodhna McDonough.

Disability and Reasonable Accommodation: Both Employment Agencies and End Users Expected to Consider Options before Taking Steps to Dismiss a Worker

Mr Gerard Cahill worked for Arravasc from October 2014, a company involved in the design and marketing of medical devices. Mr Cahill obtained this position through an agency, Cregg Labour Solutions, and was employed on a week-to-week contract.

On 17 July 2015, he suffered a heart attack at home and, as a result indicated to Arravasc that it would be 4-6 weeks before he would recover. Arravasc advised that it was difficult for them to sustain long term absences.

On 9 September 2015, Cregg Labour Solutions wrote to Arravasc and asked that they terminate Mr Cahill's contract. Arravasc confirmed that they would and 2 days later they dismissed him.

Mr Cahill made a complaint to the Work Place Relations Committee (WRC) against both Arravasc and the agency, alleging that he was dismissed because of a disability, contrary to Section 8 of the Employment Equality Acts 1998-2015 (the "Acts"). Section 16(3) of the Acts states that if it is apparent that an employee is not fully capable, the employer should consider what special treatment or facilities may be available, to enable to the employee to become fully capable.

The agency, Cregg Labour Solutions, argued that Mr Cahill's heart attack was not a disability but rather a 'once off event'.

The end-user Arravasc, did not contend that Mr Cahill did not have a disability, but stated that Cregg Labour Solutions had made the decision to dismiss Mr Cahill and they were therefore solely responsible for the alleged discrimination and argued that it had no control over how the agency terminated Mr Cahill’s employment.

At first instance Mr Cahill's claim against the Cregg Labour Solutions failed. However, his claim against Arravasc was successful and he was awarded €42,640. The WRC found that Arravasc had 'failed in its duty' as an employer and 'substantially and materially contributed to the circumstances which brought about the termination of the employment with the agency'.

Mr Cahill successfully appealed the decision regarding the agency. The Labour Court held that Mr Cahill's condition did amount to a disability and the agency had not adequately considered all available options to them. Furthermore, they held that Cregg Labour Solutions had a statutory liability for any discrimination found to have occurred. The Labour Court awarded compensation in the sum of €15,000, against the agency.

Arravasc also appealed the decision. They were unsuccessful in their appeal, as the Labour Court held that they could not avoid liability by simply shifting blame onto the agency for the termination. However the award against them was varied by the Labour Court from €42,620 to €27,000.

The two appeals in the Labour Court help to demonstrate the failings of both parties when providing reasonable accommodation for an agency worker. The Labour Court also provided commentary regarding the much disputed definition of disability, under the Employment Equality Acts 1998-2015.

This case serves as a stark reminder of the obligations that apply in relation to agency workers. Agency workers must be treated equally by employers and both an agency and an end-user are expected to consider whether reasonable accommodation can be offered before taking steps to terminate a contract of employment.

Contributed by Gráinne Donnelly.

In Short: Phew! A Sigh of Relief from Landowners

In May last year, we reported on the growing concern among landowners following the decision awarding €40,000 in damages to a hill walker in Wicklow against the National Parks and Wildlife Service.

Legislation provides that landowners must ensure that they do not injure recreational users intentionally or act with reckless disregard for the recreational user. Where a structure is provided for use primarily by such recreational users, landowners owe a duty to take reasonable care to maintain the structure in a safe condition.

On appeal, the High Court examined the nature of this duty of care for hillwalkers. The High Court found that it was necessary for the standard of care to be adapted to the conditions and that it was not an "absolute or strict" duty – hillwalkers need to exercise care. It found that not filling in the indentations in the boardwalk or replacing the sleepers was not negligence on the part of the National Parks and Wildlife Service.

This decision will be very welcome by landowners of property used without charge for recreational activity.

Contributed by Tara Rush.

In Short: Reporting Deadline for Grocery Undertakings

The Grocery Regulations introduced in April 2016 place significant obligations on grocery businesses in relation to contractual terms and commercial practices. (For more information on the Grocery Sector Regulations in general, click here).

To encourage compliance and to aid enforcement, all Relevant Grocery Goods Undertakings (RGGUs) are required to compile Annual Compliance Reports detailing their compliance with the Regulations. Annual Compliance Reports must be submitted to the Competition and Consumer Protection Commission ("CCPC") which recently published guidance on the process.

The first Annual Compliance Report is in respect of the period from 30 April 2016 to 31 December 2016. The deadline for submitting this Report to the CCPC is 31 March 2017.

Contributed by Claire Waterson.

In Short: Draft Legislation to Give Effect to 4th EU Anti-Money Laundering Directive Published

The General Scheme of the Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Bill was recently published by the Department of Justice and Equality.

The purpose of the Bill is to give effect to the 4th EU Anti-Money Laundering Directive (AMLD4) which has the aim of strengthening laws in the EU combatting money laundering and terrorist financing. AMLD4 must be transposed into Irish law by 26 June 2017.

Central to AMLD4 is a greater emphasis on a risk-based approach to addressing money laundering and terrorist financing compliance. Those carrying out customer due diligence measures will be obliged to

determine the risk of money laundering and terrorist financing posed by a particular transaction, service or customer, and apply customer due diligence measures accordingly.

The provisions of AMLD4 that require companies to establish registers detailing their beneficial owners were transposed into Irish law separately. For our previous briefing on these beneficial ownership registers, see here.

Contributed by Aoife Kavanagh.

