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# Litigation & Dispute Resolution Update

June 2010

## Unsigned contract binding where parties perform certain terms

The UK Supreme Court (formerly the House of Lords) has held that parties who had not yet signed a contract which had been negotiated under the umbrella of being "subject to contract" (and therefore not binding until signed) had entered into a contract nonetheless because the parties had begun performing the contract.

**Facts.** Müller wanted RTS to supply machinery for the packing of multipack yoghurts. During negotiations RTS had begun work on the project and Müller apparently part-paid for the work. A dispute subsequently arose. During the negotiations a draft contract had been circulated and almost all of the terms were agreed. The draft included a common counterparts clause that the contract "shall not become effective until each party has executed a counterpart and exchanged with the other".

**Decision.** The UK Supreme Court said that it must look at all the circumstances and make an objective assessment of the position considering what the reasonable business person would make of the situation between the parties. The court held that the parties had entered into a contract because the parties had begun performing the contract. They had waived the counterparts clause by conduct, meaning that a contract could come into existence even though no contract was ever signed. The terms of the contract were those which had been agreed in the draft contract as the court was satisfied that the parties had agreed all of the essential terms and that issues yet to be agreed were minor in nature and were not regarded by the parties as preconditions to a binding contract.

**Comment.** This is an interesting decision as it emphasises the dangers of starting work before a contract is concluded. In such circumstances, where no problems arise a commercial relationship may work well. However, if a dispute arises considerable costs could be involved in establishing what the contractual position is between the parties. In this case the parties litigated to the highest level to determine their contractual position which will have involved significant costs.

Lord Clarke in the Supreme Court summed the position up as follows; "the moral of the story is to agree first and to start work later".

*Case: RTS Flexible Systems v Molkerei Alois Müller GmbH [2010] UKSC 14*

## Greater recognition for electronic evidence

The Law Reform Commission recently published a paper on Documentary and Computer Evidence in Civil and Criminal Trials. Computer based evidence was the main focus with recommendations that all documentary evidence and records, electronic or manual, should enjoy a presumption of admissibility in civil and criminal cases, without the need for specialist authentication to satisfy the rules of evidence. Specific recommendations include:

- The law on documentary evidence should be technology neutral, and therefore should, in general, not be different whether related to manual or computer generated documents and records.
- All business records, whether manual or computer generated, should generally be presumed to be admissible.
- For mechanically generated recordings, such as videos or cctv, any defects in their quality should not rule them inadmissible, but should be dealt with by an assessment of the weight to be given to the recording.

**Comment.** The Law Reform Commission's recommendations appear modern, efficient and pragmatic. A question arises as to what extent the Commission has considered the abuses that can arise from the ease with which electronic documents can be altered. However, the recommendations do not prevent a party from thoroughly testing electronic documents, especially by the use of a carefully planned analysis of the other side's documents at the discovery or disclosure stage. The presumption is therefore no more than that and can be rebutted by contrary evidence.

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## Arbitration Act 2010

The Arbitration Act 2010 (2010 Act) came into force on 8 June 2010. It repeals and replaces the current Arbitration Acts and applies to all domestic and international arbitration agreements entered into after 8 June 2010. This means that arbitration clauses in pre-existing agreements will continue to operate under the old legislation with arbitration agreements entered into after 8 June 2010 operating under the 2010 Act. The 2010 Act incorporates UNCITRAL Model Law on International Commercial Arbitration which has been adopted by more than 50 countries and covers all stages of the arbitral process.

Some of the main provisions of note for arbitration agreements entered into after 8 June 2010 are as follows:

- Arbitrators will be obliged to give written reasoned awards to explain their decisions unless the parties agree otherwise.
- The 'case stated' procedure (where arbitrators refer questions of law to the courts) will be abolished. An arbitrator will be able to obtain independent advice from the courts, if necessary, in relation to a point of law.
- There is no longer a requirement that an arbitration agreement be in writing, it may now be recorded in electronic form.
- Arbitrators will have similar powers to judges in granting interim relief such as injunctions and will be able to determine who bears the costs for interim decisions.
- The only way of challenging an award will be under Article 34 of the UNCITRAL Model Law, which as stated above will be incorporated into Irish law under the 2010 Act. The grounds for appeal are very limited.

**Comment.** The 2010 Act is another measure which will strengthen the use of arbitration and encourage the use of arbitration and other methods of alternative dispute resolution instead of litigation.

## Companies in examinership can repudiate leases

A recent Supreme Court ruling paves the way for a company to repudiate onerous leases prior to the formulation of a scheme of arrangement in the examinership process.

**What is examinership?**
The examinership process under the Companies (Amendment) Act 1990 is a rescue procedure aimed at helping insolvent companies survive if they have a potentially viable business. It involves the obtaining of protection from creditors for a limited period (up to 100 days) while an independent court appointed examiner considers the company's affairs with a view to formulating proposals for a compromise or scheme of arrangement between the company, its members and its creditors which will allow the company survive as a going concern. Before a court can appoint an examiner it must be "satisfied" that there is a "reasonable prospect" for the survival as a going concern of the company as a whole or part of its undertaking. Subject to court approval, section 20 of the Act allows a company in examinership to affirm or repudiate any contract under which some element of performance (other than payment) remains to be rendered. This obviously caused particular problems with leases and future payments.

**Facts.** The company's examiner as part of a proposed rescue package wanted to reduce fixed costs and obtain better rental terms by repudiating leases on five premises that the company leased from various landlords. The High Court refused to allow this. However, the Supreme Court on appeal held that leases are contracts that were capable of repudiation within the meaning of section 20 and that section 20 should be interpreted in its ordinary meaning so even though leases create future and often long term obligations they can be repudiated by an examiner.

**Implications.** The confirmation that a company in examinership can repudiate onerous leases could help more companies successfully complete the examinership process and therefore survive. However, from a landlord's viewpoint it can be harsh. A landlord's best interests will need to be ascertained from both an assessment of relevant market factors and advice on the terms of the proposed scheme of arrangement.

*Case: Linen Supply of Ireland Limited (in Examinership) [2009] IEHC 544; [2010] IEHC 28*

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# No legal professional privilege for in-house lawyers

In-house counsel operating in Europe and wishing to avail of legal professional privilege like their law firm counterparts have been set back by a recent influential opinion from the Advocate General of the European Court of Justice (ECJ).

**Background.** Legal professional privilege protects against compulsory disclosure of communications made between a client and their lawyer in which advice is sought or given within a relevant legal context. This case developed out of an inquiry by the European Commission (the Commission) into suspected price-fixing. The Commission raided Akzo Nobel Chemicals Ltd's offices in 2003 and seized a number of papers – among them emails between a company executive and in-house counsel. The Court of First Instance of the EU (CFI) upheld a Commission decision that privilege only attached to communications with EU-qualified and independent lawyers. This decision was appealed to the ECJ.

**Opinion.** On 29 April 2010 Advocate General Kokott recommended that the ECJ dismiss the appeal by Akzo. She did not consider that the CFI erred in its application of existing case law and she confirmed the view that salaried in-house lawyers are not sufficiently independent from their employers (as compared to external lawyers) to justify the extension of legal professional privilege to communication between them and their employers.

**Comment.** Although not binding on the ECJ, this opinion is likely to be persuasive as such opinions have a significant influence on the final outcome of ECJ decisions. If followed, it will confirm that businesses should operate on the basis that the communications of their in-house lawyers are unprotected by legal professional privilege. In situations which may become contentious, clients are reminded that internal written communications may be discoverable in litigation. To ensure secure communications you should take legal advice at an early stage.

*Case: Case C-550/07 Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission*

# Mareva injunctions: chasing assets – competing interests

**Background.** A Mareva (or freezing) injunction may be granted to restrain the dissipation or removal of assets of individuals or companies where there is evidence of this happening so as to avoid the claims of the other side. It may be granted before or during proceedings.

It is a discretionary remedy which a court will grant only when satisfied that it is just and equitable to do so pending determination of the action. It prevents the party from dealing with the assets in question. All types of assets can be frozen, including bank accounts, shares, motor vehicles and land. A party may also be ordered to provide information about their assets. It does not *per se* give the claimant any rights in the assets.

**Facts.** In 2008 the High Court granted a Mareva injunction over Breifne O'Brien's (the defendant's) assets restraining him from reducing his assets below the level of €20 million and subsequently granted judgment in favour of the Dowleys (the plaintiffs) for approximately €3 million. Some of O`Brien's assets had been the subject to a right of set-off by Anglo Irish Bank. Anglo applied to the High Court to vary the terms of the injunction so it could exercise its right of set-off and take some of the frozen funds in O`Brien's bank account to set against O`Brien's debt to it. The Dowleys objected to Anglo's application as they wanted the moneys available to satisfy their judgment.

**Decision.** The High Court acknowledged that a third party, such as a bank, may have a legitimate right to deal with assets covered by a Mareva injunction. The court stated that the purpose of the injunction was not to give security to a plaintiff but to prevent a defendant from placing his funds outside the control of the court so as to frustrate execution of any judgment which might ultimately be obtained. A Mareva injunction does not normally prevent a defendant using its assets in the ordinary course of business or paying its *bona fide* debts. Therefore, where a bank has security, including a right of set-off prior to being notified of a Mareva injunction, the injunction can have no effect on the validity of the right to set-off on the security. The High Court held that Anglo's application to vary the terms of the injunction to allow the set-off was unnecessary as its right of set-off was not prejudiced by the Mareva order over O'Brien's assets.

**Comment.** This decision confirms that a Mareva injunction operates against a party compelling him/her to preserve particular assets and that it is not an order giving ownership of the assets. The danger is that litigants who freeze assets may find that the assets they think will be available to satisfy a judgment they hope to obtain are not, in fact, available.

*Case*: *In the matter of an application by Anglo Irish Bank plc: Louis and Robert Dowley v Breifne O'Brien [2009] IEHC 566*

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# New report on personal debt

Irish bankruptcy law is antiquated and badly needs to be modernised. For example, if you are declared a bankrupt, the restrictions can apply for 12 years unlike other jurisdictions where you can be discharged from bankruptcy in 12 months. In September 2009, the Law Reform Commission produced a consultation paper on Personal Debt Management and Debt Enforcement that makes 122 provisional recommendations for reform. The Commission's follow up interim report on Personal Debt Management and Debt Enforcement was launched by the Minister for Justice, Equality and Law Reform, Dermot Ahern, on 17 May 2010. It contains a 14 point action plan, the key elements of which are:

**The development of a standard financial statement:**
This will have a major practical effect in providing an agreed Irish standard to assess an individual's total income and total outgoings. Some creditors do not take into account a person's total debts when assessing how much they expect them to pay: the standard financial statement allows both the individual debtor and all creditors to have a complete view of what would be a realistic amount to pay in a given situation.

**Extension of the IBF-MABS Operational Protocol on Managing Debt:**
The IBF-MABS Protocol is a partnership document between the Irish Banking Federation (IBF) and the Money Advice and Budgeting Service (MABS), the State-funded service for people in debt or in danger of getting into debt.

The extension of the Protocol will bring more financial institutions and other creditors into a nationally agreed debt management process, so that it includes not just IBF members (as at present) but also credit unions and, potentially, the so-called "sub-prime lenders" as well as utility companies.

**A dedicated website for consumer debtors:**
This would provide a one-stop-shop of all the available information, based on the detailed material compiled in the interim report.

**A pre-action protocol for consumer debt cases:**
This would impose a mandatory requirement on creditors to issue a warning letter before bringing debt proceedings and would allow the individual debtor to obtain advice from, for example, MABS on preparing a standard financial statement to present to the creditor before court proceedings are initiated.

**A reduction before a discharge application may be brought under the Bankruptcy Act 1988:**
The proposal is to reduce the current 12 year period to six years or less. This would not affect the detailed restrictions in the current bankruptcy law, but would be a modest stepping stone towards more comprehensive reform.

**Comment.** While some of the proposals are not as sweeping as some may hope, because of the scale of the problems in this area, any positive reform proposals must be welcomed so long as they are enacted as soon as possible. Beauchamps produced a report on Bankruptcy Law in the European Union and Forum Shopping and it can be accessed at http://www.beauchamps.ie/index.php/news/publications/existing_bankruptcy_law_stifling_irish_business/593

**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 partners below.


| | |
|---|---|
| Claire Callanan (Head of Litigation and Dispute Resolution) | c.callanan@beauchamps.ie |
| Mark J. Heslin | m.heslin@beauchamps.ie |
| Gabriel Daly | g.daly@beauchamps.ie |
| Philip Smith | p.smith@beauchamps.ie |
| Emma Keegan | e.keegan@beauchamps.ie |


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**Beauchamps Solicitors**
Riverside Two, Sir John Rogerson's Quay, Dublin 2
Tel +353 (1) 418 0600 Fax +353 (1) 418 0699
email info@beauchamps.ie web www.beauchamps.ie