Business Disputes: Recent Trends & Developments

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Welcome

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Recent Developments in Irish Contract Law

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“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
Recent developments

- Implied duties of good faith
- Unilateral mistake
- Penalty clauses
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
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

• Decision under appeal – listed for December 2016

• If approved, the decision would be a significant new development in Irish contract law
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
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

(a) Say nothing
(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:

(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) Unilateral mistake

HC recently granted rectification for unilateral mistake following “sharp practice” by negotiating lawyers Slattery –v- Friends First (CA July 2015)

Background

• Hotel investment secured by charge over shares

• Clause inserted limiting liability to value of shares – radically changed effect of transaction

• Plaintiffs’ lawyers inserted clause without redline or without drawing it to the attention of the defendant

• Defendant and his lawyers reviewed version but did not notice newly inserted exclusion clause
2) Unilateral mistake

- HC: inserted by “slight of hand”, rectification ordered
- Plaintiff appealed. Argued that clause inserted in normal course of negotiation and that defendant and lawyers were obliged to check drafts
- CA upheld order for rectification for unilateral mistake
- Obvious that clause would not have been agreed, radically altered the purpose of the documents
- Concealment by plaintiff in removing redlining
Rectification

- Increased willingness of courts to scrutinise course of contractual negotiations for unilateral mistake

- Rectification where
  - (a) one party mistaken
  - (b) other party aware of mistake and failed to inform
  - (c) mistaken party suffered detriment, or other party gained benefit and
  - (d) inequitable to take advantage
What to do?

- Consider precautions to safeguard against risk of unilateral mistake
- Drafts should be sent in redline until execution of contracts
- If aware that other parties’ lawyers have mistaken or different interpretation, inform them
- Be cautious about contents of internal memos and emails prepared during negotiation – admissible and discoverable in action for rectification, subject to any legal professional privilege.
3) *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)?
3) **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.
3) 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.
- **AIB v Fahy (2014)** Default interest rate 12%.
- No evidence 12% was genuine pre estimate. Clause unenforceable.
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.
Litigation Costs & Funding

Liam Guidera, Partner
Dispute Resolution
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## Costs

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<th>Ireland</th>
<th>UK</th>
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<td>• Loser Pays</td>
<td>• Loser Pays</td>
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<tr>
<td>• No Foal – No Fee</td>
<td>• Civil Legal Aid</td>
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<td>• Section 68, Solicitors Amendment Act, 1994</td>
<td>• CFAs</td>
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<td>• Legal Services Regulation Act 2015</td>
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• Statute of Westminster, 1275
• Statute of Conspiracy (Maintenance & Champerty), of unknown date (14th Century)
• Maintenance & Embracery Acts, 1540 & 1634
Legend

**Litigation Funding**

**Pros**
- Constitutional Right of Access to the Courts
- Equality of Arms
- Commercial Autonomy

**Cons**
- Litigation Trafficking
- Promoting Litigation
- Interfering in Litigation
Summary

• **Party Costs**  More detailed itemised bills.

• **ATE Insurance**  Now established.

• **Litigation Funding**  Evolving, huge potential.
Bibliography

• Sheehan v Corr, [2016] IECA 168

• Greenclean Waste Management Ltd v Maurice Leahy P/A Maurice Leahy Wade & Company Solicitors, [2015] IECA 97

• Thema International Fund plc. v HSBC Institutional Trust Services (Ireland) Ltd, [2011] IEHC654

• SPV Osus Ltd v HSBC International Trust Services (Ireland) Ltd, [2015] IEHC 602

• Persona Digital Telephony Ltd. & anor v The Minister for Public Enterprise & ors, [2016] IEHC 187
• O’Keeffe v Scales, [1998] 1 I.R. 290

• GE Capital Woodchester Ltd & anor v Staunton Fisher Ltd & ors, [2016] IEHC 172

• Moorview Developments Limited v First Active Plc, [2011] IEHC 117

• Arkin Borchard Lines Ltd and others, All ER 613

• Excalibur Ventures LLC v Texas Keystone Inc and others, [2014] EWHC 3436

• Code of Conduct for Litigation Funders (January 2014)
Recent Privacy Litigation in the Irish and EU Courts

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Thank you

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