WILLIAM FRY

Legal News

Welcome to the December 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.

Countdown to GDPR: 6 Months to Go

There are just 6 months to go until the EU General Data Protection Regulation (GDPR) takes effect across the European Union on 25 May 2018. The clock is ticking for all business to finalise their plans for the data protection and privacy revolution.

With 6 months left to prepare, organisations are moving from the planning to delivery phases of their GDPR readiness projects. Some key actions and deliverables which organisations should be focusing on now include:

- devising a detailed record of data processing activities;
- revising and issuing data protection notices;
- amending existing data processing agreements and/or crafting new template data processing clauses;
- implementing and testing a security incident and breach management plan;
- creating data protection impact assessment processes; and
- training staff and testing systems.

The next 6 months are all about the GDPR, see our recent insights and articles on the recent Article 29 Working Party Guidelines concerning:

- personal data breach notifications under the GDPR;
- administrative fines under the GDPR; and
- automated individual decision-making & profiling under the GDPR.

For a more detailed analysis and expert insights on the incoming GDPR, we invite you to register here for **PrivacySource**, William Fry's dedicated GDPR website.

Contributed by: David Cullen

Appointment of Directors by Shareholders: The Importance of Compliance with Notice Provisions

A recent High Court judgment considered the requirements for the valid appointment of directors by Shareholders. The case puts beyond doubt that where a company's Articles of Association ("Articles") prescribe procedures for the appointment of directors in a particular manner and subject to the provision of particular notices and timeframes, there must be strict compliance with those procedures.

Background

The Plaintiff was a shareholder in Conroy Gold and Natural Resources Plc (the "Company"). He served notice pursuant to section 146 of the Companies Act 2014 (the "Act") of his intention to propose ordinary resolutions relating to the removal of six serving directors and the appointment of three new directors, one of whom was the Plaintiff. A dispute subsequently arose concerning the validity of the resolutions purporting to appoint the new directors which centred on the interpretation of the notice requirements set out in the Articles of the Company and some parts of section 144 of the Act.

Section 144 of the Act contains optional provisions on the appointment of directors, which apply unless a company's constitution provides otherwise. The Company's Articles did not dis-apply section 144, but modified it in terms of notice periods in providing that a director could not be appointed at a general meeting unless he or she was recommended by the directors, or not less than seven nor more than forty two days before the date of the meeting notice had been given to the Company:

1. by the proposing member of the intention to propose the directors for appointment and
2. a notice executed by the proposed directors of their consent to the appointment

No such notices were served on the Company. At the EGM convened at the request of the Plaintiff, the resolutions were approved following a poll, by majority vote. However the Chairman informed the meeting that the resolutions could not take effect because of non-compliance with article 85 of the Company's Articles in respect of the new directors proposed. The Plaintiff initiated proceedings before the High Court (the "Court") seeking a Declaration that the failure to give effect to the vote on the resolutions constituted oppressive conduct.

The Plaintiff contended

- There was practical and substantive compliance with the notice provisions through correspondence with the Company's agents (Allenby and IBI: stock exchange advisers),
- The Company had waived the requirement for notice, and
- The Company was estopped from insisting on strict compliance with the notice requirements.

The Findings of the Court

The Court considered the legal standing of a company's Articles holding that they are a statutory contract between a company and its members and should not be interfered with, save in accordance with law. It held that the notification requirements at issue here were simple and clear and they were not satisfied.

The Court rejected the argument of practical and substantive compliance. The Plaintiff was attempting to reclassify emails and questionnaires with Allenby and IBI whom the Company engaged for the limited purpose of ensuring compliance with the rules of the stock exchange, as notices. It held that no notice as required by article 85 was sent to the Company. The consequences of this was that the resolutions appointing the new Directors were a nullity even when passed by a majority.

The Court found that it was not within the power of the Chairman to waive compliance with the notice provisions of article 85, and the Plaintiff had not made out a case for estoppel. The Court stated that there was no obligation on the Company or fiduciary duty on directors to remind a member of the notification obligations. The Court found no evidence of oppression on the part of the Company.

The Plaintiffs case was dismissed for failure to comply with the notification provisions of the Company's Articles. The Court awarded costs to the Company.

High Court judgment *O'Sullivan v Conroy Gold and Natural Resources Plc* [2017] IEHC 543.

Contributed by: Gail Nohilly

New Bill Proposes to Modernise and Consolidate Irish Anti-Corruption and Bribery Laws

On 2 November 2017, the Government published the long-awaited Criminal Justice (Corruption Offences) Bill 2017 (the "Bill"). The Bill has been included in a package of measures intended to tackle white collar crime and implement a number of outstanding recommendations arising from the Mahon Tribunal report into planning matters and payments to politicians. The Bill is intended to assist Ireland meet its commitments under various international anti-corruption instruments. It also represents the latest statutory effort to enhance transparency over official actions following on from the Freedom of Information Act 2014, the Protected Disclosures Act 2014 and the Regulation of Lobbying Act 2015.

The Bill is significant in that it seeks to modernise and radically consolidate the law on corruption and bribery in this jurisdiction, repealing and replacing the existing legislation (the Prevention of Corruption Acts 1889 to 2010) with a single statute. If implemented, the Bill will impute offences committed by employees and agents to the company as well as opening company management to personal and criminal liability.

The headline proposals within the Bill include:

1. **A Broader Definition of "corruptly"**

   The Bill seeks to significantly expand the definition of the term "*corruptly*" to include acting with an improper purpose personally or by influencing another, whether by (a) making a false or misleading statement; (b) withholding information; or (c) *by other means* (emphasis added).

2. **Expanded Offences**

   The breath and scope of the Bill is clearly evidenced in the offences it proposes to create:

   - *Active and passive corruption*
     Section 5 of the Bill provides for the offences of active (bribe-giving) and passive (bribe-taking) corruption. This section criminalises bribing someone to do an act in relation to his or her office or conversely accepting such a bribe. No distinction is made between the public and private sector.

   - *Active and passive trading in influence*
     Section 6 of the Bill includes a new offence of "trading in influence" to criminalise bribing a person, or conversely the taking of a bribe by a person, who may exert an improper influence over the decision-making of a public or foreign official. It is immaterial whether the alleged ability to exert the improper influence existed or whether the supposed influence led to the intended result.

   - *Corruption in relation to office, employment, position or business*
     Section 7 of the Bill provides firstly, that it is an offence for an Irish official (defined to include inter alia any person employed by or acting for or on behalf of the State) to take a bribe from any person or; secondly, to make use of confidential information acquired in the course of their duties for the purpose of corruptly obtaining an advantage.

   - *Giving gift, consideration or advantage that may be used to facilitate an offence under the "Bill"*
     It is an offence under section 8 of the Bill to give a gift, consideration or advantage to a third party, where the giver knows or ought to know that it will be used to facilitate the commission of a corruption offence under the legislation.

   - *Creating or using a false document*
     Section 9 of the Bill provides that it is an offence to corruptly create or use a document, knowing or being reckless as to whether this document contains a statement which is false or misleading with the intention of inducing another person to do an act, in relation to his or her office, to his or her own prejudice or the prejudice of another. "Document" is defined to include a broad range of paper, electronic and other forms of records.

- *Intimidation*
  Section 10 of the Bill makes it an offence to threaten harm (loss, disadvantage or injury) to a person with the intention of corruptly influencing that person or another person to do an act in relation to his or her office.

3. **International Reach**

The proposed reach of the Bill extends beyond Irish shores. As drafted, the Bill provides that a person may be tried in the State for certain corruption offences committed outside of the State where those actions would constitute an offence if committed within the State. In this regard, the Bill appears to replicate provisions of the UK Bribery Act 2010.

4. **Presumptions**

The Bill seeks to extend the existing presumptions of corruption, attaching to certain acts currently provided for in the Prevention of Corruption Acts 1889 to 2010. The Bill provides for a presumption of corruption in respect of certain gifts, considerations or advantages to either Irish or foreign officials and connected persons as well as a presumption of corruption in respect of donations to politicians and political parties. There is further a presumption of corrupt enrichment in respect of the undeclared interests of Irish public officials or office holders who are required to declare such interests under statute. These presumptions can be rebutted by evidence proving the contrary on the balance of probabilities.

5. **Penalties**

Under the Bill, the penalties for the new and existing offences are to be expanded. Penalties for active and passive trading in influence are 12 months and/or Class A fine (€5,000) on summary conviction and 5 years and/or unlimited fine upon conviction on indictment. Penalties for other main offences provided for under the Bill are 12 months and/or Class A fine on summary conviction and 10 years and/or unlimited fine upon conviction on indictment. Bodies corporate can be liable to, on summary conviction, a Class A fine and, on conviction on indictment, to an unlimited fine.

The Bill also provides, in certain circumstances, for the forfeiture of any gift, consideration or advantage or, in the alternative, the forfeiture of land, cash or other property of an equivalent value. Provision is also made for the forfeiture of any office occupied by an Irish official, following conviction on indictment for certain corruption offences, where the court considers it is in the interests of justice or to maintain and restore public confidence in the public administration of the State. The Bill further empowers a Court to make an order prohibiting such an official from seeking to hold or occupy certain offices for a period of up to ten years.

6. **Liability of Corporate Bodies**

In a clear effort to address an oversight in the current statutory regime, the Bill provides for liability for corporate bodies for corruption offences. Specifically, section 18 of the Bill provides for liability to attach to a body corporate in circumstances where an offence is committed by a *"director, manager, secretary, or other officer of the body corporate, a person purporting to act in that capacity, a shadow director, an employee, agent or subsidiary of the body corporate" where such a party is acting with "the intention of obtaining or retaining business for the body corporate, or an advantage in the conduct of business for the body corporate".*

In order to avoid liability, a body corporate will need to prove that it took "*all reasonable steps"* and *"all due diligence"* to avoid the commission of the offence.

7. **Management Liability**

In addition, section 18 (3) provides for the individual criminal liability of senior officers of a company for offences committed by the company with their consent, connivance or wilful neglect. Penalties include imprisonment and an unlimited fine.

Practical Implications

While an order has been made for the Bill to go to its second stage before the Dáil, it is not possible to predict a timeline for its passage through the various legislative stages. Although there is no set date for implementation, the wide ranging nature of the proposed provisions should trigger organisations to put in place anti-corruption policies or to review policies already in place. Such policies will almost certainly form the cornerstone of any defence to proceedings brought under the enacted legislation.

Generally speaking, companies that are already subject to and in compliance with the UK Bribery Act, are likely to already have effective policies and procedures in place. Given the proposed extension of liability to company directors and management, professional advice should nevertheless be sought and an overview of all relevant policies and procedures conducted.

Contributed by: Gerard James and Louise Mitchell

Finance Bill 2017 - Key Commercial Property Measures

Budget 2018 was announced on 10 October 2017 and details of the key property measures were set out here. While the Finance Bill 2017 has put some flesh on the bones, we await further legislation for detail of certain other key commercial property measures announced in Budget 2018.

7-year Capital Gains Tax (CGT) Relief

The 7-year CGT relief provisions (sometimes referred to as the "CGT holiday") will be amended to allow the owners of qualifying assets to sell those assets between the fourth and seventh anniversaries of their acquisition with the CGT exemption continuing to apply. This relief applies to disposals made on or after 1 January 2018.

Vacant Site Levy

The vacant site levy of 3% of the market price of undeveloped land registered on the Vacant Sites Register is to apply in 2018. The vacant site levy is to be increased to 7% per annum where the land remains undeveloped in 2019 and in subsequent years.

This means that any owner of a site on the Vacant Sites Register who does not develop their land in 2018 will pay the 3% levy in 2019 and then become liable to the increased rate of 7% from 1 January 2019. In order to have the levy lifted, development should commence on the site.

These amendments are not included in the Finance Bill. We will provide an update once details are available.

Stamp Duty

Budget 2018 has increased the rate of stamp duty on commercial property transactions from 2% to 6% effective from 11 October 2017. Transitional arrangements allow certain purchasers to avail of the lower 2% rate of stamp duty. Purchasers with binding contracts in place before 11 October 2017 may avail of the transitional arrangements provided that the instrument of transfer is executed before 1 January 2018 and contains a statement, in such form as Revenue may specify, certifying that the instrument was executed solely in pursuance of a binding contract entered into before 11 October 2017. As these transitional measures are contained in the Finance Bill, they are not yet in law. Until the Finance Act is passed the increased 6% rate applies. Recognising the difficulties, Revenue has published an eBrief providing tax payers with two options:

1. *"File a return through the e-stamping system, pay stamp duty at the rate of 6% and be issued with a stamp certificate. On enactment of the Finance Bill, the filer can then request a refund of the difference in the stamp duty paid between the 2% and 6% rates by amending the return and submitting the relevant documentation to Revenue, or*
2. *File a return through the e-stamping system and pay the stamp duty at the rate of 2%, in which case a stamp certificate will not be issued. On enactment of the Finance Bill, Revenue will publish information on how the postponed stamp certificate can be obtained."*

A stamp duty refund scheme will be introduced for developers who purchase commercial land for housing development and who commence the relevant development within 30 months of the land purchase. There are no details of the scheme in the Finance Bill 2017. We will provide an update once details are available.

The stamp duty exemption for transfers of property between closely associated companies has been updated to take account of a "merger by absorption" type of merger. In the case of merger, the requirement for the transferor and the transferee companies to continue their association for the two year period following the transfer of the beneficial interest in the property is dis-applied. However for a two year period the beneficial interest in the property must be held by the transferee and the beneficial ownership of the transferee must remain unchanged. Stamp duty reorganisation reliefs have also been amended to deal with mergers undertaken in accordance with the Companies Act 2014.

Irish Real Estate Funds Regime

Technical changes to the existing Irish Real Estate Funds (IREF) regime proposed by the Finance Bill 2017 may impact direct and indirect IREF investors. We review the main changes and flag recommended actions.

Change	Background	Action
Quoted Property Company Shares	To date shares which derive the greater part of their value from Irish real estate were not considered IREF assets where those shares were quoted on a stock exchange. To remain outside the category of an IREF asset following the enactment of the Finance Bill, not only must the shares be quoted on a stock exchange, but they must also be "actively and substantially traded on such stock exchange". This change follows a more general change to the scope of Irish capital gains tax for non-Irish tax residents.	Any Irish investment funds which do not currently meet the definition of an IREF but hold quoted shares that derive the greater part of their value from Irish real estate should urgently review their investments to determine whether they will now become an IREF.
Anti-Avoidance Measures	There are several changes which appear designed to tighten up existing anti-avoidance provisions. These changes include: • Extending the definition of a holder of excessive rights by including the holdings of connected persons; • Limiting refunds of IREF withholding tax to only the IREF withholding tax suffered in respect of IREF taxable profits arising from the date the unitholder entitled to the refund invested. It is not entirely clear how this provision will operate in practice. • Further limiting refunds of IREF withholding tax to only bona fide commercial transactions that do not form part of a tax avoidance arrangement	Any IREF investors subject to the existing IREF anti-avoidance provisions should review their arrangements in light of the proposed changes.
Irish Pension Related Investors	The exemption from the IREF regime is extended to several other pension arrangements including ARFs, AMRFs and vested PRSAs.	Any ARF, AMRF and vested PRSA investors holding IREF units should ensure they make the necessary administrative filings to obtain exemption from IREF withholding tax
Indirect IREF Unitholders	Gains arising to non-Irish tax residents on the disposal of an asset, such as shares in a company, which derives the greater part of its value directly or indirectly from units in an IREF will no longer be within the charge to Irish Capital Gains Tax. The proposal as drafted does not strictly speaking remove the obligation on the purchaser under Section 980 Taxes Consolidation Act 1997 to apply 15% withholding tax on the consideration for such assets deriving their value from units in an IREF. However we understand that Revenue will clarify that Section 980 will not apply in such circumstances.	Shareholders selling such shares should ensure that the prospective purchaser is not intending to apply such withholding tax.
Tax Administration	There are helpful administrative changes which will reduce the administrative burden and cash flow impact of the IREF Regime. These changes include: • Introducing a new concept of a qualifying intermediary who can hold IREF units on behalf of certain exempt investors without incurring an IREF withholding tax; and • The introduction of preclearance for direct and indirect investors who would be entitled to a refund of any IREF withholding tax i.e. where the investor would be entitled to a refund of the IREF withholding tax they can seek preclearance from Revenue to receive the payment from the IREF without any IREF withholding tax thereby avoiding the need to suffer the tax and seek a refund.	Investors should consider whether they can take advantage of these administrative changes to relieve their administrative burden and improve cash flow.

Contributed by: Ted McGrath, Shane Wallace, Tara Rush

Commercial Court Refuses Preliminary Injunction Restraining Sale of Generic HIV Drug

The Commercial Court has refused an application brought by US-based biopharmaceutical company Gilead Sciences (the plaintiff) for a preliminary injunction against generic pharmaceutical manufacturers Mylan and Teva (the defendants). The application was brought in a case concerning the defendants' plan to market a generic version of the plaintiff's antiretroviral drug, Truvada®.

Truvada®, an antiretroviral medication for the treatment of HIV/AIDS, is protected by an Irish Supplementary Protection Certificate (the SPC). The SPC extends until February 2020 certain intellectual property rights first granted to the Plaintiff by a now expired European Patent. The defendants allege that the SPC is invalid but did not intend to "clear the way" by seeking its revocation prior to launch of their products in Ireland. The plaintiff sought a preliminary injunction restraining the defendants from launching their products onto the Irish market pending a full trial.

On 7 November 2017, Mr Justice McGovern refused to grant the preliminary injunctive relief requested. Relying on the well-established test for the granting of interlocutory injunctions set out by the Supreme Court in *Campus Oil v Minister for Industry* and later followed and summarised by Mr Justice Clarke in *Okunade v Minister for Justice,* the Court made a number of findings:

- The Court agreed with the plaintiff that there was a fair, *bona fide* or serious question to be tried.
- However, the Court found that damages would be both an adequate remedy for the plaintiff, and capable of assessment. The Court was also satisfied that the defendants were in a position to meet any award of damages that might be made.
- Finally, the Court took into account the fact that the case had been admitted to the Commercial List meaning that it would be heavily case-managed and would likely proceed to trial at an early date.

Given that the second limb of the test for an interlocutory injunction had not been met (i.e. damages were an adequate remedy for the plaintiff), the Court found that it was not necessary for it to consider separate issues going to the balance of convenience, such as:

- Whether damages would be an adequate remedy for damage suffered by the defendants as a result of a preliminary injunction.
- The relevance of Teva's claim that it would lose *"first mover advantage"* were a preliminary injunction to be granted.
- The importance afforded to preservation of the *status quo*.

This decision confirms that the well-established test for the granting of interlocutory injunctions applies in the same way to applications for interlocutory injunctions where patent infringement is alleged. The adequacy (or otherwise) of a remedy in damages will continue to be a key battleground in such applications.

Contributed by: Laura Scott & John Sugrue

Breach of Warranty Claims: Don't Fall at the First Hurdle

A recent UK Commercial Court case, *Zayo Group International Ltd v Ainger* and others [2017] EWHC 2542 (Comm), provides a stark reminder that a technical breach of the notice provisions in a contract is not a trivial or inconsequential matter. A failure to strictly comply with notice provisions resulted in the court dismissing a claim for breach of warranties.

Background

The proceedings concerned a share purchase agreement (SPA) by which Zayo acquired a company from the defendant managers. Zayo claimed that deficient accounts were prepared by the defendants and it brought a claim for breach of the relevant warranties in the SPA.

The SPA provided that, to bring a warranty claim, notice must be served at the addresses specified in the SPA within a particular period. On the last day of that period, Zayo attempted to serve each of the defendants with a notice of claim. It managed to serve six of the seven defendants by the cut-off time but failed to serve one defendant, Ms Jaggard, who no longer lived at the address specified in the SPA. The courier left the address, taking the notice with him, which he then delivered to one of the other defendants.

The defendants argued that the claim had not been validly notified to Ms Jaggard, and, since the SPA provided that a claim against one of the defendants be notified to all, the claims failed in their entirety.

Judgment

The court dismissed Zayo's claim on the basis that service of the notices was defective. The court held that the purpose of the notice provisions in the SPA was that of commercial certainty and the ordinary and natural meaning of the provisions were clear in debarring claims which had not been notified within the required period.

The court held that it was irrelevant that Ms Jaggard no longer lived at the specified address; and commented that in failing to notify a change of address, she ran the risk of being unaware of claims against her. Equally irrelevant was the fact that Ms Jaggard became aware of the notice of warranty claim shortly after the failed attempt at delivery. The crucial issue was whether the notice given complied with the provisions of the SPA.

In addition, it was held that there was no requirement under the SPA on Ms Jaggard to notify a change of address and none was implied by the court.

While Zayo argued that a failure to notify Ms Jaggard relieved only that one defendant from liability, the court held that the natural commercial interpretation of the notice provision was that a failure to notify all of the defendants meant that none of the defendants had any liability.

Although additional issues were argued by Zayo relating to the warranty claims, the judge found that the notice issue was a "knock-out" blow in favour of the defendants, rendering all other issues academic.

Implications

This case highlights the importance of both acting promptly when bringing a claim for breach of warranty and strictly adhering to the terms of the contract under which a claim is being brought. Leaving service until the last day resulted in Zayo having no additional time to rectify its technical breach of the notice provisions. The case also illustrates the possibility that a notice of claim may not reach the attention of the intended recipient and yet still be valid.

Contributed by: Julianne Ellis

New Guidance Released for Connected Cars Technology

The 39th International Conference of Data Protection and Privacy Commissioners produced guidance in relation to the connected cars technology in an effort to bring more structure from a legal perspective to this rapidly emerging area.

Through cooperative intelligent transport systems, connected cars have the ability to update other road users, traffic management systems, and third parties about current driving conditions. This advancement in technology will allow for a better driving experience, however, as the autonomous car industry grows, concern for the protection of personal data and privacy also grows. The collection/processing of this data could be intrusive into the driving behaviours of vehicle users. This data could also be manipulated by third parties if enforcement is not effectively implemented.

The following guidelines were agreed by the Data Protection Authorities:

- Data Notices must be made available detailing the types of data that will be collected and processed, and who exactly will have access to this data. All data should be anonymised/ pseudonymised where possible;
- Data retention periods must not be longer than actually needed in order to provide the service;
- Vehicle users should be able to easily access privacy controls and provide consent to data categories of their choice;
- Vehicle users should be able to restrict access to their personal data but should have the option to still receive vital real time information about hazardous road conditions;
- Any algorithms to be used in conjunction with this technology should be tested by an independent assessor to verify that discriminatory automated decisions will not be made;
- If a vehicle is sold, all previous personal data collected must be deleted in its entirety; and
- Data Protection Impact Assessments (DPIAs) should be carried by manufacturers of connected cars technology to highlight any concerns or non-compliance with the General Data Protection Regulation (GDPR).

It is hoped that this guidance will bring a greater level of certainty to operations in this area in terms of the regulation and usage of data generated by connected cars. This is particularly important in the lead up to the implementation of the GDPR in May 2018.

Contributed by: John Farrell

Tick Tock - New Clarification on Time Limits in Property Damage Claims

The Statute of Limitations 1957 prescribes a six-year time limit for property damage claims founded in negligence. That might sound straightforward, but in practice it has never been very clear when the clock starts to run. Should it be the date the wrongful act is committed, the date the damage is discovered, or some other date?

The Supreme Court addressed this very question in the recent case of Brandley & Ors v Deane & Ors.

Facts

The facts of the case are surely not uncommon. The defendant contractor and consulting engineer had respectively installed and certified the foundations for a terrace of three houses. Two of the houses developed cracks over a year later. The plaintiff developer eventually brought proceedings alleging negligence.

It is worth setting out the key dates in full:

- The foundations were completed in March 2004.
- The consulting engineer, Mr. Hubert Deane, issued his certificate of compliance with planning permission and building regulations on 4 September 2004.
- The houses were completed in January/February 2005.
- The plaintiff, Mr. Brandley, observed that cracks had appeared in each of the houses in December 2005.
- Mr. Brandley and his company WJB Developments issued a Plenary Summons on 30 November 2010.

The defendants freely admitted negligence. They also admitted that the defect in the foundations could have been identified at any time from the moment the foundations were laid, had they been properly inspected. Their defence rested entirely on the claim that the case against them was statute-barred.

Clearly, the Plenary Summons was issued more than six years after the foundations were completed and certified, but less than six years after the cracks appeared. The Supreme Court was asked to decide the date on which the clock began to run.

Decision

The Supreme Court carried out an exhaustive review of the law on statute issues in property claims and identified five potential start dates:

1. When the wrongful act was committed.
2. When the damage occurred, regardless of whether it was manifest.
3. When the damage was manifest.
4. When the damage could reasonably have been discovered.
5. When the damage was actually discovered.

In its unanimous decision, the Supreme Court firmly rejected the notion that time runs from the date of the wrongful act, or from the date on which the damage reasonably ought to have been discovered or was actually discovered. The Supreme Court concluded that time runs from the date physical damage is manifest (i.e. when it is capable of being discovered by a plaintiff).

Turning to the question of what constitutes damage, the Court drew an important distinction in these types of cases between latent defects (which were not actionable of themselves) and the physical damage that followed that defect. On the evidence before the Court, the latent defects in the foundations did not cause actual physical damage to the buildings until December 2005 when the cracks occurred. That was the time that damage became manifest and thus the claim was not statute-barred.

Comment

Insurers and professionals in the property industry should take note of the Supreme Court's clarification of the law. Much will depend on the facts of each claim to determine when damage becomes 'manifest', but it is clearly possible that a contractor can be sued well over six years after it carries out defective work. For the same reason, the ruling is good news for property owners, but they should consider conducting regular surveys to ensure that any damage that manifests itself is identified as early as possible.

Contributed by: Brian Durcan

Central Bank publishes Consultation Paper in relation to Third Country Insurance Branches in Ireland

The Central Bank of Ireland (the "Central Bank") has recently published Consultation Paper 115 on the "Authorisation and Supervision of Branches of Third Country Insurance Undertakings" (the "Consultation Paper"). The Solvency II regime facilitates a non-EEA insurer establishing a branch operation in an EEA Member State subject to meeting specific regulatory requirements (a "Third Country Branch"). Post-Brexit, on the understanding that the UK will be regarded as a "third country", a UK insurer may avail of the provisions of Solvency II which enable third country insurers to establish a Third Country Branch in an EEA Member State. A Third Country Branch does not have the right to passport into other jurisdictions similar to an EEA-subsidiary and accordingly, it would only be permitted to write business in the jurisdiction in which it is established.

The consultation will remain open for interested parties to make submissions until 5 February 2018. Entities that are considering the establishment of a branch in Ireland, should review the Consultation Paper carefully and, if necessary, make submissions to the Central Bank in accordance with the terms of the Consultation Paper.

The substance of the Consultation Paper is contained in 4 appendices:

- Appendix 1 contains a proposed Policy Notice which describes the Central Bank's position and expectation on the authorisation of Third Country Branches;
- Appendix 2 comprises a proposed handbook of requirements for Third Country Branches;
- Appendix 3 deals with proposed changes to the existing Domestic Actuarial Regime and related governance arrangements. It is currently proposed to impose the existing Domestic Actuarial Regime on third country branches;
- Appendix 4 contains a proposed guidance and checklist for submission of an application for authorisation of a Third Country Branch.

The publication of the Consultation Paper represents an important development particularly for UK insurers considering the option of establishing a branch in Ireland. In particular it provides a good sense of the Central Bank's proposed approach to authorising and supervising existing branches of UK Insurers.

Interestingly, the Central Bank indicates that the establishment of the Third Country Branch may not be appropriate for all business models owing to the nature, scale and complexity of the proposed business model and/or the proposed customer base. The point is also made that in developing its policy on the authorisation of Third Country Branches, the Central Bank considers the primary purpose of establishing such branches should be the provision of insurance to policyholders within the Irish market (a point of view that is likely to be strongly challenged by existing branches of UK insurers that write global risks).

Significantly, the Central Bank states that its supervision of a Third Country Branch will have a particular focus on ensuring that there are senior individuals in the Irish market who are clearly responsible for the management of both the branch operations and business pursued in the Irish market. The Policy Notice also indicates that the Central Bank's attention will be concentrated on ensuring that the bankruptcy regime in the relevant "third country" jurisdiction provides at least the same level of protection to policyholders of the Third Country Branch in winding-up proceedings as is currently provided under the Solvency II requirements.

Finally, the Consultation Paper deals only with insurance branches and not with reinsurance branches.

To view a copy of the Consultation Paper, please click here.

Contributed by: John Larkin

In Short: Sliding Scale Does Not Fail! Unsuccessful Claim of Age Discrimination in Pensions Restructuring/ETV

A recent recommendation of an Adjudication Officer at the Workplace Relations Commission provides some insight for employers that have restructured their Defined Benefit ("DB") pension schemes, particularly those who have used incentives for members to transfer accrued DB entitlements to Defined Contribution ("DC") arrangements.

The respondent employer company had operated a DB pension scheme of which the complainant was a member. The employer closed the DB scheme to future accrual in 2016. For future service, employees could join a new DC scheme. Members could maintain their accrued entitlements under the DB scheme but the employer gave no commitment to fund accrued liabilities of the DB scheme into the future. Members were given an alternative option of taking a transfer value to the new DC scheme with the addition of a "top up" to their transfer value as an incentive (an "Enhanced Transfer Value" ("ETV")). The complainant chose this option. When carrying out the ETV exercise:

- The Employer had paid for the complainant to have independent financial advice;
- The complainant signed a Member Decision Form and Discharge Deed (waiving all his rights in relation to the DB Scheme and discharging the trustees and the employer from liabilities); and
- There had been a 10 day cooling off period.

The ETV was calculated on a sliding scale of percentages linked to a member's age. The complainant was aged 56 and claimed the calculation method amounted to age discrimination under Section 6(2) of the Employment Equality Acts 1998-2015. However the employer argued this sliding scale was designed as a counterbalance to account for the fact that the nearer a member is to retirement, the more generous the transfer value under the Pensions Act 1990. Therefore, the nearer the member to retirement, the less of an enhancement they should need. Ultimately, the complainant's claim failed as he did not made out a prima facie case showing that he was discriminated against on the age ground and no actuarial evidence was provided on his behalf.

Comment

The adjudication officer did not reference specific facts when giving reasons for her recommendation but simply commented that her decision had taken into account all the evidence and submissions. However, the fact the employer had paid for the member to obtain independent financial advice and ensured a Discharge Deed was completed would have weakened the complainant's case had they been able to make out a *prima facie* case of age discrimination.

Contributed by: Ciara McLoughlin & Jane Barrett

In Short: The Rules on Beneficial Ownership Register for Companies and Legal Entities – What Do I Need to Do?

On 15 November 2016, the Department of Finance published the European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2016 (the "Regulations").

The Regulations require companies and other legal entities incorporated in Ireland to take all reasonable steps to hold adequate, accurate and current information on their "beneficial owners" on an internal beneficial ownership register as and from **15 November 2016**.

What do I need to do?

As the Regulations apply with effect from 15 November 2016 and there are no savers or transitional periods, entities in scope must now:

- Establish an internal register of their beneficial owners
- Where the beneficial owners are not known, take "all reasonable steps" to ensure the beneficial ownership information is obtained and entered on the beneficial ownership register
- Where no beneficial owners can be identified, enter the names of the senior managers (including the directors and CEO) of the relevant entity on the beneficial ownership register as the "beneficial owners".

A beneficial owner is an individual who ultimately owns or controls the relevant entity through direct or indirect ownership of a sufficient percentage of the shares or voting rights or ownership interest in the relevant entity. A shareholding of 25% plus one share or an ownership interest of more than 25% will be evidence of ownership or control.

For further information on the Regulations and their requirements please view our full briefing here.