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.

Patricia Taylor

Partner

Employee Awarded over €150,000 for Back Injury Sustained at Work

The High Court, in *Spes, Slavomir v Windcanton Ireland Ltd [2016]*, has found the defendant company negligent for failing to train its employees on how to turn correctly when carrying heavy loads, and awarded the plaintiff damages of €153,150.

The plaintiff employee worked in a retail distribution centre as a ‘picker’. His job involved lifting goods from pallets and placing them on trolleys. On the day in question, he suffered an injury to his back while attempting to lift five trays of yoghurts onto a trolley.

In the High Court action the plaintiff claimed that the injury sustained was due to his employer's negligence and amounted to a breach of the employer's statutory duty of care. The argument centred on the fact that although manual handling training was provided, the plaintiff was never properly trained as to the correct technique when twisting or turning while carrying a heavy load. Additionally, he argued that the daily pick rate of 1200 picks was unreasonably high, resulting in undue pressure being placed on him and therefore increasing the likelihood of injury. He further contended that he should have been rotated between heavy and light lifting work. The plaintiff stated that these combined factors led to his back being weakened over the years, resulting in the acute back pain he experienced daily and his inability to return to work.

The central issue of liability turned on whether the employee received adequate training from his employer. The court assessed the training and refresher training he had received, and found it to be deficient: the documentary evidence produced regarding the provided training had been ‘somewhat of a box ticking exercise’, rather than anything of any real substance. The court reasoned that the inadequate training was then aggravated by the excessive pressure the employee was under to reach his daily targets.

In assessing damages, the court took into account medical and actuarial evidence supporting the fact that the plaintiff would not be able to return to his pre-accident work and that as a result of the accident, he had been left at a significant employment disadvantage due to his limited English and lack of qualifications. The court awarded general and future damages for pain and suffering, as well as future damages for loss of earnings.

This decision is a stark reminder that simply having a written manual handling training policy in place will not be sufficient to avoid liability for work-place accidents or injuries. Employers must properly monitor the situation and provide appropriate training on an ongoing basis.

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Contributed by Kirsten Kingerlee and Catherine O'Flynn

Acting Honestly is the Best Policy

In two recent cases the High Court has re-affirmed that directors will not escape restriction simply because they played a passive role in the conduct of the company's affairs. The only defence to a restriction application is that a director acted honestly and responsibly in relation to the company's affairs.

In the first case, *Kirk v Kershaw [2016]*, the primary reason for the liquidation of the company was a large debt to the Revenue Commissioners. Applications for restriction were brought by the liquidator against five individuals who had acted as directors of the company. The first respondent had resigned as a director in 2007, but the liquidator claimed that he was a shadow director of the company between May and November 2010 (within 12 months of the company being wound up) and therefore could be subject to a restriction order. The Judge ruled that he was a shadow director and largely accountable for the revenue liability which was the single biggest factor leading to the insolvency of the company and restricted him.

The second and third directors had little involvement in the running of the business and did not attend directors' meetings. The Judge found that they were "puppet directors" and became directors to be of assistance to other members of the family involved in the business. However, he affirmed that their responsibility as directors could not be diminished on these grounds and restriction orders were granted against them.

The applications against the fourth and fifth directors, who were only appointed shortly before the liquidation, were brought on the grounds that the company failed to file statutory returns and to keep proper books and records. The judge accepted that at the time of their appointments these directors were dealing with a volatile company and as such this was a barrier to their ability to ensure statutory compliance. The judge also took account of their efforts to negotiate with the Revenue Commissioners and their co-operation with the liquidator, and ultimately they were not restricted.

In the second case, *In Re BOD Investments (IRL) Ltd; Murphy v. O'Flynn [2016]*, the High Court refused a restriction order against a passive director. The director had been deceived by her husband, a co-director, but she had immediately sought independent advice on learning from a third party of irregularities in the company's affairs. The court found that she had acted honestly and responsibly in relation to the company's affairs. The judge referred to case law in which it was held that although a director who abdicates responsibility is not likely to be excused, if a director has endeavoured to keep abreast of company affairs and acted responsibly in the conduct of the company's affairs, it might be possible to excuse that director from restriction. In contrast the judge found that her co-director had not acted honestly and responsibly and he was restricted. There was a persistent failure on his part to comply with obligations to maintain proper books and records and to make returns. The company had also failed to discharge significant liabilities to the Revenue Commissioners.

These cases serve as a useful reminder that directors must be cognisant of their duties and responsibilities under company law and will not be excused from restriction on the basis that they were passive or had little involvement in the running of the company.

Contributed by Niamh Cacciato

The Setanta Case Turns Yet Another Corner

On 2 March 2016, the Court of Appeal (COA) upheld the controversial decision of the Irish High Court in the case of *The Law Society of Ireland v Motor Insurers' Bureau of Ireland*.[1] In yet another twist in the tale, the Supreme Court has now granted the Motor Insurance Bureau of Ireland (MIBI) leave to appeal the COA ruling.

The question that arose for the COA to consider was how the outstanding claims against Setanta Insurance Company Limited ("Setanta") ought to be met, in circumstances where it is clear that Setanta does not have sufficient funds available to discharge these claims. In the High Court action, the Accountant of the Courts of Justice sought the direction of the High Court as to whether the claims should be met by payments out of the Insurance Compensation Fund (ICF) or by the MIBI, pursuant to its agreement with the Minister for Transport dated 29 January 2009 (the "2009 Agreement").

The MIBI's argument

The COA gave particular consideration to Clause 4.1.1 of the 2009 Agreement which requires the MIBI to make payments where a judgment is not satisfied within 28 days "*whatever may be the cause of the failure of the judgment debtor*". The MIBI contended that the 2009 Agreement must be read as a whole and that the provisions of this clause should be interpreted in light of other provisions within the Agreement which, it believed, showed that that the 2009 Agreement was not intended to apply to cases of insurer insolvency. The MIBI also pointed to its Memorandum of Association and contended that it would have in fact been ultra vires the Memorandum for the MIBI to enter into an agreement, which provided for liability in the case of insurer insolvency.

The COA's decision

While the COA did not disagree with the MIBI's general principle of interpretation, it was not satisfied that any other clause in the 2009 Agreement could negate Clause 4.1.1 which it stated was "*all embracing and comprehensive*".

The COA agreed with the High Court's view that the inclusion in Clause 4.1.1 of the 2009 Agreement of the words "*whether or not such person or persons be in fact covered by an approved policy of insurance*" and later "*whatever may be the cause of the failure of the judgment debtor*" includes a situation where the failure to pay is caused by the insolvency of the insurer. The COA's view was that Clause 4.1.1 could not realistically be read otherwise than as including cases of insurer insolvency.

Implications of the COA decision

The COA's decision extends the role of the MIBI far beyond the original intention of its creation. The judgment has far-reaching implications for consumers, claimants and the motor insurance industry. The following are regarded by industry as the main implications:

- Upholding the High Court decision will add an additional €90 million to the total liabilities of the MIBI, which will fall to motor insurers to pay.
- This cost burden will be passed on to motor policyholders through a once-off premium increase of €50 at a time when the motor market is already under considerable pressure from rising claims costs.
- Where an approved motor insurer goes into liquidation its obligations to claimants of its policyholders will have to be met by the surviving approved motor insurers who are members of the MIBI even where a competitor has behaved in an imprudent manner.
- The approved motor insurers will need to consider the implications of this outcome on their regulatory capital requirements.

- The existing MIBI model will require review as its reserving to date would not extend to covering the potential cost of an insolvent insurer.
- It is not envisaged that any reinsurers will be directly affected as they are not underwriting motor insurance in Ireland directly and, as a result, are not obliged to become members of the MIBI.

Appeal to Supreme Court

On 3 May 2016, the Supreme Court granted leave to the MIBI to appeal the COA's ruling. The board of the MIBI took the decision to appeal the case to the Supreme Court after consulting with its forty members.

The MIBI will again argue that the cost of these should be met by the ICF. We will continue to update on this topic as it develops.

Contributed by Paul Fisher

1 [2015] IEHC 564.

Irish Court Asks CJEU if Exam Paper Constitutes Personal Data

The Supreme Court has asked the Court of Justice of the European Union (CJEU) to determine whether an exam paper can be considered as personal data. The question arises out of an attempt by a student at the Institute of Chartered Accountants Ireland (CAI), Peter Nowak, to access his exam paper under the Data Protection Acts.

In 2009, after failing an exam, Nowak sought to challenge the result and submitted a data access request to CAI seeking all personal data. CAI released 17 items, but not his exam script, stating that it does not constitute personal data and is therefore not within the scope of the Data Protection Acts.

Nowak made a complaint to the Data Protection Commissioner (DPC), who advised that exam scripts "*would not generally constitute personal data*". In refusing to investigate further, the DPC held that Nowak's complaint was "*frivolous and vexatious*". It is interesting to note that UK legislation expressly excludes exam scripts from the concept of personal data, but there is no similar Irish provision.

Nowak appealed the decision of the DPC to the Circuit and High Courts, arguing that his exam script does amount to personal data as it contains comments and marks of the examiner and his biometric data in the form of handwriting. Furthermore, he claimed that if data protection legislation treats his exam results as personal data, then it follows that the "*raw material*" from which the exam results are derived is also personal data. In response, the DPC stated that the exam script merely contains answers to accountancy questions written during an open book exam and as such does not contain any personal information. Both the Circuit and High Courts agreed with the DPC that an exam script does not constitute personal data.

Faced with this complex issue and no clear parameters within which to find a solution, the Supreme Court decided to refer the question to the CJEU. Specifically the CJEU will be asked to address the relevant factors and their respective weight for determining whether an exam script is personal data.

A second issue which runs through this line of litigation is whether there is a right to appeal a DPC decision to not investigate an alleged breach of data protection legislation. Both the Circuit and High Courts held that there is not. However, the Supreme Court found that such a right of appeal does exist.

This case will be an important determinative factor for the scope of the definition of personal data, which to date has been given a very broad interpretation, in particular in the opinion of the Article 29 Working Party.

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Contributed by Leo Moore

Market Abuse Update – Public Disclosure of Inside Information

Like under the existing Market Abuse Directive (MAD), the new Market Abuse Regulation (MAR), which commences on 3 July 2016, requires issuers to inform the public, as soon as possible, of inside information directly concerning that issuer. For an overview of the definition of "inside information", please see our article here. In disclosing this inside information, the issuer must:

1. Ensure that the information is made public in a manner which enables fast access and complete, correct and timely assessment of the information by the public
2. Not combine the disclosure of inside information to the public with the marketing of its activities
3. Post and maintain the information on its website for a period of five years

While MAR does not bring about a change in this regard for issuers of securities currently admitted to trading on a regulated market such as the Main Market of the Irish Stock Exchange, by virtue of the extended scope of MAR, the obligation to disclose inside information will apply for the first time to those issuers of securities traded on multilateral trading facilities, including the Irish Stock Exchange's ESM and GEM and the London Stock Exchange's AIM.

Can issuers justify delaying the disclosure of inside information?

MAR provides that issuers may legitimately delay disclosure of inside information to the public provided all of the following conditions are met:

1. Immediate disclosure is likely to prejudice the issuer's legitimate interests.
2. Delay of disclosure is not likely to mislead the public.
3. The issuer is able to ensure the confidentiality of the information.

The European Securities and Markets Authority (ESMA) has proposed draft guidelines relating to the circumstances in which an issuer can delay disclosure of inside information to the public. These include when the issuer is in negotiations (for example, relating to an acquisition) where the outcome of such negotiations would be jeopardised by immediate public disclosure of the information.

The circumstances in which disclosure may be delayed have not changed from the position under MAD. However, for the first time, MAR requires that where disclosure of inside information to the public is delayed, issuers must inform the Central Bank of Ireland (or other relevant competent authority) that disclosure was delayed and provide a written explanation of how the conditions set out at (1) – (3) above were satisfied.

ESMA has also published draft technical standards which, if adopted by the European Commission, will place an onerous requirement on issuers to keep detailed records relating to the decision to delay the disclosure of inside information. Such records would require details on:

1. The dates and times when the inside information first came into existence and when the decision to delay disclosure was made.
2. The identity of the persons responsible for the decision to delay disclosure.
3. Evidence of the initial satisfaction of the conditions permitting delayed disclosure.

Practical tips

Issuers who are currently subject to MAD should undertake a review of their current practices relating to the disclosure of inside information and assess whether they satisfy the provisions set out in MAR. In particular, they should ensure that their current practices on the making of decisions regarding the delay of the disclosure of inside information and their record of keeping such decisions are compliant and enable them to disclose the required details of the decision-making to the Central Bank (or other relevant competent authority).

Issuers who will become subject to MAR for the first time should familiarise themselves with the provisions with regard to disclosure of inside information. They must be able to readily identify inside information, when it needs to be disclosed and when its disclosure may legitimately be delayed. They must ensure adequate records of all such matters are maintained and arrange internal training for relevant executives and employees on the practices.

Contributed by Susanne McMenamin and Niall Keane

New Rules on Market Sounding Imminent

On 17 May 2016, the European Commission adopted a delegated regulation on market sounding, which supplements and commences with the new Market Abuse Regulation (MAR) on 3 July 2016. The delegated regulation will introduce systems and procedures for disclosing market participants (DMPs) to follow when conducting market soundings, thereby regulating the practice for the first time.

Who are DMPs?

A DMP may be any of the following:

1. An issuer
2. A secondary offeror of a financial instrument
3. An emission allowance market participant, which is any person who enters into transactions, including the placing of orders to trade, in emission allowances, auctioned products based thereon, or derivatives thereof
4. A third party acting on behalf or on the account of a person referred to in (1), (2) or (3) above

What is market sounding?

Market sounding is the communication of information, prior to the announcement of a transaction, to gauge the interest of potential investors in a possible transaction and the conditions relating to it, such as its potential size or pricing. Market soundings are distinct from ordinary trading and may involve an initial or secondary offer of relevant securities. Examples of market soundings include: where an issuer intends to announce a debt issuance or additional equity offering and key investors are contacted by a sell-side firm and given the full terms of the deal to obtain a financial commitment to participate in the transaction; or where the sell-side is seeking to sell a large amount of securities on behalf of an investor and seeks to gauge potential interest in those securities from other potential investors.

Conducting market soundings may require disclosure to potential investors of inside information. However, where such disclosure is made in the course of a market sounding, and provided the requirements as set out in MAR are complied with, these disclosures will be considered to have been made in the normal course of a person's employment, profession or duties and the information will, under MAR, be deemed as having been disclosed legitimately.

What are the requirements?

A DMP will be considered to be acting within the normal course of his employment, profession or duties where the following requirements are met. Before making a disclosure a DMP must:

1. Specifically assess whether the market sounding will involve the disclosure of inside information. The DMP must then make a written record of its conclusion and the reasons for reaching it and it must provide this written record to the Central Bank of Ireland (or other relevant competent authority) upon request.
2. Obtain the consent of the person receiving the market sounding to receive inside information.
3. Inform the person receiving the market sounding that he/she is prohibited from using that information, or attempting to use that information to:
    a. acquire or dispose of, for his/her own account or for the account of a third party, directly or indirectly, financial instruments relating to that information; and
    b. cancel or amend an order which has already been placed concerning a financial instrument to which the information relates.
4. Inform the person receiving the market sounding that by agreeing to receive the information he/she is obliged to keep the information confidential.

A DMP must make and maintain records containing (i) all information given to the person receiving the market sounding and (ii) the identity of each person to whom the information has been disclosed. These records must be maintained for at least five years and must be made available to the Central Bank of Ireland (or other relevant competent authority) upon request.

It should be noted that the market sounding recipient should make their own assessment of whether the information disclosed amounts to inside information that would prohibit dealing on the basis of it, or further disclosing it. MAR also requires that the market sounding recipient be informed as soon as the information received no longer constitutes inside information.

Practical tips

The new requirements under MAR are based on what is currently normal practice in advance of certain transactions. However, an examination of your internal policies and procedures should be carried out to determine whether they need to be updated to reflect the precise requirements of MAR, particularly in relation to record-keeping. Training on the new requirements and their impact should be given to staff members who may carry out market soundings.

Contributed by Niall Keane

No More Flying Under the Radar: The Regulation of Drones

Reports in recent months of drones flying alarmingly close to aircraft have once again focused the spotlight on the issue of drone regulation. The increased demand for and availability of drones, as well as the rapid advancement of technology, have led to growing safety and regulatory concerns.

Ireland became one of the first countries in Europe to address these concerns with the introduction of two statutory instruments on 18 December 2015. The Irish Aviation Authority Small Unmanned Aircraft (Drones) and Rockets Order, 2015 (the "Regulation Order") and the Irish Aviation Authority (Nationality and Registration of Aircraft) Order, 2015 (the "Registration Order") now contain the bulk of the regulatory requirements for drones.

Regulation

The Regulation Order sets out a number of limitations for operating drones having a maximum take off mass of 150kg or less. A drone must not be flown in a manner that causes hazard to another aircraft, in the vicinity of aircraft maneuvering in an aerodrome, or in a reckless or negligent manner. The drone operator is required to ensure that the drone is able to take off and land without undue hazard to persons or property and without affecting the rights of the property-owner. Crucially, drones must always give way to manned aircraft.

Before operating a drone which weighs more than 4kg and less than 25kg, the operator must have successfully undertaken a course on safety training accepted by the IAA. Unless the permission of the Irish Aviation Authority (IAA) is obtained, a drone which weighs less than 25kg may not be flown:

- Within a prohibited area or controlled airspace such as prisons or urban areas
- Within 5km of an aerodrome during periods of aircraft operations
- Within 30m from a person, vessel, vehicle or structure not under the direct control of the operator
- More than 120m above ground or water level

A drone weighing between 25kg and 150kg may not be flown without the prior permission of the IAA.

Under the Regulation Order the IAA has the power to:

- Conduct appropriate investigations or inspections in respect of an incident or other occurrence that caused or could have caused danger to aircraft
- Detain an aircraft
- Access documents or records and may revoke, limit or suspend any permission, authorisation or exemption issued under the Regulation Order

Registration

Since 21 December 2015, a drone weighing between 1kg and 25kg (which includes attached equipment) is required to be registered with the IAA under the Regulation Order. Drones weighing in excess of 25kg must be registered in a similar manner to manned aircraft.

It is important to also be aware of the obligation on drone operators to comply with data protection legislation. See our previous article here

Amid growing concerns for both public safety and privacy rights, in January 2016, the Regulation of Drones Bill 2016 (the "Bill") was introduced to further regulate the use of drones. For example, the Bill provides for the specific offence of using a drone to photograph, video or conduct surveillance of another person’s home. The Bill has not yet progressed beyond the initial stage and is likely to be subject to further debate and amendment as it passes through a potentially lengthy legislative process. Nonetheless, with the use of drones likely to increase sharply, the Bill's introduction highlights that further regulation of their usage is both necessary and to be expected.

Contributed by Kate Harnett

In Short: Court Confirms Statutory Period for Bringing Negligence Action

The Court of Appeal has overturned a High Court ruling in relation to when time starts to run in a negligence case for the purposes of the Statute of Limitations.

The plaintiff, a developer, alleged breach of contract and negligence by a consultant engineer and contractor in the construction of two houses in Galway.

The parties disputed the point in time from which the six-year statutory period for the Statute of Limitations, within which a claim was to be brought, began. The defendants argued it began in March 2004 when the foundations of the houses were laid. The plaintiffs claimed that the damage, an essential element in the tort of negligence, did not actually occur until late 2005 when cracks appeared in the houses and therefore time only started to run at that point.

The High Court agreed with the defendants that time began to run in 2004 and dismissed the claim, ruling that it was statute- barred. The Court of Appeal overturned the decision thereby reaffirming that for the tort of negligence to be actionable, damage must have actually occurred. That damage had only occurred when the cracks appeared and therefore the six-year statutory period within which a claim could be brought only started in 2005.

Contributed by Niamh Cacciato

In Short: Brexit Briefing

The referendum on the UK's membership of the European Union is fast approaching. In this briefing we provide an overview of the upcoming referendum and the possible routes the UK might take if it opts to leave the EU. We also examine the significance of the relationship between Britain and Ireland and identify key threats and opportunities for Ireland should the UK exit the EU. We explain Ireland's attractiveness as an EU base in any post Brexit scenario.

Please click for our full Brexit Briefing.

Contributed by Shane Kelleher

In Short: William Fry Employment Snapshot

A social media and employment research report produced by William Fry has looked at the evolving trends around social media usage within the workplace. The annual report, the fourth in the series, reveals that more than 3 out of 4 employees (78%) are accessing social media using personal devices while at work (up from 60% in 2013). The report also states that men will spend more time on social media (39 minutes) than women (25 minutes) during the working day.

Catherine O'Flynn, a Partner in William Fry's Employment & Benefits Department, advised employers who have not already done so, to put a social media policy in place saying, "*our research finding that more and more employees are using personal devices to access social media at work is of note. Businesses risk serious reputational and/or financial consequences from employees' inappropriate activity on social media channels. Accordingly, it is vital that organisations address use on personal devices as well as company devices when preparing their social media polices.*"

Employers should also be aware that case law has emerged in Ireland over the last 12 months, which highlights the continuing need for employers to have a policy in place in order to have a defence to claims of vicarious liability brought by employees against the organisation in relation to the conduct of their colleagues.

Click here to download the full report.

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Contributed by Catherine O'Flynn

