WILLIAM FRY

LEGAL NEWS

Welcome

Welcome to the December issue of Legal News. For further information on any of the topics covered in this edition, please call or email any of the key contacts or your usual William Fry contact person.

Paul Murray

Partner

Airbnb – Are You Breaching the Terms of Your Lease?

Airbnb is a website that enables people to list short term rental accommodation in residential properties. Use of this and other similar websites have become increasingly popular in Ireland.

A recent English case highlights that even if a lease does not restrict short term letting, permitting Airbnb style short term lettings might breach other lease terms. In that case the owner of an apartment in a purpose built apartment block was held to be in breach of her lease by advertising the availability of her apartment for short term lettings and granting a series of such lettings.

The lease contained a restriction on sub-letting in the last seven years of the term. With just over 80 years left to run on the lease this restriction did not apply at the time. However the owner was held to be in breach of her covenant to use the premises as "a private residence". It was decided that in order for a property to be used as the occupier's private residence there must be a degree of permanence going beyond being there for a weekend or a few nights in the week. The Court stated that whether other tenants with a similar covenant would be found to be in breach would depend on the construction of the particular covenant in its own factual context. This case highlights the importance of looking at all lease covenants and not just those relating to rights to sub-let.

The issue is clearly under the spotlight in Ireland too. Recent media reports indicate that residents of various apartment complexes are being advised that short term lets such as those offered on Airbnb are contrary to their leases; and the Planning Laws are also being employed. Recently An Bord Pleanála agreed with the Temple Bar Residents' Association that the use of an apartment at Crown Alley, Dublin 2 for Airbnb lettings required planning permission. In that particular instance the Board reasoned that because of the high turnover of visitors, the attendant security risk, support activities (such as cleaning staff) to service the lettings and lack of a resident host distinguished the apartment's use sufficiently from the residential use of the rest of the block and impacted sufficiently on the amenity of the other residents as to amount to "material change of use".

Contributed by Tara Rush & Conor Linehan

Watching the Detectives

Two recent cases will give lawyers pause for thought prior to instructing private investigators.

In the first case, a private investigator (Mr Ryan) was fined €7,500 for illegally obtaining personal information from the Department of Social Protection (the "Department") when he was employed by a firm of solicitors in Dublin in relation to debt collection proceedings for two banks. The Office of the Data Protection Commissioner (ODPC), gave evidence that Mr Ryan had obtained the personal details of 68 people from his sister-in-law who worked for the Department. The District Court heard that Mr Ryan was not registered with the ODPC and had no authorisation to process personal information on databases. The District Court also heard whilst it is not against the law for solicitors and banks to hire private investigators, it remains a serious breach of the Data Protection Acts 1988 and 2003 to obtain personal information unlawfully. It was the tactics and methodology used that were of serious concern in the case. Judge Conal Gibbons also expressed concern that the banks did not take greater care to ensure that the people they were hiring to help recover debt were fully compliant with applicable rules and regulations. Following the case, the ODPC said that private investigators acting unlawfully would continue to be vigorously pursued.

In the second case, a former secondary school teacher (Ms Daly) sought an injunction against an insurance company directing the insurer to pay her disability benefit under her salary protection scheme. She also sought orders restraining the insurance company from carrying out any further surveillance of her and requiring any images of her already obtained to be handed over. Ms Daly claimed that she was placed under surveillance by a private investigator after she challenged the insurer's decision to cease paying her disability allowance. She was of the view that the action was designed to intimidate her and she feared that the surveillance would resume, although the insurance company had confirmed that it would not. Ms Daly had been deemed medically unable to work as a teacher by the Department of Education on the grounds that she suffered from ME or chronic fatigue syndrome for many years and it was asserted before the High Court that there were 6 medical reports supporting this. Ms Daly was granted permission to serve short notice of the proceedings on the insurer and the outcome of the substantive proceedings is awaited.

The Data Protection Acts 1988 and 2003 regulate how data controllers collect, store and use personal data held by them about data subjects. The ODPC is responsible for upholding the privacy rights of individuals in relation to the processing of their personal data and has focussed on the area of private investigators and tracing agents to ensure that they do not seek to access personal data held by other data controllers which is not in the public domain without the consent of the data subject or unless otherwise permitted by law. The ODPC welcomed the decision in the first case above saying "*these prosecutions send a strong message to private investigators and tracing agents to comply fully with data protection legislation in the conduct of their business and that if they fail to do so, they will be pursued and prosecuted for offending behaviour*".

It appears likely that this is an area that the ODPC will continue to focus on and at the very least, if a lawyer is instructing a private investigator, it would be prudent to ensure that the investigator is registered with the ODPC.

Contributed by Fiona Barry and Paul Fisher

The Court of Appeal – A New Approach to Damages

Recent jurisprudence of the Court of Appeal (the "Court") shows a pattern of reducing awards of damages from the High Court. The Court has stated that it has found some High Court awards to be excessive and outside the permissible range of damages typically granted. It has also been critical of the lack of objective reasoning in reaching awards and of the method of assessment of damages.

Helpfully, the Court has given guidance as to how damages should be assessed.

In Payne v Nugent [2015], the High Court had awarded €65,000 for general damages in a road traffic claim where a back seat passenger was injured when a car was rear ended. On appeal, the injuries in this case were held to be relatively modest and damages were reduced to €35,000. The principles outlined by the Court in deciding to reduce the award are of interest. It held that it is important that compensation in respect of pain and suffering should be reasonable and proportionate and that an award of one-sixth of the top end of damages was not proportionate in this case.

In Nolan v Wirenski [2016], the Court again spoke about damages having to be just and reasonable and assessed by reference to a spectrum of damages from minor to catastrophic/life changing injuries that have a cap of €450,000. The Court held that damages should be:

- Fair to the plaintiff and the defendant
- Objectively reasonable in light of the common good and social conditions in the State
- Proportionate within the scheme of awards for personal injuries generally

It was held that the task of the Court is to objectively assess injuries against a spectrum and outline the reasons for the decision.

In the earlier Supreme Court decision of M.N. v S.M. [2005], Ms Justice Denham (as she was then) advised that damages can only be fair and just if they are proportionate not only to the injuries sustained by the plaintiff but also proportionate when assessed against the level of the damages commonly awarded to other plaintiffs who have sustained injuries that are of a significantly greater or lesser magnitude. She said it is important that minor injuries attract appropriately modest damages, middling injuries moderate damages and more severe injuries damages of a level which are clearly distinguishable in terms of quantum from those that fall into other lesser categories.

An updated Book of Quantum has been published since these decisions were handed down. However, this is unlikely to have a major impact on this trend in awards of damages as the Court is of the view that, independently of the Book of Quantum, it is also appropriate to examine the award of damages by reference to where the injuries fall on the spectrum.

Going forward, it is expected that the approach of the Court will be to locate the seriousness of the case at an appropriate point somewhere on a scale that includes everything from the most minor to the most serious injuries and award damages accordingly.

Contributed by Fiona Barry

CJEU Rules Dynamic IP Addresses May Constitute Personal Data

In a decision that may have far reaching implications for website operators, the Court of Justice of the European Union (CJEU) has ruled that dynamic IP addresses can constitute personal data, even where the individual can only be identified using additional data held by a third party (normally the internet service provider that assigns the IP address).

Background

Patrick Breyer, a German politician, sought an injunction preventing the Federal Republic of Germany from storing IP addresses of visitors to their websites for cyber security purposes.

The case had reached the highest court in Germany, which referred two questions to the CJEU:

1. Whether a dynamic IP address held by an online media service provider could constitute personal data in circumstances where the additional data necessary to identify the data subject can only be provided by the internet service provider
2. Whether the provision of German law that precluded a justification based on "legitimate interest" to hold data (e.g. to prevent cyberattacks) was inconsistent with Article 7 of the Data Protection Directive (the "Directive")

Court ruling and future implications

In response to these questions, the CJEU ruled that:

1. A dynamic IP address may constitute personal data if the site operator has legal means enabling it to identify the visitor with the help of additional information provided by a third party
2. The provision of German law that limited the scope of the "legitimate interest" justification by providing that it only applied to the specific use of the site by the data subject is inconsistent with Article 7 of the Directive (which creates the justification)

The decision is likely to present challenges to online media service providers. If all IP addresses can constitute personal data, site operators will now need to balance the fundamental rights of data subjects who access their sites with the legitimate interest in preventing cyberattacks. This is likely to result in additional requirements for site operators such as carrying out privacy impact assessments.

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Contributed by John Magee

Court of Justice of the European Union Ruling on Pyrite Case

Further to our previous article on this subject, the Court of Justice of the European Union (CJEU) has issued its preliminary ruling in the James Elliott Construction v Irish Asphalt case. The CJEU has largely followed the opinion of the Advocate General in its ruling in response to the questions raised by the Irish Supreme Court.

This case involves a dispute over the supply of defective infill material in relation to the construction of a Dublin youth centre. James Elliott Construction sought compensation from Irish Asphalt, which had supplied the material in question, claiming that it had caused "pyrite heave" which necessitated remedial works to the building costing €1.55 million. The case centres on whether there was a breach of the implied contractual terms between the parties as to the merchantability or fitness for purpose of the materials supplied.

The case reached the Supreme Court, which held that, under national law, James Elliott Construction should succeed in its claim. However, this was subject to any issue of EU law to be determined by the CJEU. In particular, the Supreme Court raised queries in relation to the interpretation of an EU standard for construction products (the "Harmonised Standard").

Set out below is the CJEU's response in respect of each of the questions raised by the Supreme Court.

1(a) Does the CJEU have jurisdiction to give a preliminary ruling on the interpretation of harmonised technical standards?

The CJEU replied in the affirmative to this question.

1(b) Whether the Harmonised Standard requires compliance to be established (i) only by the testing method indicated therein and used at the time of production and/or supply of the product or (ii) by other testing methods used later?

The CJEU held that the Harmonised Standard must be interpreted as meaning that it allows a breach of its technical specifications to be established by test methods other than those expressly provided for in the standard, and such methods may be used at any time during the economically reasonable working life of the product.

2. Should national provisions implying terms as to merchantability and fitness for purpose be disapplied on the grounds that they are technical regulations not notified in accordance with the Technical Standards Directive (Directive 98/34/EC)?

The CJEU upheld the contention that national provisions such as those at issue in this case specifying, unless the parties agree otherwise, implied contractual terms concerning merchantable quality and fitness for purpose of the products sold, cannot be considered to be a ''technical regulation'' within the meaning of the Technical Standards Directive and therefore prior notification to the European Commission at the draft stage was unnecessary.

3. Does the presumption of fitness for use of building materials, derived from the Construction Products Directive (Directive 89/106/EEC) apply also for the purpose of determining whether the product is of merchantable quality when the latter is a condition laid down in general national legislation applicable to the sale of goods?

The CJEU, following the Advocate General's opinion, held that the presumption of fitness for use of construction products, which is provided for in the Construction Products Directive in order to facilitate their free movement in the internal market, does not apply, in the context of a contractual dispute, for the purposes of assessing whether one of the parties to the contract has complied with a national contractual requirement.

4 & 5. Questions regarding whether the sulphur limit of a product must comply with the Harmonised Standard to enjoy the presumption of fitness for use, and the question of whether the bearing of a CE mark is a prerequisite for a presumption of compliance with EU standards?

The CJEU noted that the questions in relation to the limits of total sulphur content of aggregate under the Harmonised Standard, and whether a product must bear the CE marking to rely on the presumption of fitness for use were raised by the Supreme Court only in the event of an affirmative answer to question 3 above and as such, there was no need to answer them.

The CJEU further noted that the decision on costs was a matter for the Irish Supreme Court to consider.

Conclusion

The final decision on this matter will subsequently lie with the Irish Supreme Court which will now use the above preliminary ruling of the CJEU as a basis for its interpretation and final judgment on this matter.

Contributed by Fionnualla Cleary

Employer Beware, Ignorance of the Law Excuses Not, Including Delays

Section 44(4) of the Workplace Relations Act, 2015 (the "Act") which provides for the appeal of decisions of the Workplace Relations Commission (WRC) to the Labour Court, was recently considered in the context of a refusal by the Labour Court to hear an appeal due to a missed deadline.

Background

This particular case involved a WRC decision against Ms Josephine Kenny's claim of unfair dismissal dated 28 April 2016.

Ms Kenny issued an appeal against the Adjudication Officer's decision by notice received by the Labour Court on 9 June 2016. Section 44(3) of the Act provides that an appeal "*shall be given to the Labour Court not later than 42 days from the date of the decision concerned*". The Labour Court concluded it had no jurisdiction to hear the appeal as the appeal should have been received by them one day earlier, i.e. 8 June 2016. The claimant informed the Labour Court that she had engaged the services of and was advised on the appeal by the Citizens Information Service in Co. Longford (CIS). The claimant noted that the reason for not meeting the deadline was that it was assumed that the timeframe for appeal was "*post*" the original decision and not "*from*" the date of the original decision.

The law

Under Section 44(3) of the Act an appeal of a WRC decision to the Labour Court should be made not later than 42 days from the date of the decision. Section 44(4) provides that this 42 day limit can only be extended "*due to the existence of exceptional circumstances*". When calculating the 42 days, it is important to note that the date of the decision must be counted as "day one".

Decision

It was deemed that the miscalculation of the appeal's deadline did not amount to "*exceptional circumstances*" as per section 44(4) of the Act. The Labour Court noted that the miscalculation of time in this case was "*akin to a misinterpretation of the statutory provisions*". Accordingly, the Labour Court held that it had no jurisdiction to hear the appeal.

Comment

The case highlights the fact that the Labour Court will not allow ignorance as to the timeframe to be relied upon to amount to "*exceptional circumstances*" when a party is seeking an extension of time in order to lodge an appeal. This strict interpretation of the statutory provisions serves as a warning to practitioners as to the importance of calculating the correct amount of time for filing an appeal against the decision of the WRC.

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Contributed by Catherine O'Flynn and Aedín Brennan

Product Recall: Major Threat to Profitability for the Food and Beverage Industry

Increasingly stringent global food and beverage regulations are requiring tighter food safety controls to be implemented by food business operators to ensure effective public consumer health protection. In the event of a product recall, having a robust plan in place ensures that the impact to business is minimised.

Food and beverage recall relates to any food safety incident that requires consumers to be notified of the safety issues, whether or not the product is actually required to be removed from consumers. According to the 2015 annual report of the Food Safety Authority of Ireland (FSAI), there were 67 published alerts during 2015, comprising 31 food alerts and 36 food allergen alerts. The alerts dealt with a range of matters including undeclared allergens, misbranded products and microbiological contamination.

At a European level, one of the largest food product recalls of 2016 involved confectionary giant Mars which recalled millions of its snack sized bars and sweets after plastic was found in one of its products. Despite the fact that the product involved had been manufactured at a factory in the Netherlands, it was necessary to recall it not just in the Netherlands, but in over 50 countries including Ireland, Britain, France and Germany. This led to significant related costs for the company.

A product recall survey conducted in the UK in 2015 indicated that one-fifth of UK food and beverage companies were operating without a product recall plan. A lack of an effective product recall plan can leave businesses exposed to potential financial loss and serious reputational damage as well as cause significant health issues to the consumer.

Methods to minimise and effectively deal with a food and beverage product recall include:

1. Simulated product recalls and staff training

Staff training is critical at every level of the operational process. Companies should invest in a quality program that evaluates and updates its recall implementation capabilities. From there, organisations can evaluate and improve strategy to protect against recalls, reduce recall operational costs, and protect the business brand.

2. Traceability and supply chain knowledge

When a recall occurs food business operators need to have a robust and tested traceability system in place. Having a global supply chain raises the possibility of legal enforcement in several different countries leading to associated litigation costs. To deal with this, all food producers should have an accurate, detailed, transparent and up to date traceability system in place so as to be in a position to identify from whom and to whom a product (including ingredients) has been supplied.

3. Business communications strategy

An effective and well-thought-out crisis communication plan, which alerts both the public and relevant authorities to the product recall, should be in place to minimise reputation and branding damage to a company. Bearing in mind the speed at which publicity can spread on social media and elsewhere, companies should be in a position to act quickly should a food safety issue arise. Communications should be co-ordinated and targeted and should put the needs of customers first.

4. Understand your insurance policy

Product recall insurance can reimburse insureds for financial losses they sustain due to a product causing or having the potential to cause bodily injury or property damage. Companies should clearly understand their policy coverage to ensure all relevant matters are insured in the event of a recall.

Contributed by Cliodhna McDonough

Sale of Computer Equipped with Pre-installed Software not an Unfair Commercial Practice

In *Case C-310/15 Vincent Deroo-Blanquart v Sony Europe Limited*, the Court of Justice of the European Union (CJEU) held that the sale of a computer equipped with pre-installed software does not in itself constitute an unfair commercial practice within the meaning of Directive 2005/29/EC (the "Directive").

The CJEU had been asked by the French Cour de Cassation to consider:

1. Whether a commercial practice consisting of the sale of a computer equipped with pre-installed software without any option for the consumer to purchase the same model without the pre-installed software constituted an unfair commercial practice
2. Whether, in the context of the combined offer of the sale, the failure to indicate the price of each item of software constituted a misleading commercial practice

The CJEU found, in response to the first question, that the sale of the computer equipped with pre-installed software does not in itself constitute an unfair commercial practice when such an offer is not contrary to the requirements of professional diligence and is not likely to distort the economic behaviour of consumers.

In relation to the second question, the CJEU emphasised that a commercial practice will only be regarded as misleading if it omits material information from the consumer, and, due to the fact that the price of each of those items of software could not be held to constitute material information, the failure to indicate the price was not misleading.

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