WILLIAM FRY

Legal News

Welcome to the September 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.

Primeo v HSBC: Cayman Court Delivers Madoff Judgment

On 23 August 2017, the Grand Court of the Cayman Islands delivered a landmark judgment in Primeo Fund (in Official Liquidation) (Primeo) v Bank of Bermuda (Cayman Limited) and HSBC Securities Services (Luxembourg) SA (HSSL) (together the HSBC Defendants).

In his judgment, Mr Justice Jones QC found that the HSBC Defendants breached various ongoing duties to Primeo, a Madoff feeder fund, in respect of the appointment and supervision of Bernard L Madoff Investment Securities LLC (BLMIS) as its sub-custodian.

Background

Primeo was an investment fund incorporated in the Cayman Islands in 1993. It had directly invested in BLMIS until 1 May 2007 and, from that point on, had indirectly invested in BLMIS through two other Madoff feeder funds domiciled in the Cayman Islands, Herald Fund SPC (In Official Liquidation) (Herald) and Alpha Prime Fund Limited (Alpha).

With the arrest of Bernard Madoff in December 2008 and the discovery of the world's largest Ponzi scheme, Primeo's liquidators issued legal proceedings in 2013 against the HSBC Defendants in relation to losses incurred as a result of the Madoff fraud. Primeo alleged, amongst other things, gross negligence on the part of the HSBC Defendants in respect of the performance of their contractual duties as custodian and administrator and claimed damages in excess of USD 2 billion in connection with its losses.

Breaches of duty by the HSBC defendants

The Court ruled that HSSL had breached its ongoing supervisory obligations to Primeo in respect of BLMIS as sub-custodian to Primeo. It was found by the Court that HSSL owed continuing contractual duties to satisfy itself about the ongoing suitability of BLMIS as sub-custodian and to require BLMIS to implement effective safeguards to protect Primeo's assets.

It was an implied term of the custodian agreement in place that HSSL would exercise the care and skill expected of a reasonably competent global custodian and the fact that Primeo had appointed BLMIS to act as sub-custodian did not vitiate HSSL's supervisory duties.

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Notably Mr Justice Jones QC held that having regard to BLMIS' business model and associated heightened operational risks, HSSL had failed to recommend that (i) a separate Depositary Trust Company (DTC) account be established to hold Primeo's securities (as opposed to being held in BLMIS' single omnibus account at the DTC) and/or make use of the Institutional Delivery System (ID System) and (ii) a separate sub-account at Bank of New York be established to hold Primeo's US Treasury Bills. The Court commented that in both instances, the *"safeguards would be equally effective if BLMIS had established the accounts for Primeo alone or for HSBC's relevant clients collectively"*.

The Court accepted expert evidence on behalf of Primeo which stated that by requiring BLMIS to establish these sub-accounts, and through use of the ID System, it would have been possible to independently verify the existence of Primeo's assets.

Failure to apply these readily available and *"most effective safeguards"* amounted to a breach of duty on the part of HSSL and, if implemented, would have been effective to safeguard Primeo's assets, the Court determined. The Court concluded that *"when the normal procedure is known to be ineffective, failing to apply a readily available alternative is negligent".*

Other legal issues and findings

Despite the Court's findings of breach of duty by the HSBC Defendants, Primeo's claim was dismissed on the basis of a number of technical legal arguments dealing with, amongst other issues, limitation and reflective loss points.

Commentary

Although Primeo's claim was ultimately unsuccessful, the judgment is significant in terms of stating the professional and legal standards expected of investment fund service providers operating in the Cayman Islands and will be of some interest in the Irish context. Whether or not the judgment will be appealed remains to be seen.

However, the judgment is explicit regarding the scope of obligations owed by custodians and administrators in providing investment fund services, particularly where there are heightened operational risks or concerns or where unusual business models are adopted. The Court noted that in such circumstances *"the reasonably competent custodian would look for an alternative operating procedure which is capable of producing the normal result. BoB Lux failed to do so."*

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Forced Retirement Deemed a Discriminatory Termination

In a recent case before the Workplace Relations Commission, *A Bookkeeper v A Retail Business (ADJ-5391),* the Adjudication Officer held that the imposition of a mandatory retirement age without a contractual basis constituted an unlawful discriminatory termination.

This decision is a reminder to employers that there is no automatic retirement age for private sector employees in Irish law.

Background

The employee was employed at the respondent family business as a bookkeeper. She had worked for the business for 12 years without a contract of employment and she was not provided with a statement of her terms of employment. She submitted that she was expected to retire on two occasions, namely her sixty-fifth and sixty-sixth birthdays. However, as there was no written agreement in place which provided for her retirement, she sought to continue working.

The employer claimed that an oral contract was in place and an implied term of the complainant's employment was that she would retire at the age of 65. The employer therefore terminated her employment and claimed that this was necessary for the management of the business. The employer also submitted that a pension scheme was in place which clearly foresaw a retirement age of 65.

The Adjudication Officer held that no justification had been provided for the required retirement and the termination of employment was therefore discriminatory on the grounds of her age. An award of €12,000 was made for the breach of the employee's rights under the Employment Equality Acts 1998 - 2015. The respondent was also found liable under the Terms of Employment (Information) Act 1994 for failing to provide the complainant with a statement of the terms of her employment and a further award of €630 was made in this regard.

Legal position

The Equality (Miscellaneous Provisions) Act 2015, which commenced on 1 January 2016 permits an employer to determine a mandatory retirement age provided the age chosen is objectively and reasonably justified by a legitimate aim and the means of achieving that aim are proportionate and necessary.

Possible justifications for the imposition of a mandatory retirement age include:- promoting access to employment for younger employees by distributing the work between generations; ensuring the health and safety of employees in physically demanding roles; and creating a workforce of balanced age and experience.

Not all employers are fully familiar with the requirements of the 2015 Act in relation to retirement ages. As the Adjudication Officer observed in this case, the employer's "*attitude of bemused indignation that a person might have to be retained in their employment up to an indefinite age gave a good indication of how far such, in fairness widely held views, are off the mark in respect to the law relating to retirement age*".

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Ireland Awarded Highest Tax Transparency Rating

On 21 August 2017, the OECD's Global Forum on Transparency and Exchange of Information for Tax Purposes (the "Global Forum") published the first ten outcomes of a new peer review process aimed at assessing compliance with international standards in the exchange of information on request ("EOIR") between tax authorities.

140 jurisdictions are members of the Global Forum, which monitors and peer reviews the implementation of the EOIR standards. As part of the review, the legal and regulatory framework of each jurisdiction and the implementation of the EOIR standards in practice are assessed.

Ireland received an overall rating of 'Compliant', which is the highest award which may be granted. Mauritius and Norway also received a rating of Compliant, while six other countries (Australia, Bermuda, Canada, Cayman Islands, Germany and Qatar) received a rating of 'Largely Compliant'. Jamaica received a rating of 'Partially Compliant'.

Minister for Finance, Paschal Donohoe T.D., welcomed the rating and stated that "the outcome of the Global Forum's review is recognition of Ireland's continued commitment to the highest international standards in tax transparency. Ireland continues to play an active role in global work to reform the international corporate tax system."

For further information, please contact Brian Duffy in the William Fry Tax Department.

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Defined Benefit Reform Disappearing Act – Committee Stage Comeback?

The Social Welfare, Pensions and Civil Registration Bill 2017 (the "Pensions Bill") as presented to the Dáil on 5 July 2017 appears to intend more modest pension reforms than was initially anticipated. More far-reaching reform proposals may re-emerge as the Bill progresses.

The General Scheme of the Social Welfare and Pensions Bill 2017 was published in May by the former Minister for Social Protection, Leo Varadkar which included extensive proposals for defined benefit pension schemes (the General Scheme of the Bill). In short, those proposals had sought to introduce (1) a minimum statutory notice period of 12 months for winding up defined benefit pension schemes and (2) a possible employer debt provision. These two key proposals have now been dropped from the Pensions Bill as initiated in the Dáil.

Instead the provisions in the Pensions Bill will include a number of timing changes for defined benefit pension schemes:

- a new 6 month time limit for the submission of a funding proposal where a scheme does not meet the minimum funding standard (a proposal retained from the General Scheme of the Bill);
- 6 months (instead of 9 months) for a funding standard reserve certificate to be submitted where a scheme does not meet the funding standard reserve; and
- an annual (rather than triennial) requirement for a scheme which ceases to be a regulatory own funds scheme to submit an actuarial funding certificate.

The changes to timings (in particular the new timeframe for submission of a funding proposal) seek to create an impetus for negotiation between employers and trustees.

Comment

The new Minister for Employment and Social Protection, Regina Doherty mentioned in a statement to the Dáil on 14 July last that she intends to put forward amendments at Committee Stage to re-introduce the 12 month mandatory notification period and a debt on the employer provision. The Pensions Bill progresses to second stage which will take place in the autumn, as the Dáil is now adjourned until September.

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Prospective Employee Dismissed for Inadequate Leaving Certificate Results

In the recent High Court decision of *Genockey v The Governor and Company of the Bank of Ireland* ([2017] IEHC 498), a successful job applicant was dismissed for failing to satisfy the defendant employer's educational qualification requirements. This decision highlights the importance of employers clearly specifying any qualification requirements or other conditions of employment at the early stages of the recruitment process, and certainly prior to making any offers of employment.

Background

The plaintiff sent her unsolicited CV to the defendant employer. There were no suitable jobs available at that time, but the defendant agreed to hold the CV on file should a suitable position arise at a later date. The plaintiff was later invited by the defendant's agents to interview for the position of loan administrator. The accompanying application form for the position stated that certain verifications were required, including "*original documentation in relation to the required educational qualifications*", prior to commencing employment. By way of phone call, the agent offered the plaintiff the position after her interview. The plaintiff asserted that this phone call constituted an unconditional offer, while the defendant claimed that it was subject to the conditions specified as to verification of qualifications.

The plaintiff later received another phone call informing her again that her original Leaving Certificate results would be required before commencing employment, and her written offer also stated that the offer was subject to "*verification of your qualifications and the information you have provided on the application form*". The plaintiff then produced her original Leaving Certificate results which, contrary to what she had stated in her CV and application form, revealed that she had failed maths and the job offer was subsequently withdrawn.

The plaintiff argued that an unconditional offer of employment was made during the first phone call and therefore sought damages for breach of contract, misrepresentation, breach of warranty, wrongful dismissal, negligence and breach of duty of care.

Decision

Mr. Justice Eagar held that the plaintiff had not established that the defendant failed to exercise a duty of care. The plaintiff had originally stated her Leaving Certificate results to be "*3 (honours) 4 (passes)*". In evidence in the High Court however, the plaintiff admitted that she had received 4 passes and 3 fails in pass level subjects, including a fail in maths.

Although the High Court accepted the plaintiff's evidence that she had unwittingly provided the incorrect results, the Court stated that: …"*in applying Sheehy v. Ryan [2008] 4 I.R. 258, it was made clear by the defendant employer that a term of any successful candidate's employment would be that they meet specific educational criteria. Unfortunately, the plaintiff did not meet these criteria, and thus the defendant employer had the right to dismiss the plaintiff for this reason.*"

Conclusion

This case is a positive decision for employers who require their prospective employees to hold certain qualifications. By extension, it also serves as a reminder to all employers of the importance of specifying any required educational requirements or other conditions of employment in a concise manner prior to making an offer of employment, and making clear that the offer of employment is conditional on satisfactory verification or completion of these conditions.

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Digital Age of Consent for Children's Data Set to Be 13

Following a consultation period, the Irish Government has decided that the digital age of consent for children to sign up to information society services without parental approval will be set at 13 years of age. The digital age of consent refers to the age at which children may legally sign up for services that process personal information, such as social media sites like Twitter or Facebook, without needing the explicit approval of their parent or guardian.

The decision follows a consultation process run in conjunction with the legislative drafting of Ireland's new Data Protection Bill 2017. While the General Scheme of the Data Protection Bill released in May 2017 contains language in Head 16 referring to a "child's consent in relation to information society services", it does not include an actual age limit instead clarifying that "a separate government decision will be sought". While the General Scheme is currently undergoing legislative scrutiny and considerable revisions are likely to be made before a final version is enacted, the Government's 26 July decision as to the age of consent being 13 is not expected to change.

Article 8 of the General Data Protection Regulation (the "GDPR"), which comes into effect across the EU next May, introduces specific protections for children by limiting their ability to consent without specific parental permission. While initial drafts of Article 8 set the age of consent at 13, negotiations saw the final draft adopt 16 as the threshold, with an option to allow member states to set a lower age not below 13. In addition to the age limits, Article 8 also provides that data controllers must obtain and use "reasonable efforts" to verify the consent of a parent or guardian when processing a child's personal data.

Speaking following the decision, a Government spokesman acknowledged that while the GDPR allowed member states to set a digital age of consent between 13 to 16, Ireland had "gone for the lower end". The decision was positively received by the Children's Rights Alliance who had recommended setting the limit at "the lowest age possible" as well as the Special Rapporteur for Child Protection, Dr Geoffrey Shannon, who had warned that Ireland should take steps to not restrict children's rights.

However, while the decision in Ireland has been welcomed, it is likely that the differing rules on the age of consent in EU member states, as well as between the EU standard and other countries such as the United States, will create significant challenges for companies that offer international services. While both Ireland and UK look set to adopt 13, which is in line with the United States' Children's Online Privacy Protection Rule, it remains to be seen whether other member states will act together on adopting a uniform age of consent before the GDPR comes into effect in May 2018.

For further information, visit William Fry's dedicated website to the GDPR, **PrivacySource**, which includes in-depth analysis and practical tips on preparing for the GDPR. For further information about the General Scheme of the Data Protection Bill 2017, see Part 1, Part 2 and Part 3 of our series.

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Trustees of Charities Obliged to Explain Failure to Comply with New Regulatory Guidance

The Charities Regulator has recently published two guidance documents to assist those involved in the administration and management of charities in Ireland.

The first document is entitled Guidance for Charity Trustees and it addresses issues such as who charity trustees are, the duties of trustees in general and their duties specifically under the Charities Act 2009.

The second document, Internal Financial Controls Guidelines for Charities, is a practical guide covering the main areas of financial control for charities, such as income, expenditure, banking (including payments and loans), assets and investments and monitoring arrangements. Various checklists for organisations are included in these guidelines to ensure they have the appropriate controls in place.

Significantly, the Charities Regulator will require trustees of registered charities to explain and justify their approach to controlling and managing their organisation, and its financial controls, if they decide not to follow the good practice set out in these guidance documents.

The Charities Regulator was established in 2014 as Ireland's independent authority for the regulation and protection of charitable trusts and organisations. Since September 2016, it has had investigative and protective powers, including a power to compel production of documents, the power to impose sanctions for breach of obligations under the Charities Act 2009 and the power to apply to the High Court to suspend or remove the trustees of charities and other staff members. Recent months have seen a willingness on behalf of the Charities Regulator to utilise these powers to protect the charity sector in Ireland.

The Regulator has stated that further guidance documents and support materials will be developed in the coming months, covering issues such as registration, conflict of interest, fundraising and how to wind down a charity. We will keep you up to date on any developments in this area.

For further advice on the administration and management of charities and the new obligations on charity trustees under these guidance documents, please contact Nora Lillis.

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Timeline for New Prospectus Regulation Confirmed

Background

The new Prospectus Regulation (Regulation (EU) 2017/1129) (the "Regulation") has been published in the Official Journal of the EU. It is designed to repeal and replace the existing body of European prospectus law.

The Regulation is intended to be of particular benefit to European small and medium enterprises when issuing shares or debt. Companies already listed on public markets will also benefit when they list additional shares or issue corporate bonds.

Changes

The key changes to the prospectus regime are as follows:

- *Monetary thresholds for publication of a prospectus.* No prospectus will be required for capital raisings and crowdfunding projects up to €1m (up from €500,000) and the threshold beyond which a prospectus is mandatory is increased from €5m to €8m in capital raised.
- *Issuers with securities already admitted to trading.* Where an issuer already has securities admitted to trading on a regulated market, it will be permitted to admit additional securities representing less than 20% of the same class of securities, over a 12 month period, without the need to publish a prospectus. This threshold has been increased from 10%.
- *Prospectus summary.* Prospectuses will have a new, shorter prospectus summary that is modelled on the existing key information document (KID) required under the PRIIPs Regulation.
- *Minimum disclosure regime.* The EU growth prospectus, a new type of prospectus, will be available for SMEs, non-SMEs (where the securities are being admitted to an SME growth market) and small issuances by unlisted companies. In addition, companies already listed on a public market seeking to issue additional shares or raise debt may avail of a new, simplified prospectus.
- *Fast track approval.* Companies that frequently access the capital markets may use an annual universal registration document (URD), which is similar to a US shelf registration. Irish issuers who regularly maintain an updated URD with the Central Bank of Ireland will benefit from a 5 day fast-track approval when they intend to issue new securities.
- *Publication of prospectus.* Paper prospectuses will no longer be required, unless requested by a potential investor. In addition, the European Securities and Markets Authority (ESMA) will provide free and searchable online access to all prospectuses approved in the European Economic Area.
- *Risk factors.* The Regulation requires lists of risk factors to be shorter, consisting of a limited selection of specific risks which are categorised according to their nature.

Timeline

The Regulation entered into force on 20 July 2017 and will mainly apply from 21 July 2019, other than the following provisions which will apply earlier:

- *From 20 July 2017:* Certain exemptions from the obligation to publish a prospectus, including where an issuer has securities admitted to trading on a regulated market and wishes to admit further securities up to a limit of 20% over 12 months.
- *From 21 July 2018:* The exemption from the scope of the Regulation for offers of securities to the public with a total consideration in the EU of less than €1,000,000 (calculated over a period of 12 months).
- *From 21 July 2018*: The option for Member States to exempt offers of securities to the public from the obligation to publish a prospectus where the total consideration of each offer in the EU is less than €8,000,000 (calculated over a period of 12 months) and it is not subject to notification under Article 25.

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The Regulation will have direct effect across the Member States of the EU, meaning that it does not strictly need any national transposing measures to take effect. However, it is to be presumed that revisions to the Irish prospectus framework will be made to comply with the new provisions set out in the Regulation.

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Key steps in Dealing with "Dawn-Raids" by Irish and EU Competition Regulators and/or Central Bank

Background

On 4 July 2017, a number of companies acting in the Irish motor insurance sector were subject to "dawn raids" by the European Commission (“EC”), accompanied by agents from the Competition and Consumer Protection Commission (the “CCPC”). The EC carried out the raids pursuant to its powers of investigation under Regulation 1/2003, which governs the enforcement of EU anti-trust rules. These rules prohibit, inter alia, cartels and restrictive business practices (such as price-fixing) and/or abuse of a dominant market position. A statement from the EC indicated that it has concerns that the companies involved may have engaged in anti-competitive practices.

The main industry body, Insurance Ireland, was also visited by the officials as part of its investigation.

The motor insurance sector in Ireland remains the subject of an ongoing investigation by the CCPC. This investigation regarding the signalling of future increases in private motor insurance premiums by industry participants opened in 2016. Press reports have noted increases in premiums of between 50% and 70% over the last three years. This probe is entirely separate to the EC's enquiries.

Handling dawn raids and regulatory inspections

The recent raids in the insurance sector are a reminder for companies to review their dawn raid/ regulatory inspections response plans and to train key staff on how to react. If you are a regulated entity you are likely to receive an inspection at some stage. Scheduled, and even routine, inspections can quickly develop into an investigation, even if it was not commenced on suspicion of wrongdoing, so it is important to be prepared.

What to do in the event of:

Scheduled visits:

- Check authorisation and identification of the relevant officials
- Follow protocol
- Be polite
- Open the meeting with the right people including senior management and a note-taker
- Co-operate but be firm and push back as appropriate
- Do not obstruct

Unscheduled visits / "Dawn Raids":

- Greet the investigators
- Obtain information from investigators on their arrival/check warrant and identification
- Call relevant lawyers (external and internal counsel)
- Call the office’s IT contacts
- Arrange to shadow the investigators
- Take copious notes
- Decide on Public Relations Strategy
- Report back to lawyers and shadowing team
- Brief the business
- Debrief at the end of the day
- Agree next steps with the lawyers including a review of the material seized.

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Recent Supreme Court decision

As a final point to note, a recent decision of the Supreme Court in *CRH PLC, Irish Cement Ltd and Lynch v CCPC* (May 2017) placed restrictions on the powers of the CCPC to seize and retain electronic records and emails and stressed the need to engage with parties that are the subject of a dawn raid in a manner which respects their right to privacy under Article 8 of the European Convention on Human Rights. The CCPC has stated that it is considering the judgment carefully and assessing the implications for its search powers.

Further information

For further information on what to do in the event of a regulatory inspection and/or a dawn raid, please get in touch with your usual William Fry contact.

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