



## Litigation & Dispute Resolution Update

September 2008

### Beef cartel: preliminary decision from Europe

**Background.** A Government report on the beef industry in 1998 recommended the number of beef processors should be reduced from 20 to between four and six and that the surviving processors pay compensation to those forced to close down. The country's ten largest beef processors decided to reduce capacity by 25% per annum. Under the rationalisation scheme, it was agreed that the Beef Industry Development Society Limited (BIDS) would give loans to those continuing to process to help pay compensation to the processors who were quitting the industry. In return, processors leaving the business undertook not to sell their equipment to anybody other than those continuing to process. They also agreed a non-compete clause for two years.

**Facts.** In 2003 the Competition Authority initiated proceedings against the BIDS for a declaration that the BIDS rationalisation scheme infringed the Competition Act 2002 and Article 81(1) of the EC Treaty which broadly prohibits agreements if they have the object of restricting competition. In 2006, the High Court found that the BIDS project was not contrary to Article 81(1). On appeal to the Supreme Court, the court realised that no European court had previously ruled on this type of "capacity cartel" and asked the European Court of Justice (ECJ) for a ruling.

**Decision.** On 4 September 2008 an Advocate General (AG) of the ECJ held that the BIDS agreement is not compatible with Article 81(1). The AG noted that BIDS had not acted under State compulsion and stated that the planned 25% reduction in the production capacity of the processing industry as a whole as a result of processors leaving the market, the staging of levies and the restrictions on use and disposal of plant meant that the object of the agreement was to restrict competition. The AG reiterated that the fact that even if a sector is experiencing a cyclical or structural crisis it does not mean that Article 81(1) does not apply and stated that the ECJ has consistently held that the fact that an agreement has a legitimate objective does not rule out the existence of a restriction on competition.

**Comment.** The ECJ follows its AG's recommendations in about 80% of cases so this opinion is likely to be confirmed by the ECJ. If so, the Supreme Court will have to find that the capacity cartel was in breach of Article 81(1).

*Case: C-209/07 The Competition Authority v the Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd, opinion of Verica Trstenjak, 4 September 2008.*

### Collective redress mechanisms: EU and UK developments

The European Commission is currently assessing the efficiency of collective redress mechanisms in the EU. For the last few years the Directorate General for Health and Consumer Protection has been researching the effectiveness of group actions for damages in the EU. To deal with the weaknesses of the current mechanisms, the Directorate issued '10 benchmarks', that comprise a list of measures that should shape the EU collective redress regimes ([ec.europa.eu/consumers/redress\\_cons/collective\\_redress\\_en.htm](http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm).) This autumn the Directorate is to publish a final report consolidating the results of its studies.

At the same time, the EU Directorate General for Competition has been examining the effectiveness of consumer collective redress for antitrust infringements in the context of its proposal to reinforce damages actions for breaches of EU competition law.

Also in August 2008 the UK Civil Justice Council (CJC) has published its formal advice on collective actions. It reviews existing law and procedure, the rationale for reform (including the EC and UK policies to facilitate competition private actions) and recommendations as to how a more efficient procedure for collective actions could be developed. The CJC recommends the introduction of a generic collective action (for all civil claims affecting multiple claimants) on either an opt-in or an opt-out basis, subject to a certification procedure and enhanced case management. The CJC does not consider that this recommendation precludes further reform of discrete collective redress actions before specialist tribunals.

**Comment.** There are concerns that these mechanisms encourage unnecessary litigation and class action suits. Collective redress systems in most member states are still developing and alternative dispute resolution mechanisms such as arbitration and mediation are perhaps not used or developed sufficiently yet and should be explored further before a new EU framework on collective actions is introduced.



## ADR proposals

The Law Reform Commission's consultation paper on Alternative Dispute Resolution was published on 30 July 2008. The paper distinguishes between mediation, where a neutral and impartial third party facilitates an agreement between the parties, and conciliation, where the third party also acts in an advisory role in helping the parties towards agreement.

The main recommendations are that:

1. There should be a general statutory framework that defines clearly what is meant by mediation (mainly facilitating agreement) and conciliation (facilitating agreement and sometimes also advising the parties about an agreed resolution);
2. Mediation and conciliation should be seen as different from litigation but should also be considered as part of a fully integrated civil justice system that includes litigation;
3. The key principles of mediation and conciliation should be set out, including their voluntary nature, the ability of the parties to control the process, the need for confidentiality, and the need for transparency and quality control of the process;
4. A court should be able to enforce an agreement made at mediation or conciliation;
5. The training and accreditation of mediators should be based on agreed international standards, building on existing accreditation structures already in place in Ireland.

Mediation is a topical subject: in April 2008 the European Parliament adopted a Mediation Directive which must be implemented in Ireland by 2011 (see *Litigation and Dispute Resolution Update No 7 for more details*). Also mediation was successfully used in the recent high profile case involving Pat Kenny and Gerald Charlton over the ownership of a strip of land.

Link to consultation paper: <http://www.lawreform.ie/publications/Consultation%20Paper%20on%20ALTERNATIVE%20DISPUTE%20RESOLUTION%20LRC%20CP%2050-2008.pdf>

## Tender selection criteria: European court challenge

Beauchamps Solicitors have successfully defended a European court challenge to tender selection criteria (*AWWW GmbH ArbeitsWelt-Working World v European Foundation for the Improvement of Living and Working Conditions, Case T-211/07*).

On 1 July 2008 the European Court of First Instance rejected AWWW's application to annul the European Foundation for the Improvement of Living and Working Conditions' decision rejecting its tender in a Community public procurement procedure for the provision of services of information and analysis on quality of work and employment, industrial relations and restructuring covering the European level.

**Facts.** The tender procedure provided for the selection in a first stage of a limited number of tenderers from which would be chosen in the second stage the tenderer to whom the contract would be awarded. The applicant AWWW was selected, along with five other tenderers, to take part in the second stage of the procedure. On failing to secure the tender it alleged that the Foundation did not state the reasons for rejecting their tender and did not comply with the selection and award criteria governing the procurement procedure.

**Decision.** The court noted that the applicant raised more than 25 questions with the Foundation regarding the assessment procedure and a further 40 questions arguing in favour of its bid. It found that the applicant's criticism was that the Foundation has refused to enter into a debate with it on the merits of its offer vis a vis the successful bid. No contracting authority is obliged on the basis of its duty to state reasons for a decision rejecting a bid, to enter into such a debate and therefore the reasons given by the Foundation to the applicant were held to be sufficient.

The court further held that the Foundation did not infringe the bid evaluation procedure by applying incorrect criteria and that the applicant misunderstood what was specifically required at each particular stage of the tender.



## UK privacy case: High award of damages

*Case: Max Mosley v News Group Newspapers Limited, 24 July 2008*

**Background.** Everyone has the right to respect for his private and family life, his home and his correspondence (*Article 8(1), European Convention on Human Rights*).

**Facts.** The claimant, Max Mosley is the head of Formula 1, the governing body of motor sports. On 30 March 2008, the News of the World published an article accusing Mosley of paying five prostitutes to dress in German Nazi-style uniforms in what it claimed looked like concentration-camp uniforms for sadomasochistic sexual practices. It was accompanied by still photographs taken from a video recording. The article and images also appeared on the paper's website, with extracts from the video recording. The material was viewed hundreds of thousands of times. Mosley accepted that the events occurred but denied that there was any Nazi theme. He argued that the published material was private and that there was a pre-existing relationship of confidentiality between the participants. He therefore brought proceedings for invasion of privacy claiming exemplary damages (damages awarded in excess of the [claimant's \(www.practicallaw.com/A34662\)](http://www.practicallaw.com/A34662) loss that are intended to punish the defendant).

**Decision.** The English High Court held that the publication of the article and video infringed Mosley's right to privacy under the European Convention on Human Rights. The court held that Mosley had a reasonable expectation of privacy in relation to sexual activities carried on by consenting adults on private property and it rejected the claim that the events had a Nazi theme or that their publication could be justified on the basis that they were illegal or immoral. The court awarded damages of £60,000 but rejected the exemplary damages claim.

**Comment.** This is the highest award of damages for breach of privacy in the English courts and the decision raises important considerations for the media. While the common law in Ireland is slow to establish a "right to privacy" this decision must be considered if a similar case comes before the courts here.

## Financial Services Ombudsman: need to follow fair procedures

*Case: J & E Davy trading as Davy v Financial Service Ombudsman and Enfield Credit Union [2008] IEHC 25*

**Background.** The Financial Services Ombudsman (Ombudsman) adjudicates complaints regarding the conduct of regulated financial services providers. If a complaint is upheld, the Ombudsman may direct the financial services provider to review, rectify and mitigate the conduct complained of and to change the practice relating to that conduct.

**Facts.** A complaint by a credit union that Davy's had mis-sold perpetual bank bonds to a credit union was upheld by the Ombudsman in January 2008. The Ombudsman ruled the bonds were unsuitable investments for credit unions and that Davy's did not advise the credit union adequately on the risks inherent in the bonds which later fell in value. As a result Davy's should buy back from the credit union, the three bonds at their original cost of €500,000. Davy's rejected the complaints made against it and insisted it had provided full and proper advice about the nature of the bonds and the risks involved. Davy's took judicial review proceedings to have the decision of the Ombudsman quashed.

**Decision.** The High Court ruled that the Ombudsman failed to follow fair procedures in the way in which he upheld the complaint against Davy's. The court held that the Ombudsman carried out his functions in good faith but quashed his decision and remitted the matter to him for it to be investigated again and set out fair procedures to be followed. This included holding an oral hearing. The court also stated that when investigating complaints against financial service providers both complainants and financial service providers must be treated equally.

**Comment.** The Ombudsman has updated its procedures for dealing with complaints as a result of this decision. On 27 August 2008 the Ombudsman announced that he is appealing this decision to the Supreme Court. The grounds for his appeal are not yet known.



## Rome I Regulation

EC Regulation No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I Regulation) will apply from 17 December 2009 to all contracts concluded after that date (except for Article 26 (List of Conventions) which shall apply from 17 June 2009.) The new Regulation will replace the 1980 Rome Convention on the law applicable to contractual obligations, while modernising some of its rules.

The new Regulation will assure that even though the substantive law of the member states is different, all member states courts will apply the same law to the contract in question. The Regulation is based on the principle of party autonomy, that is, in most cases the parties are free to choose the law to govern their contract. However, in the absence of choice, the Regulation sets out rules to determine the law applicable to a contract. Apart from the general regime, it also contains specific conflict of law rules for particular cases such as consumer contracts, contracts of carriage and individual employment contracts.

## PIAB: a new name

InjuriesBoard.ie is the new web-friendly identity of the Personal Injuries Assessment Board (PIAB). On 19 June 2008 it launched a range of new services. These include: online applications, (available 24/7), an online claims estimator, multi-lingual services and a health and well-being section to assist recovery following an accident. Under their new brand, InjuriesBoard.ie, they have stated that they aim to increase public awareness and accessibility of their services.

## Arbitration Bill 2008

The Arbitration Bill 2008 was published in June 2008 and is a consolidated Bill which will cover both international and domestic arbitrations now referred to as standard arbitrations. This Bill will apply the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration to all arbitrations which take place in Ireland. At present the Model Law applies in relation to international commercial arbitrations only. This Bill will also preserve the obligations which Ireland undertook when it enacted the Protocol on Arbitration Clauses (Geneva Protocol), the Convention on the Execution of Foreign Arbitral Awards (Geneva Convention) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The timetable for enactment of the Bill is not yet known.

## Upcoming event

Beauchamps Solicitors are sponsoring the first Thomson Reuters Corporate Restructuring Conference in the Westbury Hotel in Dublin on 21 October 2008. Gabriel Daly a partner in the Litigation and Dispute Resolution will be speaking at it. For further information about this event please contact Aideen O' Regan at 01-662 5302 or at [aideen.oregan@thomsonreuters.com](mailto:aideen.oregan@thomsonreuters.com).

### Litigation and Dispute Resolution Department

If you have any queries on the contents of this update or if there are other topics you would like to see us address in future editions please contact any of the Litigation and Dispute Resolution solicitors below.

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