

In-House Counsel Masterclass

Business Disputes: Managing the Ref?

Friday 13 October 2017



Dublin

London

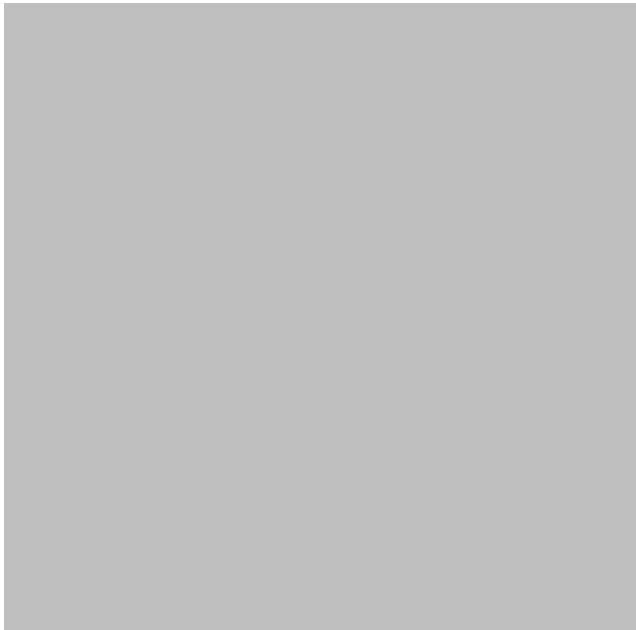
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Welcome

Declan Black, Managing Partner



Recent Developments in Irish Contract Law

Maurice Phelan, Head of Dispute Resolution



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“Good lawyers know the law; great lawyers know the judge”

- H.L. Mencken

Supreme Court

Mr. Justice Frank Clarke, Chief Justice

Mr. Justice Donal O'Donnell

Mr. Justice Liam McKechnie

Mr. Justice John Mac Menamin

Ms. Justice Elizabeth Dunne

Mr. Justice Peter Charleton

Ms. Justice Iseult O'Malley

Court of Appeal

Mr. Justice Sean Ryan, President

Ms. Justice Mary Finlay Geoghegan

Mr. Justice Michael Peart

Mr. Justice George Birmingham

Ms. Justice Mary C. Irvine

Mr. Justice Gerard Hogan

Mr. Justice Alan Mahon

Mr. Justice John A. Edwards

Mr. Justice John Hedigan

Ms. Justice Máire Whelan

High Court

Mr. Justice Peter Kelly, President

Mr. Justice Michael Moriarty

Mr. Justice Paul Butler

Mr. Justice Henry Abbott

Mr. Justice Paul Gilligan

Mr. Justice Michael Hanna

Mr. Justice Patrick J. McCarthy

Mr. Justice Michael White

Mr. Justice Kevin Cross

Mr. Justice Paul McDermott

Mr. Justice Anthony Barr

Mr. Justice David Keane

Ms. Justice Marie Baker

Ms. Justice Bronagh O'Hanlon

Mr. Justice Bernard Joseph Barton

Ms. Justice Deirdre Murphy

Ms. Justice Aileen Donnelly

Mr. Justice Seamus Noonan

Ms. Justice Mary Faherty

Mr. Justice Tony Hunt

Mr. Justice Robert Eagar

Mr. Justice Robert Haughton

Mr. Justice Charles Meenan

Ms. Justice Isobel Kennedy

Ms. Justice Mary Ellen Ring

Mr. Justice Tony O'Connor

Mr. Justice Richard Humphreys

Ms. Justice Miriam O'Regan

Mr. Justice Paul Coffey

Ms. Justice Úna Ní Raifeartaigh

Ms. Justice Leonie Reynolds

Commercial Court

Mr. Justice Brian McGovern

Ms. Justice Caroline Costello

Mr. Justice Max Barrett

Mr. Justice Robert Haughton

Mr. Justice Brian Cregan

Mr. Justice Michael Twomey

Ms. Justice Eileen Creedon

Mr. Justice Donald Binchy

Ms. Justice Carmel Stewart

OVERTURN RATE OF 20 JUDGES WITH HIGHEST NUMBER OF APPEALS DECIDED BY COURT OF APPEAL

NUMBER OF APPEALS	NUMBER OVERTURNED IN WHOLE OR PART	NAME OF JUDGE	NUMBER UPHELD	OVERTURN RATE %
12	10	Max Barrett	2	83%
10	7	John O'Hagan	3	70%
33	21	Paul Carney	12	64%
11	7	Thomas Teehan	4	64%
9	5	Anthony Barr	4	56%
38	20	Martin Nolan	18	53%
19	10	Carroll Moran	9	53%
25	13	Michael O'Shea	12	52%
17	8	Rory MacCabe	9	47%
15	7	John Hedigan	8	47%
11	5	Desmond Hogan	6	45%
24	10	Nicholas Kearns	14	42%
12	5	Patricia Ryan	7	42%
10	4	Aileen Donnelly	8	40%
11	4	Brian McGovern	7	36%
20	7	Pat McCartan	13	35%
20	6	Sean Ó Donnabháin	14	30%
14	4	Patrick McCarthy	10	28%
11	2	Barry White	9	18%
11	1	George Birmingham	10	9%

Contract law

“Contract law is essentially a defensive scorched earth battleground where the constant question is -
If my business partner was possessed by a brain eating monster from beyond space time tomorrow, what is the worst thing he can do to me?”

- Charles Stross

1) Implied duties of good faith

- Traditionally, no requirement in UK or Ireland to perform contracts “ in good faith”
- Recent shift in thinking
- Negotiation v performance
- Yam Seng Pte Ltd v International Trade Corporation (2013)
UK –uncertain it will win general acceptance in English law
- More liberal approach in Ireland? Flynn v Breccia (HC 2015).
- HC overturned on appeal (March, 2017) but implied good faith duties not ruled out in appropriate cases

Flynn v Breccia

- Dispute between shareholders of Blackrock Clinic
- One shareholder (plaintiff) defaulted on debts
- Other shareholder (defendant) bought loans from NAMA
- Defendant called in loans and appointed a receiver
- Receiver attempted to sell shares to a related company of defendant
- Plaintiff argued that actions breached implied duties of good faith in shareholders' agreement

The Breccia principles

- Good faith duties not always implied
- May only be appropriate in long term “relational” contracts
- Does not apply at negotiation stage, even if expressly stated
- Parties may expressly (a) exclude good faith duties, or (b) modify or limit their scope
- Contents of “good faith and fair dealing” are objectively determined in light of terms, vary depending on context

Actions held to be breach of implied duty

- Court held that shareholders' agreement contained implied duty of good faith
- Based on characteristics of contract: nature of joint venture, shared medical ethos, parties were friends and relations, agreement was long term etc.
- Duty had been breached by appointment of receiver
- Court of Appeal (March 2017): no good faith duty could be implied on particular facts.... but did not rule out implied good faith duties in appropriate cases.

What to do?

When drafting contracts – three possible options for addressing duties of good faith

- (a) say nothing
- (b) expressly exclude good faith duty
- (c) expressly include good faith duty

(a) Say nothing

Common approach in Irish commercial contracts

But in light of recent developments may result in uncertainty

- No certainty whether court will imply duty of good faith
- No certainty what the content of any implied duty will be
- Difficult to ascertain when contract has been breached

(b) Expressly exclude good faith duty

Pros:

- Greater certainty as to extent of rights and obligations
- Free to pursue self-interest in performing contract

Cons:

- No remedy where other party acts dishonestly or unfairly but within letter of contract

May be preferred option where:

- Client is performing service (e.g., IT service provider)
- Client is lending money
- Contract describes rights and obligations in detail

(c) Expressly include good faith duty

Pros:

- Possible remedy where one party acts dishonestly or unfairly
- Allows parties to specify scope and content of duty themselves

Cons:

- Reduces certainty
- Greater risk of litigation

May be preferred option where:

- Client is paying for service (e.g., user of IT services)
- Client is borrowing money
- Contract does not contain detailed terms

If included, need to

If included, need to:

(1) define scope of the duty

- all contractual obligations?
- Only certain obligations?

(2) define content of the duty

- Not act with “subjective dishonesty”
- “reasonable standard of fair dealing”
- “fidelity to” or “adherence to the spirit of” the bargain

2) Penalty clauses

- Unenforceable if intended to deter breaches rather than pre-estimate losses
- For many years test was set down in *Dunlop Pneumatic Tyres –v- New Garage (1915)*
- Basic question – is the clause a penalty i.e. a deterrent to contract breaker OR a liquidated damages clause (i.e. a “genuine pre-estimate of the loss” caused by breach)?

2) Penalty clauses

- Clause is penalty if amount is “extravagant and unconscionable” in relation to maximum loss caused by breach
- Clause is penalty if non payment of money punished by payment of larger sum
- If breaches of different gravity require same sum to be paid, presumption that clause is penalty
- Impossibility of precisely pre-estimating damage does not make a clause penal

2) Penalty clauses

- Easier to strike down penalty clauses in Ireland than the UK
- In Ireland, a clause must be a “pre-estimate of loss”. In UK, there may be other legitimate commercial justifications - Cavendish Square v El Macdessi (2015)
- AIB v Fahy (2014) Default interest rate 12%.
- No evidence 12% was genuine pre estimate. Clause unenforceable.
- Sheehan v Breccia; Flynn v Breccia (No. 2) (Feb 2016) Default interest rate 4%. Appeal to be heard in November 2017
- Launceston v Burke (March 2017) SC obiter – not convinced Cavendish Square is superior approach

What to do?

- Surcharge interest clauses could be made enforceable if redrafted
- Introduce different surcharge rates for different types of default
- Quantify costs (for example - additional capital costs) incurred as a result of different types of default
- Rates should not be arbitrary, but based on actual cost estimates.

What to do?

“Sothern Hemisphere teams are more skilful than their Northern Hemisphere counterparts, which means their games can be easier to referee.....”

- Alan Lewis, former international rugby union referee

Thank you



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