WILLIAM FRY
LEGAL NEWS

Welcome

Welcome to the July 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

Partner

Brexit And Your Business

On 23 June 2016 the UK took a historic decision to vote to leave the EU. While some businesses are already well advanced in their Brexit planning, now that we know the UK plans to leave the EU those businesses which have not yet considered the impact of Brexit will need to do so. Brexit planning is complicated by the fact that the UK's exit arrangements are still to be negotiated and could take a variety of forms, with or without access to the Single Market (click here to read our previous Brexit Briefing). These negotiations are likely to take a minimum of two years and could take longer.

This briefing is designed as a practical and accessible overview of some of the key issues arising from the Brexit vote, with the aim of assisting you to identify those relevant to your business. In the briefing we present a high level overview of key risks before identifying the top five issues on a sector-by-sector basis. Not all issues/risks will be relevant to all businesses.

Click here to view the Brexit And Your Business briefing where we cover the following topics:

- High Level Risks
- Financial Services Generally - Top 5 Issues
- Insurance and Reinsurance – Top 5 Issues
- Asset Management and Investment Funds – Top 5 Issues
- Banking – Top 5 Issues
- Tax – Top 5 Issues
- Employment Law and Pensions – Top 5 Issues
- Trade, Imports and Exports – Top 5 Issues
- Capital Markets – Top 5 Issues
- Intellectual Property and Data Protection - Top 5 Issues
- Litigation - Top 5 Issues
- Competition - Top 5 Issues
- Energy - Top 5 Issues
- Environment and Climate Change - Top 5 Issues

William Fry's Brexit team is available to advise you on all legal, regulatory and tax implications of Brexit on your business. Please contact Shane Kelleher, or the William Fry Brexit team member most relevant to your industry sector, or your usual William Fry contact, for legal advice.

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This publication is intended only as a general guide and not as a detailed legal analysis. It should not be used as a substitute for professional advice based on the facts of a particular case.

No Mixed Messages – Social Media in the Workplace

Two recent decisions of the Employment Appeals Tribunal (EAT) demonstrate the increasingly common problems that social media usage is creating in the workplace for both employers and employees.

Incriminating Snapchat video

In the first of these decisions, the EAT rejected an unfair dismissal claim brought by an employee who sent a Snapchat video of himself taking drugs in work uniform (in what appeared to be a workplace bathroom) to both friends and colleagues.

After the video came to light, a meeting was arranged between the employer and employee. The employee was not informed of the purpose of this meeting in advance, nor was he told that he had the option to be accompanied by a colleague. During the course of the meeting, he was presented with two choices: go down the route of an investigation and disciplinary process and lose his job, or choose to resign retaining some dignity and privacy and receive a reference.

The EAT determined that the meeting was not conducted "*with any regard to normal and fair practices and procedures*" and expressed disapproval with the choices presented to the employee. However, it ultimately decided the dismissal was not unfair considering the summary dismissal of the employee to be justified even though the employer had relied on its own "*modified procedures*". The employee's own behaviour was deemed to be so serious and significant that it made it impossible for the employment relationship to continue.

Derogatory Facebook post

In the second case, the EAT awarded €5,000 to an employee who published a derogatory Facebook post regarding his store manager.

The post was published following a phone conversation during which a manager allegedly spoke to him in a "*condescending manner*" before hanging up. The manager denied the employee's allegation that she had hung up on him up to 14 times when he tried to call back, testifying that the employee had "*abused her terribly on the day in question*". The employee offered to resign and made a full apology for what he had done. In response he was told he needed to "*cool-off*". The employee sent a further email and a letter of apology. However, at a subsequent disciplinary meeting the employee was informed that his actions were considered to be gross misconduct and he was dismissed. He challenged this dismissal before the EAT, which found that the flaws in the employer's policies and procedures were such as to render the dismissal unfair. It was admitted by the employer in evidence that no alternative sanction had been considered. In making its decision to award the employee the sum of €5,000, the EAT stated that it had been influenced by the fact that the employee had contributed significantly to his dismissal.

These decisions highlight the need for employees to consider very carefully their use of social media in the context of their employment. In addition, employers should ensure that clear policies exist in respect of the appropriate parameters for employees using social media.

For more information, a copy of our recent Employment Snapshot 2016 looking at the evolving trends around social media usage within the workplace is available here.

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Tenant-Friendly Changes to Residential Tenancies

A number of tenant-friendly changes have been made to legislation governing residential tenancies by the Residential Tenancies (Amendment) Act 2015. These include measures aimed at increasing tenant confidence and rent certainty. The measures are being introduced in phases. The most notable changes are summarised below.

Changes in place since 4 December 2015	
Rent Review	Restricting rent reviews to not more often than once in any 24 month period for an interim period of 4 years and providing that a landlord give 90 days notice before the increase is due to take effect.
Termination Notice	Increasing the notice required for termination for longer tenancies *(e.g. for tenancies of 5 years or more, landlords are required to give between 140 and 224 days notice, up from a maximum of 112 days for tenancies of 4 years or more).*

Changes in place since 9 May 2016	
Additional Termination Proofs	On terminating certain tenancies for one of the six valid reasons set out in the legislation, there are now additional landlord requirements. Statements/statutory declarations with specific content and accompanying evidence will, where appropriate, be required. Careful consideration of these additional requirements will be needed when serving any such notice of termination. In a case earlier this year, before commencement of the stricter requirements, a court held that a landlord's notice was invalid as it did not say that the landlord intended to sell the property within 3 months of termination. It simply stated that the landlord intended to sell the property.
Rent Review Notice	The notice the landlord serves on the tenant must be in the prescribed form. Some of the notable additional content includes: • Details of the dispute resolution procedures available • A statement that in the landlord's opinion the new rent is not greater than the market rent having regard to the other terms of the tenancy and lettings of dwellings of a similar size, type and character and is situate in a comparable area • Details of the rent payable in respect of three comparable dwellings

Pending Changes	The most notable section yet to be implemented relates to security deposits. Once commenced, as an additional administrative step, landlords will be required to transmit tenant security deposits to the Residential Tenancies Board (formerly called the Private Residential Tenancies Board) and to comply with procedural rules regarding the return of the deposit. There are also pending changes to the notification to the RTB following rent review which will need to be signed by both landlord and tenant.

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Appointment of Mourinho to Manchester United Job Complicated by Trade Mark Issue

The appointment of football manager Jose Mourinho to his new position at Manchester United (MUFC) was delayed as a result of a personality rights issue involving the "Special One" and his former club, Chelsea FC. It arose because Chelsea FC still owned the trade mark registered in respect of Mourinho's name, which posed a number of problems in relation to the negotiation of certain aspects of his contract with MUFC.

Rather than registering his own name as a trade mark and then licensing its use to Chelsea FC for the duration of his two terms as manager at Stamford Bridge, Mourinho allowed the London club to become the registered owner of the rights; this left him in the unusual, but not unprecedented, position of having to negotiate the use of his own name.

In 2009 a similar case arose when designer Elizabeth Emanuel attempted and failed to prevent the company to which she assigned rights in respect of her name from subsequently using the trade mark when her affiliation with the company came to an end. In Mourinho's case, the conflict didn't prove to be as fatal.

The filing for registration of Mourinho's name was made by Chelsea FC in 2005 and is next due for renewal in 2025. The registration of his signature was filed a year later and appears to have expired earlier this year. His name is currently registered in the UK, the EU Intellectual Property Office (EUIPO) and the US and is registered for five classes of goods. These things clearly matter a great deal at Chelsea FC, which is listed as the owner of 175 trade marks including former player, "Fernando Torres", current owner, "Abramovich" and another former manager, "Ancelotti".

In the period between his two terms at Chelsea FC, Mourinho managed clubs Internazionale and Real Madrid seemingly without any problems arising from exploitation of the relevant rights, and so the conflict was seen as an inconvenient delay in negotiations rather than a complete breakdown. The parties have now reached an agreement that has enabled the completion of Mourinho's contract with MUFC.

This case provides a clear warning for parties entering all kinds of agreements that contain IP provisions. Had the situation not been resolved, it would have presented an impediment to normal commercial activities that involved the use of Mourinho's name. To avoid any possible future conflict, a clause should be inserted into a contract that creates a run-off provision with regard to merchandising agreements that involve the use of a name or likeness. It is also advisable that registration of a name be made by the person in question and its use licensed to another party, instead of the other way around. A prime example of this is the trade mark of the name of former MUFC manager, Sir Alex Ferguson. This trade mark is not owned by MUFC but by Sir Alex himself, automatically eliminating any potential problems of this kind.

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New Statutory Audit Rules Come into Force

The European Union (Statutory Audits) Regulations 2016 (the "Regulations") came into effect on 17 June 2016. This new legislation gives effect to an EU Audit Directive and a directly effective Regulation, the aim of which is to improve the quality of statutory audit across EU Member States.

The new regime applies to financial years that commence after 17 June 2016. For financial years commencing before that date, the old rules as set out on the European Communities (Statutory Audits) Regulations 2010 will continue to apply.

Key measures which apply to **all** statutory auditors and audit firms include:

- Strengthening the independence of statutory auditors, particularly by making changes to the organisational requirements of statutory auditors and audit firms
- Expanding the content of the audit report
- Strengthening the supervision of statutory auditors by the relevant competent authorities across EU Member States. The relevant competent authority in Ireland is the Irish Auditing and Accounting Supervisory Authority (IAASA)
- Prohibiting "Big Four Only" clauses in contracts

Stricter requirements apply to the statutory audit of public-interest entities (PIEs), that is, listed companies, credit institutions and insurance undertakings. This is due to the systemic importance of such entities and the likely negative impact that audit failings in these entities would have on the wider economy. The stricter requirements include:

- Mandatory auditor rotation every ten years
- General prohibition on provision of non-audit services
- Limits on the fees paid for permitted non-audit services
- Specified procedures for the appointment of auditors
- More detailed report to the audit committee

In conclusion, it is likely that the impact on PIEs in particular will be considerable as they will now have to consider not only auditor rotation but also the extent of non-audit work being carried out by their statutory auditor.

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Another Twist in Rubik's Cube Trademark Dispute

Following lengthy office proceedings, a Trade Mark dispute concerning the world's best selling toy appears to be drawing to a close.

Invented by Erno Rubik in 1974, the Rubik's cube was registered as a Trade Mark in 1999. Seven years later, invalidity proceedings were initiated by Simba Toys, which sought to have the Trade Mark cancelled. This objection was first dismissed by OHIM (now known as the EUIPO) in 2008. Later, in November 2014, the EU General Court (EGC) dismissed Simba's appeal, upholding the Trade Mark. Simba is now appealing that decision to the EU Court of Justice (ECJ).

Central to Simba's appeal is that the "technical solution consisting of rotating capability" may well be protected by patent, but not as a Trade Mark. In the ECJ, Advocate General Szpunar has distanced himself from the EGC's 2014 decision. At the time, the EGC noted that it "was not the intention of the legislature that a shape of goods would be refused as a Trade Mark solely on the ground that it has functional characteristics".

The Advocate General has criticised the EGC's insufficient analysis between the function and the characteristic of the challenged Trade Mark. The vague language used by the EGC, which went so far as to claim that "any shape of goods is to a certain extent functional" in their reasoning was also criticised.

Moreover, Advocate General Szpunar cautioned that the findings of the EGC are contrary to the public interest. He paid particular attention to how the language used in the 2014 decision could broaden the parameters for proprietors, enabling them to extend their monopoly to the characteristic of goods which perform not only the function of the shape in question, but also similar features, with the potential to cover every three dimensional puzzle with a 3x3x3 grid on the face of the cube.

He concluded that the Trade Mark should be struck down as it would "unduly impair the opportunity for competitors to place goods on the market shapes of which incorporated the same technical solution"

It remains to be seen whether the ECJ follows the opinion of the Advocate General and sets aside the previous rulings of the EGC and EUIPO.

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New Market Abuse Regime Comes into Effect

On 3 July 2016, the Market Abuse Regulation (MAR) came into effect across the EU replacing and repealing the existing framework that has been in place since 2005. As we have been reporting in our monthly updates in Legal News, MAR introduces a single market abuse rulebook across all EU Member States.

For the first time, market abuse rules will apply not only to securities on the main regulated markets of the EU, but also to securities admitted to trading on multilateral trading facilities, such as the Irish Stock Exchange's ESM and GEM. Such rules include:

- A prohibition on insider dealing, market manipulation and the unlawful disclosure of inside information
- Obligations on issuers and their advisors to maintain insider lists
- Requirements concerning the public disclosure of inside information
- Disclosure obligations for dealings in the issuers securities by "persons discharging managerial responsibilities" and persons closely associated with them

MAR has direct effect, meaning that no implementing domestic legislation is required to put the new rules in place. However, the Department of Finance has published national Regulations in order to amend and, in some parts, repeal the existing market abuse framework in Ireland. In addition, the Central Bank of Ireland has produced updated Market Abuse Rules to take account of the changes.

We have prepared a comprehensive guide setting out the requirements and obligations imposed by the new regime and practical steps to ensure compliance with MAR. To obtain a copy of this guide please contact David Fitzgibbon or Susanne McMenamin or your usual William Fry contact.

Contributed by Aoife Kavanagh & Niall Keane

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In Short: New UK Rules Require Disclosure of Ultimate Controllers of Companies

Recent legislative changes in the UK have introduced a requirement for most UK companies to maintain a public register of persons with "significant control" over the company (a PSC Register). Prior to the introduction of the new rules, only the legal owners of shares were identified on the share register of a company. The UK government has introduced the new rules so as to obtain a full picture of both the legal and beneficial ownership of companies, with the overall aim of increasing corporate transparency and combatting tax evasion, money laundering and terrorist financing.

While there are currently no rules in Ireland requiring the identification of beneficial owners of shares, this is due to change once the provisions of the Fourth Anti-Money Laundering Directive (AMLD4) are transposed into national law.

To read our full article, please click here.

Contributed by Aoife Kavanagh

In Short: Updated Irish Stock Exchange Rules Published

In order to take account of changes brought about by the new market abuse regime which came into effect on 3 July 2016, the Irish Stock Exchange (ISE) has published revised rulebooks, including:

- Main Securities Market (MSM): Listing Rules
- Enterprise Securities Market (ESM): Rules for Companies and Rules for Advisors
- Global Exchange Market: Listing and Admission to Trading Rules for Debt Securities

Under the new regime, the scope of market abuse rules is extended to apply to securities admitted to trading on multilateral trading facilities, such as the Irish Stock Exchange's ESM and GEM, for the first time.

In addition to changes to take account of MAR, the MSM Listing Rules have been updated in a number of other ways. For example, the ISE has brought in the concept of "controlling shareholder", whereby a company listed on the MSM must put in place a relationship agreement with any controlling shareholder, which includes any group of persons acting in concert who together control 30% or more of the voting rights attached to the company's shares. A further change is the deletion of the concept of a Class 3 transaction. A Class 3 transaction was one which resulted in a percentage ratio of less than 5% under the class tests and which did not require a company to make an announcement on the ISE where certain conditions were met.

If you have any queries regarding the new rules published by the ISE or the new market abuse regime please contact David Fitzgibbon or Susanne McMenamin or your usual William Fry contact.

Contributed by Susanne McMenamin

In Short: Companies Act 2014 – One Year On

It is just over one year since the Companies Act 2014 (the "Act") came into force, significantly altering the corporate legislative framework in Ireland. Practitioners and companies alike have been getting to grips with the new law, and a number of issues have required the attention of companies and their boards since the commencement of the Act on 1 June 2015.

One year on, we review some of the key changes brought about by the introduction of the Act.

To read our full article, please click here.

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In Short: New Pensions Ombudsman Appointed

Mr Ger Deering has been appointed as the new Pensions Ombudsman to take effect from 18 May 2016. He takes the place of Mr Paul Kenny, who served as Pensions Ombudsman since the establishment of the office 13 years ago. Mr Deering also holds the post of Financial Services Ombudsman.

Legislation is pending to amalgamate the offices of the Financial Services Ombudsman and Pensions Ombudsman. Until this legislation is in force, Mr Deering will hold both posts concurrently.

Contributed by Michael Wolfe & Jane Barrett

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