Pushing forward
A focus on dispute resolution in 2017
Dispute resolution and litigation

What to expect in 2017

If you thought 2016 was a year full of surprises – wait until you see what’s coming down the tracks! In this article we’ve outlined some key litigation issues for financial controllers, managers and in-house Counsel to be aware of as we kick off 2017.

1. Brexit and the recognition of foreign judgments

The UK government has stated its intention to give notice to leave the EU under Article 50 by the end of March 2017. Once the UK gives notice, it shall formally leave the EU by the end of March 2019 at the latest.

One obvious area where businesses involved in litigation may be affected is the recognition of foreign judgments. If the UK does not agree to a convention on the reciprocal enforcement of judgments or agree a formal regime with the EU, then enforcement of UK judgments in Ireland and Irish judgments in the UK will be subject to international conflict of laws rules. Accordingly, judgments will still be capable of enforcement but it will likely add time and cost to such cross-border enforcement.

For more information, see our article below:

2. European Commission’s Apple Tax Ruling

The decision of the EU Commission to the effect that Apple’s Irish tax deal amounted to illegal State aid will place the tax treatment and practice of transfer pricing by non-resident multinationals with branches in Ireland under closer scrutiny by EU Regulators.

Ireland’s appeal lodged in November 2016 claims that the Commission’s decision which attributes Apple’s intellectual property licences to the Irish branches of Apple Operations Europe and Apple Sales International is not consistent with Irish law. Ireland also claims that the Commission is incorrect in asserting that two Opinions given by the Irish Revenue Commissioners in 1991 and 2007 were selective and renounced tax revenue that Ireland would have otherwise been entitled to collect.

While the appeal may take a number of years to be heard, it is likely that other large companies have similar structures in Ireland and it remains to be seen whether the Commission has any other targets in the years ahead.

3. Third Party Litigation Funding

In April 2017 the Supreme Court is due to hear an appeal of the High Court decision in Persona Digital Telephony Limited and Sigma Wireless Networks Limited v The Minister for Public Enterprise & Others, a case in which our firm is acting for the appellant and which deals with the important matter of third party litigation funding in Ireland.

Third party funding is well established in other common law systems including the UK, Australia, New Zealand, Canada and Hong Kong. It allows professional funders to provide finance for cases that meet certain criteria relating to the merits and scale of the case in return for a percentage of the damages recovered. There is invariably insurance cover to meet adverse costs if the case is unsuccessful. The rules of maintenance and champerty have to date been considered obstacles for third party litigation funding in Ireland. Other forms of support for litigants, including “no foal no fee” arrangements, are of course permitted here. The decision will be one of significant public importance as it involves issues relating to access to justice for litigants otherwise unable to fund large cases against deep pocketed defendants and it will clarify this evolving area of the law.
4. Further focus on the regulation of Insurance providers
The collapse of a number of large motor insurance providers in recent times (eg Setanta and Enterprise Insurance) has highlighted potential weaknesses with the current insurance compensation framework in Ireland. Consequently, we expect the insurance industry will continue to be under close scrutiny by the Government and the Regulator. Premiums, particularly motor premiums, having risen sharply in recent times resulting in accusations of a lack of transparency in the industry as being one of the root causes of price rises. Conversely, insurers have pointed to an increase in legal costs and compensation awards as significantly contributing to the price increases. One likely winner will be the Personal Injury Assessments Board (“PIAB”), as the Oireachtas Finance Committee report in November 2016 recommended PIAB’s powers be modernised and strengthened – overall a move likely to be welcomed by insurers and consumers alike.

The Government has also announced plans to establish a personal injuries commission to be headed by former High Court judge, Mr Justice Nicholas Kearns, to carry out comparisons of Ireland’s personal injury awards with awards in other jurisdictions.

5. Pre-action protocol for clinical negligence claims
The Legal Services Regulation Act 2015 (the “Act”) will make a significant change to the clinical negligence dispute resolution landscape by introducing a pre-action protocol for clinical negligence disputes. The intention of the pre-action protocol is to encourage early resolution of clinical negligence disputes and therefore reduce the number of cases in which clinical negligence actions are brought.

Few of the provisions of the Act have been commenced to date. The pre-action protocol is yet to come into effect as it is subject to regulations being made by the Minister for Justice and Equality specifying the terms of the protocol. We will be watching to see if the provisions come into effect in the coming months as they will place obligations on both claimants and defendants before any legal proceedings are issued.

The protocol will ensure that each party to a clinical negligence dispute is sufficiently informed of the other side’s case in order to investigate a claim efficiently and where appropriate, enable them to resolve it prior to formal proceedings being issued. A similar regime has operated successfully in England and Wales in reducing the number of clinical negligence claims proceeding to trial.

6. Health and Safety challenges
The recently published Corporate Manslaughter Bill of 2016 will create the indictable offence of corporate manslaughter by an undertaking and a non-indictable offence of “grossly negligent management causing death” by a high managerial agent of the undertaking.

Comparable legislation is in place already in the UK and if the Bill becomes law in 2017, with heightened responsibilities for directors and managers, businesses will need to ensure they have effective systems in place to minimise the risk of falling foul of the legislation.

7. The Mediation Bill
The Mediation Bill is due to be published in early 2017 and it intends to introduce an obligation requiring solicitors and barristers to advise their clients to consider using mediation to resolve disputes before issuing legal proceedings. The intention of the Bill is to promote mediation as a more cost efficient and speedier tool for dispute resolution.

Under the new Bill, once legal proceedings are issued the parties to a case will be obliged to confirm to the court that they have been advised about the option of mediation and that they have considered it before proceeding.

8. New Court Rules of the Superior Courts
New Court Rules came into force on 1 October 2016 with the intention of reducing delays and improving trial efficiencies. Throughout 2017 we will watch to see how effectively the new rules on the conduct and pre-trial procedures are implemented in the High Court by the judiciary.

The rules are similar to existing case management rules which have proved successful in the Commercial Court. Cost penalties may be imposed for delay, or if court documents are imprecise, unnecessarily long or duplicative.

9. Interest payable on judgment debts
The Courts Act 1981 (Interest on Judgment Debts) Order 2016 made by Minister for Justice and Equality, Frances Fitzgerald, in December 2016 came into effect on 1 January 2017. The Order has significantly reduced the rate of interest payable on judgment debts under section 26 of the Debtors (Ireland) Act, 1840. The rate at which interest is to be applied on judgment debts has been reduced from 8% to 2%.

After a judgment is awarded in favour of a litigant, interest is automatically applied to the judgment debt. The rate of 8% which has applied since 1989 was seen by many as punitive and unnecessarily high and will be welcomed by judgment debtors.
10. European Commission’s Policy Paper on Online Platforms

The European Commission policy paper on online platforms is advancing an interesting debate on whether a heightened ‘duty of care’ could be imposed on some online platforms that would imply more proactive action to tackle illegal content like counterfeit goods.

The European Commission has announced that its promised intermediary liability guidelines will be published in Q2 of 2017. These guidelines will seek to clarify the instances where online platforms can proactively seek out illegal content without jeopardising their liability safe harbours under the E-Commerce Directive.

11. ADR and ODR Regulations

The EU (Alternative Dispute Resolution for Consumer Disputes) Regulations 2015 have been effective since 31 July 2015. They oblige traders to offer ADR procedures to consumers, via a recognised ADR entity, enabling the resolution of certain trader-consumer disputes within 90 days.

Online traders must also be aware of their obligations under the EU (Online Dispute Resolution for Consumer Disputes) Regulations 2015. EU-established traders engaging in online sales or service contracts must provide an electronic link to an ODR platform which is easily accessible on their websites.

Traders must be aware of the obligations arising from the ADR Regulations and the ODR Regulations which both contribute to enhance consumer protection and access to dispute resolution procedures.

The ODR Regulations have been in effect since February 2016 and failure to comply is punishable on summary conviction of fines up to €5,000 and/or 12 months imprisonment. It will be interesting to see whether non-compliance by traders results in any convictions in the year ahead.

For more information, please see our article below:

Contact

Our Dispute Resolution and Litigation group acts for a variety of clients, including UK and other foreign clients who can draw on our wealth of experience in successfully handling claims and disputes. The group is particularly skilled in managing large and complex cases in a strategic and commercial manner. We continue to deal with disputes in all jurisdictions in the most cost efficient manner. Our close relationship with our international offices ensures that our clients benefit from our seamless service.

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