

Welcome to the November 2019 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.

Beneficial Ownership: Are You Ready to File?

As [previously reported](#), the Central Register of Beneficial Ownership of Companies and Industrial & Provident Societies (RBO) has been accepting filings since 29 July 2019.

We understand that, to date, only a small percentage of entities required to file beneficial ownership information with the RBO have actually done so. All companies and industrial and provident societies in scope of the beneficial ownership legislation must make their filings with the RBO by 22 November 2019 or risk incurring a maximum fine of €500,000.

All filings must be made online via the [RBO portal](#) and there is no filing fee.

The information that must be filed for a beneficial owner includes:

- Name
- Date of birth
- Nationality
- Residential address
- A statement of the nature and extent of the interest held, or control exercised, by that person
- Date on which the person was first added to the internal register as beneficial owner
- PPS number or transaction number

Beneficial owners who do not have a PPS number are obliged to submit a Declaration as to Verification of Identity containing their name, date of birth, nationality and address. The beneficial owner must solemnly declare this information to be correct and true, sign the Declaration and have it witnessed (for example by a notary public). The RBO has made a Form BEN2 available for this purpose, which should be uploaded to the RBO Portal once completed.

For more detail on this topic, see our Client Briefing on the requirements under the beneficial ownership legislation [here](#).

William Fry is available to advise you on the obligations in relation to disclosure of beneficial ownership and the steps that need to be taken to comply with the 2019 Regulations.

Compulsory Question: Challenging a Property Arbitrator in Compulsory Purchase Order Cases

Property Arbitrator Refusal to State Case to the High Court

The ESB has successfully challenged a property arbitrator's refusal to state a case to the High Court in a claim for compensation.

The property arbitrator was considering a claim by a landowner against the ESB for compensation as a result of the compulsory purchase order (CPO) of his land.

The ESB had previously made a payment to the landowner for his consent to the laying of electricity lines across his lands. The ESB requested that the property arbitrator state a case to the High Court on a point of law – i.e, whether this previous payment should be taken into account by the property arbitrator when calculating the compensation payable to the landowner.

The property arbitrator refused to state a case because he did not believe that the issue was relevant to the claim.

Judicial Review on Point of Law

The High Court found that decisions of a property arbitrator may be challenged by way of judicial review. The High Court decided that the property arbitrator was wrong to refuse to state the case and that the issue could have a significant impact on the amount of money paid out of public funds in compensation by the ESB.

Requirements for a Case Stated

The Court set out the requirements that must be satisfied before an arbitrator should state a case on a point of law, ie:

1. The point of law should be real and substantial and open to serious argument and appropriate for a decision by a court of law, as distinct from a point which is dependent on the special expertise of the arbitrator;
2. The point of law should be clear cut and capable of being accurately stated as a point of law – as distinct from the dressing up of a matter of fact as if it were a point of law;
3. The point of law should be of such importance that the resolution of it is necessary for the proper determination of the case – as distinct from a side issue of little importance.

The Court found that if these requirements are satisfied, the arbitrator should state a case. The Court found that the point of law in this case satisfied the requirements.

Application of the Arbitration Act 2010

The Court also commented on the applicability of the Arbitration Act 2010 (which incorporates the UNCITRAL Model Law) to property arbitration proceedings. This Act provides that no court shall intervene in matters governed by the Model Law unless provided for within the Model Law.

However, the Arbitration Act 2010 only applies where it is not inconsistent with pre-existing statutory regimes. As in this case the entitlement of the High Court to intervene in a property arbitration is set out in other legislation, the Model Law did not apply.

Key Takeaway

Decisions of a property arbitrator in CPO cases may be challenged by way of judicial review and the Court in this case gave guidance on the requirements that should be met before an arbitrator should state a case on a point of law to the High Court.

Can You Copyright a Powder? Charlotte Tilbury Wins Over look-a-like Contender from Aldi



Charlotte Tilbury 'Film Star Bronze and Glow' Palette

Aldi Lacura Palette

Discount retailer 'look-a-like' products are posing increasing problems for better-known brands and are commonly the subject of large-scale trade mark, passing off, and copyright litigation. However, can you copyright something as ephemeral as a powder?

In a recent decision of the High Court of England and Wales in *Islestarr Holdings Ltd v Aldi Stores Ltd*, Charlotte Tilbury has concluded that you can.

"Filmstar Bronze and Glow" palette

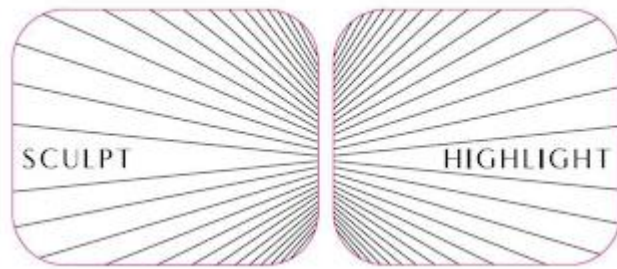
Islestarr Holdings Ltd launched the 'Charlotte Tilbury' makeup brand in 2013 with the release of the 'Filmstar Bronze and Glow' palette. Celebrity make-up artist, Charlotte Tilbury, developed the design for the palette with Made Thought Limited, who later assigned the IP rights in the palette to Islestarr.

In July 2018, Aldi Stores Ltd launched a strikingly similar palette under their own 'Lacura' cosmetics range at a US trade show. The palette bore similarities to the Charlotte Tilbury palette in both its outward appearance and the embossed design on the powder inside. The Aldi palette retailed at €7.00 per unit compared to €65.00 per unit for the Charlotte Tilbury palette.

Did the Charlotte Tilbury palette attract copyright?

In deciding whether there was copyright infringement by Aldi, the Court had to determine:

- was the Aldi design, directly or indirectly, derived from an original copyright work (i.e. did the Charlotte Tilbury palette attract copyright); and, if so
- did the Aldi design reproduce a substantial part of the copyright work?



'Filmstar Bronze and Glow' Powder Design

Before dealing with the substantive questions of copyright infringement the Court first had to consider whether a powder, being so transient in nature, could even attract copyright protection. The Court held that despite that the powder, once applied, would disappear; it was still “a three-dimensional reproduction of the two-dimensional object, namely the drawing”.

In applying the European Court of Justice decision in *Infopaq* the Court held that the Charlotte Tilbury palette was sufficiently original as to attract copyright protection because it was uniquely art deco in style and therefore required intellectual creation or independent skill and effort. It was not the product of “slavishly copying from the work produced by the efforts of another person”.

Did Aldi infringe this copyright?

In deciding whether Aldi had infringed this copyright, the Court then applied the Designers Guild test of whether the visual comparison of the similarities and the differences are such that they appear to be “the result of copying rather than of coincidence”. By applying this test, and in the knowledge that Aldi had admitted to its familiarity with the Charlotte Tilbury palette at its own design stages, the Court found that the similarities of both palettes were indeed substantial and copyright infringement was established.

Key Takeaways

This decision is of interest in assessing what artistic copyright can extend to, and how the existence of such copyright is affected by the concept of ‘fixation’ or permanency. The Court emphasised that an artistic work, unlike copyright in literature or musical works, is not explicitly required to be permanent. This position was reinforced by the fact that the embossed design in the powder originated from physical drawings. Incorporating unique style elements into products can give protection against look-a-like contenders nevertheless it could be argued that the level of intellectual creation or skill displayed in the Charlotte Tilbury palette was ‘de minimis’. In other jurisdictions, this design may have fallen down on originality.

Key Cases

- *Islestarr Holdings Ltd v Aldi Stores Ltd* [2019] EWHC 1473 (Ch)
- *Infopaq International A/S v Danske Dagblades Forening* [2010] FSR 20; [2009] All ER (D) 212
- *Designers Guild Ltd v Russell Williams (Textiles Limited)* [2001] FSR 11

Corporate crime: more tools needed in DPP's toolbox?

Ireland has a robust regime for investigating and prosecuting corporate misconduct that helps maintain its reputation as a low-risk country in which to do business. However, criminal actions against corporate entities are historically difficult to prosecute. A company can commit a criminal offence but attributing acts of an employee/director to a corporate entity for the purpose of imposing criminal liability can prove difficult. As a result, corporate entities are predominately punished for strict liability offences where proving the guilty knowledge or intent is not required. The most common form of sanction against a corporate entity is a fine.

LRC has Recommended a Scheme for DPAs

In October 2018, the Legal Reform Commission ("LRC") recommended that a statutory scheme of Deferred Prosecution Agreements ("DPAs") should be introduced as one option to address corporate crime. A DPA is an agreement between a prosecutor and the accused pursuant to which the prosecuting body agrees to dismiss a criminal charge provided that the accused fulfils specified obligations during a defined period and cooperates fully with an investigation. The LRC recommended that the process should be controlled by the Director of Public Prosecutions ("DPP") and overseen by the High Court. The High Court's role would be to consider whether a DPA is "in the interest of justice" and whether the terms were fair, reasonable and proportionate. A detailed Code of Practice was recommended setting out circumstances in which the DPP might engage in DPA negotiations and the public interest considerations the DPP should take into account when considering DPA discussions.

To date the LRC recommendation has not been implemented but DPAs would potentially provide a reasonable compromise between sanctions for criminality, certainty and speed of outcome. It would therefore suit both prosecutor and prosecuted.

What is the situation in the UK?

In the UK, DPAs were introduced on a statutory basis in 2013. To date UK DPAs have returned an estimated £1 billion to the exchequer and so, despite various criticisms, including the perceived Americanisation of the process, the financial benefit is clear.

What next?

DPAs are unlikely to replace traditional prosecutions in Ireland in the immediate future. However, as the Bill to establish the Office of the Director of Corporate Enforcement as an independent agency with enhanced powers has priority in the legislative programme, it would seem there is renewed vigour for tackling corporate crime. DPAs could provide an attractive option to resolve certain disputes without the necessity for costly and time intensive trials.

Flexible Policies Needed to Extend Working Lives of Older Workers

On 1 October 2019, the Economic & Social Research Institute ("ESRI") released a report entitled 'The Ageing Workforce in Ireland: Working conditions, health and extending working lives'. The ESRI estimate that nearly 20% of the Irish labour market is comprised of workers aged 55 and over ("Older Workers").

According to our recent Age in the Workplace Report, approximately 61% of those surveyed believed that they will have to work over the age of 66 which is the current state pension age.

The ESRI note that retention rates of Older Workers in the labour market in Ireland is higher than in other OECD countries. However, it has found that there is a significant cohort of early leavers aged between 54 and 59 which is hampering efforts to increase Older Worker workforce participation rates.

One of the key findings in this regard is that women are five times more likely to leave work early/retire in order to care for family members. The ESRI also found that "those who experience an imbalance between work and other demands (including caring) are less likely to believe they can work longer".

At our recent event on 'Work-Life Integration - Protective Leave and Flexible Working Arrangements', we highlighted the use of flexible working policies as an important means of providing Older Workers with the opportunity to extend their working life. In order to be effective, such policies must take account of the various push and pull factors on employees which can lead to early retirement.

Employers could also consider introducing a retirement policy if they have not done so already. The policy should be drafted in light of the Code of Practice on Longer Working which provides guidance in respect of engagement between employers and employees prior to retirement, including how to deal with requests to continue working beyond the employer's retirement age.

The need to increase opportunities for flexible working has been recognised at a European level with recent approval of a Directive on Work-Life Balance for Parents and Carers. At a national level, parental leave was increased last month from 18 to 22 weeks and is set to increase to 26 weeks in September 2020.

Legal Advice Privilege Survives Dissolution of Company

A recent English Court of Appeal decision has held that legal advice privilege, once established, remains in existence unless and until it is waived. Whether there is no one to waive it; or whether the Crown could have waived it but has not done so; does not matter.

What was the Background to the Case?

In Ireland, where a company has assets upon its dissolution, these assets transfer to the State. In England a similar process applies but the assets vest in the Crown. In this case investors in a scheme marketed by AnaBus Holdings Ltd (the Company) issued proceedings against the lawyers who acted for the (now dissolved) Company as they claimed the scheme was fraudulent. They sought documents in possession of the lawyers, who argued the documents were privileged as they were communications between the Company and its lawyers for the purpose of legal advice. The investors argued that as the Company was now dissolved, and the Crown had disclaimed all interest in the assets, that the privilege no longer existed.

The Rationale and Ambit of Legal Advice Privilege

The rationale behind legal professional privilege is that a client must be able to consult with its lawyer in absolute confidence with no restriction and these communications should be kept secret unless the client consents. This is a fundamental human right and remains absolute unless it is waived.

What Happens to Legal Advice Privilege upon Death?

Privilege does not cease on the death of a living person, but personal representatives are entitled to waive privilege.

The investors argued that a right must belong to someone and if there is no one then the right cannot exist. The Court of Appeal held that the correct question to ask was: when a person ceases to exist, is there anyone with the right to waive the privilege?

Dissolution of a Corporation

The investors argued that privilege should not extend to a dissolved company. The Court of Appeal held that this question could be resolved by considering the rationale for privilege: absolute confidence in communications with your lawyer. If an exception were made in the case of a dissolved company this could undermine the certainty of that principle.

The Court noted that although privilege can be overridden by legislation there was no suggestion of that in this case.

The question then became was there anyone to waive the privilege here? The Company's legal advice privilege had passed to the Crown on dissolution and although the Crown had disclaimed any interest in the assets, it had not waived privilege. Therefore, the Court of Appeal held that on the face of it there was no one to waive privilege in this case.

Key Takeaway

When considering the dissolution of a company the correct question to ask is not **who can assert** privilege but **who can waive it** and if there is a person entitled to waive it, have they done so?

See some of our related articles on privilege and shareholder disputes [here](#) and on internal investigations [here](#).

Key Case: Addlesee and others v Dentons Europe LLP [2019] EWCA Civ 1600 (English Court of Appeal)

Justice delayed, lis pendens denied

Background

In the recent case of *Ken Fennell v Darren Collins* [2019] IEHC 572, Mr Fennell as receiver appointed over lands in County Galway brought an action pursuant to section 123 of the Land and Conveyancing Law Reform Act 2009 ("the 2009 Act") to have a lis pendens registered against part of the lands vacated. The nephew of the owner of the lands had registered the lis pendens when he issued his own legal proceedings in respect to the lands in May 2017 claiming an interest arising from an alleged promise. The receiver argued that his power of sale under the mortgage was being frustrated as a result of the lis pendens.

Lis pendens

A lis pendens is a burden that can be registered against land under section 121 of the 2009 Act in circumstances where there is ongoing litigation over a property that can affect the interest of its owner by limiting the title or ultimately reduce its value.

Unreasonable delay

Simons J. relied on the Court of Appeal decision in *Carthy v Harrington* [2018] IECA 321 where the Court held that under section 123 of the 2009 Act it was entitled to vacate a lis pendens at the request of a 'person affected' by it in the case of unreasonable delay. The Court of Appeal in that case stated that a litigant asserting a beneficial interest in or over encumbered property and who seeks to litigate his/her rights in relation to same should do so "with reasonable expedition". The Court also held that had the owners of the property owed considerable debt and the possibility that a charge holder who had validly appointed a receiver could be adversely affected by delays in litigation were compelling arguments for ensuring delay by the Plaintiff who has registered a lis pendens not be accepted by the courts.

Proceedings not prosecuted bona fide

The High Court found that the nephew had no reasonable explanation as to why his proceedings, which had been commenced in May 2017, had not progressed past the service of a plenary summons. Simons J. found that the proceedings were not being prosecuted bona fide from the following:

1. the unexplained delay in prosecuting the proceedings;
2. the family relationship between the plaintiff and the defendant;
3. the language of the plenary summons, with a disproportionate emphasis on restraining the sale of the lands; and
4. the fact that the alleged promise of an interest in the lands post-dated the creation of the mortgage.

Despite being afforded an opportunity to explain the delay the plaintiff had not offered any reasonable explanation and the High Court found that intent of the proceedings appeared to be to frustrate the enforcement of the mortgage. An order vacating the lis pendens was made.

Key Points

Registering a lis pendens is a relatively simple and inexpensive procedure that does not need a court application. However as can be seen above the process for vacating a lis pendens is more burdensome as it requires an application to court. However, the recent case law shows that the courts are more alive to delays in prosecuting proceedings where a lis pendens has been registered and that where there is no reasonable explanation for such delay a court will be more likely to remove the lis pendens.

Cookies with Bite: CJEU Rules that Cookies Require Active Consent

Europe's highest Court has found that a pre-selected cookies checkbox does not constitute valid consent for cookies to be placed on a website user's browser.

Click [here](#) or on the image below to read the full article.



CCPC Consults on Simplified Merger Notification Procedure Guidelines

On 29 October 2019, the Competition and Consumer Protection Commission (CCPC) published a consultation on draft [Simplified Merger Notification Procedure Guidelines](#).

The CCPC states that the Simplified Merger Notification Procedure (the Simplified Procedure) will lead to shorter review periods for relevant transactions.

The CCPC states that it will in principle apply the Simplified Procedure in the following circumstances:

1. where none of the parties are active in the same product or geographic market or upstream or downstream of each other; or
2. where parties are active in the same market, but their combined market share is less than 15%; or
3. where parties are active in a market upstream or downstream to each other, but the market share of each is less than 25%; or
4. where a party, which already has joint control over a company, is to acquire sole control over it.

Where the Simplified Procedure applies, the parties would not have to answer all of the questions on the CCPC merger notification form. In particular, the parties would not need to provide, in areas of overlap between them, information on their agreements, shareholdings, trade associations, suppliers, customers and competitors and their internal documents assessing the competitive effects of the proposed transaction.

However, the CCPC reserves the right to revert to the standard procedure and require full information at any point. The CCPC states that this may arise, for example, in transactions involving concentrated markets, maverick firms and pipeline products.

The deadline for responses to the consultation is 29 November 2019.

In Short

Central Bank of Ireland Publishes Third Insurance Quarterly Newsletter for 2019

On 27 September 2019, the Central Bank of Ireland (the CBI) published its Insurance Quarterly Newsletter (the Newsletter) for Q3 2019.

Conditions of Authorisation

The Newsletter's lead article focuses on the revised Conditions of Authorisation under Solvency II and in particular the condition that requires (re)insurance undertakings to:

"notify the Central Bank of Ireland, in advance, of any material change in the Firm's business (including but not limited to, the introduction of a new product, transacting business in a new territory and changes to reinsurance and/or retrocession arrangements)."

The CBI states that it has become aware of an unspecified number of failures to comply with the terms of this condition, and goes on to clarify some of its expectations in this regard.

In particular, the CBI:

- Considers that any material change in the nature of a product range, such as the introduction of a guarantee, is within the scope of the notification requirement;
- Expects (re)insurance undertakings to have a formal process in their governance framework, whereby the board of directors would consider the obligation to notify the CBI in advance of any alteration to the business plan of the undertaking; and;
- Expects that any new product must be subject to the undertaking's product approval process prior to launch, which should include an assessment as to whether an ad hoc ORSA submission is required.

Insurance and reinsurance undertakings will need to carefully note these expectations from the Central Bank and consider whether their existing governance frameworks should be updated to fully reflect them.

Insurance and Climate Change

Triggered in part by the Irish Government's declaration of a "climate emergency" in May of this year, the Newsletter includes an article highlighting the material exposure of the insurance industry to climate risks. The CBI comments on the role that the industry may play in shaping the wider response to climate change risks, including the risks that might arise from a disorderly transition to a low carbon economy.

The key message of the CBI is that it intends in the coming months to engage more intensively in relation to climate change and emerging risks more broadly. This engagement is to include listening to the views of the insurance industry, and potentially seeking further information to "bridge gaps in critical data". The CBI's increased expectations in the area of climate change are clearly flagged in the following extract from the Newsletter:

"Where an undertaking has a material exposure to climate related risks, we will expect to see evidence of robust analysis and discussion within the ORSA report. The ultimate aim should be to enable discussion, challenge, and decision making in relation to climate related risks, at board level".

The boards of directors and the risk management functions of (re)insurance undertakings will need to take the CBI's views fully into account in preparing and executing their next ORSA process and report, not least in ensuring that a material discussion of climate-related risks takes place at board level.

New Reporting Requirement for Direct Non-life Insurance Business

The Newsletter confirms the introduction of the new NST.14 reporting template, the purpose of which is to allow the CBI to more effectively direct its supervisory efforts to markets and products which merit their attention, particularly for undertakings operating in the cross-border insurance market. This reporting will involve data related to the number of contracts written, for each type of policy, for the main countries in which an undertaking writes direct non-life business. Business written on a reinsurance basis does not need to be reported in NST.14. The first submission of NST.14 will take place as at 30

September 2019 (for undertakings with a 31 December financial year-end), and will subsequently be required twice yearly, as part of the Q2 and Q4 NST submissions.

Brexit

This Newsletter article recaps on the arrangements that have been put in place to manage the situation both in Ireland and in the UK in the event of a "no-deal" Brexit, including the Irish temporary run-off regime (read here for further details), the UK's Temporary Permissions Regime and the UK's Financial Services Contracts (Transitional and Saving Provision) (EU Exit) Regulations 2019.

The CBI also advises that it has placed increased focus on monitoring financial and operational resilience at a sector and firm level, and that final arrangements are also being made to govern supervisory cooperation post Brexit, though it does not go into any detail on this latter point. The CBI further stresses its expectation that firms should be in "final preparation mode", and that firms should have considered all the impacts that Brexit could have on their businesses and have developed and fully tested their contingency plans.

Other Updates

The Newsletter highlights the recently published "Anti Money Laundering and Countering the Financing of Terrorism Guidelines for the Financial Sector" (read here for further details), the "Q2 2019 Insurance Corporations Statistics" and the appointment of Mr Domhnall Cullinan as Director of Insurance Supervision with effect from 1 September 2019, as well as providing updates on a number of developments at EIOPA level, including:

- 2020 Review of Solvency II
- Sustainable Finance Activities
- Regulation for a pan-European Personal Pension Product
- Report on "Cyber Risk for Insurers - Challenges and Opportunities"
- Establishment of the Consultative Expert Group on Digital Ethics

Asset Management & Investment Funds Update October 19

Welcome to the October 2019 edition of our monthly update from the Asset Management & Investment Funds team.

In this month's edition we examine the Central Bank's consultation on a proposed set of rules for the 'treatment, correction and redress of errors in investment funds' along with other topical updates. The consultation, which is open until 9 December 2019, poses a series of questions to industry on a proposed approach to the development of a regulatory framework in this area.

Currently, there is no formal Irish regulatory regime for the treatment of errors in investment funds. This consultation, therefore, represents the first step by the Central Bank in the establishment of a set of rules and requirements to govern how funds and their management companies should address fund errors.

Please click [here](#) or on the image below to access the full update.

