WILLIAM FRY

Legal News

Welcome to the June 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.

Claire Waterson

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EU's Top Court Clarifies 'Legitimate Interest Test' for Data Processing

In a decision on 4 May 2017, the Court of Justice of the European Union (CJEU) ruled that not all 'legitimate interests' can be used to justify the processing of an individual's personal data, even when a public authority has deemed such processing "necessary". (Case C-13/16 *Rīgas*)

In the Rīgas case there was a traffic accident in Latvia where a taxi passenger scraped the side of a tram with the taxi's door. When the tram company sought compensation from the taxi company's insurance provider they were refused, as the damage was caused by the taxi's passenger not the taxi company. As the tram company did not know the identity of the passenger they turned to the Latvian police who had fined the passenger at the time of the accident. The police provided the tram company with the passenger's name but refused to provide any further information. Subsequently the tram company brought a challenge in a Latvian court, which then referred a question to the CJEU as to whether the Data Protection Directive permitted disclosure of personal data in situations where there was a legitimate interest of a third party seeking the personal data.

While the Directive provides that personal data may be processed where it is "*necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed*" it also provides that where these interests are "*overridden by the interests or fundamental rights and freedoms of the data subject*" then the processing can no longer be deemed "necessary" and therefore cannot occur.

The CJEU first held that there was no "requirement" when it came to the processing of data for "legitimate interests" and that instead the Directive merely expressed the possibility of processing data in such circumstances. However the Court went on to clarify that disclosures such as the one sought in the Rīgas case were not precluded provided that the disclosure is conducted "on the basis of national law" and in accordance with the following conditions:

- That there is a pursuit of a legitimate interest by a data controller or third party to whom the data will be disclosed.
- That there is a need to process personal data for the purposes of the pursued legitimate interests.
- That the fundamental rights and freedoms of the data subject do not take precedence and a balancing exercise should be carried out.

Disclosure not justified

The CJEU found that the tram company's due compensation adequately satisfied the first two conditions but that the standard was not met when it came to the third. Instead it stated that the totality of circumstances of a case must be analysed when assessing the third condition; that factors such as the data subject's age and whether the data at issue was already publicly available needed to be considered when weighing up the "fundamental rights and freedoms" of the data subject. As the taxi passenger in question was a minor, the CJEU did not consider the proposed disclosure justified.

Roadmap for the Future

While this case offers insight into situations where public bodies such as police and health services process personal data on the basis of a "legitimate interest" it also provides a road map of sorts when it comes to how such interests can be justified in the future.

Article 6 of the General Data Protection Regulation (GDPR) provides that from May 2018 onwards public authorities will no longer be able to rely on "legitimate interests" as a lawful basis for processing personal data in the same way they used to under the Data Protection Directive. Instead the GDPR sets a new standard and makes clear that any such processing can only be done on the basis of a strict legal obligation or clear public duty as provided by law. The ruling in Rīgas largely sets up this approach and indicates that when the GDPR takes effect the CJEU may interpret Article 6 strictly in determining what circumstances can be considered 'legitimate' when it comes to processing personal data, regardless of whether the controller is a public authority or private organisation. Consequently if an organisation is considering relying on the "legitimate interests" clause of Article 6 to justify processing personal data they will need to ensure that any impact on the rights of data subjects is examined through a data protection impact assessment to ensure full GDPR compliance, particularly where the subjects are minors.

For further information, visit William Fry's dedicated website to the GDPR, PrivacySource, which includes in-depth analysis and practical tips on preparing for the GDPR.

Contributed by John Magee.

Supreme Court not Seduced by Third Party Litigation Funding Arguments

High Court rejected Third Party Litigation Funding

This case arose as a consequence of the plaintiffs' allegations that there was impropriety in a tender process resulting in the award of a mobile phone licence to Esat Digifone in 1996. The plaintiffs were unsuccessful in their bid, alleged a resulting loss and so looked to sue a number of parties for that loss. However, financial constraints led to the plaintiffs seeking to avail of litigation funding from a third party and the ensuing application for a declaration by the High Court as to the validity of the proposed funding arrangement, given the existence of the torts (and criminal offences) of maintenance and champerty in this jurisdiction.

Donnelly J. examined the long history of the doctrines of maintenance and champerty and held that, while some of the more recent cases appeared to suggest that the doctrines needed to be developed to take into account modern realities, the majority of the pronouncements found that the third party funding of litigation continued to be prohibited on public policy grounds.

Appeal to the Supreme Court

This case was then "leap-frogged" to the Supreme Court on appeal by the plaintiffs. In a majority of 4-1 the Supreme Court recently dismissed the appeal, upholding the torts of maintenance and champerty and the strict prohibition on third party litigation funding.

The Supreme Court examined previous Irish case law, case law from other jurisdictions and the legislative history of the doctrines. In coming to its conclusions, they did not accept the arguments put forward by the plaintiffs, which included:

1. That the plaintiffs were not inviting the Court to abolish the doctrines of maintenance and champerty, but rather asking the Court to analyse the elements of maintenance and champerty and to determine whether the present funding agreement is likely to bring about the mischief that maintenance and champerty are designed to protect.
2. That public policy evolves and that this third party agreement has not stirred up litigation but rather the third party agreement had arisen after the litigation had commenced.
3. That it was part of the function of the Court in evaluating a common law doctrine to look at it in modern circumstances and modern times.

Chief Justice Denham J. held that:

"The Court was asked not to be seduced into changing the law in the interests of what the Court may perceive to be just. It may be said that in light of modern issues, such as Ireland being an international trading State, issues arising on international arbitrations, and in the Commercial Court, it might well be appropriate to have a modern law on champerty and the third party funding of litigation. However, that is a complex multifaceted issue, more suited to a full legislative analysis. This is re-enforced by the retention of the old statutes by the Statute Law Revision Act 2007, and by the work of the Law Reform Commission."

Constitutional Issues & Access to Justice

The Supreme Court was not unaware of the consequences of this ruling or of the potential injustice to future plaintiffs. However the Court noted that there can be other ways of pursuing litigation, including lawyers taking cases pro bono, "no foal no fee" arrangements and civil legal aid.

The three other Supreme Court judges wrote concurring opinions each of whom expressed varying concerns on the constitutional issue of access to justice and the nature of maintenance and champerty.

Clarke J., in particular, expressed concern about the effectiveness of the constitutional right of access to justice. He held "it is difficult to take an overview of the circumstances of this case without a significant feeling of disquiet. Serious allegations are made against the State and others". He considered various developments in terms of the increasing complexity of modern laws and the demands of the common law system that he held: "demonstrate that it is at least arguable that there is a very real problem in practise about access to justice….If that be so there may well be an argument, based on the above analysis, that there is an increasing problem emerging in relation to that constitutional entitlement."

He left open the possibility that, whereas normally the choice of a remedy for breach of constitutional rights is a matter of policy (and therefore for the Oireachtas), circumstances could arise where; "after a definitive finding that there had been a breach of constitutional rights but no action having been taken by either the legislature or the government to alleviate the situation, the courts, as guardians of the Constitution, might have no option but to take measures which would not otherwise be justified."

Dunne J. examined the criminal status of the offences but held that as their constitutional status as offences had not been challenged in this case it was a question for the future.

The Future for Third Party Litigation Funding

Many observers of the developments in this area will be disappointed by the outcome of this case, although not surprised. In many jurisdictions litigation funding has been given a statutory basis and consequentially there has been a rapid development of litigation funding as an industry abroad. Whilst the concept continues to raise legitimate concerns in Ireland, it can provide large numbers of claimants, who would otherwise be unable to pursue legitimate grievances, with access to the courts. Further, provisions have been put in place in other jurisdictions to ensure that funding cannot be used to pursue abusive litigation.

The Supreme Court has invited the Oireachtas to develop the law here in a coherent manner but, as MacMenamin J. noted in his judgment, this may be a long process.

See previous William Fry article on the High Court Judgment - here.

Supreme Court Judgment *Persona Digital Telephony Limited & Sigma Wireless Networks Limited v The Minister for Public Enterprise, Ireland and the Attorney General* [2017] IESC 27.

Contributed by Catherine Thuillier.

Another Hoop for Irish Companies Owning UK Property?

Many Irish companies hold portfolios of property which include UK property. Proposed new regulations in the UK may impact upon the timing of acquisitions and disposals by such companies.

New regulations are proposed by the UK government which, if implemented, will require the registration of beneficial owners of overseas entities that own UK properties with the following resulting implications:

- **Dealings with UK property by Irish companies**

  Overseas entities such as Irish companies will be prohibited from selling their existing properties or creating long leases or charges over the property without compliance with the new regulations.

- **Irish companies buying UK property**

  Overseas entities such as Irish companies buying UK property face the complete reversal of any transaction if they cannot prove compliance at the time they register the land transfer or lease with the Land Registry.

The proposed register would be the first of its kind in the world. A consultation process has commenced in the UK with a deadline of 15 May 2017 for feedback. Here is a link to the Consultation Paper. If implemented it will be important for Irish companies to ensure compliance with the register requirements to avoid issues and delays with property transactions involving UK property.

Update on beneficial ownership register

On a related issue, Irish companies should also bear in mind the rules (in force since 15 November 2016) which require companies and other legal entities incorporated in Ireland to take all reasonable steps to hold adequate, accurate and current information on their "beneficial owners" on an internal beneficial ownership register. New legislation is expected shortly which will require companies to submit this information on beneficial ownership to a central register to be maintained by the CRO. We will keep you updated on any developments in relation to this new legislation. For further information on the requirement to maintain a register of beneficial owners, see our full briefing here.

Contributed by Aoife Kavanagh and Tara Rush.

No Frontiers: Data Access Requests Cross the Rubicon of Litigation

The UK Court of Appeal has ruled that the motive of a data subject in making a data access request is not relevant and has clarified the limitations on the legal privilege exemption under UK law. The issue arose in proceedings concerning a 'subject access request' ("SAR") by beneficiaries of several Bahamian trusts to the law firm acting for the trustee of some of the trusts.

Subject Access Request

The UK Data Protection Act, 1998 (the "DPA") allows a data subject to submit a SAR to a data controller in order to obtain a copy of their personal data held by that data controller. The process is the same as that in Ireland, where a SAR is known as a Data Access Request. A minimal fee is payable and a data controller must comply with a SAR within 40 days of receipt. There are certain limited exemptions to compliance with a SAR.

In this case (*Dawson-Damer and Others v Taylor Wessing LLP*), beneficiaries of several Bahamian trusts, submitted a SAR to the law firm acting for the trustees. The SAR was submitted in the context of legal proceedings regarding the operation of the trusts. The law firm refused to comply with the SAR on the basis that the data requested was legally privileged. Legal professional privilege is one of the limited exemptions to the requirement to comply with a SAR under the UK DPA (and the equivalent Irish Acts).

The beneficiaries challenged this refusal claiming that the only privilege on which the law firm could rely was litigation privilege and requested an Order directing TW to comply with the SAR. Of note in this case is the fact that under Bahamian trust law, a trustee cannot be compelled to disclose a variety of trust documents and the Bahamian courts cannot order any such disclosure.

Granting the order enforcing compliance with the SAR, the Court of Appeal held that:

- The exception relating to legal professional privilege applies only to documents which are privileged as a matter of English law. There is no express exemption within the UK DPA for documents which cannot be disclosed under trust law principles and the act should not be interpreted in a "purposive" fashion in order to prevent a by-passing of those principles. Unless privilege could be established, or another exemption identified under the DPA, documents not available under trust law principles would become available under the SAR.
- The law firm failed to demonstrate that compliance with the SAR would require 'disproportionate effort' on its part. S.8(2) of the UK DPA (equivalent to Irish S.4(9)) allows a party not to supply the requested information in such circumstances.
- In this instance, TW had not produced evidence to show what, if any, searches it had carried out to separate non-privileged personal data from privileged, or to work out a plan of action and had therefore not discharged the onus on it to demonstrate that any effort to supply the relevant information would in fact be disproportionate.
- Finally, the COA held that the High Court was wrong to refuse to enforce the SAR because the appellants intended to use the information obtained to try and gain a tactical advantage in their Bahamian proceedings. The fact that there was a collateral purpose (obtaining a litigious advantage) is not sufficient for a refusal.

The COA distinguished its view from an earlier decision in *Durant v Financial Services Authority* (2004) in which it was held that a data subject's right to obtain information under S.7 of the DPA was not *"to assist him, for example, to obtain discovery of documents that may assist him in litigation or complaints against third parties"*. The COA held that the Court in *Durant* had been concerned with the definition of personal data, rather than the purpose behind the request. A person could not claim that something was personal data in order to assist him in gaining discovery or in litigation or complaints against third parties.

Position under Irish Law

The position under Irish law and the potential implications for data controllers who are also facing litigation will be explored further in next month's briefing.

Contributed by Deirdre O'Donovan.

New Prospectus Regulation: Companies to Get Easier Access to Capital Markets

Background

Agreement has been reached at EU level on a new Prospectus Regulation (the "Regulation"), which is designed to repeal and replace the existing body of European prospectus law.

The new Regulation is intended to be of particular benefit to European small and medium enterprises when issuing shares or debt. Companies already listed on public markets will also benefit when they list additional shares or issue corporate bonds.

Changes

The key changes to the prospectus regime are as follows:

- *Thresholds for publication of a prospectus*. No prospectus will be required for capital raisings and crowdfunding projects up to €1 million (up from €500,000) and the threshold beyond which a prospectus is mandatory is increased from €5 million to €8 million in capital raised.
- *Prospectus summary.* Prospectuses will have a new, shorter prospectus summary that is modelled on the existing key information document (KID) required under the PRIIPs Regulation.
- *Minimum disclosure regime.* The EU growth prospectus, a new type of prospectus, will be available for SMEs, non-SMEs (where the securities are being admitted to an SME growth market) and small issuances by unlisted companies. In addition, companies already listed on a public market seeking to issue additional shares or raise debt may avail of a new, simplified prospectus.
- *Fast track approval.* Companies that frequently access the capital markets may use an annual universal registration document (URD), which is similar to a US shelf registration. Irish issuers who regularly maintain an updated URD with the Central Bank of Ireland will benefit from a 5 day fast-track approval when they intend to issue new securities.
- *Publication of prospectus*. Paper prospectuses will no longer be required, unless requested by a potential investor. In addition, the European Securities and Markets Authority (ESMA) will provide free and searchable online access to all prospectuses approved in the European Economic Area.
- *Risk factors.* The Regulation requires lists of risk factors to be shorter, consisting of a limited selection of specific risks which are categorised according to their nature.

Next steps

The Regulation was formally approved by the EU Council on 16 May 2017 and will shortly be published in the Official Journal of the EU, with most of its provisions coming into effect 2 years after that publication date (likely to be mid-2019).

The Regulation will have direct effect across the Member States of the EU, meaning that it does not strictly need any national transposing measures to take effect. However, it is to be presumed that revisions to the Irish prospectus framework will be necessary to comply with the new provisions set out in the Regulation.

Contributed by Aoife Kavanagh.

Likely to be Confused? Legal Costs in Trademark Case Far Out Measure Damages Award

The High Court delivered its judgment in a trade mark infringement action brought by Nutrimedical B.V. & Aymes International Limited against Nualtra Limited in early May. The Court found that Nualtra's use of the various NUTRIPLEN marks amounted to an infringement of Nutrimedical/Aymes' European Trade Mark for the word mark NUTRIPLETE (the "Nutriplete EUTM"), as the marks were confusingly similar and were being used in respect of the same goods.

Not only does the judgment set out various issues that arose in respect of the alleged trade mark infringement, it also considers the costs implications of such a case.

Trade Mark Infringement

The Plaintiffs claimed infringement under Article 9(1)(b) of the Community Trade Mark Regulations on the basis that the NUTRIPLEN marks being used by the Defendant on its oral nutritional supplements were confusingly similar to the Plaintiffs' Nutriplete EUTM.

The Court held that there was little doubt that the goods being sold under the Nutriplen marks were similar to the goods for which the Nutriplete EUTM was registered. While the Plaintiffs had not yet placed any goods for sale under the Nutriplete EUTM, the Court confirmed that a trade mark can be infringed, even if the owner of the trade mark has not yet traded under that mark. The Court found that the marks were visually, aurally and conceptually similar and found that the use by the Defendant of the NUTRIPLEN mark amounted to trade mark infringement.

Who are the public for products sold under medical supervision?

The Court also considered the meaning of "*on the part of the public*" in circumstances where the products were required to be sold under medical supervision, with the vast majority of products being sold on prescription, a smaller percentage of sale being made by GPs and a small percentage of sales made without a prescription by pharmacists.

The Court held that the relevant public would be made up not only of healthcare professionals but also the end users since those end users would be in a position to make their healthcare professionals aware of their preferences. Confusion amongst the end user is relevant to the assessment of the marks notwithstanding that either a pharmacist or GP would also be involved in the selection of the product.

The Award to the Plaintiffs & the Costs of the Proceedings

The Court used its discretion to decline to allow a hearing to take place in respect of whether the Plaintiffs were entitled to an account of profits or damages. Instead, the Court held that the Plaintiffs were entitled to damages, in the amount of €35,000, which were calculated by a notional licence fee.

In relation to costs the Court noted that there was "*something perverse*" about an action that lead to an award of €35,000 costing over €2,000,000 in legal fees. Expressing its concern about the costs in the case to date and that the hearing itself had taken ten days before the Commercial Court, the Court noted it was for this reason that it was pre-empting any election by the Plaintiffs to seek an account of profits, awarding it damages instead. Further submissions are due on liability for costs and an update will provided in due course.

In his commentary Twomey J. referred to the position in England and Wales where the *Review of Civil Litigation Costs: Final Report* recommended that in certain intellectual property disputes that trials would be limited to two days, costs would be limited to £50,000 and there would be a cap on awards of £500,000. Whilst this proposal seems to be in line with the establishment of the Commercial Court here as a means to have disputes case managed and progressed expeditiously, it is difficult to envisage such a hard fought dispute, with a number of experts being required, being heard in under two days.

In light of Mr Justice Twomey's comments in this case about cost and the length of certain intellectual property trials, it will be interesting to watch for further judicial commentary on this point.

Nutrimedical B.V., Aymes International Limited and Nualtra Limited [2017] IEHC 253.

Contributed by Sarah Power.

Landlord's Action Results in Unintended Lease Surrender

In 2013 Friends First claimed for almost €190,000 in rent and other lease payments from a tenant who had a lease of a floor of Duke House. Friends First acquired Duke House in 2007. In dismissing the claim, the High Court in *Friends First Managed Pension Funds Limited v Paul Smithwick* held that the tenant surrendered his lease by conduct which was encouraged, endorsed and accepted by the landlord at the time.

With nearly 20 years left to run on his lease, the tenant vacated the premises but continued paying rent for a year until November 2004. Friends First's predecessor in title - the old landlord - initiated or encouraged the occupation of the premises by a third party known to him. The tenant expressed a wish that should such third party take possession that payment of rent would be a matter between the landlord at the time and such third party. A short term letting agreement was entered into between the tenant and the third party which included an option for the third party to take an assignment of the original lease. The option was not exercised and another party known to the old landlord took occupation, with the full co-operation of the old landlord who accepted rent from this other party.

Why did these actions lead the Court to determine the lease had been surrendered?

Even though it was not what the parties thought they had achieved by their acts (the tenant initially claimed the lease had been assigned), the Court held that the important point is the Court's construction of the parties' acts.

The Court accepted that there was a mutually understood arrangement between the tenant and the old landlord such that the tenant would vacate the premises and that he would be replaced by a person known to the old landlord. It found that this involved the tenant adopting "a position inconsistent with his position as tenant i.e. he vacated the premises and ceased paying rent in November 2004 and he did this at the request of, or at the very least, with the sanction of the plaintiff's predecessor in title." The Court found the tenant surrendered his lease by conduct which was encouraged, endorsed and accepted by the old landlord.

Landlords faced with a commercial tenant vacating before lease termination should take great care to ensure that their actions are not regarded as so inconsistent with the continued existence of the lease that they indicate acceptance of surrender of the lease by the landlord.

Contributed by Tara Rush.

In Short: Are You Set Up for Mandatory E-filing in the CRO?

From 1 June 2017, mandatory electronic filing applies to the following submissions to the Companies Registration Office (CRO):

- Form B1: Annual Return (including financial statements and electronic payment)
- Form B2: Change of registered office
- Form B10: Change of director and/or secretary, or in their particulars
- Form B73: Nomination of a new annual return date

There will be no filing fee for a Form B2, B10 or B73. A Form B1 will have a filing fee of €20, together with any late filing penalties. The filing fee and any late filing penalties can only be paid electronically by credit /debit card or by CRO Customer Account.

Companies and presenters should at this point have familiarised themselves with the CRO's online filing system to ensure they can continue to make the required filings from 1 June 2017. Paper forms for the above matters and paper financial statements filed on or after that date will not be accepted by the CRO.

When a form is filed online, a signature page will be generated which must be signed by a director and/or secretary of the company and physically submitted to the CRO. Alternatively, forms can be digitally signed using ROS (a system of electronic signature which uses Revenue's ROS system) where the persons signing the form have registered for this service.

Contributed by Aoife Kavanagh.

In Short: Public Procurement: Implementation of Concessions Directive

Directive 2014/23/EU on the award of concession contracts has been transposed into Irish law by the European Union (Award of Concession Contracts) Regulations 2017. Although signed on 18 May 2017, the Regulations are deemed to have come into operation on 18 April 2016, the date by which the Directive was due to be implemented in Ireland.

In a concession contract, the contractor is wholly or partly remunerated, not by the procuring party directly but by third parties availing of the works or services. The contractor (not the procuring entity) also bears the operational risk of the contract. Typical forms of concessions are the building and management of tolled motorways or the running of a canteen service in a public university. Before the adoption of the Concessions Directive, concessions were only partially covered by the EU procurement regime.

The Regulations apply to concession contracts worth €5,225,000 or more. The Regulations set out general requirements for the conduct of concession tenders including an obligation to comply with the principles of equal treatment, non-discrimination and transparency.

Contributed by Claire Waterson.

In Short: Changes to Company Accounting to be in Place in Coming Weeks

Nearly two years after it came into force, amendments are being made to the Companies Act 2014 to bring it into line with new EU accounting rules.

These amendments are set out in the Companies (Accounting) Act 2017 (the "Act"), which has now been signed by the President and is awaiting a commencement order to bring the legislation into operation.

It is believed that, for the most part, the new accounting rules will apply for financial years commencing on or after 1 January 2017. However, this will only be confirmed on publication of the commencement order. The Act allows certain companies to elect to adopt the new accounting provisions for financial years ending before the operative date for those provisions in the legislation.

View our full briefing on the new legislation.

Contributed by Aoife Kavanagh.

