WILLIAM FRY

Legal News

Welcome to the January 2019 issue of Legal News. For further information on any of the topics covered in this edition, please call or email any of the key contacts or your usual William Fry contact person.

New Corporate Enforcement Authority Proposed: Further Changes to Companies Act 2014 on the Horizon

The General Scheme of the Companies (Corporate Enforcement Authority) Bill 2018 (the "Scheme"), which proposes to make a number of amendments and additions to the Companies Act 2014 (the "Act"), was recently published

The main aim of the Scheme is to establish the Office of the Director of Corporate Enforcement (ODCE) as a stand-alone agency, to be called the Corporate Enforcement Authority (the "Authority"). Currently, the ODCE is an office within the Department of Business, Enterprise and Innovation. The changes are intended to enhance the status of the body tasked with enforcing company law in Ireland, by increasing its independence and giving it more control over its resources. The proposed legislation is seen as a key element of the Government's package of measures to strengthen Ireland's response to white collar crime.

The Authority will have the same functions and powers as the Director of Corporate Enforcement, with modifications to reflect the new proposed agency structure. Up to three full time members known as "Commissioners" will be appointed to the Authority for a term of up to 5 years with the possibility of reappointment for a further 5 year term. It is intended to give the Authority more autonomy and flexibility to meet the differing demands of its remit, which includes investigation, prosecution, supervision, and advocacy, and along clear lines of responsibility.

The Scheme also provides for new investigative tools, including new search and entry powers to enhance the Authority's ability to gather evidence that is held electronically.

In addition to the establishment of the new Authority, the Scheme makes a number of unrelated amendments to the Act, many of which will give effect to recent recommendations of the Company Law Review Group, the most relevant of which are as follows:

Share capital
A number of clarifications to the share capital provisions of the Act are proposed to deal with issues that have arisen in practice when carrying out corporate transactions. These include clarifying that a company can use its share premium account for various purposes, disapplying the requirement that an unlimited company have distributable reserves to redeem its own shares and exempting capital reductions from the strict rules on the making of distributions.

New grounds for restriction of directors
Due to public concerns surrounding a perceived lack of protection of employees and unsecured creditors in a liquidation scenario, the Scheme suggests new grounds for the making of a restriction

order against company directors in these circumstances. In particular, a director may be restricted where he or she has:

1. Failed to convene a general meeting of shareholders for the purpose of nominating a named liquidator;
2. At such a meeting, failed to table a motion to nominate a named liquidator; or
3. Failed to provide the required notice to employees in a winding up.

Directors to supply PPSN to the CRO for verification purposes
There is a proposal to oblige directors of companies to supply their PPSN (in data format only) to the Companies Registration Office (CRO) when incorporating a company for the first time (Form A1), filing the Annual Return (Form B1) and notifying the CRO of a change in director or secretary (Form B10).

We understand that the PPSN will not be available to view by the general public. The change is proposed to support the accuracy of the CRO Register. It should also deal with situations where an individual uses variations of their names and addresses (for example using different initials or English transliterations of Irish language given names) to circumvent the provisions of the Act that put a limit on the number of directorships any one person can hold and that prohibit on a person being both director and secretary of a sole director company. Persons who are not entitled to a PPSN number will be required to supply a copy of the photo page of their passport.

End of exemption from including particulars of directors on business letters
The Act currently enables the Minister for Business, Enterprise and Innovation to grant an exemption from the requirement to disclose particulars of directors on company letterhead. This exemption was introduced to facilitate companies that had frequent changes of director that gave rise to a corresponding need to print new company stationery. This exemption is no longer considered necessary given that company stationary can now be updated without large print runs. Any exemptions that are currently in effect will be allowed to run their course.

Next steps
Drafting on the Bill 'proper' will now commence, based on the Scheme. It is expected that the Bill will be introduced to (and pass through) the Houses of the Oireachtas during 2019. Once the Bill is enacted, the Act will be amended, with the citation of the Act remaining as is (i.e. Companies Act 2014).

Contributed by Aoife Kavanagh

IORP II – What Employers Need to Know

Published article originally appeared in the The Sunday Business Post, 6 January, 2019.

IORP II is a European Pensions Directive which is due to become law in Ireland on or before 13 January 2019. Ian Devlin examines some of the issues employers may face once IORP II comes into force.

Traditionally, employers establishing pension schemes do so through life companies or pension consultancies. As pension schemes are set up under trust, this involves appointing trustees. Typically, employees or directors of the employer are installed as trustees on a voluntary basis. These trustees usually outsource the administration, investment and any other related services to the provider who assisted with establishing the scheme. Trustees often became wholly reliant on those service providers for managing the scheme's affairs.

IORP II is likely to alter that model of scheme governance.

Professionalisation of trusteeship
A key concept within IORP II is the requirement that trustees have an effective system of governance in place. To put such a system in place, trustees need to understand what is involved in running their scheme. IORP II introduces a requirement that trustees must collectively be "fit and proper" persons. This may mean that at least one member of the trustee board will need a professional trustee qualification.
If this becomes a legal requirement, many employers will need to consider whether to: (1) replace the trustee board with a professional trustee; or (2) appoint a professional trustee to join the trustee board. In our experience, the latter approach works well. The professional trustee will know what is involved in running the scheme but can draw on the knowledge and experience of his fellow lay trustees to understand the employer's business.

Increased compliance burden
In establishing an effective system of governance, IORP II requires trustees to adopt a range of governance policies covering risk management, internal audit, actuarial activities (if relevant), outsourced activities and remuneration. IORP II also requires trustees carry out their own-risk assessment.

All these additional requirements (which must be reviewed triennially) will generate a layer of costs for trustees. Employers (who are typically responsible for scheme expenses) will need to budget for these costs.

Employers may have in-house resources and expertise to assist trustees in complying with these requirements. However, for some employers, the increased regulatory burden and cost may prompt them to consider alternative options for pension provision, such as master trusts.

A more pro-active Pensions Authority
In line with IORP II, the Pensions Authority has confirmed that it will be adopting a forward-looking risk-based approach to scheme supervision. The governance culture of schemes will be a key focus for the Authority.

Employers will have an interest in ensuring trustees are compliant as scrutiny into a scheme's affairs by the Authority could lead to administrative sanctions for trustees and consequential reputational damage for employers.

Also, as employers indemnify trustees, they may be exposed to the costs trustees incur in dealing with or defending such regulatory investigations, prosecutions or fines.

Data breaches
IORP II will require trustees, to issue member benefit statements to deferred members (former employees with retained benefits) for the first time. Trustees will rely on employers in sourcing

accurate contact details for these former employees. If those details prove to be inaccurate data breaches are inevitable with the potential for fines. Employers will therefore need to support trustees in tracing those former employees to minimise the risk of such data breaches arising.

Service level agreements

IORP II requires trustees to enter into legally binding agreements where they outsource certain activities.

Again, as employers are indemnifying pension trustees, they need to ensure that the terms of such agreements are not excessively pro-provider. At a minimum, employers should ensure the provider's limitation of liability provisions are in line with market norms. Otherwise, those providers may escape liability where issues arise, with the result that trustees are exposed and look to the employer to indemnify them.

Conclusion

Much of the commentary and focus to date on IORP II has been on the increased governance requirements it will impose on trustees. However, trustees cannot be viewed in isolation. They perform functions associated with employer related pension provision. Employers should therefore have an active role in supporting trustees in taking whatever steps they need to take to ensure they can comply with IORP II. The employer indemnity in favour of trustees means that its interests are very much aligned with those of the trustees in ensuring their pension schemes do not become subject to regulatory scrutiny for non-compliance or poor governance practices.

Employment & Benefits 12 Days of Christmas – our hot topics for the year ahead

Welcome to the final day of our 12 Days of Christmas series! After an eventful 2018, today the Employment & Benefits team takes a look towards the year ahead, sharing their predictions for topical employment and pensions issues for 2019.

1. Breach of restraint of trade clauses

Restrictive covenants in Ireland are considered a contractual matter between an employee and an employer. As the economy continues to boom, movement within the jobs market continues to heat up and we have witnessed an increase in queries and litigation related to the enforcement, or otherwise, of contractual restrictive covenants. In the absence of specific legislation, carefully drafted and well thought-out restrictive covenants offer the best protection to employers seeking to restrain staff from jumping ship to their competitors.

2. Sexual harassment

Over the course of the past year, the momentum of the #metoo movement has continued, with several more high-profile sexual harassment cases widely reported in the media in 2018. The fight against sexual harassment looks set to continue and while most employers are aware that they bear a responsibility for protecting their employees from unwanted sexual comments and attention, not all are proactive in this area. Employers need to have more than just a piece of paper outlining a sexual harassment policy; they must implement preventative measures to avoid sexual harassment taking place and take active steps to ensure that all staff members are aware of the contents of the policies in place. A clear line of communication must be available, and a no-tolerance policy adopted throughout every company, big or small. Support from the top can go a long way in setting the culture in this regard.

3. Parental Leave

The EU Commission has cited caring responsibilities as the reason for 20% of the unemployment of women within the EU (as opposed to 2% of men). It is hoped that measures such as the proposed extended Parental Leave scheme under the Parental Leave (Amendment) Bill 2017 and the Shared Maternity Leave scheme that has been put forward under the Shared Maternity Leave and Benefit Bill 2018 will be positive steps in the move towards a better work-life balance. With both Bills at the third stage of Dáil Éireann, employers can begin to consider how they will introduce these new measures in their workplace in the New Year.

4. Gender Fluidity

The idea of gender neutral bathrooms at work may not be in the plans for a lot of employers, but as gender diversity becomes more understood, it is clear that adaption and inclusion will be big topics in the year to come. A number of Irish employers have introduced gender neutral bathrooms and changing areas in the workplace. Given that gender identity can be an emotional topic, employers should be aware that the topic should be treated in an appropriate and sensitive manner. Practically speaking, this means more than just a gender-neutral bathroom or changing facility, it means easily amending a personal file or ID card if required and having a zero-tolerance policy of bullying and derogatory remarks. As the workplace strives to become a more inclusive environment this is likely to be a topic that we will see more of in 2019.

5. IORP II

The IORP II Directive has a deadline for transposition of 13 January 2019. It is expected that the Irish legislature will publish transposing Regulations in early 2019. The Pensions Authority is also expected to issue supporting guidance materials. For many schemes IORP II will require them to completely revise how they approach scheme governance. We intend to schedule a client briefing on IORP II early next year to support trustees and sponsors in addressing the new requirements IORP II will introduce.

6. Auto-enrolment

The Government is set to finalise the design of the proposed auto-enrolment system for Ireland by Q1 of 2019. This is a promised action point in the Government's "A Roadmap for Pension Reform, 2018-

2013" (the "Roadmap"). In finalising the design of the proposed system it will be interesting to see whether Government has taken on board the concerns raised by many on that proposed design during the recent consultation process.

7. Defined Benefit (DB) reforms

Proposed reforms for DB schemes were included in the pre-legislative draft of the Social Welfare Pensions and Civil Registration Bill 2017. However. these proposals, which included a provision empowering the Pensions Authority to impose a statutory debt on employers in certain circumstances, were later dropped. Speaking in the Dáil on 14 November 2018, Minister Doherty reiterated her intention to re-introduce the DB reforms to the Social Welfare Pensions and Civil Registration Bill 2017 which have been held up at Committee Stage for the last year or more. Employers with DB schemes should watch out closely for these developments in 2019.

8. EIOPA/ECB reporting

New reporting requirements for pension schemes have been introduced by EIOPA and the ECB. EIOPA's requirements for quarterly reporting will apply from Q3 of 2019. The first reporting deadline for the ECB is end of Q4 2019. The Central Bank of Ireland has published a list of pension schemes that the ECB requirements will apply to, and any scheme not on the list has been granted a derogation. The Pensions Authority has also contacted all Registered Administrators regarding the data collection process. We expect Registered Administrators will be in contact with schemes affected by this process during 2019.

9. Equal pensions treatment

Reforms to deal with the case of *Parris v Trinity College Dublin* (which we wrote about here) had previously been included in the pre-legislative draft of the Social Welfare Pensions and Civil Registration Bill 2017 but were later dropped (along with the DB reforms mentioned above). The Social Welfare, Pensions and Civil Registration Bill 2018 now includes new provisions to deal with the Parris case. The Bill may have limited application in practice to certain DB schemes with so called "*death bed marriage*" rules. This Bill passed its final stages in the Dáil and Seanad on 18 December 2018 and at the time of writing is awaiting presentation to the President for signing into law.

10. Master trusts

The Pensions Authority carried out a consultation on the proposed regulation of master trusts in Ireland which ended on 5 October 2019. The Government's proposals are related to IORP II and auto-enrolment. Master trusts are viewed as a possible vehicle for the roll-out of auto-enrolment and as a solution to consolidation of DC schemes in Ireland (which may be accelerated by the increased governance requirements of IORP II). Accordingly, this topic is likely to stay on the agenda for 2019.

11. Ombudsman regulations

New Year's Day 2019 will mark the first anniversary of the commencement of the Financial Services and Pensions Ombudsman Act 2017. This Act repealed the sections of the Pensions Act 1990 which had governed the former office of the Pensions Ombudsman and revoked the related Regulations made under it. Regulations have not yet been published under the Financial Services and Pensions Ombudsman Act 2017 to deal with topics such as Internal Dispute Resolution (IDR). If Regulations are published in 2019, trustees may need to update their IDR procedures accordingly.

Thank you to all of our readers for your interest in our "12 Days of Christmas" series.

Wishing you and your family a merry Christmas and a prosperous New Year from all of the Employment and Benefits team at William Fry.

Contributor: Aoife Gallagher-Watson, Jane Barrett

High Court Holds Liquidator Not Obliged to Present Contemporaneous Timesheets in Fees Application

Introduction

In a recent application brought by the Official Liquidator of Custom House Capital Limited (In Liquidation) ("CHC") to determine the Official Liquidator's interim remuneration, fees and expenses, Ms Justice Finlay Geoghegan sitting in the High Court held that the Official Liquidator was not required to produce contemporaneous timesheets in the assessment of his remuneration[1]. The Court also held that the increase in the charge-out rate of the Official Liquidator's solicitor during the liquidation was objectively justified in light of the level of experience gained and increased seniority over the relevant period.

Contemporaneous Timesheets

The onus was on the Official Liquidator to satisfy the Court, on the evidence put before it, that the remuneration he sought was reasonable for the work done by him. The Court must be provided with "*sufficient information*" to enable it to *"form a view as to the appropriate allowable fees whilst not adding unnecessarily to the cost of the liquidation"*. As a matter of principle there is an obligation on a liquidator to keep *"proper contemporaneous records"*, however, the Court held that it does not automatically follow that a liquidator is obliged to produce all such contemporaneous records in an application for the measurement of remuneration.

In each case it is necessary to strike a balance between requiring the provision sufficient information so that the Court may form a view on reasonable remuneration, while also not imposing unnecessary requirements that would result in extra work and expense without any proportionate benefit for creditors or contributories.

Finlay Geoghegan J. asked whether timesheets would assist the Court in assessing the value of the work done for the liquidation, or whether the time spent was necessary to achieve the work actually done, or indeed whether that work was necessary for the particular aspect of the liquidation to which it related. On the facts of this application it was held that the production of the contemporaneous timesheets would not assist in doing so. Therefore, the Court declined to make a direction requiring the production of contemporaneous time sheets.

Increase in Solicitor's Charge-Out Rate

The application also included the determination of the legal costs of the Official Liquidator for the relevant period which gave rise to a dispute regarding an increase in the hourly charge out rate for a solicitor during the relevant period from €285 to €300. This was in a context where, since 2014, the solicitor's hourly rates had increased from €175.

Finlay Geoghegan J. referred to her previous decision in *In the Matter of Mouldpro International Ltd. (In Liquidation)* [2018] IECA 88 ("*Mouldpro*") where she had held that in respect of an hourly charge out rate for persons in the liquidator's firm who were promoted during the period of the liquidation, the hourly increases in question were not objectively justified in the context of the work being done by the persons in the liquidation.

Turning to the increase in the solicitor's fees in the within application, Finlay Geoghegan J. considered the fact that the solicitor increased her seniority over the relevant period and was able to relieve a senior partner from certain of the work in the liquidation. As such, the Court was satisfied that this provided the objective justification which was required in *Mouldpro* for the element of professional fees attributable to work done by the solicitor at the increased charge out rate and allowed the increase of the solicitor's hourly fees.

Key Take Away Points

This decision will be broadly welcomed by practitioners where it has been widely regarded that fees and costs applications were becoming increasingly onerous and difficult. However, the onus remains on liquidators and their solicitors to satisfy the Court that their fees, costs and expenses are reasonable in all the circumstances.

The decision also clarifies the decision in *Mouldpro* and confirms that the onus is on practitioners to objectively justify an increase in an individual's hourly charge out rate in the context of the work being completed by that person in a liquidation.

[1] *In re Custom House Capital Ltd* [2018] IEHC 652

Contributed by: Rebecca O'Connor

WRC finds Serious Breach of Fitness and Probity Standards No Grounds for Fair Dismissal

In the recent Workplace Relations Commission ("WRC") case of Bank Official v Bank ADJ-00014020, a WRC Adjudication Officer (the "AO") found that a Bank Official was unfairly dismissed despite concluding that the Bank Official's actions constituted serious misconduct and breached the Bank's policies relating to Cash Handling and Cashing, Fraud Prevention and its Code of Ethics.

Background

A claim for unfair dismissal was brought by a Senior Customer Advisor employed by a Bank from 1 July 2007 to 21 February 2018. At the time of his dismissal the Claimant was employed in a 'Control Function' role under the Central Bank Fitness and Probity requirements and therefore had to abide by the Fitness and Probity standards set out by the Central Bank of Ireland ("CBI").

In September 2016, the Claimant disclosed to his manager that he *"may have advised a customer to sign her former husband's name on the back of a bank draft, made payable to the customer and her former husband to facilitate the lodging of the bank draft into the customer's account".* The disclosure resulted in a disciplinary investigation as the Bank's policies required that a draft payable to two persons must either be lodged into a joint account or, if lodged to a sole account, the other party must endorse their name on the back of the draft. The Claimant admitted that he was fully aware of the company policy on Cheque Handling and Cashing at the time he advised the customer, but he was unaware that the other person was in fact the customer's *former* husband. A disciplinary hearing held in November 2017 found that the Claimant had breached the Bank's policies and his actions amounted to instructing a customer to commit fraud. The actions were deemed to be gross misconduct and a sanction of immediate dismissal was imposed.

In the WRC, the Bank argued that the decision to dismiss the Claimant was reasonable and not unfair. The Bank stated the Claimant breached numerous Bank policies and that it operates a zero-tolerance approach to deliberate conduct of this nature. The Bank further stated that the entire banking sector is moving to rebuild trust in the industry and such deliberate actions and conduct cannot be tolerated. In response to the Bank's argument relating to rebuilding trust in the industry, the Claimant contended that the Bank allowed him to continue to work for two months after the allegation came to light. The Claimant argued that the sanction imposed was too severe and disproportionate as he otherwise had a clean and unblemished record. The Claimant further stated that he acknowledged his actions were a serious breach of the Bank's policies, he admitted his error in judgement and had apologised for his mistake.

Decision of the WRC

While finding that the Claimant's actions compromised the Bank's reputation and constituted *"serious misconduct"* warranting *"serious disciplinary action"*, the AO ultimately decided that the dismissal was unfair. The AO found that the actions *"did not constitute gross misconduct".* The AO decided that the dismissal was substantively unfair, but the Claimant contributed substantially to his dismissal. The AO's finding was partly based on the fact that the Claimant was allowed to continue working in a position of trust for a period of two months after the incident came to light rather than suspending him with pay pending the investigation. The AO stated that the quantum of the award must reflect the substantial contribution the Claimant contributed to his dismissal and awarded €10,000 in compensation.

Lesson for Employers

The finding of the AO is somewhat surprising given the admitted wrongdoing by the Claimant and the serious consequences of his actions. The distinction between "*serious*" and "*gross*" misconduct in the decision is rather unclear, as is the weighting given to the decision not to suspend the employee when case law clearly states that suspension should be the exception rather than the norm. Furthermore, the decision has been made at a time where the CBI is calling for more individual accountability from senior executives in the banking sector. The AO found that the Claimant's conduct fell short of *"gross misconduct*". It remains to be seen if it will be appealed but it is a reminder of the extremely high bar that the WRC gives to summary dismissals without notice.

Venture capital funding falls by 47% in third quarter to €170m

Venture capital funding into Irish tech firms fell by 47% to €170m in the third quarter of 2018, according to the Irish Venture Capital Association VenturePulse survey published today in association with William Fry. Funding for the first nine months of the year is down 33% to €546m from €817m in the same period last year.

"The third quarter confirms our earlier fears of a significant slowdown in the market this year. We know that the Government is considering initiatives to mobilise capital to this sector. These figures illustrate that we urgently need to see a meaningful response and action to address this," commented Alex Hobbs, chairman, Irish Venture Capital Association (IVCA).

"This is of particular concern at a time of global economic uncertainty when we need to be doing all we can to boost our indigenous technology sector for the future."

He added that in a recent presentation, the European Investment Fund noted that as a percentage of GDP by country, Ireland would need to grow by almost five times its current startup fundraising activity to reach the same level as Israel.

"The gap is widening between countries' investment activities and now is not the time for Ireland to fall behind," he said.

Mr Hobbs said that that the largest decline in funding over the same quarter last year is in deals above €5m. These have declined in both value and volume by around 30%.

Sarah-Jane Larkin, director general, IVCA, said that seed funding in the third quarter is down 13% on the same period last year, slowing its decline from 39% in second quarter of 2018.

"Seed funding accounted for 23% of the total funds raised in the third quarter. The decline in seed funding is being driven by the volume of deals – down 32% in number. The average seed deal size is broadly similar year on year."

She said that international investors accounted for €300m or 58% of total funds raised in the first nine months of 2018, a similar proportion to last year. International syndicate investors invested €94m in Irish firms the third quarter.

"This emphasises the importance of international relationships as global investors usually like the reassurance of participating with an Irish VC company or provide follow on from an initial local investment," said Ms Larkin.

She pointed out that since the onset of the credit crunch in 2008, in excess of 1,450 Irish SMEs have raised venture capital of €4bn. These funds were raised almost exclusively by Irish VC fund managers who during this period supported the creation of up to 20,000 jobs; attracted over €2bn of capital into Ireland and geared up the State's investment through the Seed & Venture Capital Programme by almost 16 times.

Sexual Harassment Issues in the Workplace have Surged by 200pc

Published in The Sunday Independent, 9 December 2018. Read the full article here.

Alicia Compton, partner at William Fry, one of Ireland's top-five legal practices, has told the Sunday Independent that her firm is seeing a similar trend.

"I have seen a clear increase in the number of employment-related sexual harassment complaints in the past year," she said. *"Individuals are less afraid than in the past to speak up about workplace behaviour unacceptable to them."*

"In turn, many employers are reacting differently to how they might have done a few years ago, in that instead of hoping that a problem will just go away, they are trying to prevent harassment happening in the first place and will investigate allegations and take follow-up action."

Ms Compton said allegations of sexual harassment are always difficult for both employees to make and employers to deal with: *"Maintaining confidentiality and affording fair procedure to those involved in an investigation is not easily done. This is particularly so where allegations of historic harassment are made.*

"The nature of sexual harassment allegations, and the investigation procedure required, means that at the end of the process and despite the employer's best intentions, the employee who made the complaint or the employee against whom the complaint was made is going to be unhappy at the outcome. Often both parties will be unhappy."

She stressed that good quality HR policies and training delivered in clear terms explaining acceptable and unacceptable behaviour was vital if firms wanted to stay out of court: *"Certainly the days of hoping that a sexual harassment allegation will somehow go away, or resolve itself without employer intervention, are gone."*

Ireland is following an international trend. In France, reports of rape, sexual assault and harassment have leapt by almost a third following the international scandal surrounding the allegations against Hollywood producer Harvey Weinstein.

The rise, described as "exceptional", is believed to have been prompted by victims feeling empowered to come forward after the #BalanceTonPorc (squeal on the pig) campaign among the country's social media users.

While in the UK, half of all British women and a fifth of men have also been sexually harassed at work or a place of study, a BBC survey has found.

Elsewhere, researchers in Denmark found that sexual harassment by work colleagues has a greater impact on mental health than the same actions by clients or customers, according to a new study.

A new national survey on the prevalence of sexual abuse and violence in Ireland is currently under way and will examine sexual harassment in the workplace. The report will be the second such survey carried out in Ireland, 16 years after the previous SAVI report.

Court of Appeal Confirms "Arguable Defence" Required if an Application for Summary Judgment is to be Remitted to Plenary Hearing

The recent decision of the Court of Appeal in The Governor and Company of the Bank of Ireland v O'Grady & Anor 2018 IECA 180 has confirmed that where anapplication for summary judgment is made, a defendant must establish that he has "an arguable defence" to the claim if proceedings are to be remitted to plenary hearing.

Background Facts
In this case Bank of Ireland ("The Bank") sought summary judgment against the defendants in the sum of €290,282.84 which was money payable by the defendants on foot of a Guarantee and Indemnity ("the guarantee") from November 2000. The guarantee was provided by the defendants in respect of the indebtedness of Lewis Stores Limited and the defendants (respondents in the appeal) were directors of this company.

In the High Court, the defendants had advanced two potential grounds of defence. First, they claimed that the guarantee did not comply with relevant legislation. That argument was rejected. The second was based upon the defendants' assertion that the guarantee was one which was limited in nature. According to the defendants it had been their understanding that the guarantee required by the Bank was one to be provided by them for the sole purpose of securing payment to the Bank of monies that might become payable on foot of a Life Policy, which they were also to provide to the Bank as partial security of the company's indebtedness. This defence found favour with the High Court and Binchy J. concluded that the defendants had demonstrated the probability of a credible and bona fide defence to the Bank's claim.
Binchy J. then directed the summary summons proceedings be remitted for a plenary hearing.

Court of Appeal
The Bank appealed the decision and asserted that the trial judge erred in law and in fact in refusing to grant summary judgment. In particular, the Bank claimed that the respondents had not demonstrated that there was a fair or reasonable probability of them having a real and bona fide defence to its claim. The Court of Appeal held that the position the respondents had put forward was not supported by evidence and even the facility letter put forward did not support the interpretation of the contract of guarantee which they proposed.

The Court of Appeal granted the appeal and granted summary judgment against the respondents. In doing so it stated the principle to be applied on an application for summary judgment was "whether the defendant had established an arguable defence".

Ultimately, the Court of Appeal found that the Bank had brought proceedings on foot of an all sums guarantee and indemnity, the terms of which could not have been clearer. Additionally, the terms of the guarantee, as suggested by the respondents would have given the Bank no security for the company's borrowings unless one of them died. It was not credible that the Bank would have taken the guarantee solely to secure the Life Policy. The guarantee could be rendered valueless in the event of the policy holders failing to make such payments as were necessary to keep the policy in place or the termination of the policy for other reasons.

The Court stated that it considered it material that at the time of the execution of the guarantee the respondents both certified that the nature and terms of the guarantee had been explained to them by their solicitor.

Key Points
This case serves as a reminder from the Court of Appeal of the principles to be applied on an application for summary judgment. Credible evidence must support a claim of "an arguable defence" and if there is no such evidence it is likely that summary judgment will be granted.

Contributed by: Craig Sowman and Joe-Ann Burke

A New Chapter for Disability Access Certificates under the Building Control (Amendment) Regulations 2018

The Building Control (Amendment) Regulations 2018 (the "Amending Regulations") have been published, aiming to clarify requirements for disability access certificates under the building control regime for buildings and works.

Background
The Amending Regulations clarify building procedures for Disability Access Certificate (DAC) applications. A DAC is a certificate granted by a building control authority certifying that the design of certain works, if constructed in accordance with the granted certificate, will comply with Part M of the Building Regulations. A person is not permitted to carry out works contravening building control regime requirements for DACs or fire safety certificates.

Types of buildings and works affected?
The following buildings or works will require a DAC:

- Construction of new buildings;
- Material alteration (excluding minor works) of:
    - day centres;
    - hotels, hostels or guest buildings;
    - institutional buildings;
    - places of assembly;
    - o shopping centres,

- Material alteration of shops, offices or industrial buildings where:
    - buildings are being subdivided into units for separate occupancies; or
    - additional floor area is being provided within buildings;

- Extension of buildings by more than 25 sqm,
- Material changes of use where the building becomes used as:
    - day centres;
    - hotel, hostels or guest building;
    - institutional buildings;
    - places of assembly;
    - shops (which is not ancillary to the primary use of the building); or
    - shopping centres.

Changes to existing buildings
Material alterations or extensions to existing buildings should not give rise to any new or greater contravention of the Building Regulations. If an existing building contravenes the Building Regulations, the material alteration or extension of such a building does not carry with it a requirement to make good such contravention, but merely that the contravention is not worsened.

Care needs to be taken where there is significant revision to design or works which may give rise to the requirement for a DAC which may not have applied at the outset.

It is good practice to apply for a DAC at the same time as a fire safety certificate. It is worth noting that the Amending Regulations do not change the requirements in relation to fire safety certificates.

When are DACs not required?
The Amending Regulations clarify that DACs are not required for:

- Material changes of use to buildings, where the building will be used as:
  - flats;
  - offices; or
  - industrial buildings;

- Material alterations to buildings containing a flat (although works must still comply with the Building Regulations (where applicable));
- Buildings used solely to enable inspections, repairs or maintenances of fixed plant, building services, or machinery, such as access to roof top air handling units or electric substations;
- The same building types which are currently exempted from requirements for fire safety certificates. However, the exemption for a DAC is irrespective of storey height;
- Agricultural buildings;
- Dwellings (other than a flat);
- Garage ancillary to dwellings; and
- Certain other buildings ancillary to dwellings.

When do the Amending Regulations commence?
The Amending Regulations come into operation on 17 December 2018.

Action required?
Property owners, public sector bodies, contractors, designers, project, asset and facilities managers need to carefully consider how to best design, construct and manage works and buildings to comply with these new DAC requirements under the Amending Regulations.

Contributed by: Jarleth Heneghan, Partner and Cassandra Byrne, Consultant both of Projects and Construction

Copyright the Taste of Cheese? You Gouda Brie Kidding!

The Court of Justice (ECJ) this week ruled in *Levola Hengelo BV v Smilde Foods BV* that copyright protection does not extend to the taste of cheese. In its judgment the ECJ concluded that copyright protection can only subsist in works that are identifiable with sufficient precision and objectivity, and that the taste of a food product cannot meet this threshold.

Background
Levola Hengelo, Dutch cheese producer and the owner of the "*Heks'knaas*" spreadable cheese product, claimed that one of its competitors (*Smilde*) had copied the taste of this product, an act *Levola* claimed constituted copyright infringement.
Levola Hengelo argued in particular that the taste of its "*Heks'knaas*" product was its own intellectual creation and was therefore eligible for copyright protection as a "work" within the meaning of Dutch copyright laws.
Smilde counterclaimed that the taste of cheese cannot be defined with sufficient precision so as to enable it to benefit from protection.
The question as to whether copyright could subsist in the taste of a spreadable cheese was referred by the Dutch Court to the ECJ.
In an opinion published on 25 July 2018, the Advocate General, in a ruling prior to the ECJ's decision, concluded that the taste of cheese could not be copyright protected, on the basis that works which can attract copyright protection must be recognisable with sufficient accuracy and objectivity.

Judgment
The ECJ agreed with the decision of the Advocate General and affirmed that copyright protection can ***only*** subsist in works that are *"identifiable with sufficient precision and objectivity"*.
In its judgment, the Court considered whether a taste could be classified as a "work" within the meaning of the InfoSoc Directive (*Directive 2001/29)*, thereby attracting the copyright protections afforded by the

Directive. The Directive itself does not include a definition of the term "work", nor does it instruct Member States as to how to determine the meaning and scope of the term.
The ECJ held that two cumulative conditions must be satisfied for subject matter to be classified as a "work":

1. The subject matter concerned must be original in the sense that it is the author's own intellectual creation; **AND**
2. only something which is the expression of the author's own intellectual creation may be classified as a "work" within the meaning of Directive.

The Court commented that the authorities responsible for ensuring that copyright is protected must be able to identify, ***clearly and precisely***, the subject matter so protected. Further, the Court emphasised the need to ensure that there is no element of subjectivity in the process of identifying the protected subject matter. The taste of a food product is inherently subjective, and one person's taste experience could be vastly different to another person's. As such, the Court concluded that the taste of a food product must be precluded from being protected by copyright.

Comment
This decision emphasises the requirement for legal certainty to vest in the work over which copyright protection is claimed. The ECJ did however acknowledge that expression need not necessarily be in permanent form (i.e. that expression can be subject to change and evolution) but rather that it should, at any particular point in time, be ***clearly identifiable.***
In light of this decision it will be important for food manufacturers to consider the other aspects of food products over which intellectual property rights can be asserted.
It is possible that food product ingredients and manufacturing methods can be protected through trade secrets and patents. Equally, it is open to food producers to seek to protect the product brand and reputation through the registration of trade marks and/or geographical indications.

Contributed by: Anna Ní Uiginn and Tara Maher

Increased Irish Merger Control Thresholds Enter into Force

As of 1 January 2019, the financial thresholds triggering merger notification to Ireland's Competition and Consumer Protection Commission are that, in the most recent financial year, in the Republic of Ireland:

- aggregate turnover of all of the undertakings involved is not less than €60 million; and
- turnover of each of two or more of the undertakings involved is not less than €10 million.

The revised thresholds were introduced by the Competition Act 2002 (Section 27) Order 2018 (S.I. No. 388 of 2018).