WILLIAM FRY

LEGAL NEWS

Welcome

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

Adam Synnott

Partner

Companies Act 2014

The Companies Act 2014 is now in force for all Irish companies.

The Act has many benefits, including:

- Consolidating all company law provisions into one piece of legislation, rather than being spread over 17 Acts and numerous Statutory Instruments
- Making legal obligations clearer and easing the administrative burden on companies
- Simplifying procedures for carrying out certain corporate transactions, removing the need to obtain court approval in certain instances (for example when reducing company capital)
- Widening the audit exemption to include dormant companies, qualifying group companies and guarantee companies and expanding the exemption thresholds

One of the most significant features of the Act is that it provides for two new forms of private company limited by shares.

The current form of private company limited by shares will cease to exist 18 months after the commencement of the Act.

To deal with this situation, existing private companies limited by shares have three options:

- Convert to a new form company limited by shares
- Convert to a designated activity company
- Do nothing and be deemed a designated activity company during the transition period and a company limited by shares thereafter

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Although the Act provides for an automatic default to a company limited by shares at the end of the transition period, it is not recommended that existing private companies take no action and merely rely on the default provisions in the Act to convert to the new company type.

While most of the Act became law on 1 June 2015, there are a limited number of provisions, mainly related to the preparation of financial statements, which will only take effect in respect of financial years beginning after 1 June 2015:

- The obligation on certain companies to establish an audit committee (or explain why they have not done so)
- The requirement for certain companies to produce a directors' compliance statement on an annual basis
- The requirement for the directors to state in the directors' report that all relevant audit information has been supplied to the auditors
- The new rules concerning disclosure of gains made by directors on the exercise of share options

For further information on the new Act, please go to the dedicated section of our website.

Contributed by Barbara Kenny.

High Court Refuses Appeal under Agency Workers Legislation

A truck driver who was engaged by a recruitment agency to drive for Greenstar Limited has lost his challenge in the High Court that his employment conditions were less favourable than drivers directly employed by Greenstar.

The driver was paid at a rate of €11.50 per hour. He alleged that drivers employed directly by Greenstar were paid at rates between €12.50 and €20 per hour and benefited from more favourable overtime and daily meal allowances.

His complaints to the Labour Relations Commission and the Labour Court (on appeal) were unsuccessful and his case was further appealed to the High Court. The appeal was based on his assertion that the Labour Court had incorrectly interpreted the Protection of Employees (Temporary Agency Work) Act 2012.

Under the Act, an agency worker is entitled to the same basic working and employment conditions as employees who are hired directly to do similar work. Basic working and employment conditions mean terms and conditions which exist because of an enactment, collective agreement or arrangement that applies *generally* to employees of the hirer.

The Labour Court had refused to accept payslips of another employee as evidence on the basis that these were hearsay. The High Court affirmed the Labour Court's decision in that regard, stating that the payslips of one other employee were not a sufficient method to demonstrate *generally* applicable rates of pay.

Importantly, the High Court commented on the *"crucial factor"* that the Labour Court told the driver he could summons a member of Greenstar's management team to give evidence in relation to pay structures in the Company but he failed to do so.

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It may be the case that had he put forward additional evidence from other employees of Greenstar or from a member of its management team, he would have satisfied the requirement to show that higher rates of pay were generally applicable to drivers in Greenstar.

Few complaints have been lodged under this legislation and this case is the first complaint under the Act to reach the High Court. It is a useful judgment insofar as it shows the High Court's agreement with the Labour Court's interpretation that a claimant must establish that a term and/or condition of employment is generally applicable in its effect in order for an agency worker to rely on it.

Contributed by Aisling Butler and Nuala Clayton.

ICSA Guidance Note on Good Practice for Annual Reports

The Institute of Chartered Secretaries and Administrators in the UK (ICSA) has published a guidance note on what it considers to be best practice for annual reports and explaining the benefits of reporting excellence for both companies and their members.

The guidance stresses the business benefit of viewing the annual report as a means of communication with members and prospective investors, rather than merely as a compliance requirement. It is an opportunity to demonstrate that good corporate governance is present throughout the company and to showcase the company's attributes in a clear, concise manner. However, while it is important to emphasise the successes enjoyed by the company, in the interests of transparency and confidence building, the report should also be honest about the challenges and risks the company faces and how it intends to manage them.

ICSA considers the best annual reports to have the following characteristics:

- Easy to read and providing an honest appraisal of the company
- Responding to the opportunities created by reporting requirements rather than seeing them as obligations
- Demonstrating a real desire to use corporate governance to enhance the business rather than as a 'box-ticking' exercise
- Presenting relevant information in an innovative and creative way, avoiding the use of boilerplate language
- Providing real insight into the company, its strategy, the board, and how it manages risk
- Explaining the manner in which the board and its committees are run, and how decisions are taken
- Demonstrating understanding of stakeholder interests and how these interests are balanced to ensure the company's sustainability

The guidance note sets out in brief what is expected for each section of the annual report and also names the winners of the ICSA Excellence in Governance awards for each part of the report.

Contributed by Adam Synnott and Lucy McCurry.

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Parking Fines: An Unfair Penalty?

The Court of Appeal of England and Wales has held that a parking fine of £85 was not a penalty, nor was it unfair.

A motorist, who had overstayed a two hour period of free parking, resulting in a fine of £85, argued that the fine was unenforceable on two grounds:

- The fine was unenforceable at common law because it was a penalty
- It was unfair under UK consumer protection law and therefore unenforceable

In determining whether the fine constituted a penalty, the Court looked at the commercial justification for the fine. In purely financial terms, no direct loss was suffered by the car park operator as the car park was free (for 2 hours) and therefore it suffered no loss in terms of income that might otherwise have been derived from another customer. However, the Court decided that it could have suffered an indirect loss because the mismanagement of the car park would be likely to result in the loss of the contract with the owner of the car park. Although the principal purpose of the fine was deterrence, there was significant commercial justification and the fine was not "*extravagant or unconscionable*". For these reasons, the fine was deemed not to be a penalty under common law.

On the second point, under consumer protection legislation, a contract term is deemed to be unfair where it provides for a significant imbalance between the rights and obligations of the parties, to the detriment of the consumer. The Court ruled that the term setting out the fine was not unfair on the basis that it was prominently displayed on notices within the car park and the consumer was not deceived in any way. Further, the fine was not excessive when compared to that levied in other car parks.

This decision differs from the majority of cases involving penalty clauses in that, as the motorist had availed of two hours free parking, there was no economic relationship between him and the car park operator. Further, the car park operator suffered no financial loss if a motorist overstayed because if the space had been vacated, it would either have remained unoccupied or would have been occupied by another car free of charge. The fact that a fine is in place for deterrence purposes does not of itself mean that it is a penalty where it is not extravagant or unconscionable. The decision confirms the enforceability of this common procedure, used by both private companies and county councils.

Contributed by Brian McElligott.

AML IV Adopted

On 20 May 2015, the European Parliament voted to adopt the Fourth Anti-Money Laundering Directive and Regulation (AML IV). The Council had already adopted the package in April, following political agreement that had been reached between the European legislators last December.

The amendments

AML IV implements recommendations by the Financial Action Task Force (FATF), which is considered a global reference for rules against money laundering and terrorist financing. On some issues, AML IV expands on the FATF's requirements and provides for additional safeguards.

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The key amendments that AML IV makes to the existing regime are as follows:

- The extension of the Directive's scope – AML IV extends requirements to a broader range of entities
- The application of a risk-based approach – Member States will be required to assess and identify risks and use those assessments to, where necessary, identify areas where an entity should apply enhanced AML measures
- Stricter rules on customer due diligence - entities such as banks are required to take enhanced measures where the risks are greater and can take simplified measures where risks are smaller

Beneficial ownership

AML IV introduces provisions relating to the beneficial owners of companies. Information on beneficial ownership will be stored in a central register which will be accessible to competent authorities, financial intelligence units and entities such as banks. Access will also be given to persons who can demonstrate a legitimate interest in the stored information.

Sanctions

AML IV provides for a maximum fine of at least twice the amount of the benefit derived from the breach or at least €1 million.

For breaches involving credit or financial institutions, it provides for a maximum fine of at least:

- €5 million or 10% of the total annual turnover in the case of a legal person (e.g. a company or other body corporate)
- €5 million in the case of an individual

Next steps

The Directive and Regulation were published in the Official Journal on 5 June 2016. They will enter into force on 20 June 2015. Member states will then have two years to transpose the Directive into national law (26 June 2017). The Regulation will also apply from that date.

Contributed by Ross Little.

Ten Years On, Sky and Skype Deemed Confusingly Similar

The EU General Court has upheld a decision to refuse the registration of Skype's word and logo Community Trade Marks.

The registrations were refused on the basis that there is a likelihood of confusion with Sky's earlier word mark. The Sky mark was registered in 2003, whereas the Skype marks were filed in 2004 and 2005. The marks were applied for in respect of identical classes of goods and services.

Skype argued that the marks were not similar and that its marks had acquired a secondary meaning through extensive use (the term "to skype" has been used as a verb to make video calls), which it argued could counteract any similarity with the Sky mark. Further Skype argued that the marks have co-existed in the market for ten years without confusion.

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However, the EU General Court took consumer research into account, finding that there were "visual, phonetic and conceptual" similarities between the marks. The court said that any confusion must be judged having regard to the level of recognition of the Sky mark, rather than the later Skype mark applications. Finally, the peaceful co-existence was deemed to be irrelevant, on the basis that confusion must be judged at the date of filing of the Skype marks.

While the decision does not prevent the continued use of the Skype brand name, it does prevent registration of those trade marks with OHIM (the Community trade marks office). Microsoft (which owns Skype) has indicated its intention to appeal the decision.

Contributed by Brian McElligott.

Ireland Takes Charge of Policing Dropbox and Twitter Privacy

On 1 June 2015, users of Dropbox, the popular online file-sharing service, became subject to Irish data protection law and the Office of the Data Protection Commissioner (ODPC). This change follows a similar move by Twitter, whose users outside of the US became subject to Irish regulation on 18 May 2015.

With many of the world's largest technology companies basing their European operations in Ireland, the ODPC remains firmly in the spotlight. Reacting to the Twitter decision, Data Protection Commissioner Helen Dixon noted that the ODPC already saw itself as responsible for policing Twitter insofar as Irish users are concerned. While the ODPC has come in for some criticism, particularly in the wake of Max Schrems's much publicised case involving Facebook, the Commissioner has strongly defended the position of her Office, commenting that the criticism *"doesn't stand up to any analysis and there's no evidence for what's asserted in most cases."*

Having already secured a doubling of funding, a new Dublin office and an ambitious recruitment drive (as reported here); the Commissioner has restated her Office's plan to audit Apple, Yahoo and Adobe. Facebook has already been through two Irish data protection audits – a process described by the Commissioner as "incredibly thorough". The Commissioner has also described the regular contact her office has with Facebook (indeed, the Commissioner has not ruled out a further audit), demonstrating a desire to understand how companies operate and process data.

This ongoing engagement with organisations, particularly in the tech sector, shows the ODPC's willingness to adopt a pragmatic approach to regulation.

Meanwhile, European legislators are negotiating a new Regulation to replace the existing Data Protection Directive. Under the latest text, national data protection authorities would have a greater say in cross-border enforcement cases and a new European Data Protection Board (EDPB) would resolve disputes between them.

In that context, Facebook EMEA's Vice-President of Public Policy recently warned against a fragmentation of data protection regulation in Europe. Facebook is not alone in expressing concern that recent developments could undermine the clarity and efficiency envisaged by the "One Stop Shop" proposal.

Contributed by John Magee and Niamh Gavin.

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BEPS: OECD Publishes Revised Discussion Draft on Avoidance of Permanent Establishments

As part of the ongoing work of the OECD to combat base erosion and profit shifting (BEPS) a revised discussion draft on the artificial avoidance of permanent establishments (PE) has been published. The revised discussion draft proposes specific preferred options with respect to each of the PE avoidance strategies identified. The chosen proposals reflect comments received on the series of alternative options proposed in the first discussion draft published on 31 October 2014.

Comments are invited on the revised draft before 12 June 2015 after which time the OECD will finalise the proposed changes to the text relating to PEs in the OECD Model Tax Treaty.

The following are some of the issues addressed in the revised draft:

Commissionaire structures

The first draft proposed amendments to the wording in the Model Tax Treaty relating to agency and "*authority to conclude contracts in the name of"* so as to address the problems arising from the implementation of "*commissionaire* structures" in order to erode the taxable base in the State where the sales in question are taking place.

The revised draft focuses on arrangements whereby the activities of an intermediary exercised in a country are intended to result in the regular conclusion of contracts being performed by a foreign enterprise; in such circumstances the OECD believes that the enterprise should be considered to have a sufficient taxable presence in that country unless the intermediary is performing these activities in the course of an independent business. It was agreed to include additional commentary and guidance on these amendments.

It is important to highlight that it was agreed that issues relating to low risk distributor agreements will not be dealt with under this Action and will be dealt with under Action 9, "Risks and Capital".

Use of the specific exemptions to artificially avoid PE status

The OECD is concerned that the specific exemptions from creating a PE contained in the current Model Tax Treaty (e.g. warehousing) are being abused by companies so as to ensure that no PE is deemed to exist. The revised draft contains a condition that all of the specific exemptions will be restricted to activities which are "preparatory/auxiliary" in nature. In addition, the revised draft contains additional commentary on the meaning of "preparatory/auxiliary".

Despite strong objections to the proposal, an anti-fragmentation rule is contained in the revised draft in order to address BEPS concerns on the use of subsidiaries to fragment related activities so as to maintain a preparatory/auxiliary character and avoid a PE.

Insurance

The revised draft clarifies that no specific rule will be applicable to insurance companies and that the general rules on PEs will apply.

Contributed by Sonya Manzor.

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In Short: Dawn Raids in the Cement Sector

On 14 May 2015, the Competition and Consumer Protection Commission (CCPC) carried out a dawn raid at numerous premises of Irish Cement Limited. The dawn raid is part of an investigation by the CCPC into alleged abuses of dominance in the bagged cement sector, under the Competition Act 2002, as amended. Irish Cement, a subsidiary of CRH plc, has stated that it fully facilitated the inspection and that it is continuing to co-operate with the CCPC. The CCPC has stated that its investigation is ongoing, and that it will take all necessary action to conduct a thorough investigation, including possible interviews with competitors and retailers. The dawn raid is a preliminary step in the investigation and does not mean that Irish Cement has been found to infringe competition law.

Contributed by Sheila Tormey.

In Short: Employment Legislative Updates

The Workplace Relations Act 2015 was signed into law by the President on 20 May 2015. The Act is expected to be commenced on 1 October 2015.

The Government has published the Industrial Relations (Amendment) Bill 2015. The main purpose of the proposed legislation is twofold. First, to provide a statutory framework for workers who seek to improve their terms and conditions of employment and second, to re-introduce a mechanism for the registration of employment agreements between employers and employees and/or trade unions. In 2013 the Supreme Court held that the previous system of Registered Employment Agreements was unconstitutional. The latter purpose of the legislation is therefore a significant reform in this area.

The National Minimum Wage (Low Pay Commission) Bill 2015 has also been published. Its aim is to establish a Low Pay Commission on a statutory basis which will examine annually the national minimum wage and make recommendations to Government as may be required.

Contributed by Catherine O'Flynn, Nuala Clayton.

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