WILLIAM FRY

Legal News

Welcome to the November 2018 issue of Legal News. For further information on any of the topics covered in this edition, please call or email any of the key contacts or your usual William Fry contact person.

Increased Irish Merger Control Thresholds

The turnover thresholds under which a proposed transaction must be notified to Ireland's Competition and Consumer Protection Commission (the "CCPC") are likely to be increased shortly.

On 2 October 2018, the Minister for Business, Enterprise and Innovation (the "Minister") signed the Competition Act 2002 (Section 27) Order 2018 (S.I. No. 388 of 2018) (the "Order"). The Order represents the first proposed increase to the current thresholds since their introduction on 31 October 2014.

Currently, a merger or acquisition must be notified to the CCPC when, in their respective most recent financial years: (i) the combined turnover in the State/Republic of Ireland of all the undertakings involved was EUR 50 million or more and (ii) the individual turnover in the State of at least two undertakings involved was EUR 3 million or more.

Under the new thresholds, a proposed transaction must be notified to the CCPC if, in their respective most recent financial years:
(i) the undertakings involved had a combined turnover in the State of at least EUR 60 million; and
(ii) at least two undertakings involved had individual turnover in the State of at least EUR 10 million.

There will be no change to Ireland's media mergers regime, for which special jurisdictional rules apply.

The signing of the Order follows a public consultation by the Department of Business, Enterprise and Innovation (the "DBEI"). The DBEI cited several reasons for the possible changes including the costs of submitting CCPC filings allied to the requirement to notify certain transactions with inherently localised effects on competition (e.g., the acquisition of office buildings, shopping centres and hotels).

The new thresholds, if confirmed by the Irish legislature, will apply from 1 January 2019.

New Central Bank Rules on UCITS Indices

The Central Bank of Ireland (CBI) has introduced a self-certification regime for indices used by UCITS funds. This policy change, which has been flagged by the CBI to the Irish funds industry earlier this year, materialised in the updated CBI guidance on UCITS Financial Indices (Guidance) published on 8 October 2018.

Background

Prior to the issue of the Guidance, the CBI required that indices used by UCITS funds be submitted for CBI review where an index comprised of corporate issuers exceeded the usual UCITS concentration limits or where the index was comprised of ineligible assets, i.e. assets in which a UCITS cannot invest in directly, such as commodity futures.

The CBI review process involved the submission to the CBI of the index factsheet, methodology, list of constituents and their weightings as well as a completed checklist against the CBI index requirements.

A confirmation to the CBI of compliance of the index with the CBI requirements had to be submitted as part of the submission and also in instances where the submission was not required.

The New Index Certification Process

The Guidance has introduced a self-certification regime for UCITS proposing to use an index. As before, the CBI requires a confirmation of compliance of the index with the CBI requirements. As part of the new certification process, this confirmation must now be provided by a director on behalf the UCITS management company.

The CBI has also simplified the requirement for a submission in circumstances where the weighting of a single corporate issuer in an index makes up more than 20% and up to 35% of the index. This would arise in the context of indices comprised of corporate issuers whereby the usual UCITS "5/10/40" concentration limit for corporate issuers (i.e. the exposure to the same issuer cannot be more than 10% and the sum of constituents with a weighting in excess of 5% cannot be more than 40%) is exceeded. In these circumstances, the index could avail of the increased "20/35" concentration limit envisaged by the UCITS rules (i.e. exposure to the same issuer cannot be more than 20% and exposure to one issuer may be raised to 35% where this is justified by exceptional market conditions). Under the Guidance, the index submission in respect of "20/35" indices is now limited to setting out why the market conditions justify increasing the concentration limit for investment in a single issuer to 35%. The index due diligence documentation is no longer required to be provided to the CBI as part of the submission.

Index Quality Assessments

The CBI expectations as to the information that a UCITS manager must maintain in respect of indices used by the UCITS under its management are set out in the Guidance for the first time. It is made clear in the Guidance that the CBI expects a UCITS manager to be in a position to demonstrate at all times that indices used by the UCITS under its management comply with the regulatory requirements. It is envisaged that the CBI would carry out spot checks and the Guidance sets out the following minimum information that must be provided to the CBI upon request:

- the rationale as to how the index achieves the objective of being a benchmark for the market to which it refers
- the methodology used to construct the index (which should be adequately described and include data on constituent selection criteria, constituent price collection procedures, asset allocation rules and guidelines for altering and re-balancing the index)
- information on index constituents and their current as well as historic weights
- details as to how the index calculation methodology is verified
- information should be provided on any fees embedded in the index

- any technical and marketing documents produced by the index sponsor

Summary and Action Required

Notwithstanding the simplification that the new certification regime brings, UCITS managers are likely to find that not a whole lot has changed as far as the CBI review process is concerned. In summary, index submissions have been done away with for indices comprised of ineligible assets and have been simplified for indices that rely on the increased "20/35" issuer concentration limits. A confirmation in respect of index compliance (now in the form of a certification from the management company) still has to be given for every index. The level of due diligence that UCITS managers have to carry out pursuant to the UCITS requirements on the indices they use has also not changed.

Arguably of greater note is that the CBI has formally set out its expectations as to the level of information it expects to receive at short notice from a UCITS manager in relation to the indices used by the UCITS under its management. It is now timely for UCITS managers to review the index due diligence documentation maintained by them against the CBI requirements and ensure that it is in the form that could be provided to the CBI at short notice upon request.

Contributed by: Sergey Dolomanov

Wanted: "Persons Unknown"

Background

The plaintiff, CMOC Sales & Marketing Ltd, was the victim of a cyber fraud conducted by an unknown cyber attacker. The perpetrators hacked into the plaintiff's email account and purported to be an authorised signatory of the plaintiff, who then instructed the Bank of China in London to pay US$6.91m and €1.27m across 20 different transactions. Upon discovery of the fraud, the plaintiff instituted proceedings, yet struggled to identify the perpetrators and recipients of the funds. As a consequence, the Court granted a "world-wide freezing order against "persons unknown", the perpetrators of the initial fraud. Additionally, the plaintiff obtained disclosure orders against the banks and accounts into which the stolen funds had been paid, thereby identifying further defendants to the action.

The defendants did not attend the trial, prompting the trial judge to make a preliminary observation in respect of the continuing obligation of fair procedure in those circumstances and he commended the plaintiff for following fair procedure requirements, recognising that, as stated in *Braspertro Oil Services v FPSO* that that included drawing to the attention of the court "*… points, factual or legal, that might be to the benefit of [the defendant]"*

Judgment

Persons Unknown in the new cyber era

The Court held that there is a "clearly established" jurisdiction for the granting of injunctive relief against parties unknown, highlighting three lines of jurisprudence which permitted the extension of jurisdiction to grant a freezing order against unknown people:

- "persons unknown" must be identifiable as either included within the party or not (*Bloomsbury Publishing Group Limited and JK Rowling v News Group Newspapers Ltd and Others* [2003] 1 W.L.R 1633 ("Bloomsbury"))
- Information can be obtained from banks leading to the identification of account holders (*Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] A.C. 133)
- Injunctions have been previously granted against persons unknown in the context of an IT security breach. *(PML v Person(s) Unknown (responsible for demanding money from the Claimant on 27 February 2018)* [2018] EWHC 838 and *Clarkson Plc v Person or Persons Unknown* [2018] EWHC 417 (QB))

The Court held that whilst granting a freezing order against persons unknown would be extending the principle enunciated in Bloomsbury, such was permissible given the use of Mareva injunctions as a "springboard" for further relief.

In addition there was no principled reason why knowledge of the precise identity of the victim should be required to establish liability for unlawful means conspiracy, particularly in the age of cyber fraud and given the ease with which persons may conspire together to steal a victim's funds, without needing to engage with the victim in the same way as "traditional" fraud requires.

Service via Whatsapp

In this case the Court sanctioned the service of proceedings through Facebook Messenger (as opposed to a public Facebook platform), Whatsapp Messenger and via access to a data room. Whilst heralding such as innovative, the Court noted that such should only be used where considered appropriate on an individual case by case basis.

Irish Implications?

Service via social media

The Irish Courts have been prepared for some time to accept innovative means of substituted service and service has been affected through private messages on Facebook and LinkedIn.[1] The judgment in CMOC notes the benefits of service through Whatsapp Messenger as including knowledge that recipient has read the content. The Irish High Court has noted previously, that in service by Facebook message, proof of service was evidenced by a printed copy of the message sent and a copy of the summary summons. CMOC will serve to further strengthen this novel line of case law which highlights the courts' flexibility in assisting parties with the service of legal proceedings.

Mareva Injunctions against persons unknown

Another issue raised in light of the judgment delivered in CMOC is the granting of a freezing order or Mareva injunction against persons unknown. This seems to clash with the character of Mareva injunctions as a relief granted against a specific person. However, applying the reasoning of HHJ Waksman QC and that of the Court in Bloomsbury, it is clear the parties must be identifiable. For example in this instance it was possible to trace the fraudulently appropriated funds into specific bank accounts.

Whilst there has been no recent Irish jurisprudence on the availability of a Mareva injunction against persons unknown, it is interesting to see the English High Court approve such action. Given the frequency of cyber-attacks and cyber-fraud, a decision permitting the granting of a Mareva injunction against persons unknown would undoubtedly enhance the legal remedies available to victims of such a crime.

[1] For example in Daly v Lynch (Unreported) 28 March 2012, Peart J held that substituted service could be affected through Facebook, whereby the Plaintiff sent the summary summons as a private message on Facebook.

Contributed by: Paul Convery

Blockchain Resolution Passed by EU Parliament but GDPR Could Be Weak Link

In October 2018 the EU Parliament passed a resolution: "Distributed ledger technologies and blockchains: building trust with disintermediation". The resolution was introduced by Eva Kaili, a Greek MEP. Kaili has said she wants to make the EU the "leading player in the field of blockchain" but has warned that *"regulators need to make sure that all this effort will be embraced by the necessary institutional and legal certainty."*

Blockchain technology has been the subject of increasing scrutiny by a diverse field of industries. Many are exploring the potential application of rebuilding data processes so that digital information is distributed rather than copied. With companies such as AIG, Maersk, Microsoft, De Beers, Google and IMB all using blockchain on a diverse range of projects (covering everything from cloud infrastructure to smart insurance policies, to food safety monitoring and import controls) a wider understanding appears to be emerging that the technology genuinely has a multitude of useful applications beyond the cryptocurrencies that ushered it into existence. According to Kaili, who is also the chair of the Parliament's Science and Technology Options Assessment Panel, *"blockchain and distributed ledger technologies in general have a strong disruptive element that will affect many sectors" but any regulations applied need to be "open-minded, progressive and innovation friendly."*

The Parliament's October Resolution included the following key recommendations:

- that a legal analysis is done as to the legal enforceability of blockchain smart contracts among Member States;
- that technical standards for distributed ledger technologies are developed;
- that universities and training institutions adopt blockchain based curricula;
- for any consideration of regulation on blockchain to cover the removal of barriers and approach the application of rules using both a technology and business neutral model;
- for the EU Commission and European Central Bank to identify risk when it comes to incorporating cryptocurrencies into the European payment systems;
- that analysis is conducted to ensure no competition issues arise by decentralising infrastructure to the extent that monopolies are created; and
- that an examination of the decentralisation of EU citizens data is conducted to prevent misuse.

During the debate in the Parliament a concern emerged on the final point, namely, that although blockchain technology may facilitate the decentralisation of EU citizens' personal data, how could such public ledgers ever be compliant with the General Data Protection Regulation (GDPR)? For instance, the right to be forgotten under Article 17 of GDPR provides for the erasure of personal data of any EU citizen upon request. However, a fundamental principle of blockchain technology is that information held on the chain can only be added rather than taken away. Whenever personal information cannot be deleted, there would appear to be a direct conflict with GDPR requirements.

Some technologists have pointed to methods that can be deployed when storing information via blockchain without contravening data protection principles. For instance, some propose that if the information stored on a blockchain is sufficiently limited, say to 180 bytes, it could still function and potentially not constitute processing of "personal data" under the GDPR. Additionally, information stored on the blockchain can often be encrypted so that personal information is sufficiently hidden and anonymised without affecting transaction verification. This approach forms the basis of emerging 'privacy coin' technologies such as Dash and Zcash.

The October Resolution acknowledges it is of the *"utmost importance"* that blockchain technologies are compliant with the GDPR (and calls upon on the European Data Protection Supervisor to provide further guidance). However, it appears that privacy concerns under GDPR may prove to be an irresistible force meeting an immoveable object when it comes to the deployment of the technology in certain instances. While there is considerable potential to be explored, companies, organisations and regulators need to understand that the standards of GDPR are not easily applicable to blockchain. They will need to consider the potential impact on privacy and not just possible benefits to improving processes.

With the October Resolution, the EU Parliament appears eager to promote Europe as a leader in the development of the global blockchain market. It is also clear that there will need to be work done with Member States to protect the rights of citizens, particularly when it comes to data protection. Although the October Resolution establishes only non-binding recommendations at this stage, there is a clear appetite from both the regulatory and commercial sectors to focus on the potential of this technology. Undoubtedly, it could be profoundly disruptive to established intermediary processes. However, it remains to be seen whether the technology likewise (and inevitably) might be disruptive to concepts of individual privacy in the era of GDPR.

Contributed by: Alex Towers

WRC: No Right to Legal Representation in Disciplinary Meeting

A recent decision of the Workplace Relations Commission ("WRC") has revisited the reoccurring question of whether an employee is entitled to bring legal representation to a disciplinary meeting.

Background

The Code of Practice on Grievance and Disciplinary Procedures provides that an employee has the right to have a "representative" with him or her at disciplinary meetings. A representative is defined as *"a colleague of the employee's choice and a registered trade union but not any other person or body unconnected with the enterprise"*. This conscious bid not to over-legalise the workplace was cemented in the Supreme Court case of Burns & Anor. v The Governor of Castlerea Prison, [2009] IESC 33, where it was confirmed that in general, there is no right to legal representation at internal disciplinary hearings. It was accepted that in exceptional circumstances that a right to legal representation may exist, but this would only *"be required by the principles of constitutional justice".*

WRC Decision

A new decision of the WRC (ADJ-00011096) has echoed the decision of the Supreme Court above. It found that a security company who did not allow a former employee to bring legal representation or an advisor from the Citizens Information Centre to a disciplinary meeting was not unfair. The case concerned a former employee who brought a claim for unfair dismissal after he was dismissed for refusing to work a new roster.

The employee was engaged by a security company to work three 13-hour shifts a week. In December 2016, he was transferred to another construction site where he "ran into conflict with people on the site". As a result, the client of the security company requested that he be relocated to a different site. The employee requested that at the new location he be kept on the same shift pattern as it suited him to care for his child. His employer stated the roster would remain the same for the foreseeable future but he could not guarantee that it would not change in the future. After the employee was told the company could not guarantee his current roster, he acted aggressively, stopped coming to work and told a HR representative he would "see you in court". His employer continued to circulate the roster to him until they received confirmation that he had obtained other work. Two weeks after he began work elsewhere his contract of employment was terminated for failing to come to work.

The WRC found that there were several shortcomings in the manner with which the employer dealt with the dismissal of the employee, and the claim for unfair dismissal was upheld for a number of reasons. Despite finding in favour of the claimant, the adjudicator stated that she did not find any unfairness in refusing to allow the employee to be accompanied by legal representation or an advisor from the Citizens Information Centre. The adjudicator found that the employee had prejudiced himself by choosing not to bring a representative to the meeting and noted that he could have "been steered in a different direction by a calmer colleague". Although an award was made for unfair dismissal, it was concluded by the adjudicator that the employee through his manner and conduct was responsible for 75% of his dismissal.

Lesson for Employers

The Supreme Court is the highest court in Ireland, and its decisions are binding on those courts and forums under it, yet the question of legal representation at disciplinary meetings comes up again and again. A clear statement in a disciplinary procedure outlining the parameters of representation throughout disciplinary procedures will ensure that all employees understand that there is no absolute right to legal representation.

Contributed by: [Jeffrey Greene]

IORP II Directive – Current State of Play

The Government's "Roadmap for Pension Reform 2018 - 2023" published earlier this year signalled that legislation to transpose the IORP II Directive (the "Directive") into Irish law would be published before the end of September. Disappointingly, this has not happened.

The deadline for transposing the Directive into Irish law expires on 13 January 2019. If Ireland meets this transposition deadline, then trustees and scheme sponsors will have limited time to absorb the implications of the new legislation before it becomes law.
It was, however, encouraging to see the Pensions Authority (the "Authority") publishing a paper earlier this month on "Considerations for Trustees" arising from the Directive. While the paper was published for information purposes only, it gives trustees a sense of the potential impact of the Directive and what actions they may need to consider.

Governance

One clear message which comes across from the Authority's paper is that trustees will be expected to adopt robust and detailed governance processes covering a range of scheme activities. Therefore, trustees will need to look at their existing governance processes, particularly in relation to scheme administration, risk management and internal controls, to assess what changes may need to be made to them based on the Directive's requirements once in force.

Trustee Qualifications and Experience

The Directive requires trustees, collectively, and certain key function holders to meet appropriate qualification, knowledge and experience criteria. The Roadmap for Pension Reform proposed that:

- one trustee should have a qualification of level 7 in the National Framework of Qualifications; and
- one other trustee should have at least 2 years' trustee experience.

We will have to wait to see what specific qualification and experience requirements are introduced. However, it will be important that the legislation gives existing trustee boards a grace period to re-organise or retrain their personnel to ensure that they can meet the new requirements.

The Authority in its recent paper has stated that it expects trustees to have conducted and documented their own due diligence on an incoming trustee's professional qualifications and previous experience before a person is appointed as trustee.

How such a requirement will work in practice is unclear. Typically, trustees are appointed by employers. It may mean that trustees will be advised not to join in deeds appointing new trustees if they have concerns regarding the fitness or probity of an incoming trustee, which are not shared by the employer.

Key Function Holders

The Directive will also require trustees to ensure that holders of key functions relating to risk management and internal audit or actuarial functions, in the case of defined benefit schemes, have the resources and authority to enable them to undertake their duties collectively in an objective, fair and independent manner.

Most schemes in practice outsource those functions to service providers. The Authority has flagged that trustees will now need to advise the Authority in advance before entering into a new agreement with a provider to outsource those roles. It will be interesting to see whether in practice this will operate as simply a notification requirement, which is what the Directive indicates, or whether the Authority takes any role in scrutinising such appointments.

Small Schemes

One issue that will be watched very closely is the extent to which there is any derogation for schemes with less than 100 members from the full rigor of the Directive's requirements. The Directive itself allows for some flexibility based on the *"nature, scale and complexity"* of a scheme's activities. However, introducing a wide derogation for smaller schemes would arguably cut across the Government's stated intention to *"progress measures that will support the rationalisation of the number of pension schemes".*

Conclusion

The Authority's recent paper helpfully gives trustees a sense of the scope of the new requirements that are likely to come into force once the Directive has been transposed. It may also be a signpost as to what will be contained in the Authority's own guidance on the Directive. The Pensions Regulator was quoted recently as stating that the Authority will supplement the underlying legislation with guidance *"which will set out in practical and specific terms what we expect trustees to do"*.

For now, the Authority acknowledges that specific action from trustees must await further details on transposition but it recommends that trustees read the Directive and consider what it means for their scheme. The Regulator has also stated that the *"list of prescribed tasks will be much longer, more specific and more demanding than under current legislation".*

Given these more onerous obligations, and the absence of draft legislation at this late stage, it is hoped that the Authority will take a flexible approach towards trustees in their efforts to comply with these requirements once introduced.

This briefing is current as at 19 October 2018.

Contributed by: Ian Devlin

Hard to Gain, Easy to Lose?

Background

This discovery application was made by the plaintiff, Defender, in its ongoing proceedings against HSBC for negligence and breach of contract regarding HSBC's alleged role as Custodian of funds lost in the Bernie Madoff Ponzi scheme.

Defender was seeking delivery of witness statements from two sets of proceedings involving HSBC entities but to which Defender was not a party. The two sets of proceedings were Thema International Fund plc v. HSBC Institutional Trust Services (Ireland) Ltd (the "Thema Case")) which had settled after 17 days in the High Court and *Primeo Fund (in Official Liquidation) v. Bank of Bermuda (Cayman Ltd) and HSBC Securities Services (Luxembourg) SA* (the "Primeo Case") in which a judgment was delivered in Cayman in 2017.

In respect of statements adopted by witnesses in open court in the Primeo Case the Court ordered their delivery to Defender on the basis that they had lost their privilege. However the Court had to consider whether the statements in the Thema Case retained their privilege where they had been served but not opened in court.

Relevance & Necessity

As this was a discovery application the issues of relevance and necessity were considered first by the Court and Twomey J. was satisfied that the witness statements clearly met the threshold for both tests given the fact that, in other proceedings in the Cayman Islands' High Court based on the Madoff Ponzi scheme, witness statements had been used to test the credibility of witnesses. Further Charleton J. in an earlier Defender application regarding the transcripts of the Thema Case held that:

"generally speaking if there are documents available in relation to what a witness has said before and the witness' evidence is likely to be challenged it is incumbent on people to make those available.."

Litigation Privilege

Generally documents that are protected by litigation privilege lose that privilege when they are put into the public arena, such as used in open court. However, a central question was whether the service of a witness statement on an opposing party leads to the loss of privilege when the proceedings conclude.

Twomey J. held that this could not be the case and that a witness statement does not lose its privileged status in those circumstances. He was of the view that service does not constitute putting the statement into the public arena. He relied on the judgment of Clarke J. in *Moorview v First Active* [2009] IEHC 214 to emphasise that not only is it not put into the public arena, but also that a witness statement has no evidential value unless and until it is adopted by a witness in court.

The Court contrasted the different court rules between England (which provided for privilege) and Ireland (where the rules are silent) and the policy reasons behind the rules. Twomey J. found that one of the policy reasons behind the rules in England was that it maintained an incentive for settlement. This was on the basis that it could act as a disincentive to parties settling after hearings had commenced if litigants could not rely on one potential benefit of settling, being the avoidance of a public airing of the details of their dispute.

Closely Connected Proceedings

Even if litigation privilege is not lost when the witness statement is served on the other side, litigation privilege can be lost when the proceedings are concluded, unless those concluded proceedings are closely connected with the proceedings in which the documents are sought. For two sets of proceedings to be closely connected there must be "some connection between the parties or the subject-matter, or both".

The High Court had to consider whether the Defender proceedings were closely connected to the Thema Case and the Primeo Case. In this regard the Court held that the Defender case met both tests as:

1. the parties in the cases are connected (a defendant being identical in the Thema Case and part of the same HSBC Group in the Primeo Case) and
2. the subject matter of all three cases was closely connected, involving negligence claims by three different funds against a HSBC company in connection with Madoff's alleged role as sub-custodian.

Therefore witness statements that had not been opened in court retained their litigation privilege because, although the Thema and Primeo Cases had finished, they were closely connected with the Defender proceedings.

There was one exception regarding a witness statement that had been used in Court in the Thema Case for the purposes of cross-examination but had not been adopted by the witness as evidence. The High Court held, on the basis of *Kelly v Byrne* [2013] 2 IR 389 (discussed previously by us here) that this witness statement, used in open court without any caveats or restrictions, had lost its privileged status.

Key Points

- Documents that have the protection of litigation privilege are amenable to discovery but not to production to the other side. However, if these documents are then deployed in open court, whether by adoption by a witness or otherwise without any restrictions, they can lose this status as they will be considered to be in the public arena.
- If witness statements have gained privileged status and have not been used in open court they may only retain their litigation privilege if the sets of proceedings are closely connected.

As can be seen from this decision, issues surrounding privilege are varied, complex and can frequently raise points of law that the courts have not considered. This judgment gives more certainty to the approach of the Irish Courts dealing with witness statements.

Contributed by: Catherine Thuillier

"Battle" Goes On – the Supreme Court Reaffirms that Companies Cannot be Represented in Court by Non-Lawyer

In Allied Irish Bank plc v Aqua Fresh Fish Limited [2018] IESC 49 the Supreme Court reaffirmed the decision in Battle v Irish Art Promotion Centre Limited [1969] I.R. 252 that companies and bodies corporate require legal representation in court save for exceptional circumstances.

Background

AIB loaned monies to Aqua Fresh Fish Limited (the "Company") and secured the loan by way of a mortgage over certain lands owned by the Company. AIB alleged that the Company defaulted on the loan and issued a letter of demand to the Company seeking repayment. AIB then proceeded to issue a special summons seeking an order for possession and sale of the lands secured by the loan in the absence of repayment.

Mr Adrian Flynn, the managing director and principal shareholder of the Company, applied to the court for permission to enter an appearance to the summons and to represent the Company in the proceedings. This was refused by the High Court and also on appeal by the Court of Appeal in reliance on the principles set out in Battle.

Supreme Court Judgment

The Supreme Court reaffirmed the principles in *Battle* and determined that a company must be represented by a lawyer with a right of audience before a court in the interests of justice and in accordance with the principles of fair procedures.

While an individual can represent themselves in proceedings, this is not the case for a company as a company is an artificial person with a separate legal personality distinct from its shareholders and directors. The Court commented that directors and shareholders benefit from the separate legal personality and limited liability of a company but are also subject to the disadvantages in forming a company including that it cannot represent itself as it is not a natural person.

The Supreme Court further upheld the decision in *Stella Coffee v the Environmental Protection Agency* [201] 2 I.R. 125 that a court retains a discretion pursuant to its inherent discretion to regulate its own proceedings to allow a company be represented by a third party other than a lawyer in exceptional circumstances.

The Supreme Court chose not to define "exceptional circumstances", although it did consider that if the person who wished to represent a company was a party to the proceedings or willing to be joined as a party, this could be taken into account to determine whether there were exceptional circumstances. The Supreme Court also stated that it did not consider the following to be exceptional circumstances that would allow a third party, other than a lawyer, to represent a company:

1. inability of a company to pay for legal representation;
2. where a company has a good arguable defence to the proceedings;
3. where the third party who wishes to represent the company is its principal shareholder and director.

Implications

If a company does not hire legal representation, it cannot be represented by a non-lawyer director or shareholder of the company or third party in proceedings save for exceptional circumstances. Accordingly, if a company does not obtain legal representation, the company will be undefended in proceedings and runs the risk of a judgment being awarded against it.

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For further information, please contact Zara West.

AC Milan Free to Play in Europa League after UEFA Ban Overturned

The Court of Arbitration for Sport (CAS) has partially upheld an appeal by AC Milan against a UEFA ban following the club's breach of UEFA Club Licencing and Financial Fair Play Regulations (FFP Regulations).

UEFA's FFP Regulations

The FFP Regulations were introduced by UEFA in 2012 to improve the economic and financial health of clubs and to protect the long term viability and sustainability of European club football. The break-even provisions at Articles 58-64 of the FFP Regulations require clubs to have an overall break-even surplus in the year of assessment and the preceding two years before the assessment. By way of exception, a deficit of up to €30m may be allowed where it is covered by a direct contribution from the club owner or a related party.

The FFP Regulations have generally made a positive impact on the financial sustainability of clubs with UEFA reporting an 80% reduction on net losses and a significant increase in net equity at clubs. The number of overdue payables owed by clubs has also been reduced.

AC Milan case

UEFA raised concerns about AC Milan's compliance with the break-even rules following the club's acquisition by Chinese investor Li Yhonghong in April 2017 and subsequent spending of over €200m on new players in the summer of 2017. Following assessment, the Adjudicatory Chamber of the UEFA Club Financial Control Body (CFCB) held that AC Milan had failed to fulfil the break-even requirement under the FFP Regulations and banned AC Milan from participating in the Europa League for the coming season.

AC Milan's spending spree was reportedly financed by a loan from Elliot Management Corporation. This resulted in a substantial deficit for the club, compounding previous years of financial losses sustained when it is understood that the club was under the control of former Italian Prime Minister Silvio Berlusconi's family. Elliott Management Corporation has since taken ownership of the club.

CAS decision

AC Milan further appealed the Europa League ban to CAS. In its decision CAS held that the ban was disproportionate given recent developments in the club's ownership and recent improvement in the club's financial situation. However, CAS did acknowledge AC Milan's breach of the FFP regulations and rejected its request to order a settlement agreement. The case has been referred back to UEFA to deliver a proportionate disciplinary measure considering the club's new financial situation. Significantly for AC Milan, it was free to compete in the Europa League this season where it has won its opening two matches.

The decision raises important questions regarding the future enforceability of the FFP Regulations, particularly where heavily indebted clubs receive fresh funding from investors.

Contributed by Patrick Murphy

Asset Management & Investment Funds Update - October 18

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

The topics covered in this months edition are below. For further information on any of these items, please email or phone any member of our Funds Team.

- Central Bank Announces Self-Certification Regime for UCITS Financial Indices, Depositary Agreements and other changes
- Brexit – ESMA produces soothing sounds on Delegation of Asset Management to UK
- The Trouble With KIDs – ESAs Call for Measures to Avoid Confusing Duplication
- EU Council indicates no objection to Delegated Regulations on Depositaries' Asset Segregation Obligations
- AIFMD – Clarification on Cross-border Notifications of Umbrella AIFs
- ESMA Publishes Work Programme for 2019
- Welcome Clarification on "Robust Written Plans" Requirements for Funds Using Benchmarks
- Central Bank's Feedback Statement on the ETF Discussion Paper

Click here for our full update.

Budget 2019

Budget 2019 was announced on 9 October 2018. This was Minister Donohoe's second Budget speech and, as has been the trend in recent years, many of the measures announced were leaked to the media well in advance. It is the third of three Budgets that the coalition Government has agreed to support under the Confidence and Supply Agreement.

There was speculation that this Budget would be a pre-election give-away Budget and although the Minister outlined an increased capital spending programme and various rainy day funds, it will most likely be considered 'a little something for everyone' Budget. The Budget speech was littered with references to the financial crisis and indeed the Minister mentioned that his plan for next year is to announce a "balanced Budget for the first time since 2007".

The Minister acknowledged that Brexit is the single biggest political, economic and diplomatic challenge of our generation and that Ireland needs to be Brexit ready. The commitment to Ireland's 12.5% corporation tax rate as well as a stable, transparent and sustainable corporation tax regime were reiterated.

Once again the focus of many of the Minister's proposals was the chronic under-supply of housing in the Irish market. The measures announced will be funded by increases in the rate of VAT on tourism activities, excise duty on cigarettes/tobacco products, VRT on diesel cars and betting duties. The introduction of an exit tax from midnight on 9 October 2018 where companies migrate or transfer assets offshore will have surprised many.

Full details of the budgetary measures will be set out in the Finance Bill expected to be published on 18 October 2018.

Please click here for the key measures of Budget 2019 from a tax perspective.