WILLIAM FRY

Legal News

Welcome to the August 2018 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.

Shared Maternity Leave and Benefit Bill 2018

The Shared Maternity Leave and Benefit Bill, which seeks to enable parents to share ordinary maternity leave, has been proposed to the Dáil.

Fianna Fáil proposed the Shared Maternity Leave and Benefit Bill (the "Bill") on Friday 13 July 2018. The Bill seeks to enable parents to share ordinary maternity leave which currently comprises 26 weeks. The Bill is currently at first stage and will enter debate in autumn. Whilst not opposed by any party, it remains to be seen whether the Bill will obtain government support.

Current Position

Maternity leave is governed by the Maternity Protection Acts 1994-2004 (the "Act").

The Act entitles a pregnant employee to 26 weeks ordinary maternity leave ("OML") and an additional period of 16 weeks' maternity leave. Maternity leave must be taken at least 2 weeks before and at least 4 weeks after the birth of the child.

Fathers are currently only entitled to 2 weeks' paternity leave and may only take up the mother's maternity leave entitlement or part thereof if she dies.

Parental leave is additional to maternity leave and paternity leave and currently entitles a parent (or persons acting in loco parentis) of the child to 18 weeks leave per child. It can be taken at any stage until the child reaches the age of 8 years, or 16 years in cases of disability and adoption, to care for the child.

The Bill

Under the Bill, a pregnant employee may share their entitlement to OML with an employee who is a 'relevant parent' of the child.

'Relevant Parent' assumes the definition provided under the Paternity Leave and Benefit Act 2016 and is a person other than the mother of the child. It includes the father of the child, the spouse, civil partner

or cohabitant of the mother of the child. Where the child is adopted then the relevant parent is the spouse selected by the adopting couple.

The opportunity to share maternity leave includes the ability to share the associated state maternity benefit. Where maternity leave is shared, the maternity benefit would be apportioned between the parents of the child in proportion to the period of maternity leave taken by each parent. This is referred to as "Shared Leave Benefit" in the Bill and is additional to the paternity leave benefit.

The Bill also clarifies that shared maternity leave is supplemental to the paternity leave of 2 weeks. Notably, the Bill is not applicable to the additional unpaid leave of 16 weeks.

The Bill sets out the requirements for sharing maternity leave including the obligation on the relevant parent to notify the employer in writing of the intention to share the OML entitlement. The Bill has not prescribed the notice period required.

Premise of the Bill

In proposing the Bill, Fiona O'Loughlin for Fianna Fáil stated that the Bill *"will facilitate greater equality insofar as it allows both parents to share rearing responsibilities".*

Accordingly, the Bill, if enacted, may be a positive step towards creating a more modern workplace, enabling parents to have greater flexibility in the care of their children. By affording parents the opportunity to share maternity leave, parents are in an optimal position for determining the best arrangements for their children. Other factors come into play including financial arrangements. Depending on the circumstances, it may be economically viable for a mother to share part of her maternity leave.

Fianna Fáil also highlighted that the Bill would not give rise to any additional costs to the Exchequer given that state maternity benefit is already paid to mothers.

Position in the UK

The UK government introduced a similar concept under its Shared Parental Leave scheme in April 2015. This enables parents to share the period of parental leave. The parental benefit is also apportioned between the parents in accordance with the length of parental leave taken. A mother and partner have an entitlement to 39 weeks shared parental pay. However, as a mother is statutorily required to take two weeks maternity leave, shared parental pay is available for 37 weeks.

To avail of the scheme, a mother must either return to work or curtail her entitlement to maternity leave. A mother and partner may elect to take shared parental leave separately or at the same time. It must be taken in the first year of the birth of the child.

Despite the attractions of sharing parental leave, in practice it may not cause significant change. The UK Government issued a report in 2016 that predicted only 2-8% of fathers would avail of shared parental leave.

Equality Issues

An issue which may arise in the potential implementation of the Bill, is possible allegations of discrimination if enhanced maternity pay is only provided to mothers. This has arisen in the context of paternity leave (see our article here). In *An Area Manager v A Transport Company ADJ-0000577*, the adjudication officer found that an employer could pay enhanced maternity pay but not enhanced paternity pay given the special protection afforded to women under EU and Irish legislation to ensure health and wellbeing during pregnancy and maternity leave.

In *Ali v Capita Customer Management Limited* EAT/0161/17/BA, the UK EAT determined that a policy providing for enhanced maternity pay for the first 14 weeks but not shared parental pay did not directly discriminate against men. This is due to the EU Pregnant Workers Directive (92/85/EEC) which provides that a mother must take 14 weeks maternity leave to ensure the protection of her health and wellbeing. While the UK EAT did not consider the possibility of offering enhanced maternity pay beyond the 14 weeks, it could be argued that the objective of maternity leave at that stage is no longer the health and wellbeing of the mother but rather the provision of care to the child.

Conclusion

The Bill seeks to adopt a similar approach to that taken in the UK. Whilst it is not yet clear whether the Bill will obtain the support of the Irish Government, it is likely to be welcomed by parents as a move towards a more progressive workplace.

However, given the slow uptake of the UK scheme, it remains to be seen whether the Bill, if enacted, would generate any significant change in the Irish workplace.

Contributed by Catherine O'Flynn

Time to Look a Gift Horse in the Mouth: Companies New Duties under the Criminal Justice (Corruption Offences) Act 2018

The new Criminal Justice (Corruption) Offences Act criminalises both direct and indirect corruption in wide ranging spheres of activities.

The much anticipated Criminal Justice (Corruption Offences) Act 2018 (the "Act") was signed into law by President Higgins on 5 June 2018. It is anticipated that the Act will be commenced by way of a Ministerial Order in or around 30 July 2018.

As previously discussed here and here the Act is one of the central planks in a suite of legislative measures introduced by the Government as part of its stated intention of tackling white collar crime.

Overview

The Act is considerably broader in scope than the legislative regime it replaces insofar as it criminalises both ***direct*** and ***indirect corruption*** in both the ***public*** and ***private sectors.***

Parties falling under the Act include individuals, corporates, voluntary bodies and foreign and Irish officials. The Act applies a broad definition to latter so as to capture the broadest range of office holders including officers, employees and members of any "Irish public body".

From a corporate perspective, the most significant provision introduced by the Act is the introduction of criminal liability for corporate bodies and senior management for offences under the Act.

Offences & Penalties

Most of the offences in the Act are dependent upon an act or omission being carried out 'corruptly'. While the Act defines 'corruptly' as 'acting with an improper purpose or by personally influencing another' the definition is a non-exhaustive one, consequently, there is potential scope for actions not explicitly listed under the Act to come within the definition.

While not specifically defined, a 'bribe' for the purposes of the Act is treated to be 'a gift, consideration of advantage'. In keeping with the sweeping nature of the Act, the 'bribe' need not be given or accepted in order to constitute an offence, it is sufficient that there be agreement to give or accept.

The key offences and penalties introduced by the Act are set out here.

Corporate and Management Liability

Pursuant to section 18(1), a body corporate will be liable for the actions of a director, manager, secretary, employee, agent or subsidiary who commits an offence under the Act with the intention of obtaining or retaining business for the body corporate or in obtaining an advantage for the business.

A company can seek to defend a prosecution by demonstrating that it took "all reasonable steps and exercised all due diligence in seeking to avoid the commission of the offence". In contrast to the defence of adequate procedures provided for under the UK Bribery Act 2010, the Department of Justice has indicated that it will not be publishing any guidelines around what can be considered "all reasonable steps".

Section 18(3) provides that a director, manager, secretary or other company officer who consents to the commission of the offence may also be guilty of an offence. The same office holders will also be guilty of an offence if proved that the offence on the part of the company was attributable to any wilful neglect on their part.

From a management perspective, it is worth nothing that it is not necessary for the body corporate to be convicted of the offence in order for the senior management to be prosecuted.

Public Sector Element

Section 7 of the Act has introduced the new offence of "Corruption in relation to office, employment, position or business", involving an "Irish Official". The term "Irish Official" is defined as applying to a range of specified office holders for example elected members of Dáil Éireann, Seanad Éireann and the European Parliament, the Attorney General, the Comptroller and Auditor General, the Director of Public Prosecutions, members of the judiciary, jurors and arbitrators are all specified as Officials within the meaning of the act. The definition is further extended to officers, directors, employees and members of Irish Public bodies, which is stated as including members of local authorities. Consideration should be given to the Schedule to the Act, which defines what constitutes a public body for the purposes of the act and a further analysis of this aspect of the Act will be provided by William Fry shortly.

Presumptions

The Act contains a number of presumptions in relation to officials and political donations under sections 14, 15 & 16 of corruption which are considerably broader in scope than in the legislation previously. The effect of these presumptions lowers the prosecution by switching the onus on to a defendant to rebut the presumption(s).

Extra territorial effect

In a similar vein to the equivalent US and UK legislation, the offences under the Act are given extra territorial effect.

Pursuant to sections 11 to 13 of the Act, Irish citizens, companies and corporate bodies registered in Ireland will be liable under the Act for actions committed outside of Ireland where those actions would otherwise constitute an offence under the Act if committed in Ireland.

The scope of this extra territorial effect is somewhat limited by the requirement that the act committed must also be an offence in the jurisdiction in which it was carried out.

It is anticipated that this dual requirement will provide some degree of breathing space for Irish citizens, companies and registered entities operating abroad. It is also likely to fuel criticism that the ACT doesn't go far enough in holding to account parties whose actions abroad would not necessarily match their obligations in this jurisdiction.

UK Bribery Act 2010

For many Irish businesses, the UK Bribery Act 2010 was a watershed moment that triggered a detailed re-assessment of work practices. With the introduction of the Act, the first question for many business which are already complaint with the UK Bribery Act 2010 is what additional steps, if any, will be required for compliance with the Act.

The two Acts contain many similar provisions, they both make active and passive bribery offences and contain provisions on bribing foreign officials. Both Acts contain extra-territorial effect – however the Irish legislation provides that the offence abroad must also be an offence in the place where the corrupt act was done. This is not a requirement under the UK law and it would appear that in this respect the UK legislation is stricter. The effect of both Acts could mean that a company that is found guilty of an offence in the UK could also be open to prosecution for the same act under Irish law as there is no explicit double jeopardy provision in the Act.

The Irish Act contains several offences that do not appear in the UK Act. These offences are focused on public officials.

As dealt with previously a further difference between the two Acts is the defence available to companies under section 18 (2) of the Irish Act. It would appear that adequate procedures would encompass taking reasonable steps and due diligence to avoid corruption and therefore if a company had put in place procedures for compliance with the UK Act the same procedures would provide a defence under the Irish Act.

Next Steps For Companies

Due to the sweeping nature of the Act, a one-size-fits-all approach will not work. Instead, companies will need to undertake their own assessment of the risk in order to determine what due diligence and training procedures are appropriate to their business. While the form that this should take will vary, at a minimum, the following steps should be implemented:

- Companies need to ensure that they have a robust anti-bribery policy in place, and if there is one already in place, these policies should be reviewed and updated in light of the Act.

- Responsibility for rolling-out and monitoring compliance should be vested in a designated employee.
- Once the policy is in place / reviewed, notification and training should be rolled out regularly to all directors, employees and contractors

Contributed by Gerard James

Privilege Perils: Reporting with Purpose

Report not privileged where litigation was not the dominant purpose of its creation

Background

In the recent case of *Artisan Glass Studio Limited v The Liffey Trust Limited, Slovak Limited (substituted by Aviva Limited and Anor [2018] IEHC 278*, which concerned fire damage to property, the High Court considered whether two engineers' reports prepared on behalf of the Second Defendant's insurer were protected from disclosure by litigation privilege.

The fire occurred on 2 November 2002, originating in the Second Defendant's premises and spreading to other units in the complex, including the Plaintiff's.

Aviva, the Second Defendant's insurer, took over the running of the defence of the claim on behalf of the Second Defendant.

As part of its investigation of the loss, Aviva appointed consulting scientists and engineers, Burgoynes, to advise on the cause of the fire. Burgoynes were appointed on 4 November 2002. Burgoynes produced a record of inspection on 15 November 2002 and a Report on 20 March 2003. In the Affidavit of Discovery, Aviva claimed litigation privilege over the record of inspection and the Report of Burgoynes.

Relevant factors for litigation privilege to apply

The Court considered the relevant factors when deciding on a claim of litigation privilege, as set out below:

> *"(a) Whether litigation was reasonably apprehended at the time the documents in question were brought into being;*
> *(b) Whether the documents in question were brought into being for the purpose of that litigation;*
> *(c) If the documents were created for more than one purpose, the documents will be protected by litigation privilege in the event that the litigation was the dominant purpose;*
> *(d) The party claiming privilege has the onus of proving that the documents are protected by privilege."*

Both documents created at a time when litigation was reasonably apprehended

The High Court found that litigation was reasonably apprehended at the time that the documents in question were brought into being. In particular, the Court cited that fact that the Second Defendant's solicitors had been formally instructed on the matter on 16 November 2002 and prior to that date, the solicitors had discussions with Aviva and their loss adjusters in relation to potential third party claims that may be initiated as a result of the fire. By the time that the Burgoynes Report was prepared on 20 March 2003, a letter of claim had been issued on behalf of one of the occupiers of one of the other units in the complex.

However, the court found that the fact that litigation was apprehended at the time of the creation of these reports was "*not itself determinative that they are protected by litigation privilege*."

Multiple purposes of the reports

The Court found that it was clear from the affidavits filed in the matter that the reports were prepared for more than one purpose. In order for the reports to be protected by litigation privilege, Aviva would have to show that the dominant purpose of the reports was apprehended litigation by third party claimants. The question of dominant purpose is a matter for objective determination by the court.

The Court was of the view that Burgoynes had been engaged not only to assist with the defence of potential third party claims, but also to assist with issues as to Aviva's liability to its own insured in respect of the damage done to the insured's own premises.

Record of inspection not privileged

In relation to the record of inspection dated 15 November 2002, the Court found that apprehended litigation was not the dominant purpose of this document, rather that it was "*equally capable of being referable to enquiries being made on behalf of the insurance company as to whether it had a liability to make a payment to its own insured*." Therefore, the record of inspection was not protected by litigation privilege and Aviva was directed to produce this document to the Plaintiff.

Report was privileged

However, the Court found that by the time that the Burgoynes Report was prepared on 20 March 2003, Aviva was no longer considering the question of its own liability to its own insured. The Court found that the report did not "*contain any material which suggests that this issue was still under active consideration*" and that the dominant purpose of the Burgoynes report was the apprehended litigation as between the different occupiers of the other units. Accordingly, the Burgoynes Report was protected by litigation privilege.

Consider the purpose of the document

This case highlights that it is for the party claiming privilege to prove that the document attracts privilege. Specifically in respect of litigation privilege, when parties are preparing documentation or instructing other parties to prepare documents that might be relevant in a litigation, they should consider carefully the purpose of the creation of the document. Only documents created for the dominant purpose of litigation will be protected by litigation privilege.

Contributed by Michelle Martin

AI, Used Correctly, Can Help Solve Some of our Most Pressing Employment Law

First produced in The Sunday Business Post 15, July 2018

The World Economic Forum has defined Artificial Intelligence (AI) as an element of the fourth industrial revolution (4IR) and something which will change our world and workplaces. This is similar to the changes envisaged during the previous industrial revolutions (let's not forget the fears of the Luddites) but what is different now is the pace of change. These changes are fast-approaching and 2018 will be recorded as an important year in the history of AI. However, history repeats itself and these changes are also considered a fast-approaching threat to the livelihoods of many employees.

On 10 April 2018, Ireland, along with 24 other EU Member States, signed the EU Declaration of Cooperation on Artificial Intelligence. This Declaration proves that AI is considered a game-changer in all walks of life. While it doesn't go into specific detail on employment law, the Declaration does acknowledge that Member States agree to cooperate on *"addressing socio-economic challenges, such as the transformation of labour markets…".* Member States acknowledge that AI can have positive impacts for European citizens when harnessed correctly.

Employment law change will follow too and it is important to address the threat posed by AI that many employees believe is coming. Employment lawyers and the Irish legislature need to consider now how current employment law needs to adapt to harness AI's full potential for Irish businesses and, also, to protect employees. There have already been calls for an Irish AI national strategy encompassing all elements of AI. This is to be welcomed but it must take stock of employment law issues, both the positives and negatives, to be fully comprehensive. While there are threats to livelihoods, we also envisage positives from AI and that AI can help solve some of our current pressing issues as explored in this article.

Recruitment

AI has already changed the recruitment process making it more effective and this will increase rapidly in 2018. As this continues to develop, and perhaps reach the stage where the first stages in a recruitment process have little human interaction, it will be important to ensure that Irish employment equality legislation is fit-for-purpose. The current Employment Equality Acts 1998-2015 should be considered in any national strategy to ensure that the positives in AI-assisted recruitment do not come at the detriment of employees. AI, if used correctly, can help to eliminate bias in the recruitment process and offers more accessible and cost-efficient options for candidates. This can help increase diversity in the Irish workforce too.

Gender Equality

The gender pay gap, and gender equality more generally, can improve with AI too. This can come from recruitment, bonuses, and benefits being tracked by technology to accurately identify gender pay gaps. This has the potential to defeat any latent bias in an organisation and can stand to also defeat the issues

identified following the first deadline of UK gender pay gap reporting. Irish legislation is likely to be implemented in 2018 and we must learn from failures identified in the UK experience before implementation. Any national strategy on AI should consider these potential positives.

Disabilities

The use of technology has the potential to help employees with disabilities remain in or return to the workforce more easily than before. AI can help employers honour their legislative responsibilities and perhaps assist with reasonably accommodating employees more cost-effectively. Existing legislation should be reviewed to allow for greater connection between employees and technology including potentially, the need for employers to offer education as part of accommodation following serious illness or accident.

Inter-generational Adaptions

There has been much discussion recently on the relationship between the various generations in Irish workplaces. Flexibility in the workplace is a critical issue for younger generations, while legislation has adapted to enable Irish workers to remain in the workplace longer with a corresponding need for employers to respect active aging. We will soon have a generation of employees who have grown up forever connected to technology. All of this poses challenges for employers practically and for the legislature in providing legislation to seek to enable all of these generations to work in harmony. AI, implemented correctly, has the potential to help Irish employers to solve these issues and to allow greater harmony between generations working together. For example, by allowing all generations to be more flexible in their working patterns, giving 'millennials' the flexibility they desire, while allowing older generations the opportunity to work from home comfortably.

Conclusion

AI is concerning for Irish employees and Irish employers alike and will carry heavy financial and social costs in the early years of adaptation. However, like the previous industrial revolutions, 4IR will begin to rapidly change workplace cultures and, as employees and employers adapt to this changing culture, new employment law issues will emerge. Although, like the previous industrial revolutions this change seems apocalyptic, as discussed above AI can be used as a positive tool to help solve some of Ireland's current employment law issues but we all must act now to harness that potential. An Irish AI national strategy complimenting the recently signed EU Declaration gives us that perfect chance to harness that potential.

For further information on AI in the workplace and the early employment law issues identified with AI contact Catherine O'Flynn, Head of Employment & Benefits Department.

Contributed by Darran Brennan

European Court of Justice Provides Clarity for Aircraft Carriers Operating under Wet

New ruling by CJEU provides clarity on who will be considered an "operating air carrier"

Originally appeared in Aviation Finance on 12, July 2018.

On 4 July 2018, the Court of Justice of the European Union (the "CJEU") delivered a preliminary ruling under Article 267 TFEU in the case of *Wolfgang Wirth and others v Thomson Airways Ltd* [1].

The CJEU was asked by the Regional Court, Hamburg to provide a preliminary ruling on the interpretation of an "operating air carrier" under Regulation (EC) No 261/2004 ("the Regulation") regarding flight delay compensation (the "Request").
The ruling provides clarity on who will be considered an operating air carrier under the Regulation and liable for flight delay compensation.

Background to the dispute and Request

TUIfly GmbH ("TUIfly") had entered into a *"wet lease"* with Thomson Airways regarding the provision of aircraft, crew, maintenance and insurance for a stipulated number of flights. That lease provided that TUIfly was responsible for *"ground handling including passenger handling, passenger welfare at all times, cargo handling, security in respect of passengers and baggage, arranging on-board services, etc."*

The plaintiffs held a booking confirmation issued by TUIfly for a flight from Hamburg, Germany to Cancún, Mexico. The booking confirmation bore a flight number code which referred to TUIfly, who leased staff and aircraft from Thomson Airways under the wet lease, however the flight was "operated" by Thomson Airways.

The flight was significantly delayed, therefore the plaintiffs issued proceedings against Thomson Airways in the German Courts for compensation under the Regulation claiming that Thomson Airways was the "operating air carrier" as defined under Article 2 (b).

However, Thomson Airways refused to pay compensation arguing that it was not in fact the "operating air carrier" within the meaning of the Regulation.

The Local Court, Hamburg held that both Thomson Airways and TUIfly should be regarded as operating air carriers as both fell under the definition provided in the Regulation and that it was irrelevant whether the operating air carrier performed the flight with its own aircraft or under a "dry" or "wet" lease.

The Local Court also stated that the booking confirmation issued to the plaintiffs expressly referred to Thomson Airways as the operating air carrier and that it was necessary for a consumer to rely on the information in the booking confirmation in order to ensure consumer protection.

Thomson Airways subsequently appealed the judgment to the Regional Court, Hamburg on the grounds that only the air carrier which bears the operational responsibility for the flight is in the position to undertake, in full, the duties placed on air carriers under the Regulation, given that that carrier has the necessary ground presence at airports and holds all the passenger information.

The Regional Court therefore decided to stay the proceedings in order to ask the CJEU to make a preliminary ruling on the concept of "operating air carrier" under the Regulation.

The CJEU's decision

The CJEU referred to the definition of an "operating air carrier" under Article 2(b) of the Regulation as an *"air carrier that performs or intends to perform a flight under a contract with a passenger or on behalf of another person, legal or natural, having a contract with that passenger".*

The CJEU noted that this definition requires two interconnected conditions to be satisfied in order to determine if a company should be regarded as an "operating air carrier", relating to (i) the performance and operation of the flight and (ii) whether there is a contract between the air carrier and passenger.

The CJEU stated that it was common ground that Thomson Airways merely leased the aircraft and the crew which performed the flight at issue in the main proceedings, but that the fixing of the itinerary and the performance of the flight were determined by TUIFly.

The CJEU therefore determined that in those circumstances Thomson Airways could not be held to be an operating air carrier within the meaning of the Regulation.

Commentary

In delivering its ruling, the CJEU stated that its decision is consistent with the objective of *"ensuring a high level of protection for passengers"* as set out in the Regulation enabling *"the passengers carried to be ensured compensation or that they will be cared for, without needing to take account of arrangements made by the air carrier which decided to perform the flight in question with another air carrier for the purposes of actually performing that flight."*

Consequently, the lessor of the "wet lease", in this case Thompson Airlines, will not be considered an operating air carrier for the purposes of the Regulation.

The ruling provides greater clarity as to with which party liability for compensating delay rests and offers an important reminder for those engaged in drafting aircraft leases to have regard to the definition of an "operating air carrier" under the Regulation and the two interconnected conditions outlined by the CJEU.

[1] Case C-532/17

Contributed by Sarah Twohig

Ranger Danger, Glasgow Rangers Football Club Enter Legal Battle with Sports Direct re: Sale of New Replica Club Football Jerseys

Sports Direct has obtained a temporary injunction against Glasgow Rangers Football Club on the basis that Sports Direct says it has a contractual right to "match" an offer made by Hummel to manufacture its replica club jerseys.

Just weeks before the new Scottish football season commences, Glasgow Rangers Football Club ("Rangers") finds itself prevented by Mike Ashley's Sports Direct Group from selling new replica football jerseys. This is not the first time the parties have fallen out over merchandising rights.

The existing distribution and licencing agreement between the parties has expired and Rangers proposes to replace Sports Direct with kit manufacturer Hummel. However Sports Direct is claiming a "matching right" in its contract with Rangers that entitles Sports Direct to match some or all of any third party offer. Sports Direct says that the information supplied to it by Rangers about Hummel's offer is not detailed enough and has obtained an interim Court injunction from the English High Court prohibiting Rangers from selling the Hummel kit pending the outcome of the full case. This has obvious financial implications for Rangers as the pre-season summer period is a peak time for the sale of new replica football club kits.

Right of first refusal

This "matching right", also known as a right of first refusal, puts Sports Direct in a stronger position than if it had a mere "right of first offer", which would only have obliged Rangers to enter into good faith negotiations with Sports Direct to try to reach agreement on mutually acceptable terms, after which it would be free to contract with Hummel.

The legal principles applicable to rights of first refusal were described by the UK Courts in the case of *AstraZeneca UK Ltd v Albemarle International Corp* (2011). In this case the grantor of the right argued that at most it was required to give the holder of the right an opportunity to negotiate on the same terms as the third party. The Court rejected that argument and described the right as a right to receive a contractual offer on terms which the grantor is prepared to accept, even though the detailed terms might require further negotiation.

The Court said that the right holder should be given an opportunity to match any third-party offer which the grantor might be minded to accept, and, in the event that the grantee matched the offer, to be awarded the business. The Court also held that the grantor of the right was obliged to act in good faith and to provide the right holder with the full details of the third party offer. It did not matter that the detailed terms might require further negotiation - this did not mean that the right of first refusal had no legal effect due to uncertainty.

Why do rights of first refusal create difficulties?

Various aspects of rights of first refusal can be challenging for the contracting parties, including:

1. the danger (from the point of view of the grantor of the right) that the existence of such a right will deter third parties from engaging with the grantor, given that there is always the risk that they will be "pipped at the post" by the right holder;
2. the negotiation of the more detailed terms of the agreement, even though the core "matching" terms may be clear; and
3. addressing situations where aspects of a third party offer are not capable of being matched by the right holder – this was highlighted in the 2012 proceedings taken by Oakley against Rory McIlroy and Nike. Nike offered to pay McIlroy for his endorsement of a large range of products and clothing, including golf clubs. Oakley, a manufacturer of glasses and clothing, claimed a right of first refusal under its then existing endorsement contract with McIlroy but only in respect of certain aspects of the Nike offer.

Proceed with caution

As can be seen from the above, contracting parties should treat rights of first refusal with caution and with the benefit of professional advice.

Contributed by Stephen Keogh

Paddy Power Betfair acquires FanDuel after US Supreme Court strikes down law banning sports betting in the US

Paddy Power Betfair has acquired US fantasy sports company FanDuel following the striking down of a federal law prohibiting sports betting in the US

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US Supreme Court decision

On 14 May 2018 the United States Supreme Court (Supreme Court) struck down a federal law which prohibited State-authorised sports betting in most US States. Although sports betting was not a federal crime, the federal ban prevented State legislatures from regulating for sports betting. However, legislation was passed in New Jersey purporting to introduce authorised sports betting in the State. The New Jersey law was subsequently challenged to the Supreme Court on the basis that it violated the federal ban on sports betting.

The Supreme Court found that the federal ban on sports betting was unconstitutional. It further held that if the US Congress chose not to regulate sports betting at a federal level, each State was free to enact its own laws legalising sports betting. Shortly after the decision the New Jersey Sports Wagering Act legalised sports betting on professional and collegiate sports at casinos and racetracks in New Jersey. Other states such as Connecticut, Pennsylvania and West Virginia have also passed sports betting laws which will go into effect upon adoption of licencing and regulatory measures.

Paddy Power Betfair Acquisition of FanDuel

Within ten days of the Supreme Court judgment, Paddy Power Betfair plc (PPB) announced the acquisition of a 61% share in FanDuel, an online fantasy sports game with over 40% market share of the US daily fantasy sports market. PPB will retain an option to grow its share in FanDuel to 100% in five years. The acquisition remains subject to customary regulatory and competition reviews and is expected to be finalised in the third quarter of 2018.

Gambling in Ireland

Operators must be issued with a licence from the Revenue Commissioners before they can operate as bookmakers in Ireland under the Betting Act 1931 (as amended) (the Betting Act). Both "high street" retailer bookmakers and online bookmakers can operate under the Betting Act. In contrast, the new sports betting law in New Jersey limits sports betting to racetracks and casinos.

Future developments in Ireland

The Gambling Control Bill 2018 (the Bill) was introduced before the Oireachtas by Fianna Fáil on 21 February 2018. The Bill proposes to establish a gambling regulator and to provide a comprehensive

new licensing and regulatory framework for gambling in Ireland. The Bill will now proceed to the Committee Stage to be considered by the Select Committee on Justice.

Contributed by Patrick Murphy

New Corporate Governance Code

In July 2018, the Financial Reporting Council published the new UK Corporate Governance Code. It replaces the 2016 version and applies to Irish-incorporated companies listed on the Main Securities Market of Euronext Dublin, as well as Irish companies with a premium listing on the London Stock Exchange.

On 16 July 2018, the Financial Reporting Council published the new UK Corporate Governance Code. The new Code replaces the version of the Code issued in April 2016 and applies to Irish-incorporated companies listed on the Main Securities Market of Euronext Dublin (formerly the ISE), as well as Irish companies with a premium listing on the London Stock Exchange. The Code is also used by many unlisted companies and funds as a benchmark for good corporate governance.

Formerly known as the Combined Code, the FRC's (Financial Reporting Council) UK Corporate Governance Code 2018 is substantially changed from previous versions with an increased emphasis on company culture.

William Fry partnered with the Institute of Directors (IoD) to create this briefing document which you can view here or using the button below.

The initiative at William Fry is led by Corporate Partners David Fitzgibbon, Mark Talbot and Susanne McMenamin.

Asset Management & Investment Funds Update – July

Each month our Asset Management & Investment Funds team write a 'Legal & Regulatory Update'. Welcome to the July issue.

The topics covered in this months edition are below. For further information on any of these items, please email or phone any member of our Funds Team.

- AIFM fined €443,000 by the Central Bank as a result of regulatory breaches of Client Assets, AML/CFT and Fitness & Probity Rules
- Corporate Governance Code for Investment Firms – a year to go
- Council of the EU publishes compromise text on proposals to amend UCITS IV and AIFMD
- Fifth Anti-Money Laundering Directive Published
- CP86 – Central Bank Assessments
- Investment by UCITS in non-UCITS Funds
- Fitness and Probity Requirements for Fund Management Company Directors who act as a Designated Person post 30 June 2018

Click here or on the image below to read our full update.

