WILLIAM FRY

Legal News

Welcome to the November 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.

Finance Bill 2017– New Tax Treatment For SME Share Options Under KEEP Programme

The Finance Bill 2017 has introduced a long called-for change to the taxation of employee share options. The Bill provides that from 1 January 2018, SMEs in Ireland will be able to grant KEEP (Key Employee Engagement Programme) or "qualifying" share options.

Better Tax Treatment

An employee may exercise a qualifying option without incurring the liability to income tax, employee PRSI and the USC (typically totalling 52%) that he would have under the current rules. The employee will pay only capital gains tax (33%) on his profit when he sells his shares.

A number of conditions must be satisfied at the outset for an option to be granted as a qualifying option and many of those conditions must continue to be satisfied through to the date the option is exercised, which may be several years later.

Difficulties

The need to monitor compliance with quite complex conditions will present real challenges for SMEs. More significantly, the relatively low financial limits (aggregate €3,000,000 market value of options per SME) will make KEEP options unattractive to start-up companies who are ambitious for a successful exit.

Next Steps

The Finance Bill 2017 will pass through several stages of the Houses of the Oireachtas before it is enacted in or around December 2017. There is a brief opportunity to amend the draft KEEP provisions to create a new system of taxation that SMEs would more readily embrace.

For now, we have set out below an outline of the KEEP provisions as currently proposed, and we have highlighted some difficulties they may present.

Conditions for proposed KEEP/Qualifying Share Options

The company must:

- be an SME (have no more than 250 employees (globally) and an annual turnover not exceeding €50 million, and/or an annual balance sheet total not exceeding €43 million);
- be incorporated and resident in Ireland, or resident in another EEA state and carrying on business here;
- not have shares or other securities listed on a stock exchange (excluding the Enterprise Securities Market of the Irish Stock Exchange); and
- be engaged in a trading activity. (Some activities are excluded, including professional services, dealing in securities, land development, construction and forestry).

The individual to whom a KEEP share option is granted must:

- be a full-time employee or director of the qualifying company and required to devote at least 30 hours per week to it; and
- not directly or indirectly control more than 15% of the ordinary share capital of the company.

The share option must be over ordinary shares and have an exercise (or "strike") price that is not less than the market value of the underlying shares on the date the option is granted.

There is no guidance as to how an SME can determine the market value of its shares on a basis that the Revenue Commissioners will certainly accept.

Limit per Employee

The total market value of all shares subject to qualifying options granted to an individual may not exceed:

- €100,000 in any tax year;
- €250,000 in any three consecutive tax years; or
- 50% of the individual's annual pay in the tax year in which the option is granted.

Imposing a limit based on each employee/director's pay will be burdensome to administer, and the draft legislation is unclear as to when the market value is measured.

Company Limit

The total market value of all unexercised qualifying options may not exceed €3,000,000. This applies over the entire period from the date of grant of an option to the date on which it is ultimately exercised. It is unclear how the market value must be calculated.

Option Exercise

A qualifying option generally may not be exercised:

- earlier than 12 months after it is granted;
- later than 10 years after it is granted; or
- later than 90 days after the option holder ceases to be an employee or director.

If you have any questions about the proposed KEEP share options or other employee share scheme matters, please contact one of our Share Scheme lawyers: Maura Roe, Louise Harrison or Tina Quealy.

Contributed by Maura Roe.

Future of Standard Contractual Clauses Remains in Limbo (Schrems II)

The Irish High Court will ask the Court of Justice of the European Union (CJEU) whether the transfer of personal data under the EU Standard Contractual Clauses (SCCs) is adequate under European law.

The High Court held that the Data Protection Commissioner had *"well-founded concerns"* that:

- the personal data of EU citizens transferred outside Europe may not be protected, under SCCs, from being "accessed and processed by US state agencies for national security reasons" and in a manner "incompatible" with the Charter of Fundamental Rights of the European Union (the Charter); and
- there is no equivalent or effective remedy under US law for EU citizens to assert their right to privacy and data protection under the Charter.

In making this determination, the High Court ruled that: *"[European] Union law guarantees a high level of protection to EU citizens as regards the processing of their personal data within the EU. They are entitled to an equivalent high level of protection when their personal data are transferred outside the EEA [European Economic Area]."*

The Court also noted that *"it is extremely important that there be uniformity in the application of the [Data Protection] Directive throughout the [European] Union on this vitally important issue. This requires that there be consistency and clarity."*

While the Schrems II case focused on data transfers by Facebook to the US, the decision will have wider implications for all businesses relying on SCCs for data transfers internationally.

For a more detailed analysis and copy of the full text of the ruling of the Irish High Court, visit William Fry's dedicated website to the GDPR, PrivacySource. See our previous reports here on the Schrems II case.

Contributed by John Magee and Rachel Hayes.

New Guidelines On Administrative Fines Under GDPR

The Article 29 Working Party has published draft guidelines that a supervisory authority (SA) should take into account prior to issuing administrative fines under the General Data Protection Regulation (GDPR). Detailed instructions for calculating the size of fines are expected to be included in a future updated version of the guidelines.

Under the GDPR, the scope and nature of administrative fines which SAs can impose on non-compliant organisations has significantly increased. Such fines may be up to €20 million or 4% of total worldwide annual turnover (whichever is greater) of the undertaking for breaches of GDPR.

It is clear that a failure to address data protection compliance obligations could prove very costly for organisations, especially as the guidelines take a broad view of "undertaking", considering it to mean a parent company and all involved subsidiaries.

Of course, the figures above are maximum caps rather than “price tags” for specific breaches. Fines are also not the only corrective measures available to SAs under the GDPR (other measures include warnings, reprimands and various orders).

Nevertheless, the guidelines emphasise that fines are a powerful part of an SA’s toolbox, which should be wielded in appropriate circumstances. Fines are not necessarily to be relied upon as a “last resort”.

The guidelines state that SAs must assess each case individually to identify the most "effective, proportionate and dissuasive" corrective measure (or combination of measures) having regard to a number of assessment criteria (both aggravating and mitigating). These criteria include:

- The nature, gravity and duration of the breach;
- The number of data subjects involved;
- The scope and purpose of the processing;
- The damage suffered by data subjects (and any action taken by the organisation to mitigate this damage);
- The degree of responsibility of the organisation including the technical and organisational measures implemented by it;
- The intentional or negligent character of the breach; and
- The degree of cooperation with the SA in order to remedy the breach.

While an SA may ultimately uses its discretion in deciding which corrective measure(s) is/are most suitable in the circumstances, the guidelines stress the need for SAs to achieve consistency with regard to the amounts of fines they set and with regard to their choice of corrective measure(s). Cooperation between SAs is encouraged. The expected guidance on calculating the size of fines should assist in achieving reasonable uniformity of approach across member states, as should the GDPR's consistency mechanism.

For further information on the GDPR, please see William Fry's **PrivacySource,** a dedicated website where our Technology team will provide ongoing analysis and assistance on the implementation of the GDPR.

Contributed by David Cullen.

Stamp Duty – Purchasers Mid Transaction Breathe a Sigh of Relief

The Minister for Finance has included transitional measures in the Finance Bill 2017 providing mid transaction stamp duty relief for certain purchasers.

What is the new rate of stamp duty for commercial property transactions?

The Finance Bill 2017 increases the rate of stamp duty for conveyances and transfers of non-residential property from 2% to 6%.

From when does this rate apply?

The higher rate of stamp duty of 6% is effective from 11 October 2017.

Are there any transitional arrangements to cover ongoing transactions?

Yes, the Finance Bill 2017 announced transitional measures providing stamp duty relief for certain purchasers of commercial property who were mid transaction as at 11 October 2017. Purchasers benefitting from the transitional arrangements will not have to pay the higher rate of stamp duty even though their transactions completed/ will be completing after the effective date of 11 October 2017.

What are the transitional arrangements?

The 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.

The Finance Bill 2017 provides that it is an offence under the Taxes Consolidation Act 1997 to provide an incorrect statement.

These transitional measures will be welcomed by purchasers keen to avail of the lower stamp duty rate in respect of commercial property they are already in the process of acquiring. Please click here for more information on the key measures from a tax perspective in Budget 2018.

Contributed by Tara Rush.

Irish Real Estate Funds Regime Changes: Actions For Funds And Investors

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.

	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 on which 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.

Adverse Possession - Take Action Landowners

A recent Circuit Court case on adverse possession is a cautionary tale for landowners. It highlights how an oversight can result in the loss of land.

Adverse possession can allow a person (without claim to the land) to become its owner without having to make any payment to the true owner. To do this that person has to be in occupation of the land for the relevant period in a manner which is inconsistent with the true owner's possession. The relevant period is usually 12 years but there are exceptions.

In a recent Circuit Court case, Byrne, a home owner in Marino secured a declaration that land of just under a quarter of an acre to the rear of her home now belonged to her. The land located behind certain houses and gardens in Marino was a left over portion of a construction site from 1934. It had been leased by the local authority as allotments to Byrne's grandparents. The Byrne family remained in possession but after some time no rent was paid. The local authority sought possession of the property in 1995 and served a notice to quit. However it never followed up on this. The Court was satisfied that Byrne was in adverse possession of the property for 12 years and granted a declaration that those lands were now hers.

Landowners should be live to the presence of third parties on their land without permission and take action to demonstrate ownership to avoid any such third parties acquiring ownership through adverse possession.

Contributed by Tara Rush.

Arbitration Agreements – To Stay Or Not To Stay? Gotta Stay connected!

Article 8(1) of the UNCITRAL Model Law, incorporated into Irish law by the Arbitration Act 2010, provides that if a dispute between parties to proceedings is the subject of an arbitration agreement, then if one party so requests, the Court shall stay the proceedings and refer the dispute to arbitration.

In the recent case of *Maguire & Anor –v- Motor Services Limited t/a MSL Park Motors & Anor*[1] the High Court heard an appeal of a Circuit Court decision relating to the scope of an arbitration agreement. The plaintiffs, Mr and Ms Maguire, contracted to purchase a car from MSL Park Motors. The new car presented with difficulties and the plaintiffs instituted court proceedings claiming relief for *inter alia* breach of contract, misrepresentation and negligence against both MSL Park Motors and Mazda Motor Ireland (as manufacturer of the car). At the time of purchase, only Ms Maguire signed the standard terms and conditions ("T&Cs") issued by MSL Park Motors. Those T&Cs contained an arbitration agreement that the Court held was binding on Ms Maguire and MSL Park Motors only.

In the Circuit Court an order was granted staying the proceedings in their entirety pending arbitration. While section 11 of the Arbitration Act 2010 states that there can be no appeal of a court determination to grant a stay, the plaintiffs lodged an appeal challenging the scope of the stay on the proceedings.

Pursuant to Article 8(1) of the Model Law, a stay can only apply to an action which is the subject of an arbitration agreement. Though it is possible for an arbitration agreement to apply to a non-party where there is a sufficient connection, the High Court in this case determined that as between the first and second named defendants, there was not *"more than….bare commercial or legal connection between two entities"*.[2] Therefore, the arbitration agreement did not extend beyond Ms Maguire and MSL Park Motors, being the parties to the T&Cs which contained the arbitration agreement.

Mr Justice Max Barrett then considered whether the remainder of the claims (i.e. Mr Maguire's claim against both the defendants and Ms Maguire's claim against Mazda Motor Ireland) should be stayed pending the arbitration of Ms Maguire's claim against MSL Park Motors but ultimately held that:

> *"If parties have validly agreed that a legal dispute should go to arbitration, then to arbitration that dispute must go. But if parties have not agreed that a legal dispute should go to arbitration, then to the courts that dispute should go".*

This judgment offers further guidance on the application of "stays" to proceedings and is an endorsement of the decision of the High Court in *P Elliot & Company Limited v FCC Elliot Construction Limited*[3]. In that case Mac Eochaidh J. provided the first Irish decision on the interpretation of Article 8 and endorsed the test formulated in *Gulf Canada Resources Ltd v Arochen International Limited*[4] *:*

> *"…a stay of proceedings should be ordered where it was arguable that the subject dispute falls within the terms of the arbitration agreement; and where it is arguable that a party to the legal proceedings is a party to the arbitration agreement".*

Barrett J. held that if related parties wishing to avail of the arbitration agreement cannot meet the "sufficient connection" test, separate proceedings must be issued and did not see any reason why the related but substantively different claims could not be separately adjudicated upon.

In practice, however, the cost implications arising from the duality of arbitration and court proceedings would be significant and likely to surpass the value of the car. On another practical level, while the full contractual matrix is not set out in the judgment, the case highlights the importance to ensure contracting parties execute all documentation including any terms and conditions.

This case also serves as a reminder that identical dispute resolution clauses be mirrored in suites or related contracts and in such circumstances that the arbitration clauses contain a provision for the consolidation with other arbitral proceedings, including arbitral proceedings involving a different party or parties[5].

[1] [2017] IEHC 532 (Unreported, High Court, Barrett J, 7 September 2017)

[2] At para 5 endorsing the dicta of McEochaigh J. in P. Elliot & Co. Ltd v. FCC Elliot Construction Limited [2012] IEHC 361, at para. 46

[3] P. Elliot & Co. Ltd v. FCC Elliot Construction Limited [2012] IEHC 361at para 49

[4] [1992] BCJ 500

[5] Section 16 of Arbitration Act 2010

The New Reign Of The "Rational" Employer?

The UK Court of Appeal case of *IBM United Kingdom Holdings Ltd and another v Dalgleish and others* [2017] EWCA Civ 1212 (the "IBM case") clarifies the scope of the Imperial duty of good faith. That duty created a limitation on an employer's exercise of a non-fiduciary discretionary power in respect of their pension scheme. This is the first case at appellate level in which the Imperial duty of good faith has been considered and it may be significant for Irish employers who are considering making changes to their pension schemes. The UK Court of Appeal took a more employer friendly approach than the UK High Court by reducing the importance of the expectations of pension scheme members and demonstrates a movement towards a test of the rational employer.

Background

The *Imperial* duty of good faith (*Imperial Group Pension Trust Limited v Imperial Tobacco Limited* [1991] 1 WLR 589) created an obligation on an employer not (without a reasonable and proper cause) to conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. The *IBM* case considered pension changes sought to be implemented in 2009 by IBM to its defined benefit (DB) schemes in Project Waltz. There had been two previous projects in 2004 and 2005 by which IBM had altered pension benefits under the DB schemes. Project Ocean in 2004 had resulted in

1. an increase to the employee's contribution rate,
2. a commitment from IBM to pay towards reducing the deficit in the schemes, and
3. a parent company guarantee to fund liabilities until 2014.

Project Soto in 2004-2005 offered members a choice to either

1. remain in the DB schemes, accruing benefits, subject to agreements which would result in only two-thirds of future salary increases being pensionable, or
2. transfer to a new defined contribution (DC) section with enhanced DC benefits for future service from July 2006 but retain final salary-linking in respect of past service DB benefits.

Then in 2009, Project Waltz sought to include the following proposals:

1. to cease future accrual from 2011;
2. for a new early retirement policy from 2010 (with less advantageous terms);
3. an early retirement window for active members to retire early;
4. for pay increases from 2009 onwards to be non-pensionable; and
5. to allow former active members of the DB schemes to enter into the DC section.

Reasonable expectation

A central basis of the earlier decision of the UK High Court was its view of the expectations created for active members by communications made by IBM to them during 2004 and 2005 (for example a webcast during Project Ocean in which reference was made to IBM's commitment to the DB schemes). The UK Court of Appeal criticised the weight that the High Court had given to the members' reasonable expectations arising from those circumstances. The Court of Appeal held that the High Court had wrongly elevated reasonable expectations to a status in which they had overriding significance over other relevant factors.

Rationality

The Court in IBM decided that the *Wednesbury* test (applicable in judicial review cases) should apply in deciding whether the constraints imposed by the *Imperial* duty have been respected. The Court relied on the Supreme Court employment case of *Braganza v BP Shipping Ltd* [2015] UKSC 17 which applied the *Wednesbury* test to a case assessing the exercise of a discretion of an employer under an employment contract.

The *Wednesbury* test assesses if:

- the relevant matters (and no irrelevant matters) have been taken into account; and
- the result is such that no reasonable decision-maker could have reached it.

Additionally the UK Court of Appeal criticised the reference to a reasonable employer which they viewed as a test diluted from the test of irrationality. They suggested it might have been more helpful to refer to a rational employer. The UK Court of Appeal concluded that the High Court judge decided there would have been adequate business justification for Project Waltz, but for, the reasonable expectations of the members. Project Waltz could therefore proceed.

Comment

The Court of Appeal displayed an appreciation of the realities of business. It commented that it was not for them *"to retake a commercial decision previously adopted by a commercial entity. Nor should the Court assess the legitimacy of IBM UK's actions with the wisdom of hindsight."* It has been reported that this case will not be appealed to the Supreme Court. Employers operating pension schemes will welcome the fact that reasonable expectations won't necessarily be a show-stopper for pensions restructuring. However if an employer creates an expectation to members in its communications to them, this will still be a relevant factor for assessment in an examination of rationality. Employers should tread carefully and seek professional advice before planning changes to their pension schemes.

Contributed by Jane Barrett and Ciara McLoughlin.

In Short: Age in the Workplace – Lessons And Guidance For Employers

Retiring at 65/66 might not be an option for many people: according to a survey commissioned by William Fry (Age in the Workplace 2016), 63% of those surveyed aged 55 or above stated that they believed they would need to work beyond the age of 66. We review the legal position regarding the enforcement of mandatory retirement ages in Ireland, and the huge influence that EU legislation and EU case law has had on this area. We also look at the related subject of maximum recruitment ages, and discuss recent developments in age discrimination and retirement age law.

This article was first published in Industrial Relations News Issue 34 on 21 September 2017 and is reproduced with the kind permission of Industrial Relations News.

Please click on the link below to read the full piece:

Age In The Workplace – Lessons And Guidance For Employers

In Short: In-House Solicitors Caught By Mediation Act 2017

On Monday 2 October the Mediation Bill 2017 was signed into law by the President and a commencement order is expected in the coming weeks. Once commenced, the Act will place on a statutory footing the obligation to consider mediation, and requires litigants to confirm to the courts that they have considered mediation.

Of particular interest to legal practitioners is section 14 which requires "practising solicitors", prior to issuing proceedings, to advise clients to consider mediation as a means of resolving their dispute and provide clients with information on mediation services. Practising solicitors are required under the section to make a statutory declaration evidencing that their obligations under Section 14 have been properly fulfilled. This statutory declaration accompanies the originating document (e.g. Civil Bill, Summons or Originating Notice of Motion) and both are filed in the relevant court office.

In-house solicitors should be aware that the definition of "practising solicitor" in the Act is broad and therefore the obligations under section 14 of the Act equally apply to in-house solicitors, who have been admitted as solicitors, are on the roll of solicitors, provide legal services and hold a practising certificate (unless exempt by section 56 of the Solicitors (Amendment) Act 1994).

While some companies may exclusively outsource their litigation work to solicitor firms, other companies may expect their own in-house solicitor to initiate proceedings and therefore the requirements under section 14 should be reviewed carefully. For further information on the general provisions of the Mediation Bill 2017, please see previous William Fry article here.

A link to the Mediation Bill 2017 as enacted, can be found here.

Contributed by Rebecca MacCann.