WILLIAM FRY

LEGAL NEWS

Welcome

Welcome to the October 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.

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CJEU Spells the End of Safe Harbor

The Court of Justice of the European Union (CJEU) has ruled that the European Commission decision establishing the ‘Safe Harbor’ framework is invalid as it does not sufficiently protect the fundamental rights of EU citizens.

The unusually expedited ruling of the CJEU follows the publication of the opinion of Advocate General Bot less than two weeks ago (see here).

The EU Data Protection Directive provides that the transfer of personal data to a third country may only take place if the third country ensures an adequate level of protection. The Directive also provides that the European Commission may decide whether a third country ensures the requisite level of protection. The Commission decided in 2000 that the level of protection afforded to individuals in the US is adequate provided the organisation receiving the data complies with the Safe Harbor framework.

As part of the well-publicised proceedings taken by European privacy campaigner, Max Schrems, against the Irish Data Protection Commissioner (DPC), the Irish High Court sought clarification from the CJEU on whether it is bound by the Commission decision establishing the Safe Harbor framework or whether it could/must conduct its own investigation of the matter. The CJEU found that EU data protection law does not prevent oversight of transfers to third countries by EU national authorities, even where the Commission has adopted an equivalence decision. National authorities must be able to examine, with complete independence, whether the transfer of personal data to a third country complies with the requirements of EU law and fundamental rights of EU citizens.

The Commission decision provided that national security, public interest or US law have primacy over the Safe Harbor principles. The CJEU found that the Safe Harbor framework, in permitting public authorities to have general access to the content of electronic communications, compromised the essence of the fundamental rights of the persons whose data is being transferred. Further, in order to adopt a decision of equivalence, the Commission was required to find that the US in fact ensured a level of protection of fundamental rights equivalent to that under EU law but the Commission did not state in its decision that this was so. Accordingly, the CJEU declared the decision invalid.

The CJEU's decision that the Safe Harbor framework is invalid has serious consequences for companies which rely on the framework and may have a major effect on such companies' operations. Over 3,000 US companies are currently certified under the Safe Harbor framework, relying on it to legitimise transfers by affiliates and other companies with which they do business. Such certification can no longer be relied upon to legitimise a transfer of personal data to the US.

The Safe Harbor framework was not the only method of legitimising transfers to the US. Irish businesses currently relying on Safe Harbor must now consider alternative options including Model Contracts and Binding Corporate Rules (BCRs).

Contributed by John Magee.

UK Supreme Court Allows Double Tax Relief for a Delaware Limited Liability Corporation

The UK Supreme Court has allowed double tax relief under the US/UK Double Tax Agreement (DTA) for a UK resident member of a Delaware Limited Liability Company (LLC). There had been uncertainty regarding the Irish tax treatment of LLCs and so the judgment will be of interest to Irish taxpayers who are in receipt of income from Delaware LLCs.

Mr. Anson was a UK-resident member of a Delaware LLC. The members were taxed in the US on their share of the LLC profits, whether or not that sum was actually distributed to them. Anson, as a UK resident but non-domiciled individual, was taxed under UK law on that portion of his share of the LLC profits which he remitted to the UK. He sought to rely on a provision of the US/UK DTA (which is almost identical to the corresponding provision in the US/Ireland DTA) to claim a credit against his UK tax liability for US taxes paid. The key question was whether the income of the US LLC on which Anson suffered US tax was the same income which was subject to UK tax.

HMRC argued that the profits taxed in the US were the profits of the LLC, whereas the profits taxed in the UK were the distributions made by the LLC to its member. This was consistent with published HMRC guidance which states that HMRC regard LLCs as taxable entities and not fiscally transparent. Irish Revenue guidance regarding the treatment of LLCs is limited to stating that an LLC will be looked through for Irish interest withholding tax purposes – no published Revenue guidance exists as to the treatment of an Irish member of an LLC. However, it is understood that, in the past, Irish Revenue has been inclined to follow the HMRC position in treating LLCs as opaque for such purposes.

The UK Supreme Court's approach was to consider the legal regime governing the rights of the LLC and its members in order to determine whether a profit that arises from a business carried on by an LLC constitutes the income of the LLC members or the LLC itself. The Court concluded that the profit by reference to which Anson's UK tax liability was computed was the profit arising as a result of the business being carried on by the LLC – this was undeniably the same profit on which Anson was taxed in the US and therefore double tax relief should be available.

The judgment goes against the long-standing HMRC practice of regarding LLCs as opaque and the published HMRC guidance regarding double tax relief. Given the lack of Irish Revenue guidance on how LLCs are to be treated for Irish tax purposes, the decision by the highest court in the UK is significant, particularly in the context of double tax relief. Irish taxpayers may therefore wish to consider whether there is an opportunity to claim double tax relief that they may have heretofore thought unavailable.

Contributed by Leo Sexton.

McDonald's Burger Not Artisan, According to Food Watchdog

The Food Safety Authority of Ireland (**FSAI**) has notified McDonald's, the world's largest fast-food chain, that its new Irish-themed "*McMór*" burger is not *"artisan"* as defined in recently published guidance on the use of certain terms in the marketing of food products in Ireland. Although the guidelines will apply to food products placed on the market or advertised after December 2016, McDonald's has reportedly decided to cease using the term when marketing its new burger.

The FSAI guidance (which we reported on here) aims to ensure that marketing terms convey a clear meaning to the customer, while protecting the needs of smaller businesses that rely on genuine distinctions in marketing terms in order to differentiate their products in the marketplace.

The FSAI guidance provides clear definitions for certain commonly used food marketing terms, such as *"artisan", "traditional", "farmhouse"* and *"natural"*. For example, in order to be marketed as *"artisan"*, a food product must:

- Be made in limited quantities by skilled craftspeople
- Be made by a traditional method which is not fully mechanised
- Be made in a micro-enterprise at a single location
- Have, as a characteristic ingredient, food grown or produced locally (at least where seasonally available and practical)

While an 18-month window within which to ensure compliance with the new guidelines is in place, those involved in the food industry should take note of the proactive attitude to enforcement already being displayed by the FSAI.

Contributed by John Magee.

Changes to the EU Trade Mark Regime

The final texts of the proposed new Trade Mark Directive and Community Trade Mark Regulation have been published by the Council of the European Union, marking the first significant change to the harmonised trade mark regime introduced over 20 years ago.

The new regime seeks to improve trade mark law and practice across member states through:

- Increased harmonisation of rules
- Introducing measures to protect brand owners' rights relating to counterfeit goods in transit
- Modernised provisions to facilitate registration of new types of trade marks
- Increased co-operation between the Office for Harmonisation in the Internal Market (OHIM) and national trade mark offices
- Changes to the governance and finances of the OHIM

While the cost of trade mark registration will be reduced under the new regime, additional class fees will be introduced for applications and renewals in order to discourage trade mark owners from filing and maintaining overly broad trade mark specifications. The OHIM will also be renamed as the 'European Union Intellectual Property Office'.

It is expected that the draft Regulation will come into force in the second quarter of 2016. Once the draft Directive is formally adopted, member states will have three years in which to transpose its provisions into national law.

The proposed regime will improve trade mark protections for all companies regardless of their size, market or geographical presence. For this reason, the package is expected to increase incentives for innovation by enhancing legal certainty and predictability, limiting the risks of litigation and providing a level playing field for all European businesses.

Contributed by John Farrell.

Ryanair Flight Attendant Loses Case for Constructive Dismissal

A female flight attendant who resigned after requesting autographs from celebrities during a flight has lost her case for constructive dismissal against Ryanair at the Employment Appeals Tribunal (EAT).

In December 2009 the employee approached some celebrity passengers on board a flight (reported in the media to be John and Edward Grimes a.k.a. Jedward) and asked for their autographs. In accordance with the Ryanair company manual, cabin crew are not permitted to speak to celebrity passengers. The employee was told by her supervisor that she had harassed the passengers and was not to do so again. Two years later, the same celebrity passengers were on board a flight and some members of the crew approached the passengers and had photographs taken with them. No action was taken against these crew members and the employee wrote a letter of complaint to management regarding the differing treatment she had received.

The employee in question also made a number of other complaints to management during her employment – a complaint in relation to how she was spoken to by a captain during a flight, various complaints surrounding her transfer from flying duties to office-based duties during her pregnancy and complaints regarding her lack of promotion. The employee contended that one of the reasons she had not been promoted related to the incident with the celebrity passengers. However, Ryanair management denied this. Upon tendering her resignation in September 2012, the employee claimed that her grounds for doing so were *"discrimination, harassment and bullying in the workplace".*

Having examined the evidence in the case, the EAT found that the employee had *"failed to fully engage with and exhaust the grievance procedure open to her"*. The EAT stated that when an employee resigns and asserts that his/her actions amount to constructive dismissal, the employee must act reasonably and this includes affording the employer *"an adequate and reasonable opportunity to address and remedy any grievance".* By resigning before the grievance procedure had been exhausted, the employee did not act reasonably. Therefore, the EAT found in favour of Ryanair.

This case highlights the necessity for employees, in certain circumstances, to fully follow the steps of their employer's grievance procedure and exhaust all possibilities of appeal prior to resigning from their position. Employers should ensure that they have a robust written grievance policy in place so that there is a clear process to be followed when an employee wishes to raise a grievance.

Contributed by Catherine O'Flynn.

UK Employee Fairly Dismissed for Facebook Comments

The dismissal of an employee for derogatory comments made on Facebook about his employer two years prior to his dismissal has been found to be fair by the Employment Appeals Tribunal in the UK.

The employee worked for the British Waterways Board (BWB) and was part of a team responsible for the maintenance and upkeep of canals and reservoirs. The team worked on a seven-day rota and was required to be on stand-by to deal with emergencies for seven days one week in every five. During the stand-by period, the team members were not permitted to consume alcohol.

During the course of his employment, the employee raised a number of grievances. In the course of preparing for mediation of a grievance in May 2013, BWB obtained copies of comments taken from the employee's Facebook account, which then prompted further investigation. The comments referred to his supervisors in derogatory terms and also stated that he had been drinking alcohol while on stand-by. The social media policy of BWB stated that *"any action on the internet which might embarrass or discredit the BW (including defamation of third parties for example, by posting comments on bulletin boards or chat rooms)"* was forbidden.

Following an investigation by BWB, the employee was dismissed for gross misconduct. The employee brought a claim for unfair dismissal before the Employment Tribunal (ET), who found that his dismissal had been unfair. BWB appealed to the Employment Appeals Tribunal (EAT) who overturned the decision and ruled that the dismissal was fair. The EAT found that BWB had followed fair procedure and that it had a genuine belief that the employee had taken alcohol while on stand-by. The EAT stated that the ET had given too much consideration to the mitigating factors raised by the employee (such as his unblemished service record, his consistently good performance reviews and the fact that HR did not investigate the comments when they became aware of them) and despite the fact that the breaches had taken place some years earlier, BWB had been entitled to reach the decision it did.

This decision is a reminder to employers of the importance of having an effective social media policy in place. It also suggests that a failure to take immediate steps in relation to misconduct will not necessarily prevent the employer from taking action in respect of that misconduct at a later date. However, advice should always be sought in such circumstances.

Contributed by Catherine O'Flynn.

Data Protection Requests Must Be Reasonable and Proportionate

The High Court of England & Wales has dismissed an application to compel a law firm to comply with a data access request made on a variety of grounds, including that it would have required a disproportionate effort.

The majority of the large volume of documents falling within the terms of the request were likely to be subject to legal professional privilege and, as such, would have qualified for an exemption from the access request under data protection legislation. The Court found that it was not reasonable or proportionate to ask the firm of solicitors to assess which documents were privileged and which were not. The question of whether a document was protected by privilege was a matter that would require considerable work by skilled lawyers and the statutory fee of £10 bore little relation to this time-consuming and costly exercise.

The Court also noted that the purpose of data protection legislation was to protect data subjects' right to privacy and accuracy of the information held about them but, that in this case, the real purpose of the access request was to obtain information to be used in separate proceedings which was not a valid purpose.

It will be interesting to see what potential impact this decision may have in the Irish courts when the issue of disproportionate efforts is next litigated here as this decision could potentially result in a significant departure from the current practice adopted in Ireland.

Contributed by John Farrell.

MIBI to Cover Liquidated Insurer

On 4 September 2015 the High Court ruled that the Motor Insurance Bureau of Ireland (MIBI) would be liable for approximately 1,750 outstanding claims stemming from the recent liquidation of Setanta Insurance Company Limited (Setanta).

The liquidation of Setanta in early 2014 resulted in serious ambiguity and uncertainty in the insurance market as to, among many other things, whether the Setanta policies remained valid, whether Setanta claims would be honoured and if so, by whom?

This led to High Court proceedings being taken by representatives of the Law Society of Ireland, the MIBI and the Accountant of the Courts of Justice (who bears responsibility for administering the Insurance Compensation Fund). The Law Society was seeking a declaration from the Court as to whether the outstanding claims should be paid out of the Insurance Compensation Fund, which is primarily designed to facilitate payments where insurers go into liquidation, or by the MIBI, the body responsible for making payments in relation to claims against uninsured drivers.

The MIBI, which draws from a fund contributed to by all motor insurers, argued that the scope of its responsibility did not extend to liquidated insurers but Mr Justice John Hedigan ruled that, given the purpose and nature of the MIBI, it was liable to cover any claim against Setanta policy holders which existed at the date of Setanta's liquidation.

This judgment brings clarity to the issue of liability in these cases. The Law Society became involved due to the unprecedented number of claims and queries being made to the Law Society and the lack of any definitive answer to those questions. As a result of this decision, many of the 1,750 outstanding claims will now be processed and finalised – at the expense of the MIBI and thus the insurers.

Contributed by Lisa Carty.

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