

Intellectual Property Update

By Rebecca Smith
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The most significant legislative changes in relation to intellectual property rights from January to November 2005 have been regulations for customs action regarding infringing goods, which are considered below. It is anticipated that a considerable range of legislative proposals will be published within the coming months.

Prospective Legislation

Among the prospective legislation is, firstly, the successor to the Patents (Amendment) Bill 1999, which was originally introduced with the aim of amending the Patents Act 1992, itself to give full effect to the World Trade Organisation Agreement on the Trade Related Aspects of Intellectual Property. It passed the second stage in the previous Dáil (and thus fell with the dissolution of that Dáil). The most significant provisions concern the compulsory licensing of patents. It is understood that in September 2004 the Government authorised the drafting of a bill incorporating the provisions of the lapsed Patents (Amendment) Bill 1999 together with amendments to trade marks and copyright legislation. These amendments are understood to be predominantly of a technical nature, although they will have some significance in respect of the manner of the hearing of proceedings before the Patents Office.

Secondly, on 1 August 2005 the Department of Enterprise, Trade and Employment announced its intention to bring forward legislative proposals to implement a public lending right payments system for authors whose works are lent by Irish public libraries. This follows the decision of the European Commission in December 2004, to institute proceedings against Ireland for failing to properly implement Directive 92/100 on rental rights and on certain rights related to copyright by reason of the State exempting all public lending institutions from the obligation to pay remuneration in respect of the lending of works to the public. It is anticipated that the proposed legislation will be in the form of

a statutory instrument under the Copyright and Related Rights Act 2000.

Finally in this regard, the Department of Enterprise, Trade and Employment announced the intention to provide for an artists' resale right payments system benefiting artists whose original works are resold through the art trade (thereby implementing Directive 2001/84 on the resale right for the benefit of the author of an original work of art, which is due for implementation by 1 January 2006); and for the transposition into Irish law of Directive 2004/48 on measures and procedures to ensure the enforcement of intellectual property rights, which is due for implementation by 30 April 2006.

SI No 344 of 2005

European Communities (Customs Action against Goods Suspected of Infringing certain Intellectual Property Rights) Regulations 2005 were adopted. The purpose of these Regulations was to implement Council Regulation (EC) No 1383/2003 and Commission Regulation (EC) No 1891/2004 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights. These Regulations designate the Revenue Commissioners as the competent customs authority to receive and process applications for action in respect of infringements.

An intellectual property owner may apply to the Revenue Commissioners for action by the customs authority when goods are entered for release, export or re-export. The customs authority may also detain goods and notify the right-holder of their detention in order to permit the right-holder the opportunity to submit an application for customs action. SI No 344 of 2005 creates offences and related penalties. Where the customs office is satisfied that the relevant goods infringe an intellectual property right, it has the power to

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suspend their release or detain them, and to permit inspection of the goods by the right-holder.

The question arises is to whether these new regulations supersede previous regulations in this field and whether they can be used against the unlawful parallel importing of genuine goods from non-EU countries, which was not possible previously, and is suspected that this remains the case. This Statutory Instrument came into effect on 6 July 2005.

Intellectual Property Litigation before the Commercial Court

Before turning to Irish case law on intellectual property in 2005, it is desirable to make some brief comment regarding the emerging position in respect of the conduct of intellectual property litigation before the Commercial Court. Intellectual property disputes are of course somewhat unusual in that Ord 63A of the Rules of the Superior Courts (which regulates practice and procedure in respect of the Commercial Court) does not require that such disputes involve a claim exceeding a threshold value—set at €1 million in respect of several other types of proceedings—before they can be considered for entry into the Commercial List of the High Court. However, this is understood not to have resulted in a substantial volume of intellectual property litigation being diverted into the Commercial Court and it is speculated that this is for two reasons.

First, the case management in the Commercial Court of a dispute towards an expeditious hearing—with, it is understood, an average period of nine weeks elapsing from issue of the summons to hearing—places a substantial costs burden upon litigants, and litigants may quite naturally take the view that the value or other circumstances of the claim do not justify shouldering that burden. Second, in many infringement situations it can be anticipated that the obtaining of interlocutory injunctive relief will bring an end to a dispute in its entirety, and that relief can of course continue to be sought in what might be termed “traditional” chancery proceedings before the High Court. However, in those cases which are appropriate for entry into the Commercial List, it is unquestionably the case that the capacity of the Commercial Court to deliver an early trial constitutes a remarkable improvement upon the preceding position.

Copyright

EMI Records (Ireland) Ltd Sony BMG Music Entertainment (Ireland) Ltd Universal Music Ireland Ltd Warner Music Ireland Ltd v Eircom Ltd & BT Communications Ireland Ltd, unreported, High Court, Kelly J, 8 July 2005.

The plaintiffs were granted a *Norwich Pharmacal* disclosure order against the defendants for the purpose of bringing copyright infringement proceedings against those users who illegally uploaded music.

The plaintiffs were Irish companies which had been assigned the Irish copyright in a large number of sound recordings. The plaintiffs retained a company to investigate and gather evidence of what were perceived as activities which infringed the plaintiffs’ copyright. Certain computers connected to the

internet via the defendant’s facilities had been used to upload songs, the copyright of the plaintiffs. The plaintiffs applied to the High Court for an order directing the defendants to make disclosure of the names and addresses of 17 of their internet subscribers. The defendants accepted that there was no other way apart from the application made by which the plaintiffs could acquire the information concerning the identities sought.

Kelly J was satisfied that there was prima facie evidence of wrongdoing, namely infringement of the plaintiffs’ copyright but that there was no suggestion of any wrongdoing on the part of the defendants. The defendants did not resist the application but addressed submissions to the court simply in order to bring to the court’s attention matters that might be germane to the exercise of its discretion. It was accepted by both parties that the jurisdiction to make the orders sought was a jurisdiction that falls to be exercised sparingly. It involved the court balancing the rights of the plaintiffs with the obligations of the defendants towards their subscribers and their rights of confidentiality and privacy.

In citing the case of *Norwich Pharmacal Co & Ors v Custom & Excise Commissioners* [1974] AC 133, Kelly J accepted that where through no fault of their own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing, he may incur no personal liability, but he comes under a duty to assist the person who has been wronged by giving him the full information and disclosing the identity of the wrongdoer. The Supreme Court has approved of these orders, known as “*Norwich Pharmacal orders*” in Ireland in *Megaleasing UK Ltd v Barret* [1993] IRLM 497. Referring also to the recent Canadian case of *BMG Canada Inc v DOE* [2005] FCA 193, the judge agreed that although modern technology such as the internet had provided extraordinary benefits for society, this must not be allowed to obliterate personal property rights.

In balancing the rights of both parties, Kelly J. found that the right to privacy or confidentiality of identity must give way where there is prima facie evidence of wrongdoing, as in this situation. In finding for the plaintiffs, he made an order requiring disclosure, which would be given on the basis of undertaking which the plaintiffs had agreed to give. The undertakings were that the information disclosed was to be used solely for the purpose of seeking redress in respect of infringement of copyright in sound recordings and that the information would not be disclosed to the general public.

It is submitted that the court’s action strikes a balance with other infringements (by parties other than those in this case), which have been hitherto facilitated by the internet. The suit reflects recent similar enforcement proceedings taken by larger companies in the music industry worldwide. It is understood that following on from the judgment and order of Kelly J, a number of settlements have occurred copyright infringement and file sharing.

Patent and Discovery

Ranbaxy Laboratories Ltd, Ranbaxy Europe Ltd and Ranbaxy Ireland Ltd v Warner—Lambert Company, unreported, High Court, O’Sullivan J, 8 July 2005.

O’Sullivan J refused the plaintiff’s application to introduce documentation used in arguments before foreign patent offices prior to the patent being granted.

The plaintiffs sought a declaration that manufacture of a certain product did not infringe the defendant's Irish patent, which protects a product known as "LIPITOR"—the world's most widely prescribed anti-cholesterol drug. The plaintiffs alleged that the defendant's Irish patent covered only certain mixtures of the relevant chemical compounds. The plaintiffs submitted a request for voluntary discovery from the defendants, which was rejected on the grounds that the documents sought were irrelevant to the sole issue before the Irish court (all parties agreed this to be "...the interpretation of the patent and the scope of the claims ..."). The dispute on discovery came before Finlay Geoghegan J on 8 April 2005 when she made an order that an issue be tried as to whether the matters set out in paragraph 7 of the reply or other evidence of a similar type is admissible in evidence in the proceedings. The learned judge also made an order that the plaintiffs write a further letter setting out their request for discovery.

The documents sought comprised all documentation passing to and from the European Patent Office, the Danish Patent Office and the US Patent Office relating to the scope of the patent. They also sought all documentation relevant to the scope of the US patent put in evidence in proceedings in the US concerning that patent, and all documentation relating to the construction of, or interpreting by the patentee of the scope of the patent including all internal memoranda and minutes.

In referring to English case law, the learned judge confined himself to two principles of construction of a patent by the court. First that construction is a question of law for the judge, evidence as to what a patent means is inadmissible, and in particular evidence as to what the inventor or patentee (or his representatives) intended it to mean is inadmissible. Second that evidence will be received from witnesses "skilled in the art" concerned, being persons with practical knowledge and experience of the kind of work in which the invention, was intended to be used.

The plaintiffs argued that the documents they wanted showed what persons "skilled in the art" understood the patent to mean. They argued that if the documents were admissible in principle, the fact that they had been prepared by the representatives of the patentee in the context of the proceedings did not make them inadmissible. The plaintiffs contended that they were highly relevant because they could assist the plaintiffs in showing a conflict between what the defendant contends is the meaning of the Irish patent now, and what is contended on its behalf in earlier non-contentious settings in respect of the same or sufficiently similar claims and descriptions.

The defendant argued that the proper description of the documents sought was that they were the expression of the thoughts, or an interpretation by the patentee or its representatives, as to the meaning of the patent and as such were clearly inadmissible and irrelevant to the interpretation of the patent and the scope of the claims. It also submitted that the scope of the documentation was so vast and wide that the discovery in itself would require further investigations.

In considering a number of UK and US decisions, O'Sullivan J followed the dicta of Staughton LJ in the case of *Glaverbel SA v British Coal Corporation*, [1995] RPC 225, who

set out a number of principles of construction: (1) that the interpretation of a patent is a question of law; (2) the court should have regard to the surrounding circumstances as they existed at the date of publication of the specification; (3) the court should admit evidence of the meaning of technical terms; (4) the whole document must be read together; (5) the court must adopt a purposive construction rather than a purely literal one; (6) subsequent conduct is not available as an aid to interpretation; (7) a claim must not be construed with an eye on prior material in order to avoid its effect.

O'Sullivan J, in distinguishing the case relied upon by the plaintiffs of *Rohm and Hass Company v Collag* [2002] 28 FSR 445 on its facts, also refused to follow US case law and admit the documents sought when doing so would involve abandoning a well-developed principle of patent law on this side of the Atlantic. The learned judge found that the representations sought to be discovered were inadmissible because they were representations which came into existence and were made for the purpose of indicating the thoughts, intentions and opinions of the inventor and were inadmissible because they were irrelevant to the sole issue before the court in these proceedings. He held that were the plaintiff to succeed, any documents coming from any source generated by the representatives of the patentee were all in principle admissible notwithstanding that they came into existence, unambiguously it may be, to show the thoughts and intentions of the patentee and its representatives. He held that it would be difficult to see what could be excluded.

It may be observed that despite encouragement in that regard, the court did not follow the approach of the United States courts in determining patent construction. O'Sullivan J quoted Hoffman LJ in *Kirin-Amgen Inc v Hoechst Marion Roussel Ltd* [2004] UKHL 46 and agreed that "life is too short" and found against undertaking extensive searches in foreign patent offices to consider the comments of the patentee or their representatives in aid of the construction of the patent.

Patent and Costs

Re Sankyo Company Ltd, unreported, High Court, Kelly J, 10 January 2005.

This case involved the revocation of a Supplemental Patent Certificate (SPC). The petitioner applied to have Sankyo's patent revoked on the grounds that it was invalid. The petitioner issued proceedings, to which the plaintiffs consented, for the revocation of the patent. An order on consent that the SPC could be revoked was made. However, the respondent objected to the award of costs in favour of the petitioner and sought their own costs.

The respondents claimed that the petitioner failed to send a warning letter prior to the presentation of the petition, arguing that a prudent litigator would have sent such a letter. If the letter had been sent then the current litigation would not have been necessary.

Kelly J considered the position with reference to the related English case of *Merial Ltd v Sanakyo Company Ltd*, unreported, Mann J, 16 December 2004. In *Merial*, the respondents sent a letter to the petitioner's solicitors agreeing to consent to the revocation but at the same time failed to

withdraw their defence. In what was described by the learned judge as having their cake and eating it, he compared this behaviour to what the respondents in this case were doing—essentially offering qualified consent.

He held that although it might be prudent for a party to send a warning letter prior to instituting revocation proceedings in certain circumstances, there is no necessity, and the fact that a party does not is not fatal in respect of costs. He described it as “fanciful” to suggest that the dispatch of a warning letter would have resulted in different behaviour on the part of the respondent. In making an order for the revocation of the patent, the judge found no reason why he should depart from the normal practice and granted the costs of the proceedings in favour of the petitioner.

The determination of the High Court demonstrates the difficulty in persuading the court to depart from the normal rule guiding the exercise of its discretion in respect of costs, namely that costs follow the event, even in circumstances where no warning letter has been sent prior to the commencement of proceedings. However, as noted by Kelly J, the prudent course remains to send a warning letter where circumstances allow.

Trademarks and Injunctions

Metro International SA, Tidnings AB Metro, Fortunegreen Ltd v Independent News & Media PLC, unreported, High Court, Clarke J, 7 October 2005.

Clarke J granted an interlocutory injunction to the plaintiffs restraining the defendant from infringing the plaintiff's trade mark “METRO”.

The third named plaintiff in the case, in a joint venture involving the first named plaintiff and Associated Newspapers Ltd were to launch a free daily newspaper called “METRO” which was to be distributed by hand at busy locations in Dublin. The second named plaintiff held the Irish trade mark registration of “METRO” as a trade mark for newspapers. The first named plaintiff was the parent company of the Metro International Group, an association that published free daily newspapers worldwide under the name “METRO”. It was intended that the third named plaintiff would publish in Ireland a similar free newspaper using the title “METRO”.

The defendant also proposed to launch a free daily newspaper called in full “Herald Metro Edition”, incorporating the word “METRO” in the name and masthead and advertising it as a free newspaper. The defendant was a publisher of numerous newspapers, including the *Evening Herald*.

The proposed masthead of the defendant's free daily newspaper incorporated both the words “Evening Herald” and “Metro Edition”. The defendants established in evidence that its paper, the *Irish Independent*, had made use of the term “Metro” in describing certain editions of its newspaper or in relation to supplements. The judge noted that the intention of the defendant to publish its free newspaper was at least in significant part a reaction to the proposal by the third named defendant in order to protect its legitimate business interests.

The court in asking whether there was a serious issue to be tried, considered s 14(2) of the Trade Marks Act 1996. The plaintiffs argued that their trade mark was infringed, as the

sign similar to the mark was used in services identical to that for which the trade mark was registered. They argued that there would exist a likelihood of confusion on the part of the public, which included the likelihood of association of the sign with the trade mark. In deciding upon whether he should grant an injunction, the judge pointed out that it was not for the court to ask at this stage whether there was the likelihood of association of the sign with the plaintiff's registered trademark, but it was necessary for the court to determine whether or not there was a serious issue to be tried in that regard.

In relying on the European case of *Sabel BV v Puma AG and Others* [1997] ECR I-6191, the judge applied the following criteria: that the likelihood of confusion must be appreciated globally, taking into account all factors relevant to the circumstances of the case. The judge concluded that there was a serious issue to be tried, as he was of the view that at trial there was a sufficient likelihood of confusion so as to meet the test for infringement.

The judge then turned to the question of the adequacy of damages and where the balance of convenience lay. He applied the test identified by McCracken J in *B & S Ltd v Irish Auto Trader Ltd* [1995] 2 IR 142 that: (1) an interlocutory injunction be refused if damages would adequately compensate the plaintiff; (2) if not, an interlocutory injunction should be granted if the plaintiff's undertaking as to damages would adequately compensate the defendant should he be successful at trial; (3) if damages were not to fully compensate either party then the court may consider all relevant matters in determining where the balance of convenience lies; (4) if all matters are equally balanced the court should preserve the status quo; (5) where the arguments are balanced the court may consider the relative strength of each party where the strength of one case is disproportionate to another.

The judge felt that it was important for the court to take into account in addressing the question of whether damages may be an adequate remedy, whether the nature of the matter which is alleged to be interfered with is traditionally protected by injunction rather than simply compensated for in damages. The judge, while fully accepting that the primary consideration of the court in assessing the adequacy or otherwise of damages at the interlocutory stage is the loss that might be sustained in the period between the refusal of an injunction and the trial, was of the view that the court could have regard to the question of whether the right sought to be enforced by the injunction was one which was of a type which the court will normally protect by an injunction even though it might, in one sense, be possible to value the extinguishment of diminution of that right in monetary terms.

The judge referred to the fact that the market for free newspapers was relatively unexplored in Ireland. Assessing damages was done in a speculative way, as the case did not concern an established market. What was established was that the early period of the publication of newspapers is of crucial importance, especially in considering the advertising revenue involved in newspapers.

In the circumstances the judge was satisfied that although there would be an inconvenience on both parties, the likelihood was that the consequences for the plaintiffs of not obtaining the injunction but succeeding at trial would be

significantly greater than the corresponding consequences for the defendant of being enjoined pending trial but being released from that injunction upon being successful.

In granting an interlocutory injunction, the judge concluded that it might be possible for the defendants to devise a masthead coupled with undertakings sufficient to satisfy that it was unlikely that the word “Metro” would become synonymous with the defendant’s free newspaper. He gave the defendants liberty to apply to the court to vary the order made to permit publication under an alternative masthead which did not give rise to a serious issue to be tried as to infringement.

Note: The following week, the defendant submitted a masthead to the court, which was accepted by the judge. The masthead did have the words “Metro” in the title but in a small font and with the word “edition” attached to it in accordance with its established usage of the phrase in the *Irish Independent* newspaper.

Copyright, infringement and damages

Tommy Hilfiger Europe Inc. and Tommy Hilfiger Euro BV v Derek McGarry t/a ‘LIFEJACKET’, Goodstock Ltd and Lifejacket Ltd, unreported, High Court Carroll J, 8 March 2005.

Carroll J awarded damages to the plaintiffs for infringement in the following circumstances. The plaintiff owned a well-known American clothing brand, “Tommy Hilfiger”, which was to be introduced into Ireland in 1999. The first named defendant was selling a brand at a fashion fair when a representative of the plaintiff observed him selling copies of “Tommy Hilfiger” garments along with other garments named “Tommy Sports”. He instructed his solicitors to bring an application for an order made under s 20 of the Trade Marks Act 1996, which was granted by Judge Macken.

An interlocutory application was heard on 25 March 1999 and the court granted certain relief. There could be a

permitted sale of certain garments by the defendants, those named “Tommy Sports”, but garments listed in schedule 2, namely the “Tommy Hilfiger” garments were not to be sold, (the defendant applied in March 1999 to register “Tommy Sports” as a trade mark, but this was still pending at the time of trial). The defendant contested the prohibition on the sale of those garments—the judge found that the use of the word “Tommy” and “Tommy Sports” was sufficient to allow the garments to benefit from the association (as they were placed next to the “Tommy Hilfiger” garments) and amounted to passing off.

The judge also considered whether after an amount of time, the garments manufactured as “Tommy Sports” could be the subject matter of passing off. The judge concluded that if the registrar of trademarks refuses to grant a trade mark, then the use of the word “Tommy” would amount to passing off.

In holding that the plaintiffs were entitled to an order restraining the first and third named defendants from infringing any of the plaintiff’s trade marks and an order restraining those defendants from passing off their clothing or that of a third party as those of the plaintiffs, she awarded damages for infringement.

The modest damages awarded (€10,000) were due to the speed with which the plaintiffs took action, and were to be halved in the event that the registrar of trade marks granted a trademark in “Tommy Sports” to the second defendant company.

It is interesting to note that the judge had no hesitation in making an order personally against the first defendant citing the case of *MCA records Inc v Charly Records Ltd* [2003] 2 BCLC 93. She stated that the first named defendant had procured and directed the wrongful acts, and as such was a joint tortfeasor. The joinder of individuals, such as company directors, as co-defendants in infringement proceedings taken against corporate defendants can often have a very significant effect on a defendant’s approach to proceedings and this case contains an extremely useful statement of the circumstances in which the joinder of such individuals is appropriate.

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ensions Update

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Pensions Directive

In 2003 the Council of Ministers of the European Union adopted Directive 2003/41 on the activities and supervision of Institutions for Occupational Retirement Provision (IORPs).

The aims of the Directive are to provide:

- (1) An internal market for occupational retirement provision;
- (2) Protection for members and beneficiaries of pension schemes;
- (3) Security and efficiency—particularly in relation to investments; and
- (4) A framework under which pension schemes can operate on a cross-border basis.

The Directive lays down minimum prudential and investment requirements for pension schemes and allows for the establishment of cross-border pension schemes. Pension schemes are referred to in the Directive as “Institutions for Occupational Retirement Provision”, or IORPs. Hence, the Directive tends to be referred to as the “IORPs Directive”. This update summarises the key changes brought about by Ireland’s implementation of the IORPs Directive.

The IORPs Directive was implemented in Ireland with effect from 23 September 2005. This date was the deadline for implementation by Member States. Transposition of the Directive was achieved through the Social Welfare and Pensions Act 2005 (primarily by the insertion of a new Pt XII into the Pensions Act 1990), the Finance Act 2005, and also through secondary legislation: the Occupational Pension Schemes (Cross-Border) Regulations 2005 (SI No 592 of 2005); the Occupational Pension Schemes (Investment) Regulations 2005 (SI No 593 of 2005); the Occupational Pension Schemes (Trustee) Regulations 2005 (SI No 594 of 2005); and the Occupational Pension Schemes (Funding Standard) (Amendment) Regulations 2005 (SI No 595 of 2005).

Cross Border Schemes

An occupational pension scheme established in Ireland can apply to the Pensions Board under Pt XII of the Pensions Act 1990 to become a cross-border scheme. The conditions for authorisation are set out in s 149 of the Pensions Act 1990. Once authorisation is granted, the cross-border scheme can operate in other EU Member States which have implemented the IORPs Directive. The Board has the power under s 140 to revoke authorisation. Section 151 sets out the requirements that the cross-border scheme must satisfy before contributions can be accepted from an employer in another Member State.

Following the implementation of this Directive, an Irish scheme can, if properly authorised, include employees from other companies in a multi-national group residing in, for example, the United Kingdom and the Netherlands. The Pensions Board will be responsible for regulating the scheme. In addition to Irish regulatory requirements, the trustees will be required to comply with the social, labour and tax laws of any country in which it operates (in the example, the UK, the Netherlands and Ireland) in respect of the employees in that country. It is expected that some investment restrictions will also apply at Member State level.

The legislation implementing the IORPs Directive also allows a pension scheme to be established and authorised in Ireland but have no Irish members, just members from other EU States.

Finally, a scheme established in another EU Member State and authorised by that State’s pensions regulator can include members in Ireland even though the scheme is not established or authorised in Ireland. In that case, the overseas scheme must comply with Irish social, labour and tax laws in respect of its Irish members.

One of the requirements of the IORPs Directive is that cross-border schemes must be fully funded at all times. Accordingly, it is believed at this point that cross-border

defined benefit schemes are unlikely to emerge, at least in the short or medium term. The emphasis will be on the development of cross-border defined contribution schemes.

Prudential and Investment Requirements

As well as introducing a mechanism to allow for the development of cross-border schemes, the IORPs Directive has required Irish legislation to be amended regarding certain prudential and investment requirements. These requirements apply to all funded occupational pension schemes, not just cross-border schemes. Irish legislation already includes most of the requirements, as it is quite advanced by European standards. However, there are a few issues that needed to be addressed in the Irish context and these are set out in the balance of this update.

Statement of Investment Policy Principles (SIPP)

All schemes above a certain size are, with effect from 23 September 2005, required under s 59(1B) of the Pensions Act to prepare and maintain a written statement of the investment policy principles (the SIPP) applicable to the scheme. This applies to both defined benefit schemes and defined contribution schemes. It is not required for schemes of less than 100 active and deferred members (pensioners are not counted). The trustees must review the statement at least every three years and revise it whenever there is any change in investment policy which is inconsistent with the statement.

The SIPP must be in writing and must include:

1. the investment objectives of the trustees;
2. the investment risk measurement methods;
3. the risk management processes to be used; and
4. the strategic asset allocation with respect to the nature and duration of pension liabilities.

These conditions are stipulated under the Occupational Pension Schemes (Investment) Regulations 2005.

Investment Rules

The Occupational Pension Schemes (Investment) Regulations 2005 set out a number of investment rules that must be complied with from 23 September 2005 by all pension schemes, both large and small, other than one-member arrangements (on which see “Borrowing Rules” below). The rules largely follow the text of the IORPs Directive. The following is a summary.

The assets must be invested in a manner designed to ensure the security, quality, liquidity, and profitability of the portfolio as a whole having regard to the nature and duration of expected liabilities.

Assets must be invested predominantly on regulated markets and assets not on regulated markets must be kept to a prudent level. “Predominantly” is not defined but the Pensions Board has taken the view that it means more than 50 per cent of the scheme assets. Investment on regulated markets is tested on a look-through basis, so unitised funds

satisfy the rule if the underlying assets satisfy the rule. Regulated markets are, in general terms, the stock markets. As property is not on a regulated market, any investment in property is restricted, as would be any unitised or collective property funds or arrangements.

Assets must be properly diversified. There are no criteria set out as to what this means. Investment in derivatives is only permissible if they contribute to a reduction in investment risk or facilitate efficient portfolio management.

Ireland has availed itself of a derogation in the IORPs Directive with regard to investment in the employing company (self-investment). Accordingly, self-investment is permitted although there are existing restrictions on self-investment. Self-investment cannot be taken into account in determining if a defined benefit scheme meets the funding standard under the Pensions Act. Also, small self-administered schemes (generally schemes with fewer than 12 members) cannot invest in the employing company. This is a requirement of the Revenue Commissioners.

Borrowing Rules

Borrowing within the pension scheme is only permitted for liquidity purposes and only on a temporary basis. However, there is an exemption for one-member arrangements. In general, a one-member arrangement is defined as a scheme established for one-member (who will always be the only member) and that member has discretion on how the fund is invested. There are no restrictions on borrowing for a one-member arrangement.

Actuarial Valuations

One important change in relation to actuarial valuations for defined benefit schemes is that valuations and funding certificates now have to be prepared every three years—up to now it was every three and-a half years. This applies to all valuations and funding certificates. Where a valuation has an effective date on or after 23 September 2005, it is the next one that must be prepared within three years.

Minimum Standards for Trustees

The IORPs Directive has applied the “prudent person” test for trustees of pension schemes. This is the test that would have already been applicable to trustees in Ireland under general trust law most recently re-stated in Ireland by Murphy J in *Stacey v Branch* ([1995] 2 ILRM 136, at 142); but, in implementing the Directive, the legislation did not include any statutory re-statement of the duty, and so the common law duty remains. The prudent person test is that a trustee must use as much diligence as a prudent person of business would exercise in dealing with his or her own affairs. In selecting investments, the trustee must take as much care as a prudent person would take in making an investment for the benefit of persons for whom the trustee felt morally bound to provide.

Section 59A(2) of the Pensions Act and the Occupational Pension Schemes (Trustee) Regulations 2005 require trustees to have qualifications and experience relevant to investment of the scheme’s resources. Trustees will be taken to possess

such qualifications if they have entered into an investment management agreement or agreements with one or more investment firms under which the investment firms provide an investment service. Alternatively, the Trustees will be taken to possess the necessary qualifications and experience if they can satisfy the Pensions Board that they have or have access to such qualifications and experience as the Board considers appropriate; where these requirements are met by at least one trustee on the trustee board, then the whole board will be regarded as satisfying the requirements.

There are also certain persons who are disqualified from acting as a trustee. These are:

1. undischarged bankrupts;
2. a person who has made a composition with creditors and his or her obligations have not been discharged;
3. a person convicted of an offence of fraud or dishonesty;
4. in a company, any director of which would fail the above conditions; or
5. a person who is the subject of a disqualification or restriction order under the Companies Acts.

Ireland/UK Dual Approved Schemes

A number of pension schemes operate within both Ireland and the UK on a dual-approved basis between the Irish and UK authorities. Regulations have been in place for some time in both jurisdictions in relation to such schemes. The IORPs Directive will apply to such schemes and they will be required to seek authorisation from either the Irish or UK pensions regulator to operate as a cross-border scheme. In addition, defined benefit schemes will have to be fully funded. However, transition provisions are being put in place to give such schemes time to comply with the IORPs Directive or,

alternatively, to split into separate Irish and UK schemes and cease to be cross-border schemes.

Conclusion

Following the implementation of the Directive, multi-national employers operating in more than one EU Member State are considering the implications of the IORPs Directive and the advantages of establishing a cross-border scheme. The general view, at present, is that this will largely be confined to defined contribution schemes.

Trustees with schemes of 100 or more active and deferred members are now required to prepare a Statement of Investment Policy Principles, and all trustees will now need to review their investment agreements in light of the prudential investment requirements of the regulations, in particular, issues such as diversity, regulated markets, security, quality and liquidity. Investment agreements may need to be amended to incorporate explicitly these requirements.

There are issues for defined contribution schemes, particularly those giving investment choice to the members. The trustees will have to comply with the above investment requirements, and this could well limit the investment choices offered and may require the trustees to take a more active role in overseeing the investment choices that are exercised by members.

Small self-administered schemes that have more than one member may need restructuring so that each member has a separate scheme. This will give greater freedom in relation to investment outside of regulated markets (such as in property) and will permit borrowing.

Ireland/UK dual-approved schemes will need to consider what action (if any) they need to take following the implementation of the IORPS Directive.

C Company Law Update

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Barrister at law

The Conduct of Directors Generally and Restriction

The High Court has adopted a succinct expression of the legal test to determine an application under section 150 of the Companies Act 1990 that incorporates the provisions of that Act and the relevant decisions of the Supreme Court. It is [adapted from Finlay Geoghegan J's judgment in *Re SPH Ltd (in voluntary liquidation) Fennell v Shanahan*, unreported, High Court, 25 May 2005] and reprinted here after:

Section 150 of the Companies Act 1990 imposes a mandatory obligation on the High Court to make a declaration of restriction in respect of persons to which it applies unless the Court is satisfied 'as to any of the matters specified in sub-s. (2)'. The relevant matters to such an application are 'that the person concerned has acted honestly and responsibly in relation to the conduct of the affairs of the company.

An application under s 150 is not a normal *inter partes* adversarial application. The onus of establishing that he acted honestly and responsibly rests on the director. The practice direction of the President of the High Court in relation to voluntary windings up requires a liquidator to put before the court those matters which he considers the court should take into account in determining whether the director has acted honestly and responsibly. Whilst in practical terms a director may primarily seek to address the matters raised by the liquidator, the director is not relieved of the general onus established by s 150 of the Act of 1990.

The matters to which the court should have regard in determining the responsibility of a director for the purposes of s 150(2)(a) as set out by Shanley J in *La Moselle Clothing Ltd v Soualhi* [1998] 2 ILRM 345 and as approved by the Supreme Court in *Re Squash (Ireland) Ltd* [2001] 3 IR 35 are:

- (a) The extent to which the director has or has not complied with any obligation imposed on him by the Companies Acts 1963–1990.
- (b) The extent to which his conduct could be regarded as so incompetent as to amount to irresponsibility.
- (c) The extent of the director's responsibility for the insolvency of the company.
- (d) The extent of the director's responsibility for the net deficiency in the assets of the company disclosed at the date of the winding up or thereafter.
- (e) The extent to which the director, in his conduct of the affairs of the company, has displayed a lack of commercial probity or want of proper standards."

According to a judgment given in the matter of *Tralee Beef and Lamb Ltd (In Liquidation)*, unreported, High Court, Finlay Geoghegan J, 20 July 2004, the court should under para (a) above also have regard to the duties imposed on a director at common law. That case adopted the general formulation of the duty of an individual director as stated by Jonathan Parker J in *Re Barings plc (No.5); Secretary of State for Trade and Industry v Baker* [1999] 1 BCLC 433 in the following terms:

"Each individual director owes duties to the company to inform himself about its affairs and to join with his co-directors in supervising and controlling them".

The court agrees with three general propositions derived by Jonathan Parker J in the same judgment from earlier authorities in relation to duties of directors in the following terms:

- (i) "Directors had, both collectively and individually, a continuing duty to acquire and maintain a sufficient knowledge and understanding of the company's business to enable them properly to discharge their duties as directors.

- (ii) Whilst directors were entitled (subject to the articles of association of the company) to delegate particular functions to those below them in the management chain, and to trust their competence and integrity to a reasonable extent, the exercise of the power of delegation did not absolve a director from the duty to supervise the discharge of the delegated functions.
- (iii) No rule of universal application can be formulated as to the duty referred to in (ii) above. The extent of the duty, and the question whether it has been discharged, depended on the facts of each particular case, including the director's role in the management of the company".

This summary of Jonathan Parker was approved of by the Court of Appeal in *Re Barings plc (No. 5); Secretary of State for Trade and Industry v Baker* [2000] 1 BCLC 523 at p 536. Finally, in accordance with the decision of the Supreme Court in *Re Squash Ireland Ltd* [2001] 3 IR 35, the court should look at the entire "tenure of the respondents as directors and not simply the 12 months in the run up to the liquidation."

Honestly, Responsibly and Restriction

Re 360Networks (Ireland) Ltd O'Ferral v Coughlan, unreported, Finlay Geoghegan J, High Court, 21 December 2004.

In making the restriction orders sought, the court commented that a decision by the directors to appoint a receiver after legal advice was indicative of taking steps to manage the company, despite criticism by the liquidator on the appropriateness of such a step.

Re SPH Ltd; Fennell v Shanahan, unreported, High Court, Finlay Geoghegan J, 25 May 2005.

The court, in making the restriction orders sought, found that due to the transparent nature of tax liability, the directors knew or ought to have known or ought to have had appropriate systems to know that revenue liabilities were undischarged.

Re Mitek Ltd; Grace v Kachkar, unreported, High Court, Finlay Geoghegan J, 21 February 2005.

The court, in making the restriction orders sought, found that director support for a scheme of arrangement before the High Court without having sufficient funding in place, or trading when ostensibly insolvent, would not necessarily preclude a finding of responsible management, but were factors to be borne in mind by the court. In relation to a claim by directors that shortage of funds prevented certain corporate management steps being taken, the court held that a difficult financial position "if anything . . . increased the obligations" on the directors to maintain such controls.

Re Cherby Ltd; Kavanagh v Cooke, unreported, High Court, MacMenamin J, 29 June 2005.

In making the restriction order sought, the court made it clear that delegation of functions does not absolve a director from his overall responsibilities.

Re Xnet Information Systems Ltd; Stafford v Higgins, unreported, High Court, Finlay Geoghegan J, 6 May 2004.

In making the orders sought against the executive directors, the court held that the obligation to disclose an interest in a contract contained at s 194 of the Companies Act 1963 should properly be regarded as a principle of good governance, sound commercial probity, and proper standards in commercial dealings. She held that there is a parallel common law obligation on a director to make one's entire board of directors aware of any interest that he has in a contract.

Re First Class Toy Traders Ltd; Gray v McLoughlin, unreported, High Court, ex tempore, Finlay Geoghegan J, 9 July 2004.

The court refused to make the restriction orders sought. The directors commenced trading with an under capitalised company but were experienced businessmen and two of whom gave personal guarantees in respect of the company's borrowing.

Re Careca Ltd; Martin v Ferris, unreported, High Court, Clarke J, 4 May 2005.

In making the restriction orders sought by the liquidator, the court cited Costello J's decision in *Re Shannonside Holdings Ltd (in liquidation)* unreported, High Court, 20 May 1993 as authority for the proposition that there is a duty to wind up once a company is insolvent. Clarke J held that such a duty "depends on all the circumstances of the case and there may well be appropriate instances, at least for a period of time, it may be appropriate to postpone winding-up pending attempts to deal with the issues that arise by virtue of the insolvency". In *Halley v Nolan*, unreported, High Court, O'Leary J, 1 July 2005, the court declined to make one of the orders sought on the basis that a delay of almost two years in applying to wind up was justified by correspondence with an official administering the "passports for investment" scheme.

Similarly in *Re Mitek Holdings Ltd Grace v Kachkar*, unreported, High Court, Finlay Geoghegan J, 21 February 2005, held that trading while insolvent for four months was not necessarily a reason to restrict a director. Finally in the decision in *Re USIT WORLD plc; Jackson v Colleary*, unreported, High Court, Peart J, 10 August 2005, the court held in refusing the orders sought that, *inter alia*, an apparent failure to have adequate bonding cover up to US\$20 million between the insolvency of the company's insurer on 17 June 2001 and the ostensible insolvency event of 9 September 2001, was not irresponsible, given the approximate turnover of US\$600 million as at October 2001.

Costs and Restriction

Re Mitek Holdings Ltd (In Liquidation) and others, unreported, High Court, Finlay Geoghegan J, 5 May 2005.

A pharmaceutical group (“the Company”) became insolvent after a business interruption following a standards upgrade necessitated by the Irish Medicines Board. Examinership produced an approved scheme of arrangement, the implementation of which was unsuccessful and, despite an attempt to procure more funding, the company was put into official liquidation by the High Court. Two directors were restricted by order of the High Court and an application was made by the Official Liquidator for costs pursuant to s 150(4B) of the Companies Act 1990:

“The court, in hearing an application for a declaration under subsection (1) from the Director, a liquidator or a receiver, may order that the directors against whom the declaration is made shall bear the costs of the application and any costs incurred by the applicant in investigating the matter”.

An issue arose as to whether the phrase “any costs incurred by the applicant in investigating the matter” included remuneration due to the liquidator arising from investigation of the matters involved in the s 150 application and reporting to the Director of Corporate Enforcement pursuant to the obligation arising from s 56 of the Company Law Enforcement Act 2001.

The court confirmed that, in accordance with Ord 74, r 46 of the Rules of the Superior Courts 1986, it was appropriate, when measuring the remuneration of a liquidator not to draw a distinction between work done by the liquidator or other members of his firm.

The Companies Act 1990 contained no definition of the terms “costs” or “costs incurred by the applicant”. The court applied the ordinary rules for construction and referred to the decision of the Supreme Court in *Rahill v Brady* [1971] Ir 69 at 86:

“In the absence of some special technical or acquired meaning, the language of a statute should be construed according to its ordinary meaning and in accordance with the rules of grammar. While the literal construction generally has prima facie preference, there is also the further rule that in seeking the true construction of a section of an Act the whole Act must be looked at in order to see what the objects and intention of the legislature were; but the ordinary meaning of words should not be departed from unless adequate grounds can be found in the context in which the words are used to indicate that a literal interpretation would not give the real intention of the legislature.”

Finlay Geoghegan J found that the literal meaning of the words “costs incurred by the applicant” is money that an

applicant is obliged to pay to a third party and excludes any of his own remuneration. The learned judge rejected the submission that the purpose of the legislature in amending the Companies Act 1990 (and creating s 150(4B)) was to ensure that the additional costs incurred in a winding up as a result of the s 150 application were borne by restricted directors, and not the creditors. Finlay Geoghegan J. found the force of the literal meaning of s 150(4B) and the absence of the phrase “costs incurred by the liquidator” to exclude the said submission. In doing so she quoted from a section of *Craies on Statute Law* (1971) (7th ed) at p 65 which had been approved by Blayney J in the Supreme Court in *Howard v Commissioner for Public Works* [1994] IR 101 at 151:

“The cardinal rule for the construction of Acts of Parliament is that they should be construed according to the intention expressed in the Acts themselves. If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the lawgiver. ‘The tribunal that has to construe an Act of a legislature, or indeed any other document, has to determine the intention as expressed by the words used. And in order to understand these words it is natural to enquire what is the subject matter with respect to which they are used and the object in view.’ [per Lord Blackburn in *Direct United States Cable Co. v Anglo-American Telegraph Co.* (1877) 2 App. Cas. 394]”.

Finlay Geoghegan J held that she could find no grounds for a special meaning in s 150(4B), and the phrase “costs incurred by the applicant” means the costs recoverable on an order for costs from the High Court, when taxed and ascertained, not including the liquidator’s remuneration. The court found assistance in the fact that the phrase “costs, charges and expenses incurred in the winding up” is employed within the general scheme of the Companies Acts 1963–2005 and was not used in s 150(4B).

The court also drew assistance from *Maxwell on the Interpretation of Statutes* (12th ed at pp 256 and 279). Two additional rules were invoked. First that statutes which impose pecuniary burdens are subject to a strict construction and that such charges must be imposed by clear and unambiguous language. The court did not identify any clear and unequivocal intention to impose a burden, which included the remuneration of the liquidator, in the usual meaning of that phrase. Second, that a presumption exists that a word carries the same meaning regardless of its location within an Act. The court held that the word “costs” carried the same meaning throughout the Companies Act 1990. Accordingly, the court disallowed the award of costs as it applied to the remuneration of the liquidator and his firm.

It is noted from the logic of the judgment in *Mitek* that if either of the other two parties with *locus standi* under section 150(4A) (a receiver or the Director of Corporate Enforcement) seek to restrict a director of an insolvent company, then the costs of accountants retained to

“investigate the matter” will be determined by section 150(4B), only be recoverable if incurred on an “outsourced” basis—no cost may be recovered that is not due by the relevant applicant to a third party. Similarly, it appears possible to argue that professionals retained by the liquidator to “investigate the matter”, such as solicitors or barristers, are also within s 150(4B).

Retrospective Costs

Re Tipperary Fresh Foods Ltd (In Liquidation), unreported, High Court, Finlay Geoghegan J, 18 March 2005.

The official liquidator of an insolvent company (“the Company”) obtained, unopposed, orders restricting two directors of the Company. The liquidator sought the costs of the application and of investigating the matter pursuant to s 150(4B) of the Companies Act 1990. It was not disputed that Ord 99 of the Rules of the Superior Courts 1986 gave the court jurisdiction to make an order for costs, but the restricted directors submitted that to permit the liquidator to rely on s 150(4B) would be to give that subsection a retrospective application not warranted by that Act.

Section 150(4B) was created by the commencement of s 41 of the Company Law Enforcement Act 2001 by the Company Law Enforcement Act 2001 (Commencement)(No 5) Order 2002 (SI No 53 of 2002) on 1 March 2002. The official liquidator claimed remuneration for work carried out after the commencement of s 150(4B) on 1 March 2002. The liquidator was appointed on 26 March 2001.

Finlay Geoghegan J identified three issues:

1. Would an order for costs pursuant to s 150(4B) be a retrospective application of that subsection?
2. If so, does the presumption against retrospectively apply as s 150(4B) applies to costs? And;
3. If the presumption does apply, is this warranted by s 41 of the Company Law Enforcement Act 2001?

The learned judge recalled the explanation of the nature of retrospective legislation by O’Higgins CJ in his judgment in the Supreme Court decision *Hamilton v Hamilton* [1982] Ir 466, at 473 to 474, where the then Chief Justice adopted the text of *Craies on Statute Law* (7th ed) at p 387 that legislation operates retrospectively where it “takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes anew duty, or attaches a new disability in respect to transactions or considerations already past”.

The Official Liquidator argued that the operation of s 150(4B) was not retrospective as the for costs claimed were incurred after its commencement. The court noted that from the date of the commencement of s 150, a director of an insolvent company was potentially liable to an order for costs under Ord 99 of the Rules of the Superior Courts 1986, and that the court could not have made the order for costs sought by the liquidator under s 150(4B) before its commencement on 1 March 2002. Finlay Geoghegan J found that s 150(4B) amounted to “the creation of ‘a new obligation’ in respect to ‘transactions . . . already past’” and accordingly was retrospective in operation.

The presumption against retrospective construction does not apply to legislation that only affects the practice and procedure of the courts. The court referred to the decision of Murphy J in the judgment in the High Court in *Re Hefferon Kearns Ltd (No 1)* [1993] 3 IR 177 at p 184 in which, having referred to the explanation of retrospective legislation by O’Higgins CJ in *Hamilton v Hamilton* [1982] IR 466, at 473 to 474, Murphy J stated:

“The Chief Justice was thus distinguishing retrospective legislation properly so called from other statutes having a retroactive effect such as statutes dealing with the practice and procedure of the courts which enabled procedures to apply to actions arising before the operation of the statute”.

Finlay Geoghegan J approved the following quotation from *Maxwell on Statutes* (12th ed, 1969) explaining the exclusion of the practice and procedure of the courts from the presumption against retrospective construction:

“No person has a vested right in any course of procedure but only the right of prosecution or defence in the manner prescribed for the time being, by or for the court in which he sues, and if an Act of Parliament alters the mode of procedure, he can only proceed according to the altered mode”. (p 222)

The liquidator argued that s 150(4B) was such a procedural enactment and relied on a statement in *Maxwell on Statutes* (12th ed, 1969), which stated that costs rules are procedural for the purposes of retrospectivity. The passage cited two pre-independence English judgments. Finlay Geoghegan J considered the decisions and questioned the weight that should be attached to the comments in *Maxwell*. She quoted Blackburn J in the second of the two decisions (*Kimbray v Draper* [1868] LR 3 QB 160):

“The cannon of the decision in *Wright v Hale* [1860] 30 L.J. Ex. 40 is, that when the effect of an enactment is to take away a right, prima facie it does not apply to existing rights; but where it deals with procedure only, prima facie it applies to all actions pending as well as future. Whether the Court of Exchequer applied that test properly, in holding it was matter of procedure where a statute enabled a judge to deprive a plaintiff of costs in a case where but for the statute he would have been absolutely entitled to them, may be questionable; but for the decision in that case I certainly should have been inclined to think this was taking away a right. The present case, however, is far more clearly matter of procedure, as the statute only imposes on the plaintiff the alternative of giving security for costs or proceeding in the county court. This is certainly much more matter of mere procedure than was the case in *Wright v Hale*, and we are bound by

the principle of that case, and the rule must therefore be absolute". (p 162)

Finlay Geoghegan J did not view s 150(4B) as being merely of a procedural nature. She drew a distinction between legal costs and "costs" in s 150(4B), which are "any costs incurred by the applicant in investigating the matter". Section 150(4B) was described by the court as not "included in the previous principle" and "a new monetary obligation". The court held that it was correct to apply a retrospective construction to s 150(4B). The discussion of the new principle of costs in s 150(4B) may be reconciled with the later decision in *Re Mitek Holdings Ltd (In Liquidation) and others*, (unreported, High Court, Finlay Geoghegan J, 5 May 2005) first as it does not state that the liquidator's remuneration is covered by the section and second as it preceded the close examination afforded in *Mitek* to the action of the costs provision.

The court in *Tipperary Freshfoods* stated that the correct adopted the approach of Murphy J in *Re Hefferon Kearns Ltd (No 1)* [1993] 3 IR 177 at p 186 in which he stated that the correct way to determine the issue of retrospective application was in accordance with the decision of the Supreme Court in *Hamilton v Hamilton* [1982] IR 466. Murphy J stated at 186:

"[the enactment] must be construed on its own terms and in the context in which it appears to see if the legislature has clearly and unequivocally declared its intention that this legislation should take effect retrospectively".

Finlay Geoghegan J examined s 41 of the Company Law Enforcement Act 2001 and held that s 150(4B) applied to all applications brought under s 150(4A)—being the section that gave, among others, the liquidator the *locus standi* to apply to restrict a director. The court referred to the scheme of s 56 of the Company Law Enforcement Act 2001, which was commenced on a phased basis, and was extended to the class of liquidations that included *Tipperary Foods Limited* on 1 June 2003. The Oireachtas was held to have clearly intended the retrospective effect of s 56, which itself gave rise to the obligation on a liquidator to bring the application under s 150(4A). On this basis the court held that the costs provisions of s 150(4A) were entitled to retrospective application.

The court also questioned the weight to be attached to an *ex tempore* decision of Finlay Geoghegan J in *Re Sarth Investments Ltd (in receivership and liquidation)* (unreported, High Court, 26 July 2004), which she distinguished on the basis of that that case did not afford an opportunity to examine the operation of s 150(4A) in sufficient detail.

Costs

Re Tipperary Fresh Foods Ltd (In Liquidation), unreported, Finlay Geoghegan J, 5 May 2005.

The court followed the decision in *Re Mitek Holdings Ltd (In Liquidation)*, unreported, High Court, Finlay Geoghegan J, 5 May 2005 and allowed only the legal costs claimed pursuant to s 150(4B) of the Companies Act 1990.

Honest and Responsible

Re Careca Investments Ltd (In Liquidation), unreported, High Court, Clarke J, 4 March 2005.

A "single purpose" company ("the Company"), despite the successful purchase and sale of land in north County Dublin, became insolvent and was wound up on the petition of the Collector General with substantial Capital Gains Tax Act liabilities. The liquidator applied to restrict the two directors of the Company. No books and records had been kept during the crucial period when the land transaction was struck. A catalogue of absent information was presented to the court. The second respondent director ("the Director") claimed that he had been wrongfully excluded from the affairs of the company, and accordingly had no ability to ensure that proper books were kept. He maintained that this state of affairs altered his responsibilities under the Companies Acts as a director. Without making a determination on the appropriateness of such a defence to a s 150 application, the court found that the Director had not established that he had been "sufficiently excluded from the conduct of the affairs of the Company so as to absolve him from his obligations to ensure that proper books and records were kept". The court took notice of the total absence of any books and records, the quality of the dispute that took place between the directors in relation to control, and the irresponsibility of the acceptance by the Director of part of the proceeds of the Company's land transaction without any accounts.

Duty to Wind Up When Balance Sheet Insolvent (Trading Risk)

Re Careca Investments Ltd (In Liquidation), unreported, High Court, Clarke J, 4 March 2005.

In a decision arising out of the insolvency of a property trading company ("the Company") relating to the restriction the second respondent director ("the Director"), Clarke J cited the decision of Costello J (as he then was) in *Re Shannonside Holdings (In Liquidation)* (unreported, High Court, 20 May 1993) as a remaining authority for the proposition that, in general terms, the directors of an insolvent company are under a duty to seek to have the same wound up. The learned judge reminded that the scope of that duty is dependent on the surrounding facts of a case and that, for a period of time it may be appropriate to "postpone winding up" for "a reasonable period" pending attempts to deal with the issues that underpin the insolvency. Clarke J appeared to view the solvency *challenge* by the company of its capital gains tax liability as possible of resolution other than through liquidation. There was no evidence of any other debts or liabilities. The court held that the Director was prepared to do nothing for several years until prompted by the Revenue Commissioners and accordingly was not acting responsibly by failing to have the Company wound up.

Discovery

Re Silken Construction Ltd (In Liquidation), unreported, High Court, Finlay Geoghegan J, 14 November 2003.

The director respondents to an application brought by the official liquidator of an insolvent company sought discovery of the report made by the liquidator to the Director of Corporate Enforcement under s 56 of the Company Law Enforcement Act 2001. The Ord 31, r 12 of the Rules of the Superior Courts letter gave as reason for discovery of the s 56 report was to allow the respondent to know what the liquidator had told the Director of Corporate Enforcement about their conduct. No contest was offered on the application of Ord 31, r 12 to an application under s 150 of the Companies Act 1990.

The Director of Corporate Enforcement was joined as a notice party. The liquidator and the Director of Corporate Enforcement argued that a s 56 report was not relevant to the determination of the issues in a s 150 application and that its discovery would have the additional effect of inhibiting a frank and candid report. The test of relevance was accepted by both parties to be that identified by Brett LJ in *Compagnie Financière du Pacifique v Peruvian Guano Company* [1882] 11 QBD 55 at p 63:

“It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contained information which may—not which must—either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words ‘either directly or indirectly’ because it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of enquiry, which may have either of those two consequences”.

Finlay Geoghegan J concluded that two matters were at issue in a s 150 application: 1) Did the directors act honestly and responsibly in relation to the conduct of the affairs of the company, and; 2) Is there any other reason for which it would be just and equitable that a declaration of restriction be made. On the basis of the test in *Peruvian Guano*, two of the entries in a s 56 report were relevant: 1) Paragraph 22(g) “[h]as the person demonstrated to you that he has acted honestly and responsibly in relation to the conduct of the Company’s affairs?”, and; 2) Paragraph 31 where a liquidator may ask the Director of Corporate Enforcement to relieve him of the requirement to seek to have the directors restricted. The court identified a third relevant question relating to shadow directors that did not arise in this case (para 21).

It was submitted that a s 56 report was a confidential document due to s 17 of the Company Law Enforcement Act 2001 which states:

“Information obtained by virtue of the performance by the Director of any of his functions which is not otherwise come to the notice of the public, shall not be disclosed, except in accordance with the law by any person including . . .”.

The court held that the phrase “except in accordance with the law” did not prevent discovery of a section 56 report on grounds of confidentiality.

Non-Executive Directors

Re RMF (Ireland) Ltd (In Voluntary Liquidation), unreported, High Court, Finlay Geoghegan J, 27 May 2004.

In an application to restrict directors of an insolvent company (“the Company”), an issue arose as to whether one of the directors (“the Director”) had acted responsibly as a director of the Company in relation to the conduct of its affairs. The Director sought to draw a distinction in terms of corporate responsibility between a non-executive director, which he claimed to be, and an executive director. Finlay Geoghegan J made the following statement:

“The distinction between executive and non executive director is well established in commercial life, if not expressly recognised in the relevant companies legislation. In considering whether a person has acted responsibly whilst a director of the company it appears to me that his court must recognise the distinction between executive and non executive directors. A person may, from time to time be appointed as a non executive director to bring a particular expertise to a board of directors. Where this is done it appears appropriate to consider such persons conduct as director *inter alia* in relation to any such particular agreement or purpose. However, every person who agrees to become a director of a company, whether executive or non executive *or for the purpose* of bringing a particular skill to the board of directors must discharge the general duty of a director which has been summarised by Jonathon Parker J in *Re: Barings plc* (No 5) *Secretary of State for Trade and Industry v Baker* (1999) BCLC 433 and cited with approval in *Re: Vehicle Imports Limited* (unreported, High Court, Murphy J, 23 November 2000) as follows: ‘each individual director owes duties to the company to inform himself about its affairs and to join with his colleagues in supervising and controlling them’.

She went on to make it clear that delegation of supervisory functions does not absolve a director of their accountability for the ultimate supervision of a company.

In determining whether a director has acted responsibly in the context of a s 150 application, the court suggested that a non-executive director may rely upon information provided by executive directors and also rely on the executive directors to carry out normal management functions. She warned that this reliance has a limit, and that if factual circumstances place a non-executive director on notice that further reliance on the executive directors is unsafe or that management functions are not being properly performed then he (the non-executive director) must take action.

The court declined to make a restriction order against the Director, holding that when he became of the financial difficulties of the Company he “took significant steps to deal with the matter” and organised a review by an independent chartered accountant and a search for refinance. The Director resigned following the report of the independent chartered accountant but, in the context of his prior actions, was held to have acted responsibly.

Re Xnet Information Systems Ltd (In Voluntary Liquidation), unreported High Court, Finlay Geoghegan J, 6 May 2004.

In examining the position of two non-executive directors, the court highlighted *faits accomplis* carried out by executive directors in between directors’ meetings. The non-executive directors are indicated to have “taken such steps as they could to procure repayment of loans and ameliorate the perceived damage caused to the Company by the making of the loans” and restriction was refused. Considerable controversy was associated with the loans that were revealed to the non-executive directors as *faits accomplis*. No mention appears to have been made of the power available to all directors to apply to the High Court to require a director to comply with the provisions of the Companies Acts.

This decision reflects the decision of Finlay Geoghegan J in *Re Mitek Ltd; Grace v Kachkar*, unreported, 21 February 2005, in which the court accepted averments to the effect that a non-executive director, introduced by her brother to fulfil the Irish-resident director rule, was effectively excluded from the relevant financial information by the other two directors “[the other directors] were more familiar with the detailed affairs of [the group] and in particular the financial matters than [the Irish resident director]”. There was no detailed treatment of this director’s position.

William Halley v Edward Nolan, unreported, High Court, O’Leary J, 1 July 2005.

The liquidator of an insolvent company (“the Company”) applied to restrict the directors of the Company. The Company was wound up after it had been unsuccessful in obtaining a second round of funding from the “passport for investment” scheme. Criticism was levelled at the directors for failing to wind up the company despite its insolvency for almost two years. The three directors were all part of the same family. The court held that the actions of one director (“the Director”) in seeking additional funding from the Forbairt were honest and reasonable “although with hindsight not perfect”. However, the other directors had taken no further participation in the Company than

the signature of documents at the behest of the Director. This “lack of independent decision making” was held to have not been responsible and the other directors were both restricted.

De facto Directors

Re First Class Toy Traders Ltd Gray v McLoughlin, unreported High Court, ex tempore, Finlay Geoghegan J, 9 July 2004.

A preliminary issue arose in relation to an application brought by an official liquidator to restrict a director (“the Director”) of an insolvent company (“the Company”). One of the respondents to the s 150 of the Companies Act 1990 application claimed that he was not formally appointed as a director, nor was he registered in the Companies Registration Office. The liquidator submitted that he was a *de facto* director.

Section 2(1) of the Companies Act 1963 provides that “a director” includes any person occupying the position of director by whatever name called” and s 1(3) of the Companies Act 1990 requires that that Act be construed as one with the Principal Act. A *de facto* director is a person who assumes to occupy the position of a director or assumes to act as a director of a company. Under s 150 of the Companies Act 1990, the onus of proof was upon the liquidator to prove that a given respondent was a *de facto* director.

Finlay Geoghegan J adopted the approach of O’Neill J in *Re Lynrowan Enterprises Ltd*, unreported, High Court, 31 July 2002 that a *de facto* director is a director within the meaning of s 2(1) of the Principal Act and potentially amenable to restriction. Finlay Geoghegan J then examined the test applied by O’Neill J in identifying a *de facto* director, which was itself distilled from the examination of English decisions by Timothy Lloyd QC sitting as a deputy High Court judge in *Re Richborough Furniture Limited*, [1996] BCLC 507. O’Neill J identified the following three circumstances for identifying a *de facto* director:

1. Where there is clear evidence that a person has been either the sole person directing the affairs of the company, or
2. Is directing the affairs of the company with others equally lacking in valid appointment, or
3. Where there were other validly appointed directors that he was acting on an equal or more influential footing with in directing the affairs of the company.

O’Neill J found Timothy Lloyd QC’s argument influential and placed the following limitation on these circumstances:

“That in the absence of clear evidence of the foregoing and when there is evidence that the role of the person in question is explicable by the exercise of a role other than director, the person in question should not be made amenable to s 150 restriction”.

Finlay Geoghegan J identified her task as to see “whether the individual in question has assumed the status and functions

of a company director” and in doing so noted that the test identified by Timothy Lloyd QC was no longer the preferred test in England. She found the reasoning in the judgment of Jacob J in *Secretary State for Industry v Tjolle* [1998] BCC 282 and the explanation of his approach by Robert Walker LJ in *Re Kaytech International plc, Potier v Secretary of State for Industry* (1999) BCC 390 to be preferable. In *Tjolle*, Jacob J stated at p 290:

“For myself I think it may be difficult to postulate any one decisive test. I think what is involved is very much a question of degree. The court takes into account all the relevant factors. Those factors include at least whether or not there was a holding out by the company of the individual as a director, whether the individual used the title, whether the individual had proper information (e.g management accounts) on which to base decisions, and whether the individual had to make major decisions and so on. Taking all these factors into account, one asks ‘was this individual part of the corporate governing structure?’, answering it as a kind of jury question. In deciding this, one bears very much in mind why one is asking the question. That is why I think the passage I quote from Millett J is important. There would be no justification for the law making a person liable to misfeasance or disqualification proceedings unless they were truly in a position to exercise the powers and discharge the functions of a director. Otherwise they would be made liable for events over which they had no real control, either in fact or in law”.

Finlay Geoghegan J noted that Robert Walker LJ added the following when citing the above passage with approval in *Re Kaytech*, at p 402:

“I do not understand Jacob J, in the first part of that passage, to be enumerating tests which must all be satisfied if de facto directorship is to be established. He is simply drawing attention to some (but not all) of the relevant factors, recognising that the crucial issue is whether the individual in question has assumed the status and functions of a company director so as to make himself responsible under the 1986 Act as if were a *de jure* director”.

To assist it in its task, the court agreed with the formulation of the essential duties of a director by Jonathon Parker J in *Re Barings plc (No. 5) Secretary State for Industry v Baker* [1991] BCLC 433 who said:

“Each individual director owes duties to the company to inform himself about its affairs and to join with his co-directors in supervising and controlling them”.

Finlay Geoghegan J was mindful of the common law powers and duties of a director and took these into account in applying the test that she identified.

In finding that the respondent in question was a *de facto* director, the court took notice of the following facts: the *de jure* directors considered that he had been appointed a director, he agreed to be called “finance director”, he regularly met at what were characterised as “board meetings”, he was a cheque signatory but not an employee, he had full information in relation to the financial affairs of the company, he claimed that he was responsible for the financial affairs of the company, and he was held to have a role that included negotiation in property matters.

Re Mitek Holdings Ltd (In Liquidation), unreported, High Court, Finlay Geoghegan J, 21 February 2005.

Two of the directors of an insolvent pharmaceutical company, that was itself part of a group of companies, were aware that the financial controller was under the direction of a third party, being a director in a related company. The two directors were criticised by the court for a failure to take any steps to supervise or control the financial controller. It may be observed that when the facts in *Mitek* are measured by the test in *First Class Toy*, it is possible to argue that the financial controller’s “master” was a *de facto* director. Equally, in light of the criticism levelled at the directors in *Mitek*, directors place themselves at risk when they knowingly permit a *de facto* director to control an aspect of their company.

Joinder

Re Document Imaging Systems Ltd (In Liquidation) and others, unreported, High Court, Finlay Geoghegan J, 22 July 2005.

The former director (“C”) of an insolvent company was held not to have been a director within 12 months of the winding-up of the company. C subsequently applied, pursuant to Ord 15, r 13 of the Rules of the Superior Courts, to be joined as a party to the application to restrict other directors of the company. Rule 13 provides:

“No cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added. . . .”

C was a creditor and a contributory of the company and wished to support the official liquidator's application to restrict. An expression of the breadth of the discretion by Hardiman J in his judgment in *T.D.I. Metro Ltd v Delap (No 1)* [2004] 4 IR 337 in which the Attorney General sought to intervene in an appeal against an order of *certiorari*:

“Although the Attorney General has not in my view any entitlement as of right to intervene and be heard in the present proceedings he has applied to do so. That is something which the court should consider very seriously. The court has a jurisdiction in its discretion to allow a party to be joined in the proceedings even at the appeal stage where this is considered to be necessary in the interest of justice and where there is no specific rule of law excluding the additional parties at that stage of the proceedings.” (at p 354)

Finlay Geoghegan J held that however wide the discretion, the court must be satisfied that the proposed party is a person whose presence before the court may be necessary in order to enable that court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter. C attempted to rely on a passage from a decision of Shanley J in *Re Steamline Ltd (in voluntary liquidation)* [2001] 1 IR 103 at 106. Shanley J had considered s 150 as originally enacted and in particular the *locus standi* of a creditor to bring such an application and said that “. . . the court ought to construe s. 150(1) in such a way as to promote, rather than restrict, the remedy provided for in that sub-section . . .”. Finlay Geoghegan J stated that s 150 is quite different to that considered by Shanley J and s 150(4A) explicitly defines those with *locus standi* to bring an application (the Director of Corporate Enforcement, a receiver or a liquidator). On this basis, the court held that the only jurisdiction that remained to join a party to a s 150 application under the 1990 Companies Act was if “exceptional circumstances” pertained. The application to join C was refused. No explanation was offered as to such circumstances. The court declined to make a decision on whether C could be joined solely pursuant to Ord 15, r 13 on the basis that no submissions were made to her in that regard.

The court admitted the affidavits proffered by C which the liquidator stated that he wished to rely upon, as “it made no practical sense to rule them out” as he had direct practical knowledge of the company during the material times.

Affidavit Evidence

Re CMC (Ireland) Ltd (In Voluntary Liquidation), unreported, High Court, Clarke J, 4 March 2005.

In an application to restrict directors of an insolvent company, a large volume of evidence in the affidavits referred to whether certain respondent directors had resigned on a given date. Given the marginal importance ascribed to the issue by the learned judge, he determined that he would consider the

matter on the basis of the high point of the respondent directors' cases. The procedure adopted is not of importance given the very low weight attached to the issue but demonstrates the approach of the court to contradictory affidavit evidence in an application that is normally heard without any cross-examination.

USIT WORLD plc; Jackson v Colleary, unreported, High Court, Peart J, 10 August 2005.

In a substantial liquidation of a group of insolvent companies the official liquidator applied to restrict the directors. A large number of affidavits were filed containing a series of conflicts of evidence, which the court attempted to summarise only in its judgment. Peart J noted that the facility to cross-examine was open to all parties and that no notice had been served in this regard. In order to resolve the conflict, one of the respondent directors referred the court to a decision of Browne Wilkinson VC in *Re Lo Line Electrical Motors Ltd*, [1988] Ch 477 at 487 where he said:

“In the present case there are many factual issues on which the evidence given by Mr. Browning in his affidavits directly contradicts allegations made against him by the official receiver. Yet he has not been cross-examined. In my judgment proceedings for disqualification are no different from any other court proceedings: it is not possible for the court to disbelieve evidence given on oath in the absence of cross-examination of the witness. I therefore proceed on the footing that Mr. Browning's evidence is correct.”

Peart J then qualified this statement saying:

“Nevertheless, where matters deposed of by a director/respondent relate less to purely factual matters than to a view held by the director as to the probity of his actions, the Court may of course take into account the fact that such a director will inevitably be seeking to place as favourable an interpretation of facts and events as he can, so as to discharge the onus upon him”.

It is submitted that Peart J was referring to situations where opinion evidence is undisputed on affidavit, and advising that such opinions may be subject to judicial scepticism on the basis of the test operated by the court in an application under s 150 of the Companies Act 1990.

Peart J also held that where a fact is averred to by an applicant liquidator, a mere denial of the truth of that fact by a respondent director will not dislodge a “presumption” that the liquidator's evidence is to be preferred, unless “corroborated by other evidence or from the circumstances generally”.

Peart J in the course of his judgment resolved a series of conflicts of evidence largely, apparently limited to the determination of the s 150 application, in favour of the respondent directors “on the balance of probabilities”, a consistent approach by the High Court in this regard (see for example *Re Mitek Holdings Ltd (In Liquidation)*, unreported,

High Court, Finlay Geoghegan J, 5 May 2005). The conflicts are expressed in the judgment to be of the type referred to by the learned judge as “less purely factual” and are determinative of the reasonableness and responsibility of the directors’ actions.

Post Liquidation Conduct

Re CMC (Ireland) Ltd (In Voluntary Liquidation), unreported, High Court, Clarke J, 4 March 2005.

The court considered the legal status of the actions of directors in the period after the appointment of a liquidator to see whether it was appropriate to refer to that conduct in an application for restriction pursuant to s 150 of the Companies Act 1990. Clarke J referred to a comment in Shanley J’s judgment in *Re La Moselle Clothing (in liquidation)* [1998] 2 ILRM 345 at 353. Shanley J held that in relation to the requirement that the director must satisfy the court that there is no other reason why it would be just and equitable to restrict the director, that permitted the court to take into account any relevant conduct of the director after the commencement of the winding up. Clarke J confirmed that this was the appropriate test notwithstanding the amendments to s 150.

In examining the actions of the directors post liquidation, Clarke J pithily summed up the obligations of a director:

“It is axiomatic that the duties of persons who have served as directors include an obligation to be of any assistance that they can to the liquidator in the conduct of the liquidation. The rights of creditors of a company are likely to be compromised not only by the fact that a company is insolvent and unable to pay its debts as of the date of liquidation but also such rights can be further compromised where due to inappropriate action or inaction on the part of directors or former directors the liquidator is prevented from being in a position to effectually get in the assets of the company for the purposes of discharging the liabilities due to the creditors to the greatest extent possible and as soon as possible . . . the court is entitled to take into account any conduct on the part of directors or former directors which amounts to inappropriate retention of the companies assets subsequent to the commencement of the winding up”.

The learned judge opined that although he made an order restricting the respondents, for the purposes of s 152 of the Companies Act 1990, the conduct was at the lower end of the spectrum of seriousness. The actions of the directors had been the retention of an asset of the company (a forklift truck) for approximately six months, they failed to meet the liquidator for one year following his appointment, and they failed to consult the books and records of the company when filing witness statements detrimental to the interests of the company in legal proceedings in the Netherlands.

Conduct in Relation to Non-Irish Companies

Re Mitek Holdings Ltd (In Liquidation), unreported High Court, Finlay Geoghegan J, 21 February 2005.

In the course of her judgment, Finlay Geoghegan J. had regard to the actions of respondent directors in order to determine whether directorships of non-Irish companies gave rise to competing obligations, in the context of a cross-border group of companies. The court made it clear that it was for this narrow purpose only. It is likely that future cases involving liquidation of companies with cross-border effect, may require the restriction of non-Irish located directors if the winding-up is administered from Ireland in accordance with the European Communities (Corporate Insolvency) Regulations 2002 (SI No 333 of 2002).

Delay

Re Knocklofty House Hotel Ltd (In Liquidation), ex-tempore, unreported, High Court, Finlay Geoghegan J, 5 April 2005.

In considering an application for restriction by the official liquidator of related companies, the court dealt with the delay of 11 years in bringing the application. The court applied the test summarised by Hamilton CJ in *Primor plc v Stokes Kennedy Crowley* [1996] 1 IR 459 as applied by Fennelly J in his judgment in *Duignan v Carway* [2001] 4 IR 550. *Duignan* dealt with a delay in prosecuting rather than a delay in commencement of proceedings and Finlay Geoghegan J held that similar if not more exacting principles applied than those identified in *Primor*.

Specifically, the learned judge noted that s 150 applications were not “strictly speaking *inter partes* proceedings” and held that slightly differing factors ought to be taken into account:

1. The legislative intent of s 150, as identified by the Supreme Court in *Duignan*, includes a public interest in the qualification of the rights of directors of insolvent companies and a protection for third parties;
2. The constitutional entitlements of respondent directors to have their applications determined in accordance with the constitutional guarantee of fair procedures, including a right to fair and speedy trial as identified by Fennelly J in *Duignan*;
3. The special features of s 150 in imposing an onus on respondent directors to establish that they acted honestly and responsibly and the absence of any discretion of the court as to the period for restriction (five years);
4. The amount of time that has elapsed since the matters the subject matter of the application took place (15 years in this case);

The court did not hold that there was an inherent prejudice in dealing with matters that had taken place up to 15 years

previously but appeared to take judicial notice of the “added difficulty” caused by the lapse of time. The court briefly considered the merits of the application before concluding that a period of in excess of eight years following the appointment of the liquidator would have been a last reasonable time to have commenced the s 150 proceedings and dismissed the application on the grounds of delay.

Security for Costs

Rayan Restaurant Ltd v Julies Company Restaurant Ltd High Court, Budd J, (ref 2005 44CA), 18 April 2005.

In this case the plaintiff failed in its action in the Circuit Court and appealed to the High Court. The defendant argued that the plaintiff company would not be in a position to meet the costs of the appeal if it lost the main action and sought security for costs of the appeal. This was based on a finding in the judgment of the Circuit Court that the plaintiff was a limited liability company whose single asset was a lease.

A director of the plaintiff company averred that the plaintiff’s financial difficulties were as a direct result of the defendant’s actions. The defendant acknowledged that if appropriate evidence was adduced by the plaintiff to the effect that its (the defendant’s) wrongdoing had allegedly caused the plaintiff’s parlous financial state, this could be a ground for resisting the motions for security for costs. The defendant argued that on the case law, a bare assertion on behalf of a plaintiff that it had been rendered insolvent by alleged wrongdoing was insufficient, and that it is necessary to demonstrate that but for the alleged wrongdoing the plaintiff would have been solvent.

Budd J went considered s 390 of the Companies Act, 1963 which states:

“Where a limited company is plaintiff in any action or other legal proceeding, any judge having jurisdiction in the matter, may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs and may stay all proceedings until the security is given”.

He stated that the crucial question was whether a *prima facie* case had been made to the effect that the inability identified by the section flows from the wrong allegedly committed by the party seeking security. The court referred to *S.E.E. Company Ltd v Public Lighting Services Ltd and Petit Jean (UK) Ltd* [1987] ILRM 255, which concerned defective light poles; and *Campbell Seafoods Ltd and Anor v Brodrene Gram A/S*, unreported, High Court, 21 July, 1994, which involved defective machinery. Budd J concluded that both cases saw strong positive evidence adduced that the respective defendants had been the cause of the plaintiffs’ financial embarrassment. In granting the application for security for

costs, Budd J found that the assertion of the plaintiff was insufficient.

Scheme of Arrangement—Solvent Company

Re Colonia Re Insurance (Ireland) Ltd unreported, High Court, Mr. Justice Kelly, (ref: 2005/11 COS), 15 March 2005.

Colonia Re Insurance Ireland Ltd (the company) petitioned the court for approval of a solvent scheme of arrangement pursuant to s 201 of the Companies Act 1963. The company ceased to write any new business as of 31 December 2002, but faced liabilities in relation to the policies underwritten by it prior to 31 December 2002. The scheme proposed to establish a mechanism to shorten the time involved in quantifying and paying these “run off” liabilities. This was the first time that an Irish court was presented with a proposed solvent scheme of arrangement in respect of an insurance company.

Kelly J examined the advantages of the proposed scheme:

1. Cost effectiveness for both the company and persons making claims under the scheme;
2. A greater level of finality;
3. A fair mechanism for providing the scheme creditors with a reasonable opportunity to assert their claim and have the value thereof adjudicated;
4. The very considerable advantage of early payment; and
5. A monetary benefit.

Kelly J went on to consider five matters which the court had to be satisfied with:

1. Those sufficient steps have been taken to identify and notify all interested parties;
2. That the statutory requirements and all directions of the court have been complied with;
3. That the classes of creditors are properly constituted;
4. That the majority were acting bona fide and not coercing the minority;
5. That an intelligent and honest man, a member of the class concerned, acting in respect of his interest might reasonably approve.

There were two disadvantages of the scheme disclosed to the court. First, if any scheme creditor failed to return a claim form its claim would be valued at nil. Second, there would be circumstances where scheme creditors may receive less than they would have received had the claims developed to maturity.

Kelly J, in approving the scheme, held that that the proposed scheme of arrangement was such as an intelligent and honest man, a member of the class concerned and acting in respect of his interests, might reasonably approve.

Winding up on Petition of Revenue, Agreement to Pay Debts, Unconscionable Bargain and Consideration

***O'Reilly (applicant) v O'Connor (respondent),
unreported, High Court, Carroll J, (ref: 2000 No 110
COS) 29 July 2005.***

A liquidator sought judgment against the respondent on foot of two agreements. Under the two agreements, the respondent agreed to pay 65 per cent of the total debts of the company as certified by the examiner's office in instalments of £2,000 every month, none of which had been paid. He also agreed to buy the assets of the company for £8,523.45, of which a portion was paid, but three cheques for the balance were dishonoured.

The circumstances of entering into the first agreement were brought about when the respondent was due to be examined

before the Master of the High Court. The respondent submitted, *inter alia*, that it was an unconscionable bargain and should be set aside. On this point, Carroll J stated that the respondent had made no prior attempt to set the agreement aside, and as such, this delay defeated the equity sought by the respondent. In holding that there was no unconscionable bargain, Carroll J referred to the liquidator's report that showed there were several questionable actions by the respondent. Personal pre-incorporation liability to the Revenue Commissioners of £60,000 was paid off out of company funds and a number of company transactions were processed through the respondent's personal account.

The respondent submitted that there was no consideration for the agreement. Carroll J explained that forbearance of cross-examination before the Master of the High Court and the agreement for sale of the assets of the company constituted adequate consideration. The Court held that judgment should be given against the respondent.

Employment Update

By Stephen O'Sullivan,
Barrister at law

Industrial Relations: The Consultation Directive

Directive 2002/14 (otherwise known as the "Consultation Directive") has been in force in Ireland since 23 March 2005 though legislation has not yet been enacted to transpose it.

The Directive sets out the minimum requirements for employees to be informed and consulted by their employer regarding developments in their business. Currently the Directive applies in Ireland to undertakings with at least 150 employees or establishments with at least 100 employees. From 2008 onwards, the Directive will apply to undertakings of at least 50 employees or establishments of at least 20 employees.

Article 4 of the Directive provides *inter alia*:

- "2. Information and consultation shall cover:
- (a) information on the recent and probable development of the undertaking's or the establishment's activities and economic situation;
 - (b) information and consultation on the situation, structure and probable development of employment within the undertaking or establishment and on any anticipatory measures envisaged, in particular where there is a threat to employment;
 - (c) information and consultation on decisions likely to lead to substantial changes in work organisation or in contractual relations, including those covered by the Community provisions referred to in Article 9(1).
[**Note**—this relates to provisions on collective redundancy, transfer of undertakings and European Works Councils]
3. Information shall be given at such time, in such fashion and with such content as are appropriate to

enable, in particular, employees' representatives to conduct an adequate study and, where necessary, prepare for consultation.

4. Consultation shall take place:
- (a) while ensuring that the timing, method and content thereof are appropriate;
 - (b) at the relevant level of management and representation, depending on the subject under discussion;
 - (c) on the basis of information supplied by the employer in accordance with Article 2(f) and of the opinion which the employees' representatives are entitled to formulate;
 - (d) in such a way as to enable employees' representatives to meet the employer and obtain a response, and the reasons for that response, to any opinion they might formulate;
 - (e) with a view to reaching an agreement on decisions within the scope of the employer's powers referred to in paragraph 2c."

The Minister for Labour Affairs published the Employees (Provision of Information and Consultation) Bill 2005 at the end of July 2005. This is the first draft of legislation to implement the general provisions of the Directive listed above. In s 7 of the Bill, the onus is placed on employees to trigger a request that an employer sets up an information and consultation procedure. Once ten per cent of employees (subject to a minimum of 15 and a maximum of 100) make such a request, an employer must enter into negotiations to agree an appropriate procedure with employees. The parties have six months to conclude a negotiated agreement, after which the "standard fall-back rules" apply if no agreement is reached. The standard rules in the Bill prescribe the procedures to be followed in setting up an "information and consultation forum". This forum must comprise elected employee representatives.

Industrial Relations Act 2001–2004

Ryanair v Labour Court, unreported, High Court, Hanna J, 14th October 2005

Prior to 2001 trade disputes were investigated by the Rights Commissioner or the Labour Court. The term “trade dispute” was given a wide interpretation and encompassed almost any grievance an employee or a group of employees had in relation to the employment. The only problem with bringing such a claim was that it was not enforceable.

This problem was remedied by the Industrial Relations Act 2001 where it is now possible to bring a trade dispute before the Labour Court, provided certain conditions are met, which can result in an enforceable order. The most important condition is that “it is not the practise of the employer to engage in collective bargaining”.

Under the legislation, for instance, a group of employees could bring an action that their pay is not in line with the pay of comparable employees who work for an employer who engages in collective bargaining (who negotiates with unions). In cases CD 04/364, CD 04/362, CD 04/414, the Labour Court made orders in favour of employees under the Acts 2001–2004 to provide for better pay. This line of authority has posed a serious threat to companies that do not engage in collective bargaining.

The position in Irish law has long been that while an employee has a constitutional right to join a union he does not have a constitutional right to have that or any union recognised.

In *Ryanair v Labour Court*, IMPACT, a trade union acting on behalf of pilots, wrote to the chief executive of the respondent seeking written particulars of the contract of employment for pilots, details of the principles to be applied in the event of redundancy affecting pilots, and arrangements for pilot movement to other aircraft. Much of the dispute surrounded the decision of the applicant to change its fleet of aircraft, which would require many of its pilots to undergo additional training at their own cost if they did not remain with the company for five years. The applicant refused to deal with the union in respect of the matters raised. As a result of that refusal, IMPACT referred the dispute to the Labour Court under the Industrial Relations Amendment Act 2001.

As a preliminary issue, the applicant argued before the Labour Court that the Court did not have jurisdiction to hear the dispute in particular that the conditions in s 2 of the Act of 2001 were not met. The Labour Court held, in a decision reported at *Irish Municipal, Public and Civil Trade Union/Irish Airlines Pilots Association v Ryanair* [2005] 16 ELR that it had jurisdiction to investigate the dispute.

The applicant sought to judicially review this decision. The applicant argued, *inter alia*:

- (1) that the applicant ran employment relations committees (ERCs). Therefore it was the employer to engage in collective bargaining. Therefore the respondent was incorrect in finding the precondition in section 2.1.a was met;
- (2) The respondent had not used fair procedures. In particular it did not require the individual pilots to

appear before the Labour Court and give oral evidence. It relied on documentary evidence presented by IMPACT which was not formally proven.

The High Court refused the application. In relation to (1) above, the court stated that the ERC forum did not constitute collective bargaining since such a body did not carry a trade union negotiation the employees had indicated a preference to negotiate through a trade union with such a licence—that union being IMPACT.

In relation to (2) above the court stated:

“In my view, the Labour Court is entitled to manage its own affairs and to conduct proceedings before it as it sees fit provided it so conducts itself within the limits of the statutory provision for which it derives its authority ...” and “[N]ot only was the applicant the author of the essential documentation relied upon by the respondent in coming to its conclusion but, furthermore, it was fully aware that such documents were before the respondent and the applicant had every opportunity of addressing the Labour Court on them.”

Stress at Work

Maher v Jabil Global Services Ltd, unreported, Clarke J, 12 May 2005

The principles for stress at work cases were laid out in UK law in *Sutherland v Hatton* [2002] 2 All ER 1. These were adopted by the Irish High Court in *McGrath v Trintech Technologies Limited* [2005] 16 ELR 49.

The principles have been applied again in *Maher v Jabil Global Services Limited* (unreported, Clarke J, 12 May 2005) the plaintiff claimed damages for stress. He claimed two matters caused the stress. First, that he took up a position of shift manager and after two months in employment, he had to take sick leave for approximately two months. He argued he was subjected to unreasonable pressure during this period. Second, that on his return he was moved to a different role. Three months later he went out on sick leave. He then resigned from the post seven months into this period of sick leave. He argued that this was effectively a “non-job” which exposed him to humiliation amongst his fellow workers to whom it would be obvious, in his case, that he had been, in effect, demoted.

The Court refused to award damages on either ground despite being satisfied that he had suffered personal injury, which had been caused by his work environment. This was after a trial of some seven days before the High Court. Effectively the Court applied the principles to find that it was not reasonably foreseeable that the employer’s action would cause the damage complained of.

The test the court applied was as follows:

- (a) Has the plaintiff suffered an injury to his or her health as opposed to what might be described as ordinary occupational stress?

- (b) If so is that injury attributable to the workplace; and
- (c) If so was the harm suffered to the particular employee concerned reasonably foreseeable in all the circumstances.

The court concluded that on the test identified and having regard to the facts of that case, the “objective threshold” for foreseeable harm caused was not met. The court could not identify evidence that the plaintiff’s workload was unusual or that the employer should have known that the plaintiff would find it so. In so finding the court had regard to the demands made on other employees in comparable jobs and such evidence as suggested that those employees did not find it unduly stressful. The court specifically had regard to the level of sickness and absenteeism in this regard.

The court concluded on the facts that there was not any concerted plan on the part of the employer to seek to exclude the plaintiff from his employment. Although he made complaints these were not as frequent as originally suggested by the plaintiff. The court took into account Item 11 of the practical propositions set out in *Hatton* which indicates that an employer who offers a confidential advice service, with referral to appropriate counselling or treatment services, is unlikely to be found in breach of duty. In doing so, the court indicated that this proposition is subject to a caveat that if the court was satisfied that notwithstanding the provision of such a service the truth was that an employer was intent on removing an employee the availability of such a service might be regarded as being more a matter of form than substance (“going through the motions”).

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Prior to 2001 trade disputes were investigated by the Rights Commissioner or the Labour Court. The term “trade dispute” was given a wide interpretation and encompassed almost any grievance an employee or a group of employees had in relation to the employment. The only problem with bringing such a claim was that it was not enforceable.

This problem was remedied by the Industrial Relations Act 2001 where it is now possible to bring a trade dispute before the Labour Court, provided certain conditions are met, which can result in an enforceable order. The most important condition is that “it is not the practise of the employer to engage in collective bargaining”.

Under the legislation, for instance, a group of employees could bring an action that their pay is not in line with the pay of comparable employees who work for an employer who engages in collective bargaining (who negotiates with unions). In cases CD 04/364, CD 04/362, CD 04/414, the Labour Court made orders in favour of employees under the Acts 2001–2004 to provide for better pay. This line of authority has posed a serious threat to companies that do not engage in collective bargaining.

The position in Irish law has long been that while an employee has a constitutional right to join a union he does not have a constitutional right to have that or any union recognised.

In *Ryanair v Labour Court*, IMPACT, a trade union acting on behalf of pilots, wrote to the chief executive of the respondent seeking written particulars of the contract of employment for pilots, details of the principles to be applied in the event of redundancy affecting pilots, and arrangements for pilot movement to other aircraft. Much of the dispute surrounded the decision of the applicant to change its fleet of aircraft, which would require many of its pilots to undergo additional training at their own cost if they did not remain with the company for five years. The applicant refused to deal with the union in respect of the matters raised. As a result of that refusal, IMPACT referred the dispute to the Labour Court under the Industrial Relations Amendment Act 2001.

As a preliminary issue, the applicant argued before the Labour Court that the Court did not have jurisdiction to hear the dispute in particular that the conditions in s 2 of the Act of 2001 were not met. The Labour Court held, in a decision reported at *Irish Municipal, Public and Civil Trade Union/Irish Airlines Pilots Association v Ryanair* [2005] 16 ELR that it had jurisdiction to investigate the dispute.

The applicant sought to judicially review this decision. The applicant argued, *inter alia*:

- (1) that the applicant ran employment relations committees (ERCs). Therefore it was the employer to engage in collective bargaining. Therefore the respondent was incorrect in finding the precondition in section 2.1.a was met;
- (2) The respondent had not used fair procedures. In particular it did not require the individual pilots to

appear before the Labour Court and give oral evidence. It relied on documentary evidence presented by IMPACT which was not formally proven.

The High Court refused the application. In relation to (1) above, the court stated that the ERC forum did not constitute collective bargaining since such a body did not carry a trade union negotiation the employees had indicated a preference to negotiate through a trade union with such a licence—that union being IMPACT.

In relation to (2) above the court stated:

“In my view, the Labour Court is entitled to manage its own affairs and to conduct proceedings before it as it sees fit provided it so conducts itself within the limits of the statutory provision for which it derives its authority ...” and “[N]ot only was the applicant the author of the essential documentation relied upon by the respondent in coming to its conclusion but, furthermore, it was fully aware that such documents were before the respondent and the applicant had every opportunity of addressing the Labour Court on them.”

Stress at Work

Maher v Jabil Global Services Ltd, unreported, Clarke J, 12 May 2005

The principles for stress at work cases were laid out in UK law in *Sutherland v Hatton* [2002] 2 All ER 1. These were adopted by the Irish High Court in *McGrath v Trintech Technologies Limited* [2005] 16 ELR 49.

The principles have been applied again in *Maher v Jabil Global Services Limited* (unreported, Clarke J, 12 May 2005) the plaintiff claimed damages for stress. He claimed two matters caused the stress. First, that he took up a position of shift manager and after two months in employment, he had to take sick leave for approximately two months. He argued he was subjected to unreasonable pressure during this period. Second, that on his return he was moved to a different role. Three months later he went out on sick leave. He then resigned from the post seven months into this period of sick leave. He argued that this was effectively a “non-job” which exposed him to humiliation amongst his fellow workers to whom it would be obvious, in his case, that he had been, in effect, demoted.

The Court refused to award damages on either ground despite being satisfied that he had suffered personal injury, which had been caused by his work environment. This was after a trial of some seven days before the High Court. Effectively the Court applied the principles to find that it was not reasonably foreseeable that the employer’s action would cause the damage complained of.

The test the court applied was as follows:

- (a) Has the plaintiff suffered an injury to his or her health as opposed to what might be described as ordinary occupational stress?

- (b) If so is that injury attributable to the workplace; and
- (c) If so was the harm suffered to the particular employee concerned reasonably foreseeable in all the circumstances.

The court concluded that on the test identified and having regard to the facts of that case, the “objective threshold” for foreseeable harm caused was not met. The court could not identify evidence that the plaintiff’s workload was unusual or that the employer should have known that the plaintiff would find it so. In so finding the court had regard to the demands made on other employees in comparable jobs and such evidence as suggested that those employees did not find it unduly stressful. The court specifically had regard to the level of sickness and absenteeism in this regard.

The court concluded on the facts that there was not any concerted plan on the part of the employer to seek to exclude the plaintiff from his employment. Although he made complaints these were not as frequent as originally suggested by the plaintiff. The court took into account Item 11 of the practical propositions set out in *Hatton* which indicates that an employer who offers a confidential advice service, with referral to appropriate counselling or treatment services, is unlikely to be found in breach of duty. In doing so, the court indicated that this proposition is subject to a caveat that if the court was satisfied that notwithstanding the provision of such a service the truth was that an employer was intent on removing an employee the availability of such a service might be regarded as being more a matter of form than substance (“going through the motions”).