WILLIAM FRY

Legal News

Welcome to the April 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.

Ken Casey

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Faithless? Good Faith and Fair Dealing in Irish Contract Law

The Court of Appeal (the "Court") has overturned an earlier decision of the High Court and refused to imply a term of good faith and fair dealing into a shareholders' agreement. The Court also upheld the position that there is no general principle of good faith and fair dealing in Irish contract law.

On 8 March 2017, the Court handed down its ruling in the matter of *John Flynn and Benray v Breccia and Michael McAteer.* The case centred on a dispute around the acquisition and sale of shares in Blackrock Clinic and the correct interpretation of a 2006 shareholders' agreement between the parties (the "Shareholders' Agreement"). The Plaintiffs had successfully argued before the High Court that (among other things) there was an implied term in the Shareholders' Agreement that the shareholders owed each other mutual duties of good faith and fair dealing. As a result, the High Court accepted that the Shareholders' Agreement restricted how shares in Blackrock Clinic could be dealt with outside of that agreement.

The question of whether or not a duty of good faith could be implied into the Shareholders' Agreement was only one of the matters to be considered by the Court. In her decision, Justice Finlay Geoghegan accepted that while there are certain types of agreements to which a duty of good faith applies (such as partnership agreements and insurance contracts), there is no general principle of good faith and fair dealing in Irish contract law.

In refusing to imply a duty of good faith into the Shareholders' Agreement, the judge noted that the agreement expressly included a "no partnership" clause. A partnership would have bound the parties by obligations of good faith. She also pointed to the fact that the agreement contained a single specific clause requiring the parties to "negotiate in good faith" in the event that any provision of the agreement was found to be void or unenforceable, but didn’t contain any more general provisions on good faith. Looking at the circumstances in which a term can be implied in a contract, she noted that in this case an implied term of good faith and fair dealing:

- Was not necessary to give business efficacy to the Shareholders' Agreement
- Could not be considered so obvious that "it goes without saying", and
- Lacked certainty

It is a common misconception among parties to a commercial agreement that there is a mutual duty of good faith or fair dealing in existence between them, whether or not this is expressly stated. However, this decision makes it clear that this is not the case under Irish contract law. Where a party to a contract wants to rely on a good faith or fair dealing provision, then they must ensure that it is expressly included in the agreement.

Contributed by Deirdre O'Donovan

Employers Beware - Advice from HR Consultants Not Legally Privileged

The Employment Appeals Tribunal (EAT) has recently confirmed that legal advice privilege does not attach to advice given to employers by their non-lawyer advisors. As such, this advice may be disclosable to employees who submit data access requests to their employers.

Richard Carron v Fastcom Broadband Limited t/a Fastcom (UD1515/2013)

Mr Carron brought a claim for unfair dismissal against his former employer Fastcom Broadband Limited (Fastcom). Prior to Mr Carron's dismissal, Fastcom took legal advice from HR consultants Peninsula Business Services (Ireland) Limited (Peninsula) in relation to a grievance raised by Mr Carron.

In the course of preparing his claim before the EAT, Mr Carron submitted a data access request under the Data Protection Acts 1988 and 2003 to Fastcom seeking copies of certain documents arising from his grievance, including the advice provided by Peninsula to Fastcom. Fastcom refused to release the documents to Mr Carron claiming that they were subject to privilege. The EAT was asked to determine a preliminary issue as to whether privilege attached to these documents.

The EAT considered the issue of privilege under two headings:

1. Legal Advice Privilege

   The EAT reiterated that legal advice privilege applies to communications between a lawyer and client containing legal advice during the course of a professional legal relationship. The EAT examined the status of Peninsula noting that it had referred to itself as a "legal advisor" in its submission to the EAT. Mr Carron disputed this classification and drew the EAT's attention to Peninsula's website where it had described itself as "Employee Assistant Specialists".

   The EAT determined that Peninsula was primarily a consultant and advisor to employers which, although involving some advice on legal issues, did not classify Peninsula as a lawyer and thereby enable it to avail of legal advice privilege. Therefore, Fastcom could not refuse to disclose the requested documentation under Mr Carron's data access request as legal advice privilege did not attach to the communications prior to the date on which Mr Carron had filed his claim to the Workplace Relations Commission (WRC).

2. Litigation Privilege

   The EAT differentiated legal advice privilege from litigation privilege noting that the latter category of privilege can apply to communications between a client and its non-legal advisor in connection with litigation.

   On this basis, the EAT accepted that the communications between Fastcom and Peninsula were subject to litigation privilege from the date on which Mr Carron's unfair dismissal claim was filed with the WRC.

Conclusion

In many employee grievance situations employers obtain sensitive advice at the outset of the matter, long before any claim or litigation is threatened or in being. Employers should bear this in mind. This is particularly so when in the majority of cases an aggrieved employee will, without a doubt, make a data access request to obtain personal data held by the employer in relation to them.

We understand that the High Court is due to examine the issue of privilege arising from a similar set of facts in a case scheduled for May and we will provide a further update on this matter when the case is determined.

Contributed by Alicia Compton and Paul Buchanan

An End to Mandatory Retirement Ages?

Unlike many other EU jurisdictions, there is no statutory retirement age in the private sector in Ireland, with retirement related issues being regulated instead by employment contracts. Private sector employers in Ireland are permitted to set mandatory retirement ages provided they are objectively and reasonably justified.

Late last year, Sinn Féin TD, Deputy John Brady introduced the *Employment Equality (Abolition of Mandatory Retirement Age) Bill 2016* (the "Bill") to Dáil Éireann with the aim of amending the Employment Equality Act 1998 to abolish mandatory retirement ages in the workplace. Typically, an opposition Bill would not be expected to proceed past the initial legislative stages, but a greater number of these types of Bill are now progressing due to the current minority Government arrangements. In this instance, the Government has indicated that it supports the Bill in principle, while voicing concern that there are technical issues with the Bill as drafted.

When introducing the Bill, Deputy John Brady commented *"age should not determine whether someone can do their job. The Bill is about giving people a choice*". The William Fry "Age in the Workplace" Report 2016, found that while only 48% of employers have a mandatory retirement age in place, many rely on individuals retiring when they reach the 'normal retirement age' of the organisation, typically 65. However, the Report also highlighted that 63% of employees over 55 want or believe they will have to work past the age of 66.

In addition to abolishing mandatory retirement ages, the Bill also seeks to resolve certain pension issues whereby employees required to retire at 65 (or younger) have no option but to sign on for jobseekers allowance until they reach the qualifying State pension age (currently 66). It proposes to give employees who have insufficient pension contributions the option to remain in the workforce to build up additional contributions if they so wish.

However, it is worth noting that a similar Bill which sought to end mandatory retirement ages was proposed in 2014 by the then Labour TD, Deputy Anne Ferris and failed to progress beyond initial Dáil discussions. As in 2014, the Government has warned that there are technical problems with the Bill as drafted and it raises serious policy and expenditure issues that will need to be considered.

It also appears that the Bill is intended to apply retrospectively to pre-existing contracts of employment which could have complex implications. Furthermore, the Government has warned of significant cost implications as the Bill seeks to allow financial incentives to be offered to employees to cease work at any particular age.

The Bill will now progress to the Oireachtas Select Committee on Justice and Equality. While Sinn Féin has welcomed the unanimous cross-party support for a change in the law, it is likely that the Bill will need to be significantly amended if it is to reach enactment. We will provide further updates in respect of the progress of this Bill through the Houses of the Oireachtas.

Contributed by Catherine O'Flynn

CJEU Calls Foul on Streaming Sites Playing Catch-Up

A recent ruling by the the Court of Justice of the European Union (the "CJEU") has re-asserted the right of broadcasters to control how, when and where their shows are aired.

In light of a question referred to the CJEU as part of a long-running dispute between a number of British broadcasters and internet streaming service "TVCatchup", the CJEU has indicated that the online streaming by third parties of live television broadcasts is, with limited exceptions, contrary to EU law.

TVCatchup previously enjoyed the protection of the "Section 73 Defence", an exception under the UK Copyright, Designs and Patents Act 1988 which permits the re-transmission of wireless broadcasts *by cable* to users in the area in which the broadcast was originally transmitted. The English High Court had held that this exception allowed for the retransmission of free-to-air broadcasts over the internet, but did not extend to streaming services to mobile devices over mobile networks. However, the CJEU's recent ruling highlighted that Section 73 must be read in light of the Copyright Directive[1], an EU Directive designed to bolster copyright protection for authors.

The upshot of this is that European law, taking priority over national law, will generally prohibit the online streaming of free-to-air broadcasts, even in the geographic area of the initial broadcast.

What does this mean for broadcasters and streaming websites?

The equivalent legislation in Ireland (Section 103 of the Copyright and Related Rights Act 2000) virtually mirrors the UK's Section 73 and will also need to be interpreted in light of the Copyright Directive.

The CJEU's ruling indicates that online streaming services subject to European law will only be able to provide live retransmissions in the very limited circumstances outlined exhaustively in Article 5 of the Copyright Directive. The decision may also lead to public service broadcasters charging retransmission fees to cable operators. With Irish public service broadcasters already developing their own streaming services (e.g. RTE Player), websites that offer unauthorised streaming services are likely to become less and less influential in the market. For those involved in the area of online streaming services, now is the time to consider protecting your business from vulnerability to similar litigation before the Irish courts.

Contributed by Kellie O'Flynn

[11] Specifically Article 9 of Directive 2001/29/EC of the on the harmonisation of certain aspects of copyright and related rights in the information society (also known as the Copyright Directive and the InfoSoc Directive)

'Fintastic' Award of One Year's Salary for Seafood Restaurant Manager

In a recent workplace relations case a Restaurant Manager was awarded compensation equivalent to one year's salary for a pregnancy-related dismissal. The Adjudication Officer indicated that the award may have been even higher if the Restaurant Manager had more than three months' service.

Background

This case concerned an individual who had been employed as a Restaurant Manager by a seafood restaurant. She carried out her role with another manager, Ms B. Two months after starting work, the Restaurant Manager told her employer that she was pregnant. After this, the Restaurant Manager noticed a change in atmosphere. She was no longer invited to weekly managerial meetings. She also received an email from Ms B outlining a number of performance issues, some of which had not been discussed with her. The Restaurant Manager accepted some of the issues raised but attributed most of them to inadequate training. The Restaurant Manager offered to have a meeting with Ms B to discuss these matters and to have a meeting with their manager, Mr A. The Restaurant Manager then emailed Mr A for a meeting to discuss "really urgent matters" and said she required his assistance as the situation had become "too serious". Despite her request, no meeting took place. Three days after this email (and one month after the notification of her pregnancy), the Restaurant Manager was advised that she was being let go.

The Restaurant Manager brought a claim under the equality legislation alleging that she had been discriminated against and dismissed due to her pregnancy.

The restaurant contended that the Restaurant Manager was dismissed during her probationary period due to performance issues unrelated to her pregnancy. It claimed that she had been adequately trained, that performance issues arose prior to the pregnancy notification and that, despite meeting with the Restaurant Manager to discuss improving her performance, there had been no improvement. The restaurant accepted, however, that there were no records in relation to opportunities afforded to the Restaurant Manager to improve her performance and conceded that everything had been communicated verbally.

Findings

While the Adjudication Officer recognised that there may have been genuine performance issues, she stated that the restaurant was misconceived in believing that it could rely on the probation clause to dismiss for performance issues without having recourse to a formal review, a disciplinary process or fair procedures. As there were no records or minutes of meetings discussing the Restaurant Manager's performance, the Adjudication Officer did not find it credible that they took place. The Adjudication Officer also said that there was an added onus on the restaurant to identify and provide the Restaurant Manager with any necessary supports once it became aware of her pregnancy, which it failed to do.

The Adjudication Officer decided that, given the proximity of the notification of the pregnancy to the dismissal and Mr A's refusal to have a meeting, the Restaurant Manager's pregnancy was a significant factor contributing to her dismissal. The Adjudication Officer held that the restaurant failed to show that there were exceptional circumstances unrelated to pregnancy that would have warranted the dismissal and awarded the Restaurant Manager compensation equivalent to one year's remuneration for pregnancy-related dismissal.

Conclusion

There is a high burden for employers to discharge when trying to prove that employment was terminated due to circumstances unconnected to pregnancy. This case is a stark reminder of this. In addition, this case highlights the importance of following a process and documenting it, where there are any performance issues with an employee. Without having such documentation, it can be difficult to defend a claim.

Contributed by Catherine O'Flynn and Ciara Ruane

Anti-Avoidance and Offshore Structures – Last Call for Penalty Mitigation

The Minister for Finance Michael Noonan T.D. announced a comprehensive national programme targeting offshore tax evasion in his budget speech in October 2016 to tackle the perceived abuse of offshore structures. One particular element of this programme is the change in the taxation approach to certain arrangements which have an offshore element.

The provisions are complex but in a nutshell mean that, from 1 May 2017, the benefits afforded to those who make a qualifying disclosure (prompted or unprompted) to the Revenue Commissioners will be withdrawn where the arrangement relates to either direct or indirect offshore matters in respect of which Irish tax is payable. The benefits of a qualifying disclosure will also be lost where the disclosure does not relate to offshore matters and offshore matters are subsequently discovered by the Revenue Commissioners.

"Offshore matters" include:

- A holiday property abroad;
- An overseas pension;
- A non-Irish bank account; or
- Any of the above held through offshore companies or offshore trusts

Where Irish tax has not been paid in relation to such matters, professional advice should be sought now.

Non-Irish domiciled individuals need to be aware that they may also be caught by this new legislation due to the recent amendments to Section 806 of the Taxes Consolidation Act 1997. This amendment expanded the remit of the anti-avoidance legislation to the transfer of assets abroad to non-Irish domiciled individuals chargeable to Irish income tax on the remittance basis.

There will be no basis on which you can make a qualifying disclosure for offshore matters from 1 May 2017. From this date, any offshore matters discovered will be subject to strict penalties, namely,

- Penalties of 100% of the tax liability;
- Possible prosecution; and
- Definite publication on the list of tax defaulters.

The principles of equity do not apply in tax law, meaning that there is no opportunity for a court to mitigate the penalties. Intention to default or knowledge of the breach will have no bearing on the penalties applied. The Minister for Finance has stated that failure to disclosure offshore matters will be a strict liability penalty.

Clearly, this is a serious change in approach which could have material consequences for those coming within scope.

Anyone with offshore accounts or assets (even those held indirectly through an offshore company or offshore trust) should take this opportunity to review their offshore tax filing affairs and write to the Revenue Commissioners before 1 May 2017 to disclose their position.

Contributed by Olwyn O'Driscoll

In Short: Companies (Accounting) Bill 2016 Takes Step Closer to Enactment

The Companies (Accounting) Bill 2016 (the "Bill") passed Report and Final Stages in Dáil Eireann on 22 March and is now in the process of being examined by the Seanad. Once all the Stages in the Houses of the Oireachtas have been completed, the Bill can be sent to the President for signing.

As we previously reported, the main purpose of the Bill is to transpose the Accounting Directive 2013 (the "Directive"), which provides significant simplifications and reductions of administrative burdens with regard to the preparation of financial statements for enterprises, in particular SMEs. It also introduces mandatory requirements for large companies, large groups and "public interest entities" that are active in the mining and extractive industries or the logging of primary forests to prepare and file annual reports on payments made to governments.

Of particular interest to a number of corporate structures in Ireland are the new provisions requiring a much broader scope of unlimited companies to file financial statements than is the case currently. These provisions are very technical and require careful consideration by any companies that may be impacted by the changes. One of the new requirements being introduced by the Bill is that an unlimited holding company with limited liability subsidiaries will be obliged to file financial statements where it previously may have benefitted from an exemption from doing so. The latest draft of the Bill proposes that the new filing requirement for such holding companies will only come into effect for financial years commencing on or after 1 January 2022.

We will publish a more detailed overview of the new legislation once it has been enacted.

Contributed by Aoife Kavanagh

In Short: Drafting Board Minutes - Best Practice

It is essential that company directors ensure that minutes are kept of all board meetings in order to comply with requirements set out in the Companies Act 2014. This note details these statutory requirements and highlights best practice to be adopted when drafting board minutes.

Click here for the full briefing.

Contributed by Aoife Kavanagh

In Short: Court of Appeal Decision Affirms Position of High Court on Litigation Funding

In a number of previous articles we have covered the current position of the Irish courts on litigation funding and after-the-event insurance (ATE) (see here, here and here).

The Court of Appeal has confirmed the position in Ireland in its recent decision in *SPV Optimal Osus Limited v HSBC Institutional Trust Services (Ireland) Limited & Ors*. This decision stemmed from the considerable amount of litigation arising from the Bernie Madoff scandal and concerned the assignment of funds. In the High Court, Justice Costello reviewed both the Irish and English authorities in considering whether the assignment here was void for being champertous and contrary to public policy and outlined the Irish position in 14 principles. She held that the assignment in this case was void because it amounted to the assignment of a bare cause of action and constituted trafficking in litigation. This decision was appealed.

The Court of Appeal found that the High Court did not have to find that there was an intention on the part of the assignee to engage in the trading of litigation, whether professional or otherwise. The Court of Appeal affirmed the decision of Justice Costello in the High Court and in doing so drew a distinction between the decision in *Greenclean Waste Management Ltd v Leahy (No.2),* where there was a "legitimate commercial purpose" behind the insurer's involvement in the claim, and the case in hand, where the plaintiff had purchased the right to litigate the claim.

Similar issues were before the Supreme Court this week as it heard the case of *Persona Digital Telephony Limited & Anor v Minister for Public Enterprise & Ors*. It is understood that the Supreme Court reserved its judgment in this case at the close of submissions by the parties on 4 April 2017. It is anticipated that this decision will provide clarity on the position of litigation funding in Ireland given the changes that have occurred in this area of the law over the last number of years in England, where a more permissive regime is in place. We will provide an update on the position after the Supreme Court decision is published.

The Court of Appeal judgment in *SPV Optimal Osus Limited v HSBC Institutional Trust Services (Ireland) Limited & Ors* [2017] IECA 56 can be accessed here.

Contributed by Catherine ThuillieR