WILLIAM FRY

LEGAL NEWS

Welcome

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

Patricia Taylor

Partner

Court of Appeal Re-affirms Strict Basis for Restricting Directors

A recent decision of the Court of Appeal has seemingly halted a trend towards leniency in the High Court in applications for the restriction and disqualification of directors of insolvent companies, particularly where the company has been struck off the register of companies for failing to file annual returns.

In *Re Walfab Engineering Limited and RPB Products Limited*, the High Court had rejected an application by the Office of the Director of Corporate Enforcement to disqualify or alternatively restrict the directors of two related and insolvent companies where the companies had been struck off the register of companies (the Register) for failing to file annual returns.

Reduced level of scrutiny

In the High Court the Judge, whilst critical of the directors' failure to comply with their statutory obligations, adopted the view that the '*financial maelstrom'* that afflicted the State from late 2008 and led to the insolvency of the companies, provided some degree of defence to the directors.

In particular, the High Court applied a reduced level of scrutiny in circumstances where the directors were '*not professional directors, do not possess qualifications, and have never served at the helm of large or quoted enterprises*' and determined that the obligations imposed by the Companies Acts must be '*tempered by reference to the times*'*.* The High Court decided that the directors' failures to file annual returns or to wind up the company before it became hopelessly insolvent, such that there were no assets to fund a liquidation, were reproachable but understandable in the wider economic circumstances.

In addition, the High Court had also adopted the view that one of the directors, who was married to one of the main directors/shareholders and had no day-to-day role in the company (i.e. a '*passive director*'), was not tainted with any '*real moral blame*' that would justify an order being made against her.

Affirmation of strict obligations upon company directors

However, the Court of Appeal rejected this approach and re-affirmed the approach taken in previous cases by the High Court that had led to a significant number of orders for the disqualification or restriction of directors for failure to file annual returns leading to the striking off of insolvent companies.

The Court of Appeal determined that where an insolvent company has been struck off the Register for failing to file annual returns the appropriate sanction, absent any exculpatory evidence, is an Order disqualifying the directors from acting as directors of any other company for a period of five years. Factors which a court should take into account when hearing such applications are the:

- Quantum of undischarged liabilities of the struck off company
- Directors role in relation to the struck off company
- Circumstances leading to the strike off
- Impact of a disqualification order against the ability of the director to earn a future livelihood

Whilst such factors may impact a court's discretion to reduce the sanction from disqualification to restriction, they do not affect the underlying obligations imposed on company directors. The Court of Appeal held that directors of all companies, regardless of whether the companies are family based or small or where the company directors have no professional qualifications or face economic hardship, must comply with their obligations.

Furthermore, the Court of Appeal rejected the High Court's finding that there was a necessity to find real moral blame before restricting a passive director. Rather the Court of Appeal re-affirmed the approach adopted in previous cases that directors' duties apply equally to executive and non-executive directors and that the passive nature of a director's role is not sufficient to relieve that director from disqualification or restriction.

In this case, where the companies had liabilities exceeding €300,000 each when struck off and had been badly affected by the economic downturn, the Court of Appeal ordered that each of the directors be restricted for a period of five years.

Conclusion

This decision clarifies that a director's duties are not affected or limited by economic troubles and must be complied with at all times – in fact it is in times of business difficulty when directors' duties and responsibilities can be most important. Furthermore, the decision rejects the recent trend towards leniency which had been seen in a number of cases where directors of insolvent, family run, companies had not been restricted where the insolvency was directly related to the economic downturn.

In addition, the case underlines the importance of directors' compliance with their statutory obligations, particularly the filing of annual returns, and that passive directors of insolvent companies will not escape sanction solely because they have adopted a passive role in the company.

Contributed by Ruairi Rynn.

Anchors Aweigh: Tenant not Forced to Keep Open

In the recent case of *Thomas Thompson Holdings Ltd & Ors v Musgrave Group Plc & Ors [2016],* the landlord's application for an interlocutory injunction to prevent the anchor tenant from terminating its lease was refused on the basis that the business was trading at a continued loss.

The plaintiffs are the owners of Carlow Shopping Centre and the landlord to the lease with the original anchor tenant, Superquinn. Following the sale and purchase of the Superquinn group, the defendants, Musgraves became the owner and operator of the Supervalu grocery store in the shopping centre. In early December 2015, Musgraves publicly announced its intention to terminate the lease and cease trading in the shopping centre from 22 January 2016, following several years of operating at a substantial loss.

The plaintiffs sought an interlocutory injunction to prevent Musgraves from closing the Supervalu store as it was in clear breach of the 'keep open' covenant in the lease. The unilateral decision on the part of Musgraves to terminate the contract would, according to the plaintiffs, cause irrevocable and irreparable damage to the plaintiffs and other tenants in the shopping centre. Musgraves on the other hand, claimed that they would continue to incur further significant losses if forced to trade until the expiration of the lease in September 2018.

The question before the court was whether it should grant a mandatory injunction in circumstances where the tenant has clearly breached a covenant in the lease but is trading at a substantial loss. As there was no clear Irish authority on the question, the court considered the UK position and decided that in this instance the landlord had not met the threshold for a mandatory injunction – proving there was a '*strong case likely to succeed at trial*'. Further, damages would be an adequate remedy to compensate the landlord, especially in circumstances where the lease itself explicitly provided that the tenant indemnify the landlord for breach of covenant. Most importantly, the court felt it would have 'grave doubts over the wisdom of forcing companies that are trading at a loss to continue to do so'.

The High Court refused the injunction pending the substantive specific performance action. This is a welcome clarification of the Irish position, which adopts a practical commercial approach.

Contributed by Richard Breen & Gerard James.

Market Abuse Update

The Market Abuse Regulation (MAR) enters directly into force on 3 July 2016, replacing and repealing the existing framework under the Market Abuse Directive (MAD). The new MAR regime aims to introduce a single market abuse rulebook across EU member states, allowing less scope for national discretion than under the existing MAD rules. The new framework seeks to enhance confidence in the integrity of European markets and in so doing it is hoped to reduce regulatory and administrative costs, especially for firms operating on a cross-border basis.

The key changes to be introduced by MAR include:

- Significant expansion of scope to not only include financial instruments traded on 'regulated markets', but also instruments traded over the counter (OTCs) and on organised and multilateral trading facilities (OTFs and MTFs)
- Introduction of offences of 'attempted' insider dealing and market manipulation, including the requirement to report suspicious orders or transactions, even if orders are not executed
- Explicit prohibition on manipulating the calculation of benchmarks
- A broader definition of 'inside information', which includes information that a reasonable investor would be likely to use in making investment decisions
- Greater requirements on issuers and their advisors to maintain insider lists in the forms prescribed by ESMA
- Obligation to explain to competent authorities the reasons for any delay in the disclosure of inside information
- Greater disclosure obligations for dealings in the issuer's securities by persons discharging managerial responsibilities
- Prescriptive procedures to be followed when disclosing inside information for market soundings purposes

Further, the Directive for Criminal Sanctions for Insider Dealing and Market Manipulation (CSMAD) also becomes effective on 3 July 2016. CSMAD is designed to complement, and ensure the effective implementation of MAR, by giving competent authorities increased investigative and sanctioning powers, including the imposition of criminal sanctions.

Once adopted by the European Commission, ESMA's technical advice and standards will set out much of the detail of the new MAR regime. Such advice and standards should assist companies in preparing for their obligations under MAR, particularly in relation to amending internal policies, maintaining insider lists, preparing its share dealing code, and updating training practices.

We will keep you updated on developments and the practical implications of MAR over the coming months.

Contributed by Niall Keane.

A Friend in Need is a Pest Indeed

In a decision that should be of interest to all professionals, the English High Court has recently considered legal obligations when performing gratuitous services.

Background

Hoping to save costs, the claimant couple engaged their friend of ten years, Mrs Lejonvarn (a self-described architect in sole practice) to assist with a significant garden landscaping project at the couple's London home. Mrs Lejonvarn secured a contractor to carry out the works, and attended the site at regular intervals to manage the project. The couple later took a claim alleging the works were defective. Mrs Lejonvarn contended at trial that she was merely an intermediary between the couple and the contractors.

Decision

The English High Court found the parties did not intend to be bound by a contractual relationship, nor was there any intention that consideration would be given for the services provided. However, the Court held that Mrs Lejonvarn had a duty of care to provide particular services to the standard of a reasonably competent architect and project manager. The relevant ingredients giving rise to a duty of care were present, notably the assumption of responsibility by Mrs Lejonvarn and reliance on her by the couple. The Court came to the conclusion that Mrs Lejonvarn was heavily involved in the project and provided her services on a professional footing, albeit gratuitously and in the absence of a contract.

Lessons

Although decided on its particular facts (which were far from the typical ad hoc circumstances under which many professionals no doubt offer services to friends), the case highlights the risks surrounding such informal arrangements. Professionals who do decide to lend a hand will be in a far clearer position if they go to the trouble of putting a written contract in place in case anything does go wrong.

Contributed by Brian Durcan.

Regulatory Enforcement and White Collar Crime: Time for Change?

The Law Reform Commission (LRC) has published an issues paper on twelve topics relating to regulatory enforcement and white collar crime. The paper concentrates on two broad themes and draws on recent examples of law reform in these areas in several countries.

The first theme is whether the supervisory and enforcement powers of the State's main financial and economic regulators are sufficiently adequate or need to be supplemented. Some of the main issues on which the LRC is inviting submissions include:

- More standardisation of the powers of different regulators and greater coordination between regulatory authorities
- Increased use of civil financial sanctions by regulators
- Greater use of negotiated compliance agreements by regulators
- Introduction of deferred prosecution agreements similar to those used in the US and UK (i.e. suspending prosecution for breach conditional upon a regulated entity becoming compliant within an agreed timeframe)
- A single regulatory appeals system from decisions of different regulators

The second theme considers whether there are gaps in the existing criminal law, particularly in the area of white collar crime. Some of the key issues upon which the LRC is seeking feedback include:

- Whether reckless trading should be made a criminal offence
- Whether a defence of due diligence should be introduced for certain corporate offences
- How criminal liability should be attributed to companies and to their directors and officers
- Whether the current law relating to fraud offences is fit for purpose

Responses to the issues paper are invited until 30 March 2016 and will inform the LRC's specific proposals for law reform in this area.

Contributed by Shane Kelleher.

Data Sharing in the Public Sector – What You Need To Know

The Office of the Data Protection Commissioner (DPC) has issued updated guidance on data sharing in the public sector, and has re-iterated the importance of informing the data subject about the processing of their personal data.

Following on from the recent case of *Bara* at the Court of Justice of the EU, the DPC recommends that all data sharing arrangements in the public sector should:

- Have a basis in primary legislation
- Be made clear to individuals that their data may be shared and for what purpose
- Be proportionate in terms of their application and the objective to be achieved
- Have a clear justification for individual data sharing arrangements
- Share the minimum amount of data to achieve the stated public service objective
- Have strict access and security controls
- Ensure secure disposal of shared data

It is also advised that in circumstances where the public policy objective being pursued involves a data sharing arrangement without the data subject's consent, an assessment should be made as to whether the likely benefits of the sharing justify the overriding of the individual's data protection rights. Any exemptions contained in the Data Protection Acts which reduce fair processing provisions should be applied on a very narrow basis in order to protect and uphold the fundamental data rights of the individual.

The drafting of a data sharing and governance bill has been approved by the Irish Government and it is to be led by the Department of Public Expenditure and Reform. Case law is emanating from Europe on this topic, raising the profile of data protection among public sector bodies even further. Now is the time that public sector bodies should review their data sharing activities with other public bodies and be clear on data protection compliance and the potential effect the sharing would have on the individual involved.

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Contributed by Leo Moore.

Updated ASAI Code

The updated Code of Standards for Advertising and Marketing Communications in Ireland (the "Code") published by the Advertising Standards Authority for Ireland (ASAI) came into effect on 1 March 2016.

The 7th edition of the Code amends and updates the standards for advertising in Ireland and introduces notable changes to the general advertising rules as well as to industry specific requirements.

The updates to the **General Rules** of the Code include the following:

- Advertisers cannot disclaim responsibility for advertising created by agents or third parties on their behalf, whether directly or indirectly.
- Clarification that the ASAI will adjudicate any complaints on the basis of the likely effect on consumers, rather than on the basis of the advertiser's intention.
- A requirement for advertisements to be clearly identified and distinguished from editorial matter and a prohibition on the presentation of marketing communications as user generated content, private blogs or independent reviews.

The Code also introduces **industry specific requirements**, which include new rules on the following:

- Marketing of e-cigarettes
- Advertising for gambling services and products
- Distance Selling
- Food advertising
- Children's advertising
- Medicines, medical devices, treatments, health-related products and beauty products

A significant addition to the Code is the introduction of a complaints procedure in respect of **online behavioral advertising** (**OBA**). The rules require an OBA third party to provide notice to web users in or around an online display advertisement if they are undertaking OBA. This notice should link to a mechanism whereby the web user can opt out of the collection and use of web viewing behaviour data. The Board of ASAI has the ability to impose additional sanctions on OBA Third Parties where such parties persistently defy the Code such as the removal of the European Interactive Digital Advertising Alliance Trust Seal and referral to the Office of the Data Protection Commissioner.

It will be important for businesses advertising in Ireland and Irish media channels to familiarise themselves with the changes to the Code, to ensure that any advertising in Ireland after 1 March 2016 is compliant with the Code; and minimise the risk of a complaint to the ASAI and the related negative publicity, which might result from an adverse finding by the ASAI.

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Contributed by John Farrell.

Recent Updates to the Public Works Contracts and Procuring Public Sector Projects

On 18 January 2016, the Department of Public Expenditure and Reform published revised arrangements for procuring public works projects under the Capital Works Management Framework (CWMF). These result from a review by the Government Contracts Committee for Construction (GCCC) of the Public

Works Contracts; and recommendations from the Office of Government Procurement, following a stakeholder consultation in 2014. The revisions take effect from 4 April 2016 and are set out in Circular 01/16 ("Construction Procurement - revision of arrangements for the procurement of public works projects").

Revised requirements

Public Works Contracts PW-CF1 to PW-CF5 inclusive have been amended and related new tender forms and guidance notes published. Key changes include:

- The pricing document on the employer-designed contract forms (PW-CF1, PW-CF3 and PW-CF5) must be a fully measured bill of quantities to an approved defined method of measurement. Inconsistencies between the pricing document and works requirements will be a compensation event in favour of the contractor.
- A new procedure whereby contracting authorities may separately directly tender specialist works sub-contractors who are to be appointed by the contractor (as reserved specialists).
- New dispute resolution procedures under forms PW-CF1 to PW-CF4 including:
    - A project board for projects greater than €5m
    - A standing conciliator for projects with a value in excess of €10m

Implementation

Contracting authorities must use the new works contract forms where procuring works from 4 April 2016 unless the derogation below applies.

Where procuring construction services from 4 April 2016, the services forming the basis of the design team brief must reflect the procedures in the new contract forms. If tendered before 4 April 2016 with tender returns due after that date, contracting authorities should amend the scope of services and tender documents to reflect the new requirements.

From 8 January 2017 the previous contract forms should not be used without GCCC sanction.

Derogation

Contracting Authorities may use the previous works contract forms up to 8 January 2017 where:

- Consultant service providers have been engaged before 4 April 2016
- Consultant service provider tender return date is before 4 April 2016 and the services do not extend to the requirements of new contract forms

Conclusion

The new contract and tender forms are available on the Department of Public Expenditure and Reform's website. Contracting authorities, professionals and those involved on public sector construction projects should familiarise themselves with the various changes and implications for procuring works and services on public sector projects.

Contributed by Cassandra Byrne.

In Short: Paternity Leave Imminent as Government Approves Legislation

Following commitments made in Budget 2016, the Government has now approved the proposals for necessary legislative amendments to introduce paternity leave in Ireland.

Until now, Ireland had remained one of the few European countries where employers were not required to provide paternity leave.

Two weeks of paternity leave for fathers will be introduced from September 2016 and will be accompanied by a social welfare benefit of €230 per week (subject to PRSI contribution requirements) on the same lines as maternity leave.

It is intended that the paternity benefit will be paid to both employed and self-employed fathers provided they satisfy the necessary PRSI requirements. As with maternity leave, employers may decide to pay employees in full during the two week period, but will not be obliged to do so.

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Contributed by Catherine O'Flynn & Kirsten Kingerlee.

In Short: Cyber Risk Next on Agenda for Central Bank Thematic Review

The Central Bank has announced plans to carry out a thematic review focusing on cyber risk across the regulated financial services sector, including (re)insurance companies.

The announcement, made by the Director of Insurance Supervision, Sylvia Cronin, follows the statement last year by the Deputy Governor of the Central Bank, Cyril Roux, that the Central Bank intends to publish an initial paper on cybersecurity risk outlining its thinking and supervisory experience on the issue and setting out its expectations for regulated firms. This paper is expected to be published shortly.

Cybersecurity is set to remain an area of supervisory priority for both the Central Bank and regulators internationally and boards of directors must prioritise it accordingly. It is important for all regulated financial services firms to firmly focus on managing and addressing cyber risk. It is now front-and-centre on the supervisory agenda for 2016 and firms must ensure they are able to demonstrate to the Central Bank that appropriate steps are being taken to deal with it.

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Contributed by John Magee.

In Short: MiFID II Implementation Date Extended to January 2018

The European Commission has announced a delay to the implementation date of MiFID II, granting national competent authorities and market participants one additional year to comply with the rules set out in the directive. The proposed new deadline is now 3 January 2018.

The Commission proposed the delay following the European Securities and Markets Authority's (ESMA) concerns with regard to the tight timeframe to implement the directive and to build the necessary IT infrastructure systems. ESMA must collect data from circa 300 trading venues on about 15 million financial instruments, and work closely with national competent authorities and the trading venues themselves. However, ESMA informed the Commission that neither competent authorities, nor market participants, would have the necessary systems ready by 3 January 2017, the original operational date. In light of these technical implementation challenges an extension was considered necessary.

The extension will not however impact on the timeline for adoption of the Level II implementing measures under MiFID II/MiFIR and the Commission is proceeding with their adoption irrespective of the extended deadline.

Contributed by Audrey Giles.