WILLIAM FRY

Legal News

Welcome to the December 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.

Central Bank of Ireland – Report on Outsourcing

On 19 November 2018, the Central Bank of Ireland (CBI) published a report on outsourcing by regulated firms across different segments of the financial services sector (the Report).

The Report sets out the CBI's main findings from its review of regulated firms' outsourcing activities and outlines the CBI's minimum supervisory expectations arising from those findings. The Report identifies several areas of weakness in firms' management of outsourcing arrangements and outlines the specific actions that it expects firms to take to address these. The three key areas of weakness and related expectations and as follows:

- **Governance** — boards and senior managers must increase their degree of operational oversight over outsourcing arrangements;
- **Risk management** — improvements in the identification and active management of outsourcing risks are required; and
- **Business continuity management** — firms must be in a position to transfer or bring outsourced services 'in-house' if required.

The Report also highlights current outsourcing trends and corresponding risks that arise for regulated firms as a result of particular outsourced activities. Outsourcing to cloud service providers (CSPs), amongst others, is identified as an emerging trend that gives rise to a specific set of challenges that the CBI expects firms to address and mitigate against, including managing data protection, location, concentration, systemic and security risks.

The Report concludes that the results of the CBI's review into outsourcing are "disappointing" and that the CBI expects that regulated firms will take immediate action to remedy the significant weaknesses in firms' management of outsourcing arrangements identified in the Report. The Report communicates the CBI's minimum supervisory expectations and reaffirms the CBI's commitment to increasing regulatory inspections and oversight in this area.

For further information, read our full briefing on the Report **here**.

Contributed by: Shane Kelleher

Scope of Section 357 Guarantees Extended (Formerly Known as Section 17 Guarantees)

What is a Section 357 Guarantee?

An Irish private company which is a subsidiary in a group is exempted from having to publicly file its annual financial statements in the Irish Companies Registration Office (CRO) where certain conditions are met. The main condition is that there is in force, for the whole of the relevant financial year, an irrevocable guarantee from the parent company of the subsidiary which covers all commitments entered into by the subsidiary including all amounts shown as liabilities in the financial statements of the subsidiary in respect of that financial year (the "Section 357 Guarantee"). Where a Section 357 Guarantee is in place, the subsidiary must instead append the consolidated group financial statements to its annual return that is publicly filed in the CRO. Section 357 of the Companies Act 2014 (the "Act") has been amended with the effect that the requisite parent guarantee is wider than that previously required.

Previously, the parent company was required to give a guarantee in respect of "all liabilities shown in the financial statements" of a subsidiary. This guarantee is non-specific as to addressee and so could be relied upon by any creditor whose debt is included in the liabilities shown in the financial statements. Typically, the guarantee is put in place after the relevant financial year end but in respect of the full financial year and is attached to the annual return filed in the CRO. Consequently, when approving the giving of the guarantee in respect of the just completed financial year, the directors of the parent knew that the amount being guaranteed was effectively capped at the total amount of liabilities shown in the financial statements for that year.

Guarantee extended to "all commitments entered into" by the subsidiary

Directors of parent undertakings should be aware that Section 357 has been amended (by Section 55 of the Companies (Accounting) Act 2017 which was introduced into Irish law on 9 June 2017). As a result of the amendment, the guarantee must now be given in respect of **not just "all liabilities shown in the financial statements"** of the subsidiary for that financial year, as had previously been the case, **but also for "all commitments entered into" by the subsidiary.** These commitments, if any, might not necessarily be included in the liabilities shown in relevant financial statements.

The full wording of the relevant part of Section 357 is as follows:

*"There is in force in respect of the whole of that financial year an irrevocable guarantee by the holding undertaking of **all commitments entered into by the company**, including amounts shown as liabilities in the statutory financial statements of the company in respect of that financial year." (emphasis added)*

This new requirement applies to any financial year which commenced on or after 1 January 2017. The change has introduced a level of uncertainty as to what exactly is to be covered by the requisite guarantee as the term "commitments" is not defined in the Act. There is a view that as Section 357 now refers to all commitments that have been "entered into" by the subsidiary, this would capture contractual commitments entered into by the subsidiary and that contingent tortious liabilities would not be within scope. However, this has not yet been tested. In addition, it is not clear that the reference to "all commitments" entered into is limited to commitments entered into during and accruing in respect of the relevant financial year being reported on. It is open to interpretation as to whether the guarantee now extends to commitments arising from contracts entered into in that financial year but which continue to accrue after the relevant financial year, for example, a guarantee given by the subsidiary company in respect of the commitments of its subsidiary/branch entering under a new lease agreement.

In light of this change, the directors of parent companies should, before a Section 357 Guarantee is put in place, consider whether there are any "commitments entered into" by the subsidiary which are not covered in the liabilities shown in the financial statements of that year and, if so, whether these are material and would affect the decision to give such a guarantee.

Contributed by Aoife Kavanagh

The Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Act 2018

On 14 November 2018, legislation was enacted to fully transpose the Fourth Anti Money Laundering Directive (MLD4) into Irish law.

Some of the main reforms are:

- the definition of persons to be considered beneficial owners of bodies corporate, trusts and partnerships is expanded;
- designated persons are required to conduct business risk assessments as part of customer due diligence (CDD) processes and are required to more comprehensively monitor business relationships;
- the definition of politically exposed persons (PEPs) now includes individuals residing inside the State; and
- exemptions relating to certain electronic money products have been tightened.

Read our full briefing here.

Money, it's a gas

Costs - the "normal" rule

Order 99, r.1(3) of the Rules of the Superior Courts lays down the "normal rule" that costs follow the event unless the Court, for special reasons, otherwise directs. There have been a number of recent decisions in the area of costs that illustrate the various complexities of the oft cited Order 99.

If you are a not a party to a case can you be made liable for the costs?

The Supreme Court in Moorview Development Limited & ors v First Active Plc & ors [2018] IESC 33 confirmed that a non-party can be made liable for the costs of proceedings where he has funded those proceedings.

This case was an appeal from a decision of the High Court where Clarke J. had made an order against the developer Brian Cunningham in relation to long standing litigation by a group of companies owned and controlled by him against First Active Plc. The High Court order was made in 2011 (see here) and Brian Cunningham was made liable for the costs on the grounds that he funded (and directed) the litigation. This decision became known as a "Moorview Order" but had not received an endorsement from the Supreme Court until now.

Before the Supreme Court issued its decision the Court of Appeal had overturned a High Court decision awarding costs against a non-party. In WL Construction Limited v. Chawke [2018] IECA 113 Hogan J. had stated that a non-party witness could not be joined to proceedings after a judgment had been issued purely to award costs against him where he was not put on notice during the proceedings that he could be made liable for costs. Hogan J. questioned the correctness of the High Court *Moorview* decision and stated ultimately even if *Moorview* was correct that the jurisdiction to award costs against a non-party was an exceptional one.

Now that the Supreme Court have issued their decision it is settled the High Court have jurisdiction to make an order against non-parties generally subject to the various factors identified by the Court for consideration in such circumstances.

Can you deny a party the majority of their costs?

In Lowry v. Moriarty [2018] IECA 66 the Court of Appeal considered whether the Tribunal of Inquiry into certain Payments to Politicians and Related Matters, (the Moriarty Tribunal) was correct when it decided that Mr. Lowry should only recover one third of his costs on the basis that he had not fully co-operated with the Tribunal. Mr. Lowry had sought to judicially review the decision of the Tribunal but had been refused leave by the High Court.

Generally every person appearing before a Tribunal of Inquiry by solicitor or counsel has an entitlement to be reimbursed by the State his or her costs of so appearing.

The Court of Appeal considered the issues in a lengthy judgment and found that the reduction of costs to which Mr. Lowry had an entitlement had not been detailed or reasoned and that Mr. Lowry had not been given an opportunity to address the quantum of the reduction. The Court of Appeal did not take issue with reducing the costs to which someone had an entitlement for non-cooperation, but outlined that there must be a detailed and rational approach to this decision.

Wasted costs orders

This sort of costs order is provided for under Order 99 Rule 7 and it allows the Court to impose the costs of the proceedings on the solicitor personally in cases where there has been misconduct, clearly pointless litigation or a lack of good faith.

In 2012 Mr. Justice Hogan in the High Court stated that the:

"…wasted cost procedure could become an instrument of oppression in the hands of the wealthy or the powerful or the vested interests who, for example, feared legal change being brought about by ground-breaking litigation." (Ho v Minister for Justice [2012] IEHC 231)

However there appears to be a growing trend towards their imposition; a number of recent cases considered their applicability.

In PO v Minister for Justice [2015] IR 164 a wasted costs order was made by the Supreme Court where Charleton J. held that while strong advocacy is to be admired, "floating points that dissolve on first consideration is a misuse of court time and of the costs necessary in answering them."

In re Dunnes Stores; Dunnes Stores v. Taculla Ltd [2018] IEHC 346 a wasted costs order was made in the High Court against Taculla Ltd where it had furnished affidavit evidence so late that the hearing date had to be adjourned.

Further in Bebenek v Minister for Justice [2018] IEHC 323 Keane J. in the High Court considered the inherent jurisdiction to make a wasted costs order where the behaviour of the lawyers fell below the minimum professional and ethical standard even in last minute applications.

And Finally…Open Offers

The decision of the High Court in O'Reilly & Anor v Neville & Ors [2018] IEHC 228, has already been discussed here and it provides a reminder that as a plaintiff there may be adverse costs consequences where one side makes genuine efforts to settle and the other side do not engage.

Legal Costs not always a simple formula

All of these decisions are a reminder that any apparently simple rule always has an exception. Both litigants and their lawyers should be mindful of the conduct of proceedings and the fact that costs are not necessarily a foregone conclusion even if you win your case.

Contributed by: Catherine Thuillier

No looking behind the Curtain - The Court of Appeal has confirmed that the Land Registry is conclusive evidence of title in repossession cases

Background

Bank of Scotland (Ireland) Limited ("BOSI") loaned monies to Mr Rolf Kane and secured the loan by way of a mortgage over his principal private residence and registered the charge in the Land Registry in 2006.

All of the assets and liabilities of BOSI including the mortgage and charge over Mr Kane's property (the "Mortgage") transferred to Bank of Scotland plc ("BOS") pursuant to a cross-border merger in 2010 and BOSI was then dissolved. No steps were subsequently taken to register BOS as the legal owner of the mortgage and charge in the Land Registry.

BOS sold a loan portfolio to Tanager DAC ("Tanager") in 2014 which included the Mortgage over Mr Kane's property and Tanager registered its ownership of the Mortgage in the Land Registry.

The borrower fell into arrears and Tanager issued proceedings for possession of the property in the Circuit Court. The borrower's main defence to the proceedings was that, as BOS was never registered as the owner of the Mortgage in the Land Registry, it was not entitled to transfer the Mortgage to Tanager. Accordingly, the borrower argued that Tanager never acquired title to the Mortgage and was not entitled to enforce the Mortgage against the borrower.

The Circuit Court found in favour of Mr Kane and this decision was appealed by Tanager to the High Court. The High Court then stated a case to the Court of Appeal.

Court of Appeal Judgment

The following five questions were put to Court of Appeal for judgment:

Q1 Can the borrower challenge the registration of Tanager as owner of the Mortgage having regard to the conclusiveness of the Register pursuant to section 31 of the Registration of Title Act 1964 (the "Act")?

A The Court of Appeal held that the Register is conclusive evidence of title in possession cases. The party seeking possession must prove that he is the registered owner of the Mortgage and it is that registration which triggers that party's statutory entitlement to seek possession. Accordingly, the Court cannot look behind the Register in possession proceedings.

Further, the Court of Appeal held that the jurisdiction to rectify the Register on the grounds of actual fraud or mistake is limited to proceedings between the registered owner of the Mortgage and the party who asserts that they are the correct owner of the Mortgage. The court held that the borrower did not have locus standi to make an application to rectify the Register.

Q2 If yes, can the court join the Property Registration Authority ("PRA") as a notice party to the proceedings?

A The Court of Appeal held that the PRA may not be joined as a notice party in possession proceedings as possession proceedings require the Court to consider whether the proofs are met by the party seeking possession and not whether the Mortgage was wrongly entered in the Land Registry.

Q3 Is the court entitled to have regard to the circumstances in which Tanager became the registered owner of the Mortgage in the Land Registry?

A The Court held that this does not arise arising from the determinations given to questions 1 and 2.

Q4 Is it open to the borrower to argue that those circumstances amounted to a "mistake" within the meaning of section 31 of the Act?

A No.

Q5 In considering the validity of the registration of Tanager as owner of the Mortgage, does section 90 of the Act apply to the transfer of the Mortgage?

A Section 90 of the Act allows a party to deal with its interest in a mortgage before the registration process of ownership is completed by the Land Registry but does not allow a party to enforce its mortgage pending registration.

Section 90(2) allows a party to whom the section applies to take such action, including the action of passing the interest in the charge as if that party was registered as the owner of the mortgage. The court held that section 90 of the Act applied to the transfer of the Mortgage from BOS to Tanager and that BOS was entitled to transfer its ownership of the Mortgage to Tanager notwithstanding that it was not registered as the owner on the Register.

Implications
This judgment will have positive implications for acquirers of loan portfolios as it has now been determined that in possession proceedings, a court cannot be asked to look behind the Register which provides conclusive evidence of a party's title to a charge. This should provide comfort to acquirers of loan portfolios in possession proceedings as long as they have taken steps to have their ownership of charges registered in the Land Registry.

Contributed by Zara West

Auto-Enrolment Plan's Goal may be Laudable but it Poses Major Challenges

This article first appeared in the Irish Independent Monday 26, November 2018.

The primary policy aim behind the Government's auto-enrolment (AE) proposals is to increase the low rates of pension coverage for private sector workers in Ireland. Government officials are currently assessing the responses to the consultation process on its outline proposals ('A Strawman Public Consultation for an AE Retirement Savings System for Ireland') which closed on November 4.

The Government's policy goal is laudable, but the 'Strawman' has features which, if left unaddressed, could undermine that goal from the outset.

Many employers are already wondering how AE may affect their existing pension arrangements.

Employers who currently provide pension benefits to their employees may be able to ignore AE initially.

However, as contributions under the AE system increase, will those employers then be required to increase contributions to their schemes to match those required under AE?

Also, presumably there will be a State agency charged with policing employers to ensure they are either enrolling their employees into the AE system or providing pension benefits which are at least equivalent to those available under AE.

This could be a major challenge and will require the Government to commit significant resources to that policing body to ensure non-compliance does not undermine the overall policy aim here.

By comparison with other jurisdictions, the rate at which pension contributions into the AE system will increase following its introduction is quite aggressive.

The proposal sees employer and employee contributions starting at 1pc in 2022 and increasing to 6pc of gross earnings by 2027.

The difficulty with such an aggressive rate of escalation is that it could prompt employees to simply opt out of AE during any opt-out period and therefore see the project fail to address the primary policy goal of increasing pensions coverage.

In contrast, the UK's AE system, which has been in place since 2012, set employee contributions at 1pc initially and only increased to 3pc this year.

On contributions, it is proposed that rather than pension contributions attracting tax relief, there will instead be a Government top-up contribution of €1 for every €3 of employee contributions.

Introducing an entirely separate model of State incentives for pension saving within AE risks creating significant complexity if employees move between AE and company pension schemes during their working lives.

One of the big criticisms the pensions system in Ireland continually faces is that it is layered with excess complexity.

Introducing a separate State incentive as part of any AE system is likely to add to that complexity.

This is unnecessary given that there is a well-established model of tax relief on pensions contributions currently in place to incentivise pension saving.

One slightly unusual feature of the AE proposal is that a so-called carousel model would apply to allocate employees to one of the licensed AE providers where they fail to elect one. In those circumstances, the carousel would simply allocate the employees in turn between the providers.

Those providers will invariably perform differently in terms of investment performance. Employees who discover that they have been allocated to a provider who underperforms relative to others their co-workers have been allocated may understandably query why they were allocated to this underperforming provider. This loss of trust in providers could also prompt opt-outs.

The Government has proposed that the final design of its AE system for Ireland will be settled by Q1 2019. Only time will tell whether these challenges are addressed in finalising the design of the proposed AE system.

Whatever the final design, the Government should seek to ensure that the overall aim of increasing pension coverage via the AE system does not undermine or see a levelling down of contributions to the existing voluntary system of pensions saving.

Large Companies Preparing to Disclose Non-Financial and Diversity Information

Background

Many large PLCs are for the first time preparing to disclose non-financial and diversity information under Regulations introduced in 2017. The European Union (Disclosure of Non-Financial and Diversity Information by certain large undertakings and groups) Regulations 2017 (the "Regulations") incorporated provisions into Irish law from an EU Directive requiring certain large companies to make information on non-financial matters publicly available on an annual basis. Matters to be reported on include environmental issues, social and employee matters, respect for human rights and corruption and bribery risks and policies.

In addition, the Regulations require large listed companies to include in their corporate governance statement a report on their diversity policy with regard to their board of directors.

The Regulations have recently been amended by the European Union (Disclosure of Non-Financial and Diversity Information by certain large undertakings and groups) (Amendment) Regulations 2018 (the "Amending Regulations"). The Regulations are to be read as one with the Companies Act 2014.

Timing

The Regulations apply for financial years commencing on or after 1 August 2017. For companies in scope with a 31 December financial year end, the first financial year for which they will be required to prepare non-financial and/or diversity reports will be 1 January 2018 to 31 December 2018. Therefore, it is expected that most companies in scope will turn their attention to preparing the non-financial and diversity information reports in early 2019.

What companies are in scope?

Diversity report

The requirement to provide a diversity report applies only to "large traded companies". These are large companies with transferable securities admitted to trading on an EEA regulated market. Certain debt issuers are exempted from this requirement.

Non-financial statement

In the context of the requirement to provide a non-financial statement, the Regulations apply to any company that meets all three of the following criteria:

- it is a large company or a holding company of a large group (other than companies which qualify as large by virtue only of their being an "ineligible entity" or of being the holding company of an ineligible entity);
- it, or the group of which it is the holding company, has an average of more than 500 employees;
- it is an "ineligible entity".

Ineligible entities include:

- PLCs (whether listed or unlisted);
- companies with transferable securities admitted to trading on a regulated market of any EEA Member State;
- credit institutions;
- insurance undertakings;
- other undertakings specified under Schedule 5 of the Companies Act 2014, including investment firms, investment companies, and insurance intermediaries;
- undertakings designated as "public-interest entities", for instance undertakings that are of significant public relevance because of their size, nature of business or number of employees.

In order to qualify as large, a company must have a balance sheet total exceeding €20m or turnover exceeding €40m. With regard to a holding company, a large group is one which has an aggregate balance sheet total exceeding €20m net (or €24m gross) or an aggregate amount of turnover exceeding €40m net (or €48m gross).

Non-financial information

What must be included in the non-financial statement?
The directors of a company in scope are obliged, for each financial year, to produce a statement (the "non-financial statement") containing information, in the context of the activity of the company, on environmental matters, social and employee matters, respect for human rights, and bribery and corruption. The company must describe the policies pursued in relation to, and main risks associated with, these matters. A brief description of the company's business model must be given and an analysis of the non-financial key performance indicators relevant to the particular business should be set out.

What if I cannot report on any of the matters mentioned above?
Where the directors of the company do not pursue policies in relation to one or more of the matters mentioned above, the non-financial statement must set out a clear and reasoned explanation as to why such policies are not pursued.
Information relating to impending developments or matters in the course of negotiation may be omitted from the non-financial statement where to disclose such matters could, in the opinion of the directors, seriously prejudice the competitive position of the company. Such omission must not prevent a fair and balanced understanding of the company's development, performance, position and impact of its activity. The fact and reason for any omission of information must be set out in the non-financial statement.

How should the non-financial information be published?
The non-financial statement can be included as a specific section of the directors' report, which forms part of the company's annual audited financial statements. Alternatively, the non-financial information can be set out in a separate statement, a copy of which must either be published on the website of the company within 6 months of its financial year end or be annexed to the annual return of the company.
Where the non-financial statement is published on the website of the company, the directors' report must refer to this fact and must give the website address of the company.
In addition, where a separate statement is produced (whether published on the website or annexed to the annual return), it must be attached to every balance sheet laid before the AGM of the company.
The main benefit of the option to produce a separate statement is to allow the company some flexibility with respect to how and when it publishes its non-financial information. This flexibility may be of benefit to companies particularly where they already publish some of the required information on their website, for example, in a sustainability report.

What about holding companies and subsidiaries?
Where a holding company is in scope, it must prepare a non-financial statement or a separate statement in respect of the group.
Where a subsidiary company is in scope, it will be exempt from the obligation to prepare a non-financial statement if it is included in the group non-financial statement prepared under the Regulations or under the equivalent implementing legislation in another Member State.

Do the auditors have a role in relation to the non-financial statement?
When preparing their annual statutory auditors' report, the auditors of a company in scope are obliged to establish that the company has, in respect of the financial year immediately preceding the financial year that is the subject of the auditors' report, prepared the non-financial statement as required under the Regulations. Where a company has not so prepared the statement, the auditors must state that fact in their own report. Prior to the Amending Regulations being published, the statutory auditors were required to look to the non-financial statement produced for the financial year to which their auditors' report related. It seems an amendment was required here to take account of situations where a company opted to publish a separate statement, rather than publishing the statement in the directors' report. In such cases, the statement would not have been available for the auditors to opine on at the time that they were preparing their statutory auditors' report.

Diversity report
The requirement to provide a diversity report relating to the board of directors of the company only applies to large traded companies, and not the broader category of companies that must produce a non-financial statement as set out above. The diversity report must be included in the corporate governance statement of the company and must describe the diversity policy applied in relation to the company's

board of directors with regard to aspects such as age, gender or educational and professional backgrounds. The company must also state the objective of the policy, how the policy has been implemented by the company, and the results of that policy in the financial year.
Where a company does not apply any diversity policy, it must give an explanation as to why it does not.
The statutory auditors of the company are obliged to give an opinion as to whether the information required under the Regulations with regard to the diversity report has been included in the corporate governance statement.

What are the penalties if I do not comply?
A director who fails to comply with the requirements under the Regulations with regard to the non-financial statement and diversity report will be liable on summary conviction to a class A fine (currently €5,000) or to a term of imprisonment not exceeding 12 months, or both.

Further guidance
The European Commission has published non-binding guidelines on methodology for reporting non-financial information, including non-financial key performance indicators, with a view to facilitating the disclosure of non-financial information by companies. These guidelines suggest that, when preparing the non-financial information report, companies may cross-reference to information publicly available elsewhere, for example in the company's sustainability report.

Contributed by - Aoife Kavanagh

Artificial Intelligence in the Workplace (Part 5): AI and Inter-generational Working

In our Artificial Intelligence (AI) in the Workplace article series we are considering the potential positive impacts that AI could have on the workplace and the possible amendments required to Irish employment law to allow these to happen. In this article we consider the impact on workplaces of employees working longer than the traditional retirement age and how AI can help different generations work together in harmony.

Active Aging

As explored in our 'active aging' articles throughout 2018, age in the workplace has been a hot topic of debate in recent years and in particular in 2018. With the publication of the Code of Practice on Longer Working by the WRC and the Retirement and Fixed-Term Contracts Guidelines by the Irish Human Rights and Equality Commission and recent WRC case-law such as Valerie Cox v RTÉ, there is a move away from the traditional retirement age in Ireland and towards longer working. There are many reasons for this move including an extension of the age of receipt of the State pension and the fact that many employees reaching retirement age are healthier and fitter than ever before and simply feel no desire to retire.

This all means that for the first time in history five generations are working together. These generations range from the 'Linksters' (as identified by Meagan and Larry Johnson) who have grown up forever connected to technology to the 'Traditionals' who are reaching the traditional retirement age or beyond and are choosing to stay in the workplace. Each generation has different expectations and perceptions of what a workplace should be and how work should be carried out. This presents challenges to employers in managing diverse groups of employees and creating a harmony in the workplace. As identified by Meister and Mulcahy (*The Future Workplace Experience*, McGraw Hill Education, 2017) many employers' focus then is shifting from generational differences between employees to harnessing 'generational intelligence' and trying to harness the intelligence and skills unique to each generation to create a harmonious workplace. AI can help and has helped employers to achieve this harmony for example by the creation of virtual reality workspaces such as those invented by Magic Leap. AI also can help employees near retirement age engage for longer in the workplace while giving employers options to extend employment and to avoid the spectre of increasing age-related discrimination claims.

Flexible Working

One feature common to the youngest and oldest generations of workers is a growing desire for the provision of flexible working arrangements from employers. The younger generations of workers value flexible working arrangements to fit around their lives and the older generations of workers often find that flexible working arrangements can aid with active aging and to help to stay in work longer. Generations of workers in the 'middle' also find flexible working arrangements useful in family planning by providing greater options to work at home. However, difficulties exist for employers in meeting targets and measuring performance while also providing flexible working solutions for employees. The Irish legislature has not, as yet, provided legislation to focus on flexible working similar to the Flexible Working Regulations 2014 in the UK. The enactment of such legislation would help employers and employees alike in providing some guidance and clarity.

With the lack of legislative guidance on flexible working in Ireland, AI has provided an answer for many employees and employers. Applications such as Cisco Spark provide online rooms that allow for group messaging, video calling and desktop sharing, creating virtual workplaces that can be accessed from anywhere with an internet connection. These virtual workplaces give employees the freedom to work from home or from other locations and give employers the assurance that work can still be performed productively, and targets can still be met.

Collaborative Workspaces

Collaboration is key to unlocking the 'generational intelligence' discussed earlier in this article. With many employees choosing to embrace flexible working or for older generations choosing to use flexible working to help them stay in work longer, collaboration then is key for employers to create unity and harness skills unique to different employees and different generations. AI helps employers to foster this unity by creating virtual workspaces such as discussed earlier, to the use of user-friendly apps such as Mircosoft Yammer or Google Hangout. These collaborative workspaces allow intelligence to move between generations allowing older generations to impart experience and skills developed throughout careers to allowing younger generations to teach the use of new technologies.

Comment

Irish workplaces have changed rapidly in recent decades. With longer working and the use of technology, the 'traditional' Irish workplace no longer exists. This change can be difficult for employers and there are many possible employment law pitfalls for employers such as meeting obligations under new active aging guidance or avoiding disputes between inter-generational workers caused by varying work styles and practices. The gradual introduction of flexible working legislation might help solve some of these issues for employers and the greater use of AI can help create greater flexible working solutions for employers and employees. As discussed in previous articles, the introduction of a national AI strategy has been called for in this series, in national media and by many commentators and any such strategy should consider inter-generational working and AI solutions as part of its remit.

In times where employers continue to explore the exciting world of AI in the workplace, we continue to explore its employment law possibilities and effects. In the final instalment of our series we will reflect on our 2018 series.

Please click on the following links to read Part 1 (An Employment Law Perspective), Part 2 (AI-Assisted Recruitment & Employment Equality Law), Part 3 (AI and Gender Equality) and Part 4 (AI, Disability and Accessibility).

For further information on AI in the workplace and the early employment law issues contact Catherine O'Flynn, Head of Department or Darran Brennan, Solicitor in the William Fry Employment & Benefits Department.

Contributed by Catherine O'Flynn and Darran Brennan

In Short: Directors' Compliance Statement Reminder

Directors of companies that are obliged to produce a directors' compliance statement under section 225 of the Companies Act 2014 (the "Act") should bear in mind the requirements of that section when approaching financial year end.

Specifically, section 225(3)(c) requires that a review be carried out, **during the company's financial year**, of the arrangements or structures that the company has in place to secure material compliance with its main or "relevant obligations" as defined in the Act. Relevant obligations are tax laws and provisions of the Act the breach of which are category 1 or 2 offences. These are the most serious offences under the Act. Serious market abuse, transparency and prospectus provisions are also relevant obligations.

The directors are obliged to confirm in their directors' compliance statement that such a review has been carried out. If the confirmation cannot be given, the directors must disclose this in the Directors Report and give reasons as to why not.

Contributed by Aoife Kavanagh

Asset Management & Investment Funds Update - November 18

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

- PRIIPS KIDs – ESAs consult on resolution measures
- Have we seen the end of Share Cancellation in MMFs?
- Publication of Sixth Anti Money Laundering Directive
- Final Corporate Governance Code for Investment Firms Published
    - In-Scope Firms
    - Main Provisions of the Code
    - Legal Basis of Code
    - Sanctions
- UCITS and AIFMD Depositaries – Asset Segregation Obligation Amendments Finalised

Click here for our full update.

Third Strike for Warner-Lambert's Lyrica® patent

Background
The patent in suit is a second medical use patent for pregabalin (Lyrica®) which is indicated for epilepsy, generalised anxiety disorder and the treatment of neuropathic pain. In 2014 Mylan and Actavis brought separate claims for revocation of the patent on the basis that the specification was insufficiently disclosed for it to be performed by a person skilled in the art. Subsequently Warner-Lambert brought an infringement action in relation to Actavis' "skinny label" pregabalin product, which was authorised and marketed for non-patented indications.
In the UK High Court Arnold J held that - Claim 1 *"Use of [pregabalin] or a pharmaceutically acceptable salt thereof for the preparation of a pharmaceutical composition for treating pain"* extended to all pain and dependant Claim 3 for the treatment of "neuropathic pain" would be understood broadly as including both central and peripheral neuropathic and that the patent application insufficiently disclosed pregabalin’s efficacy in treating peripheral neuropathic pain. Finally, he held that, even if the patent was valid, Actavis' "skinny label" product would not infringe the asserted claims.
Following this decision Warner-Lambert made a conditional application to amend the patent. One of the amendments sought to limit the scope of Claim 3 to peripheral neuropathic pain, and thus to exclude from its scope central neuropathic pain, which was found to be vulnerable to the insufficiency attack.

Without deciding the merits of the amendment application, Arnold J held the application to amend was an abuse of the process.
In 2015, the Court of Appeal upheld Arnold J's decision. Regarding sufficiency Lord Justice Floyd upheld Arnold's decision that Claims 1 and 3 of the patent were insufficient. It further held it was implausible that pregabalin would be effective in treating any type of pain (asserted in Claim 1) or central neuropathic pain (asserted in Claim 3) based on the data provided in the patent specification (obtained using an animal model of inflammatory pain).

Supreme Court Decision
The Supreme Court upheld the decision of both lower courts. One of the most interesting parts of the decision is the Supreme Court's views on the role of plausibility in the statutory test for insufficiency and how infringement by Swiss-style claims should be determined.

Sufficiency
The Supreme Court held by majority that Claim 1 and Claim 3 failed for insufficiency because the disclosure in the specification supported the claims in relation to inflammatory pain, but not neuropathic pain. In so doing it not only dismissed Warner-Lambert's appeal that the claim to the use of pregabalin for the treatment of central neuropathic pain was sufficiently disclosed, it also upheld Actavis' and Mylan's cross-appeal that the treatment of peripheral neuropathic pain was insufficiently disclosed. Similarly, the Supreme Court concluded that the animal models used to provide the data in the specification were only relevant to inflammatory pain.

Infringement
The Supreme Court unanimously held that if Claim 1 and Claim 3 had been valid, they would not have been infringed. The Judges' reasoning differed on the test to be applied with Lord Sumption and Lord Reed holding that the intention of the alleged infringer is irrelevant and preferring the "Outward Presentation Test". While agreeing in principle with this test Lord Mance added that in some cases the objective of the product appearance should not to be taken at face value. Lord Briggs and Lord Hodge preferred the view of Arnold J in the main hearing that the test is whether the alleged infringer subjectively intended to target the patent-protected market. It is worth noting that whilst the Supreme Court's views as to the correct test for infringement is noteworthy it is *obiter*.
The Supreme Court also rejected Warner-Lambert's indirect infringement claim on the basis that the prescription, dispensing or use of generic pregabalin to treat neuropathic pain does not “put into effect” the patented invention, or involve any supply to doctors, pharmacists or others of the means of putting it into effect. Lord Mance summarised the Court's position -"the patented invention is, under English law, the process completed by manufacture of the composition for the patent-protected use. Any subsequent use is not itself patented".

Key Considerations for the pharmaceutical sector
This decision is likely to have far reaching implications for the pharmaceutical sector. The UK Supreme Court has heightened the plausibility threshold for sufficiency in second medical use patents to the point that patentees must provide supporting experimental evidence or robust scientific reasons as to how the product is thought to have a direct effect on a mechanism involved in whatever disease is to be treated. This higher threshold is likely to make second medical use patents harder to obtain and easier to undermine.

Contributed by Charleen O'Keeffe & Florence Meagher