WILLIAM FRY LEGAL NEWS

Welcome

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

Sonya Manzor

Partner

Organisations Contacted Regarding Suspected Unlawful Vetting Procedures

The Data Protection Commissioner (DPC) has contacted more than 40 of Ireland's biggest organisations, across a variety of sectors, in order to assess compliance with legislation concerning "*Enforced Subject Access Requests*". Organisations were selected at random and include prominent banks, energy suppliers, recruitment companies and major chain stores.

Individuals have the right to request access to personal information about them held by certain organisations. "*Enforced Subject Data Requests*" occur where an individual is required by a potential employer to make a data access request from an entity (such as the Gardaí) and deliver the information provided under such a request to the potential employer. Requests of this nature have been an offence under data protection legislation since July of last year.

While Garda vetting is permitted in certain distinct roles, for example those relating to childcare and vulnerable adults, the Garda Vetting Unit received a "*questionably high*" number of data access requests from individuals last year, leading to suspicion on behalf of the DPC that organisations have been using such requests as a means of "*vetting by the back-door*". Further, data access requests may reveal more sensitive data than may be disclosed by a simple Garda vetting check.

The DPC has warned that she intends to "*vigorously pursue and prosecute any abuse detected*". The organisations contacted have been given three weeks to respond to the DPC and follow up inspections will be carried out. This represents yet another example of the DPC's proactive approach to regulation. For organisations engaged in this type of activity, now is the time to take remedial action.

Contributed by John Magee & Niamh Gavin.

Registration of Charges and Priority under the Companies Act 2014

The Companies Act 2014 has introduced a number of changes aimed at simplifying the registration of charges and clarifying the law governing the priority of charges. However, the basic requirement to register a security interest created by a company within 21 days of its creation in the Companies Registration Office (CRO) remains.

Procedure for registration of charges

The existing procedure for registering a charge (One-Stage Procedure) has been retained under the Act. However, a new procedure (Two-Stage Procedure) is now available, and the differences between the two procedures are summarised below:

One-Stage Procedure	Two-Stage Procedure
Complete Form C1 to deliver particulars of the charge to the CRO within 21 days of the date of creation of the charge	1. Complete Form C1A to deliver notice to the CRO advising of the company's intention to create the charge (First Filing) 2. Not later than 21 days after the delivery of the First Filing, complete Form C1B to deliver notice to the CRO stating that the charge referred to in the First Filing has been created (Second Filing)

Under the Two-Stage Procedure, should the company fail to file the Second Filing within the prescribed time limit, the CRO will automatically remove the First Filing from the register. If the Second Filing is filed by the company, then the date of registration of that charge shall be the date of the First Filing. Use of the Two-Stage Procedure will allow lenders to secure priority before the charge is actually created.

Changed priority rules

The Act now clearly sets out that the relevant date for establishing the priority of charges is the date (and time, if two charges are registered on the same date) on which the particulars of the charge are received by the Registrar in the CRO.

Charges created by foreign companies

Under the Act, charges created by foreign companies over Irish property/assets can only be registered with the CRO where the foreign company has registered a branch in Ireland. A practice had arisen in Ireland, following a decision in the English High Court in the Slavenburg Case, whereby foreign companies with no branch registration (and therefore no registration number) recorded charges created on a separate file called a "Slavenburg file". The prohibition on non-registered branches filing charges effectively abolishes Slavenburg filings and means that foreign companies without a branch registration in Ireland will no longer have any means by which to have the creation of a charge recorded by the CRO.

Contributed by Eibhlín O'Donnell and Michael McDonald.

Louis Vuitton Forced to Take a Rain Check on Famous Patterns!

Luxury brand Louis Vuitton (LV) has been hit with a double blow after the European General Court confirmed that two of its figurative Community Trade Marks (CTM), protecting the brand's chequerboard patterns, are invalid for lack of distinctiveness.

LV had registered their beige and brown, and light and dark grey, patterns with a weft and warp structure as CTMs for leather or imitation leather goods such as bags, cases and travel sets in 1998 and 2008 respectively. In 2009, a German company Nanu-Nana lodged invalidity claims at OHIM.

In upholding the earlier decisions of OHIM's Cancellation Division and the Board of Appeal, the European General Court made the following key points:

- A CTM must have distinctive character, inherent or acquired through use throughout the EU.
- In its view it would be paradoxical for a Member State to refuse to register as a national mark a sign that is devoid of any distinctive character in its territory and, on the other hand, that the same Member State has to respect a CTM relating to that sign for the sole reason that it has acquired distinctive character in the territory of another Member State.
- In applying the criteria for assessing the distinctive character of three-dimensional marks consisting of the appearance of the product itself, it should be borne in mind that average consumers are not in the habit of making assumptions about the origin of products on the basis of their shape in the absence of any graphic or word element. It could therefore prove more difficult to establish distinctiveness in relation to such a three-dimensional mark than in relation to a word or figurative mark.
- The marks as applied to the goods lacked inherent distinctiveness, as the presentation of LV's marks did not, from a graphic point of view, contain any notable variation from the conventional presentation of such goods.
- LV could not prove that its marks had acquired distinctive character through use in all Member States as it had filed insufficient evidence of use in a number of Member States. Therefore the previous decisions holding the marks null and void were correct.

Contributed by Charleen O'Keeffe.

Hyperlinked 'Click-Wrap' Terms are 'Durable Records'

In e-Commerce transactions, providing a hyperlink to terms and conditions is sufficient to meet the requirement that certain provisions of the contract be "in writing" or "evidenced in writing", according to the Court of Justice of the European Union (CJEU).

The case concerned the validity of a jurisdiction clause in a sale of goods agreement entered into by the buyer clicking a box on the seller's website to confirm acceptance of the terms of a contract (also known as a "click-wrap" agreement). The law stipulates that for jurisdiction clauses agreed by electronic means to be valid, a "durable record" of the terms of the agreement must be provided. The CJEU found that this requirement was met by making it "*possible to print and save the text of those terms and conditions before the conclusion of the contract*".

In click-wrap agreements, the terms and conditions of sale are not always displayed automatically in the process leading up to the conclusion of the transaction. Instead, the buyer may have to click on an additional hyperlink to view them. The disputed jurisdiction clause in this case was only viewable by clicking on the additional hyperlink.

Because the terms and conditions could be saved or printed, the possibility of creating a durable record was sufficient regardless of whether or not the purchaser actually saved or printed the terms and conditions. This conclusion reached by the CJEU is similar to that reached in a recent Irish Supreme Court case (we reported on the High Court decision here).

By contrast, in click-wrap consumer contracts, a jurisdiction clause contained in hyperlinked terms and conditions might not be effective. This is because extra protections are afforded to consumers.

Terms and conditions provided only by hyperlink may also be insufficient for other consumer contracts purposes, such as distance selling information requirements. In the *Content Services* case (which we reported on here), the CJEU held that mandatory information that was set out in a click-wrap consumer contract had not been provided in a durable medium as the consumer had to click on a hyperlink sent by email in order to view it.

Given the differing approaches to click-wrap contracts evident from these decisions, businesses operating across the European market should tread carefully as many use the click-wrap method to incorporate terms and conditions into e-commerce transactions and other contracts concluded online. Firms that sell to both consumers and businesses using a single click-wrap method and/or a single set of terms and conditions must carefully consider their approach to ensure that they meet their legal obligations.

Contributed by Leo Moore.

The State of Play for After the Event Insurance Cover

A recent decision of the Court of Appeal has cast further light on the use of after-the-event (ATE) insurance policies in litigation in Ireland. Whilst the High Court previously accepted the legality of such policies in principle, the Court of Appeal identified significant difficulties in relying on such policies in practice where a party is insolvent.

Background

In 2000, Greenclean Waste Management Limited (Greenclean) entered into a lease agreement for a building which required significant refurbishment. The lease committed Greenclean to repair and refurbish the premises. Greenclean alleged, amongst other matters, that its solicitors had failed to advise it of the extent of those obligations which ultimately led to the company incurring liabilities in excess of €400,000.

Greenclean went into liquidation in 2011 and its liquidator issued proceedings against Greenclean's solicitors. The solicitors argued that Greenclean did not have the means to pay their costs if Greenclean was ultimately unsuccessful. On that basis, the solicitors argued that they were entitled to security for costs from Greenclean. Such security typically takes the form of a cash lodgement in court or a cash bond to cover the defendant's costs if the plaintiff is unsuccessful.

Whilst Greenclean could not provide such security, it argued before the High Court that its ATE cover, which insured its liability for legal costs up to €200,000, provided sufficient protection for the solicitors and that an order for security for costs was not required.

High Court decisions

The proceedings came before the High Court twice. In the first case, the Court accepted that the ATE policy was highly conditional and without a commitment from the insurer not to rely on a clause which would allow it to end cover (the 'Prospects Clause'), it would order Greenclean to provide security for costs. However, the insurer ultimately provided a commitment, albeit limited to non-reliance on the Prospects Clause, to maintain the cover in place throughout the proceedings, thereby allowing the Court to hold that the policy was sufficient security for costs.

That decision was appealed to the Supreme Court which immediately sent it back to the High Court for consideration of the underlying legality of ATE cover for litigation costs. At the second hearing, the Court accepted in principle the lawfulness of the ATE insurance as a valid aid to litigants (see our previous report on this decision here).

Court of Appeal

The matter was appealed by the solicitors to the Court of Appeal. The Court examined the terms of the ATE policy in detail and found it to be so conditional (even with the insurer's commitment regarding the Prospects Clause) that it did not provide sufficient protection for the solicitors by way of security for costs.

Whilst the decision ultimately turned on a separate evidential issue, the Court adopted the following principles when considering the effectiveness of ATE insurance in the context of a security for costs application:

- An ATE policy can provide sufficient security for a defendant's costs.
- ATE insurance will rarely, if ever, be as strong a security as a payment into the court or a bank bond or guarantee given the conditional nature of ATE policies.
- The policy should not permit the insurer to avoid liability to pay the other party's costs.
- The existence of an ATE policy may reduce the quantum of the security required by the Court.

In doing so, the Court of Appeal implicitly accepted the validity of such policies. However, given the highly conditional nature of the company's ATE cover, the Court of Appeal found that the High Court should not have relied on the ATE policy as a basis for not awarding security for costs.

Conclusions

The decision of the Court of Appeal demonstrates the significant difficulties that an insolvent company (or company without the means to discharge the other party's costs) will face in seeking to rely solely on ATE insurance cover when disputing an application for security for costs.

However, the second decision of the High Court established that ATE insurance is a valid aid for litigants and the Court of Appeal judgment does not overturn that element of the High Court decision. Consequently ATE cover could provide a useful funding method for individual or solvent corporate litigants before the Irish courts. The area of litigation funding is likely to see further developments in the near future as an application in another case to approve an alternative form of third party litigation funding is reportedly pending before the High Court.

Contributed by Ruairi Rynn.

Supreme Court Confirms Dual Bankruptcies Can Exist

The Supreme Court has recently confirmed that a debtor can be adjudicated a bankrupt in Ireland and be subject to the Irish bankruptcy regime notwithstanding that the debtor has already been adjudicated a bankrupt in another jurisdiction, in this case the US.

Background

Mr Dunne had been adjudicated a bankrupt by the High Court on 29 July 2013. In March of that year Mr Dunne had filed for bankruptcy in the US. He attempted to overturn the bankruptcy adjudication in Ireland in the High Court. However, he was unsuccessful in that application and ultimately appealed to the Supreme Court.

The principal ground of appeal related to a challenge on the jurisdiction of the High Court to make bankruptcy adjudication in Ireland in circumstances where he had already been adjudicated a bankrupt in the US. He argued that this amounted to 'dual bankruptcy' which was contrary to the jurisprudence in international insolvency and that the Irish legislation did not permit it.

The Supreme Court was unanimous in its decision and found against Mr Dunne's appeal. The Court noted that there was no Irish case law on dual bankruptcy but, having regard to the UK authorities on the issue, was satisfied that there was nothing in the Irish personal insolvency legislation which precluded the High Court from making an order adjudicating Mr Dunne a bankrupt. The Court also noted that it was not the role of the Supreme Court to make any determination regarding the conduct of the bankruptcy although it did acknowledge that dual bankruptcies could, in practice, give rise to some procedural issues in the administration of the insolvent estate.

Conclusion

This decision of the Supreme Court is significant in that it has confirmed that it is possible for a debtor to be adjudicated a bankrupt in this jurisdiction despite having previously been adjudicated a bankrupt in another jurisdiction. This may have some consequence for debtors seeking to avail of the perceived more lenient bankruptcy regimes in other jurisdictions such as the US. However it should be noted that this decision is limited to jurisdictions that are not subject to the European Insolvency Regulation which governs multi-jurisdictional insolvencies amongst participating States and will not apply, for example, to Irish debtors that have been adjudicated bankrupt in the UK.

Contributed by Craig Sowman.

New Media Merger Guidelines

New guidelines on the operation of the new media merger regime were published on 10 June 2015. Under the new regime, media mergers must be notified not only to the Competition and Consumer Protection Commission (CCPC) but also to the Minister for Communications, Energy and Natural Resources. The Minister is tasked with assessing, at Phase I, whether the "*media merger will be contrary to the public interest in protecting plurality of the media*" in Ireland. In doing so, s/he must have regard to a set of "*relevant criteria*". The guidelines provide detail on the "*relevant criteria*". They include, in relation to the media businesses of the merging parties and any other "*relevant media assets*" which they own:

- The ownership and control structure
- Market shares
- Governance structures and editorial ethos including future plans for the proposed merged entity

Other "*relevant media assets*" are defined as holdings which constitute a "*significant interest*" in a media business in the State, in other words, the ability to influence directly or indirectly the direction or policy of the media business. The guidelines state that a holding or voting strength of between 10% and 19% may constitute a significant interest and of more than 20% generally will constitute a significant interest.

Additional *"relevant criteria*" which the Minister must consider are:

- The content of each of the media businesses party to the merger
- The financial structure of the media businesses party to the merger
- The current scale and reach of the Irish Public Service Broadcasters, RTE and TG4
- The decisions and recommendations of the Broadcasting Authority of Ireland under its licensing function and under its ownership and control policy
- Any commitments proposed by the parties

So far, only two media mergers have been notified to the Minister under the new media merger regime.

Contributed by Sheila Tormey.

Insurance Update For Employers – Are You Covered?

Mobile work equipment – motor insurance

Towards the end of 2014, the Court of Justice of the European Union (CJEU) gave its decision in a case in which an individual claimed for damages following an accident during which he was knocked from a ladder by a tractor and trailer in a farmyard. The insurance company refused indemnity on the basis that the relevant policy did not extend to the use of a tractor in a private place.

The CJEU had to consider the concept of 'use of vehicle' under EU law. The Court determined that the concept of 'use of vehicles' covers any use of a vehicle that is consistent with the normal function of that vehicle and that potentially includes the manoeuvre of a tractor in the courtyard of a farm. In practical terms, this means that motor insurance should cover a vehicle's normal functions even where it is not being used in public.

In Ireland, motor insurance policies generally only cover vehicles used on public roads. Many employers use mechanically propelled vehicles (MPVs) such as forklifts and diggers in the workplace i.e. in a private setting and not on public roads. In light of the CJEU's decision, both employers and insurers should review their policies and, if necessary, extend the terms of the policies to cover the use of MPVs on private property.

Personal injuries and employers' liability insurance

Unlike other jurisdictions, Employers' Liability (EL) insurance is not compulsory in Ireland. However, most employers will have EL insurance in place to cover claims made by employees for injuries at work or, by others, where the employer is being held vicariously liable for acts or omissions of an employee. Until recently, it was believed that certain types of claims arising from statutory obligations, such as health and safety obligations, placed a *strict liability* on employers. However, the Supreme Court recently provided some much needed clarity on this subject.

In that case, a bus driver, was injured when the suspension of his bus malfunctioned causing an injury to his neck and lower back. Having been awarded damages in the High Court, Dublin Bus (the employer) appealed the matter to the Supreme Court. The Supreme Court unanimously overturned the High Court's decision holding that an employer does not have an *absolute* duty to ensure the safety of work equipment provided to employees. In circumstances where an employer can show that it has done all it can do in relation to the prevention of risk(s), an employer cannot be held strictly liable where injury occurs that was not reasonably foreseeable.

Whilst it should be remembered that the specific circumstances of each case will have to be examined, this is a helpful indication of the Supreme Court's current view on the scope of an employer's duties. However, the maintenance of adequate EL insurance is still important in protecting employers from exposure to loss arising from such claims.

Whistleblowing and Employment Practices Liability insurance

Employment Practices Liability (EPL) policies typically cover claims relating to wrongful employment acts by an employer. This type of policy is less frequently taken out by employers than EL insurance. However, the question arises as to whether EPL cover is equally important.

The Protected Disclosures Act 2014 which provides protection for whistleblowers makes provision for an award of up to five years' remuneration in circumstances where an employee shows that (s)he has been penalised and/or dismissed as a result of having made a protected disclosure. This is a departure from the more usual award of a maximum of two years' remuneration for breaches of employment legislation.

As with other claims for wrongful employment practices, claims under the 2014 Act should be covered by EPL policies. When putting insurance in place, however, employers should clarify with the insurance provider that benefits under the policy will extend to the broader category of "workers" as defined in the 2014 Act, as opposed to employees only. Workers include employees, former employees, independent contractors, trainees, agency workers, individuals on work experience and potentially volunteers.

Contributed by Aisling Butler and Nuala Clayton.

In Short: Redaction of Directors' Residential Address From the Register

Regulations have been published prescribing the procedure to be followed by an officer of a company who wishes for his/her residential address to be exempted from the register of companies. These Regulations came into effect on 1 June 2015.

To obtain the exemption, an application must be sent to the Registrar of Companies and must be accompanied by a supporting statement from An Garda Síochána requesting that the residential address of the officer in question does not appear on the register for reasons of personal safety or security.

Successful applicants must instead provide the address of the company's registered office. A separate application requesting an exemption must be sent to the Registrar in respect of each company that the officer wishes to obtain such an exemption for.

Where an officer of a company subsequently includes their usual residential address on any form required by the Registrar, an automatic cancellation of the exemption will be triggered.

Contributed by Adam Synnott.

In Short: Public Procurement Law: Automatic Suspension

The Remedies Regulations which make provision for aggrieved bidders to challenge public contract award procedures have been amended following a recent Supreme Court judgment. Under the Remedies Regulations, an aggrieved bidder may apply to the Court for an order either to correct alleged infringements in the award procedure during its course, or to review the contracting authority's decision to award the contract to a particular bidder at the end of the procedure. The Supreme Court confirmed that either of these applications operates to automatically suspend the award of the contract, i.e. the contracting authority must not proceed to conclude the contract once such an application is made. The Supreme Court then considered, in respect of each type of application, whether a contracting authority could apply to the court to lift the automatic suspension. It held that a contracting authority can only do so in the context of an application to correct alleged infringements during the course of an award procedure. It cannot do so in the context of an application to review a contracting authority's decision to award the contract to a particular bidder at the end of the procedure. In the latter case, the automatic suspension must remain in place until the substantive case is resolved or otherwise disposed of. The Remedies Regulations have now been amended to clarify this distinction.

Contributed by Sheila Tormey.