WILLIAM FRY

Legal News

Welcome to the February 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

Chop Chop! Plans to Accelerate Delivery of Housing and New Residential Tenant Protections

Tenant Protection	
Rent Control	Rent control measures are now in place for areas designated as Rent Pressure Zones (RPZs). Dublin and Cork City are designated as RPZs for 3 years from 24 December 2016. Further areas have been included for 3 years from 27 January 2017 including parts of Galway City and areas within Wicklow, Kildare, Meath and Cork. Orders may be made to include further areas. Rent set for new tenancies or rent reviews for existing tenancies in RPZs on or after the relevant date of designation are capped by reference to a legislative formula (effectively 4% of rent previously paid for the dwelling) save in certain limited circumstances.
Extending Security of Tenure	Generally tenants renting dwellings for at least 6 months who haven't been served with a valid notice of termination acquire security of tenure entitling them to stay in the property for up to 4 years. After that first 6 month period the tenancy becomes known as a Part 4 tenancy. Tenants of Part 4 tenancies created after 24 December 2016 are now entitled to remain for 6 years (extended from 4 years), assuming no valid notice of termination is served.

Constraining Landlords' Termination Rights	Landlords will no longer have the right to terminate without reason within the first 6 months of a new Part 4 tenancy. Landlords' rights to terminate a tenancy on grounds of intending to sell the property are restricted where the landlord is seeking to sell (simultaneously or within a specified 6 month period) 10 or more properties, each being subject to a tenancy, within the same development. Limited exceptions apply.
Housing Supply	
Fast Track Planning/ Streamlining Local Authority Approvals	A fast track planning procedure for residential developments of 100 units or more and large-scale student accommodation projects is to be introduced, following which such planning applications are to be made directly to An Bord Pleanála. Existing arrangements for approval by local authorities of their own development proposals are to be streamlined.
Extending Planning Duration	A further extension of the duration of certain permissions will be permitted.
Pre-planning Environmental Impact Assessment	As part of the planning process, developers often have to conduct information-gathering exercises in order to understand the environmental effects of a development. For certain developments, a determination of whether or not such an assessment is required is to be permitted before a planning application has been submitted.
The date for commencement of the new arrangements on housing supply has yet to be set.	

Contributed by Tara Rush.

"Death Bed Marriage" Rule in Pension Scheme *Not* Discriminatory

On 24 November 2016, the Court of Justice of the European Union (CJEU) issued its judgment in the *Dr David Parris v Trinity College Dublin* case. The final decision diverges from the opinion of Advocate General (AG) Kokott (see our previous article here), who found that there had been indirect discrimination against the plaintiff based on his sexual orientation.

Dr Parris had sought to establish that his civil partner should be entitled to receive a survivor's pension on his death. The Trinity College scheme rule prescribed that a survivor's pension would not be available where a member had married or entered into a civil partnership after reaching the age of 60 or after having retired. Dr Parris retired in 2010 at age 64. The Civil Partnership Act 2011 entered into force on 1 January 2011. It was legally impossible for him (or any other homosexual scheme members who turned 60 before 2011) to satisfy this scheme requirement prior to 2011.

The questions put to the CJEU were whether that rule was discriminatory on grounds of sexual orientation or on grounds of age; or, whether discrimination arose from the combined effect of both age and sexual orientation grounds. AG Kokott had considered the rule to constitute indirect discrimination based on sexual orientation. The CJEU, however, held that the rule was not discriminatory on this basis. Key to its reasoning was that Member States were not required to implement civil partnership or same sex marriage (or required to do so retrospectively). Member States were also not required to lay down transitional measures for same sex couples in a position similar to Dr Parris (if circumstances thwarted them from satisfying this rule due to the timing of legal developments in Ireland).

The CJEU concluded that the scheme rule was covered by Article 6(2) of Directive 2000/78, which permits the fixing of ages for admission or entitlement to retirement benefits. Therefore no age discrimination occurred. On the question of the combined effect of discrimination, the CJEU found that where a national rule creates neither discrimination on the ground of sexual orientation nor age the rule cannot produce discrimination on the basis of the combination of those factors.

This judgment will be a comfort for any employers with similar restrictions in their rules. It is also a reinforcement of the exception in age discrimination law for pension schemes and confirms the lack of a rule on combined discrimination in circumstances such as these.

Contributed by Jane Barrett & Ciara McLoughlin.

Competition Body Extracts Undertakings from Landlords' Association

The Competition and Consumer Protection Commission (CCPC) has closed an investigation into anti-competitive conduct by the Irish Property Owners Association (IPOA) after the IPOA's agreement to give certain behavioural undertakings.

The investigation was triggered by a press statement published by the IPOA in December 2016 in response to amendments to the Residential Tenancies Act 2004 which introduced rent controls in the private rental sector. It stated that, following a meeting of IPOA members, property owners were considering a range of potential measures, including withdrawing from State-sponsored rental schemes and introducing new charges for tenants. Concerned that the IPOA was potentially co-ordinating the business conduct of its members, the CCPC opened an investigation.

Private residential landlords are considered as undertakings for the purposes of the Competition Act 2002. Moreover, the IPOA, which is a national association representing private residential landlords, is considered an association of undertakings. As such, any agreements, decisions or concerted practices by them which prevent, restrict or distort competition would be prohibited under competition law.

In response to the CCPC's concerns, the IPOA has entered into an Agreement and Undertakings with the CCPC, under which the following binding commitments were given by the IPOA:

- To retract the offending press statement and to inform its members of same
- To remind its members that the setting of rents and charges in the private residential sector is a matter for individual landlords and tenants
- To introduce competition law compliance training for IPOA committee members
- Not to seek to influence decisions of its members or other landlords, especially in relation to the setting of rents and charges and participation in State schemes

This is the second time that the CCPC has investigated the IPOA for potential anti-competitive behaviour. Other trade associations have also been investigated recently, including the Irish Medical Organisation and Approved Tour Guides of Ireland.

The CCPC's action against the IPOA demonstrates its willingness to intervene to prevent businesses coordinating their behaviour via trade associations. It is important for trade associations to factor in competition law compliance when publicly reacting to developments, especially in relation to government policies or legislation.

For advice on competition compliance, please contact our Competition & Regulation Team.

EU Ordered to Pay Damages to Two Companies for Breach of Fundamental Right to Timely Court Proceedings

In 2006, Gascogne Sack Deutschland and Gascogne sought to annul a European Commission decision fining them €13.2 million for participation in a cartel in the industrial plastic bags sector. However, it wasn't until November 2011, 5 years and 9 months later, that the EU General Court (GC) delivered its judgment and dismissed their actions.

The companies sought approximately €5 million in damages from the EU as compensation for both material and non-material harm caused by the inordinate length of the proceedings. In its first decision on this issue, the GC noted that non-contractual liability may be incurred by the EU when three cumulative conditions are fulfilled:

- **First, an EU institution must act unlawfully**

  The GC held that a period of almost 6 years was not justified by the specific circumstances of the cases and breached the right to adjudication within a reasonable period, as enshrined in the EU Charter of Fundamental Rights. In reaching this conclusion, the GC considered the appropriate length of proceedings, bearing in mind the complexity of competition law and other parallel actions. The GC also uncovered a 20 month period of inactivity.

- **Second, actual damage must be suffered**

  The GC accepted that bank costs in relation to the fine paid by Gascogne during the 20 months of inactivity amounted to actual damage. However, the GC rejected other claims of actual damage, including losses due to the payment of statutory interest applied to the Commission's fine.

- **Third, there must be a causal link between the unlawful conduct of the EU and the actual damage**

  This condition was satisfied as bank costs paid by Gascogne during the 20 months of inactivity would not have arisen had the proceedings before the GC been more efficient.

The GC partially upheld the actions of the two companies, awarding damages of approximately €47,000 to Gascogne for material harm suffered due to the additional bank costs. The companies were also awarded €5,000 each for non-material harm caused by the excessive uncertainty created by the lengthy proceedings.

This is the first time that the EU courts have awarded damages for a breach of a company's fundamental right to timely court proceedings. The right is well established before the European Court of Human Rights, and the Irish Supreme Court recently recognised, in principle, that damages would be available for breach of the right (*Nash v DPP*).

Damages themselves are of course not the primary goal, and it is notable that the compensation awarded in this case fell well below the millions sought. Recent reforms of the GC – including an increased number of judges and greater flexibility in the use of chambers – are intended to combat the excessive duration of proceedings and to allow the delivery of judgments within a reasonable time.

Contributed by Claire Waterson.

Is There Something They Should Have Known?

In a recent judgment of the English High Court, members of the group Duran Duran were found to have been precluded from exercising rights under US law. Duran Duran sought to terminate an historic assignment of copyright in 37 of their songs to the music publishing company Gloucester Place Music Limited (Gloucester). The court found that by attempting to terminate the assignment the group was in breach of the assignment contract.

In 1980 the members of Duran Duran entered into an agreement with Gloucester which assigned the worldwide copyright to songs written over a 3 year period to Gloucester, including their best known songs "Rio" and "Hungry Like a Wolf".

Section 203 of the US Copyright Act allows authors, such as Duran Duran, to terminate assignments of copyright in works where the assignment was made after 1 January 1978 and certain other conditions are met.

Duran Duran claimed that they complied with the requirements of Section 203, in that 35 years had elapsed since the assignment of the copyright. As such they were entitled to serve notice of termination of the assignment on Gloucester. Upon receipt of the notice of termination Gloucester filed an action for breach of contract.

The court reviewed the assignment, which was governed by English law, noting that expert evidence was not presented during the case as to the applicability of Section 203. In the absence of such expert evidence, the court decided that the assignment precluded Duran Duran from exercising rights under US law.

The case serves as a reminder to parties to give careful consideration to selecting a governing law clause where a contract has effect in more than one jurisdiction. This is particularly important in light of Brexit.

On 3 February 2017, Duran Duran was granted leave to appeal this decision, but no date has yet been set for the hearing.

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Contributed by Brian McElligott.

William Fry Data Protection Day Update 2017

2016 was the year of the global data revolution in which privacy and data protection became a top priority for organisations in many sectors and industries, both technology and non-technology related. Undoubtedly, this increased focus on data protection and privacy was driven largely by the formal signing of the GDPR and the EU-US Privacy Shield. 2016 was also the year of **landmark** data protection and privacy court cases in which William Fry was acting.

In 2017 organisations will need to kick-start their 'GDPR Readiness' programmes and actively accelerate their journey to 25 May 2018 (the date that the GDPR will apply). The GDPR will have a global reach, applying to organisations that are established or direct business activities in the European Union. This widened territorial ambit will require multinational organisations to ensure their data processing activities are GDPR compliant.

To mark International Data Protection Day 2017, our Technology team provided a round-up of some of the key data protection stories of 2016 and looked ahead to likely events for 2017. Now in its eleventh year, International Data Protection Day is celebrated globally every 28 January to raise awareness and promote privacy and data protection best practices.

Part 1: 2016 Round-Up

- Future of International Data Transfers Hangs in the Balance before Irish Courts
- EU-US Privacy Shield Signed
- Court orders Microsoft to transfer data stored in Ireland to the US
- General Data Protection Regulation Formally Adopted by the European Union
- Validity of International Data Transfers Challenged Before Irish Court
- CJEU Rules Dynamic IP Addresses May Constitute Personal Data
- Irish Court Asks CJEU if Exam Paper Constitutes Personal Data
- Network and Information Security Directive Adopted by European Council

Part 2: 2017 Forecast

- European Commission Proposes new ePrivacy Regulation
- EU Privacy Watchdog Announces 2017 GDPR Action Plan
- Digital Right Ireland Challenges EU-US Privacy Shield
- EU-US Privacy Shield: Set for Review in June 2017

For general information on the incoming **General Data Protection Regulation** (the GDPR) and detailed guidelines on compliance, register for **PrivacySource**, William Fry's dedicated GDPR website.

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Contributed by David Cullen.

Public Works Contracts Update

In January 2016, the Department of Public Expenditure and Reform (DEPR) published revised arrangements for procuring public works projects under the Capital Works Management Framework.

These revisions took effect from 4 April 2016 and were set out in Circular 01/16 ("Construction Procurement - revision of arrangements for the procurement of public works projects"). A lead-in time of approximately 9 months had been allowed since the publication of Circular 01/16. However, this phased implementation has now ended and since 9 January 2017 it is mandatory for contracting authorities to use the amended contracts and tendering forms on construction procurements for public works.

These contracts and their associated pre-qualification/suitability assessment questionnaire, forms of tender and instructions to tender must have a cited revision reference commencing with v2. Where the deadline for receipt of tenders for works is after 8 January 2017, sanction must be formally applied for and obtained from the Government Contracts Committee for Construction for use of the earlier versions of the construction contracts and associated tender forms with reference cited version 1.

A summary of the key changes introduced by the amended forms is set out here.

The amended contract and tender forms are available on DEPR's website. Contracting authorities, professionals and those involved on public sector construction projects should familiarise themselves with the various changes and implications for procuring works and services on public sector projects.

Contributed by Cassandra Byrne.

Nutrition Declaration Now Mandatory Under Food Information to Consumers Regulation

The Food Information to Consumers Regulation (FIC) (Regulation (EU) 1169/2011) came into force across the EU on 13 December 2014. It applies not only to all foods within the supply chain, but also to food business operators at all stages of the food chain from processors to retailers and caterers.

The Regulation introduced a requirement to provide a mandatory nutrition and allergen packaging declaration label. This provision was subject to a two-year transitional period, during which time food business operators had the option of providing this nutritional information on their products on a voluntary basis. However, food products bearing nutrition and/or health claims or foods to which vitamins and/or minerals have been added must have complied with the Regulation since 13 December 2014.

The transitional period ended on 13 December 2016 and it is now mandatory for those food business operators that have not voluntarily provided this nutritional information to comply with the Regulation. This means that, unless exempted, all prepacked food must be labelled with mandatory nutrition information, which is to be set out in a prescribed format on product packaging. This includes information regarding:

- Energy values
- Nano-ingredients
- Refined oils/fats of vegetable or animal
- Carbohydrate
- Sugars
- Protein
- Salt (sodium)
- Certain vitamins and minerals.
- Allergen information

The aim of the legislation is to provide consumers with clear, factual and comparable nutrition information while streamlining labelling legislation across the EU Member States. Food business operators must not knowingly sell food that is not compliant with this Regulation even if they are not responsible for the labelling of the food (e.g. retailers). The legislation also broadens the role of the European Commission and will assist consumers in making a more informed purchasing food choice based on a product's nutritional content.

Contributed by Cliodhna McDonough.

In Short: Informal Agreement Reached on Revised Shareholder Rights Directive

A proposal to revise the existing Shareholder Rights Directive (2007/36/EC) has been agreed at EU level. The 2007 Directive sought to improve corporate governance in companies traded on an EU regulated market by ensuring that shareholders could exercise their voting rights and rights to information across borders.

The revisions to the Directive were proposed to tackle perceived corporate governance shortcomings in listed companies in the EU and to further encourage transparency and shareholder activism.

Key aspects of the revised Directive include:

- The introduction of a "say on pay" and the requirement to publicly disclose the remuneration policy of the directors
- Measures to assist companies in identifying their shareholders
- New obligations on intermediaries (i.e. firms that provide services of safekeeping of shares, administration of shares or maintenance of securities accounts) to facilitate the exercise of rights by shareholders
- Transparency requirements for institutional investors, asset managers and proxy advisors
- A requirement for material related party transactions to be approved by the shareholders and be announced publicly

The new Directive will shortly be formally adopted by the European Parliament and Council. It will then be published in the Official Journal of the European Union, after which Member States will have two years to transpose the provisions into domestic law.

Contributed by Aoife Kavanagh.

In Short: New Pensions Directive Enters Force

Directive (EU) 2016/2341 on the activities and supervision of institutions for occupational retirement provision (IORP II) entered into force on 12 January 2017. An IORP is an "Institution for Occupational Retirement Provision" and most occupational pension schemes in Ireland are IORPs.

IORP II introduces a number of changes for IORPs including:

- The operation and authorisation of cross-border IORPs
- The types of investments an IORP can make
- Collective qualification requirements for those who run an IORP (e.g. pension trustees) in additional to other governance provisions
- The information that must be provided to members
- A strengthening of the powers of supervising competent authorities (e.g. the Pensions Authority)

Member States are obliged to transpose the Directive into national law by 13 January 2019. It is likely that an amendment will be made to the Pensions Act 1990 in the near future to transpose IORP II.

We will keep you updated of all developments.

Contributed by Jane Barrett & Ciara McLoughlin.

In Short: The 'Right to Disconnect'

In a much-publicised move, from 1 January 2017, French law has been amended to provide employees with the 'right to disconnect' from their work e-mails outside of normal working hours.

The intention is to allow employees to enjoy actual rather than token rest periods at the end of their work day/week. It is hoped that this development will assist in reducing employee work-related stress and burnout, as well as promoting a work/life balance.

From an Irish employer's perspective, the right to disconnect will be relevant where there are plans to relocate employees to France. While there is no sign of a similar right being introduced under Irish law, employers in Ireland should ensure that they fully comply with their obligations to provide employees with the necessary rest periods between work days and at the end of the work week, as required under the Organisation of Working Time Act 1997. Employers should also bear in mind their common law duties to their employees.

Contributed by Alicia Compton and Paul Buchanan.

