WILLIAM FRY

LEGAL NEWS

Welcome

Welcome to the November 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.

Adam Synnott

Partner

Litigation Funding and After the Event Insurance – Two Steps Forward…

The issue of third party funding of litigation recently came before the High Court for the first time. Persona, the company that lost out to ESAT Digifone in the award of the State's second mobile phone licence in 1996, brought an action against the Minister for Public Enterprise, Ireland and the Attorney General alleging various irregularities and seeking damages. Owing, it claimed, to the wrongdoing of the defendants, Persona did not have the money to fund the litigation without the help of a third party funder and therefore entered into a funding agreement with a UK litigation funder in March 2015.

Litigation funding

Under the medieval concepts of maintenance and champerty, the funding of litigation in Ireland by a third party, particularly in return for a share in the proceeds of the litigation, is unlawful. Persona is therefore seeking a declaration from the High Court that its funding arrangement does not offend against these concepts and does not amount to an abuse of process. As a preliminary issue, the defendants sought disclosure of the litigation funding agreement. In reaching its conclusion that a redacted version of the agreement should be disclosed to the Court and the other parties, the High Court referred to another recent decision of the Court of Appeal in relation to the use of an After the Event (ATE) insurance policy in litigation.

ATE insurance

ATE insurance provides cover for the legal costs incurred in bringing (or sometimes defending) litigation. It is purchased after a legal dispute has arisen and generally protects a plaintiff from potential exposure to the costs of the litigation. In its decision, the Court of Appeal accepted that an ATE policy can, in principle, provide security for costs once it can be shown that the policy is actually effective and does not contain terms which would allow the insurers to contractually avoid liability to pay the costs of the defendant to an action. While the market for ATE policies is still quite limited in Ireland, and questions surrounding their validity still remain, the decision in this case marks a significant step in this area.

The High Court is due to deliver its ruling on the validity of the funding agreement in Persona shortly. This has the potential to alter the litigation funding landscape in Ireland forever.

Contributed by Deirdre O'Donovan.

Safe Harbor Update – A Week is a Long Time in Data Protection

As reported previously (see here), the Court of Justice of the European Union (CJEU) recently declared that the EU Commission's decision on Safe Harbor is invalid because the Safe Harbor framework does not sufficiently protect the fundamental rights of EU citizens.

Irish High Court rules on Schrems

The matter recently returned before the Irish High Court to decide how the case should proceed following what the judge described as *"possibly one of the most important decisions"* of the CJEU in recent years.

Arising from the CJEU decision, the Data Protection Commissioner (DPC) quashed the 2013 refusal of her office to investigate the complaint. The Court noted that *"it is clear that the DPC had no jurisdiction to go behind the 'Safe Harbor' agreement"* at that time.

Counsel for Mr Schrems expressed concern that the complaint would be *"long-fingered"* by the DPC in the hope of a new Safe Harbor arrangement being agreed. However, Counsel for the DPC assured the Court that the complaint would be investigated in line with the High Court and CJEU decisions.

In a statement following the ruling, the DPC welcomed the decision and noted that her office will now *"proceed to investigate the substance of the case with all due* diligence*"*.

Safe Harbor 2.0?

In the meantime, the wait for Safe Harbor 2.0 may not be a long one. The EU Commissioner for Justice announced this week that the EU had agreed *"in principle"* on a new data transfer agreement with the US while discussions are ongoing to ensure that *"the new arrangement lives up to the standard of the Schrems ruling"*.

The two sides have been negotiating a new agreement since Edward Snowden leaked details of a US mass electronic surveillance program in 2013 and a number of meetings have taken place since the judgment with the aim of transforming the system from a purely self-regulating one. The Commissioner noted that the European Commission is not assessing the US system generally but ensuring that it offers safeguards which are *"globally equivalent"* to those offered in Europe. The Commissioner also noted that ensuring sufficient safeguards and limitations to prevent access to personal data on a generalised basis *"is the biggest challenge in the judgment"* but welcomed the reforms made by the US in this regard.

EDPS offers advice to businesses

Meanwhile, European Data Protection Commissioner Supervisor (EDPS), Giovanni Buttarelli, noted that Standard Contracts and Binding Corporate Rules (BCRs) remain solutions for the transfer of personal data to the US for the time being but warned that they cannot be conceived of as *"entirely solid"*.

Mr Buttarelli reaffirmed the position that companies that currently transfer data to the US must immediately cease relying on Safe Harbor to legitimise transfers. He suggested that companies should *"identify interim solutions"* and await guidance from national data protection authorities which he believed would issue shortly.

The Commissioner, observing that businesses need *"clear explanations and a uniform interpretation of the ruling"* noted that the European Commission will shortly issue an explanatory communication on the consequences of the ruling in respect of data transfers.

In the meantime, Irish businesses affected by the Safe Harbor ruling should continue to identify and implement interim solutions in respect of data transfers between the EU and US.

Contributed by John Magee.

Central Bank Fines Credit Union for Breach of Prudential Requirements

In only the fourth and fifth settlement this year, the Central Bank, last month, entered into its first settlement agreement with a credit union since the commencement of the Administrative Sanctions Procedure.

The Central Bank found that the credit union had breached its statutory obligation to provide the Central Bank with periodic financial statements and that an officer of the credit union, Mr Hogan, had participated in those breaches.

Significantly, when the Central Bank issued its enforcement priorities for 2015 earlier this year, prudential requirements and credit unions specifically, were identified.

The specific breaches in this case were that:

- The credit union failed to comply with its Prudential Regulatory Returns requirement for the quarters ending 30 September 2013 to 30 September 2014
- There were no adequate controls in place to ensure the submission of returns within the required timeframe
- The credit union failed to ensure the accuracy of the information provided in the submitted returns

The officer in question was responsible for preparing and submitting the prudential returns on behalf of the credit union and was found by the Central Bank to be personally responsible for the breaches. The Central Bank noted that it expects persons concerned in the management of regulated entities to act to the required standards.

The Central Bank has repeatedly stated that for it to effectively regulate credit unions, it is essential that it is provided with these returns as it informs the Central Bank of the financial position and regulatory compliance of each credit union.

As with previous settlements, the Central Bank took several factors into consideration when deciding upon a penalty, including the seriousness and repeated nature of the breaches, the need for a penalty to have a deterrent effect, the size of the credit union and the fact that the credit union had taken measures to resolve the breaches. Furthermore, the credit union admitted its liability for the breaches and agreed to implement systems and controls to remediate the three breaches and confirmed on 29 July 2015 that this work had been completed.

Ultimately, the Central Bank imposed a fine on the credit union of €5,000 and reprimanded both it and the individual officer for the breach of its statutory obligations.

Contributed by Hilary Rogers.

€16,000 Awarded for Failure by Employer to Risk-assess Workstation

The High Court has awarded €16,000 in damages to a charity housing support worker finding that a defective workstation contributed to her medical conditions.

Due to extra resources, the room in which the employee worked was overcrowded. The employee's workstation was directly adjacent to a radiator and a window. The other employees in the room controlled the heating and would often turn it up when they returned to the room.

The location of the employee's workstation meant that she was consistently very warm and the air was so dry that she began to suffer from sinus infections. Whilst she had previously suffered from sinus problems, she had had no issues when on a two year secondment from her role. She also began to suffer from neck and shoulder problems and was treated by a chiropractor.

The employer circulated a workstation assessment form. It was only when the employee received the form that she first reported her issues to the employer. The employer then took immediate steps to rearrange the workstations in the room.

The High Court was of the view that it was entirely foreseeable that the person sitting at the employee's workstation would be exposed to far greater levels of heat than those further back in the room. It held that if a risk assessment had been carried by the employer in line with its statutory duties under the *Safety, Health and Welfare at Work Act 2005*, the workstations would not have been arranged in that way.

The employer had also failed to meet its obligations under the *Safety, Health and Welfare at Work (General Application) Regulations* which require employers to ensure that during working hours, the temperature in rooms containing workstations is appropriate having regard to the working methods being used and the physical demands placed on employees.

However, the Court was not satisfied that the employer's negligence and breach of duty were the cause of the employee's medical conditions. The Court stated that the defects in the workstation were, at most, *"merely a contributory factor in the onset of her condition".* The employee's previous medical issues were considered in that context.

The High Court made an award of €16,000 in damages to compensate the employee for one year post onset of her condition.

This decision serves as a reminder to employers of the importance of meeting statutory health and safety obligations in the workplace, and of regular monitoring of compliance.

Contributed by Catherine O'Flynn and Nuala Clayton.

€10,000 Awarded to Baker Who Worked 98 Hours a Week

The Labour Court has awarded €10,000 compensation to a Polish baker who worked between 70 and 98 hours a week in a Limerick bakery.

The employee alleged that, at the time he was recruited in Poland, he was informed that he would work 30 hours a week for an agreed amount. However, he worked between 70 and 98 hours, with no additional payment for any overtime. He claimed that he was subsequently instructed by his employer to complete false time sheets for the purposes of a NERA inspection and was threatened with losing his job and deportation if he did not do so.

The employee maintained a diary recording his correct start and finish times, which was put into evidence. The employer relied on pay slips which did not match the hours recorded in the employee's diary. The employer also claimed that the employee had remained on the premises for additional hours in order to avail of transport home. Whilst admitting that the start and finish times recorded for the NERA inspection were incorrect, the employer contended that the actual working time was accurate and in compliance with legislation.

The parties' versions of events were in direct contradiction with each other. In reaching its decision, the Labour Court found that the evidence adduced by the employer was unreliable, while the evidence put forward by the employee was honest to the best of his recollection. Accordingly, the Labour Court found in favour of the employee.

The Organisation of Working Time Act 1997 states that an employee's maximum average working week should not exceed 48 hours. While this does not mean an employee can never work more than 48 hours in any seven-day period, the average (in most cases to be calculated over a four month period) may not exceed this amount.

This case is a stark reminder to employers of the substantial compensation that can be awarded and the serious view the Labour Court takes of abuse of the legislation, particularly in relation to vulnerable employees, in ensuring employees do not work beyond the average number of hours per week permitted under the Act.

Contributed by Catherine O'Flynn & Kirsten Kingerlee.

Duty of Good Faith and Fair Dealing Implicit in Shareholders' Agreement

In a recent High Court case involving, amongst other things, a claim for breach of a shareholders' agreement, the trial judge held that it was appropriate to imply a duty of good faith and fair dealing in a shareholders' agreement.

The parties were both shareholders of Blackrock Hospital Limited (BHL), the company which owns and controls the Blackrock Clinic in Dublin. The Plaintiff had taken out a loan from Anglo in order to purchase its shares in BHL. The Defendant subsequently acquired this loan from NAMA and sought to call in the loan by issuing letters of demand and appointing a receiver. The Plaintiff challenged this as an attempt by the Defendant to seize control of its stake in BHL in breach of an implied term of good faith in the shareholders' agreement.

In recognising the existence of a duty of good faith, the judge drew heavily on the context in which the agreement came to be executed. In particular, the agreement demonstrated elements of a "relational" contract, which involves a longer term relationship and requires parties to communicate effectively and cooperate with each other in its performance.

Furthermore, while the parties themselves were businessmen, this was not a simple commercial agreement between two *"hard nosed businessmen"*. There were other shareholders who were first and foremost doctors, and whose motivation was a mixture of friendship, professional achievement, family investment and altruism. Although not a partnership, this was a venture that was not purely commercial but was motivated in part by other considerations.

Although its acquisition of the loan was valid, the implied term of good faith meant that the Defendant was not entitled to demand or recover monies otherwise than in accordance with the shareholders' agreement.

This decision could have implications not just for shareholders' agreements, but also for other long-term relational contracts, such as distribution agreements and joint ventures. The courts have generally been reluctant to imply terms into agreements negotiated between two parties at arm's length, but this case demonstrates that a court may be willing to imply terms such as good faith and fair dealing in certain circumstances, particularly where the relationship is not purely one of business.

Contributed by Adam Synnott.

OECD Publishes Final BEPS Package

On 5 October 2015 the OECD released the final Base Erosion and Profit Shifting (BEPS) reports covering the 15 actions of the BEPS action plan of July 2013. The aim of the BEPS action plan is to realign taxation with economic activities and value creation and to create a single set of international tax rules to address BEPS issues.

The final package of BEPS measures includes new minimum standards on country-by-country reporting, which should give tax administrators a global picture of the operations of multinational enterprises; treaty shopping, to attempt to put an end to the use of conduit companies to channel investments; curbing harmful tax practices, in particular in the area of IP and through automatic exchange of tax rulings; and effective mutual agreement procedures.

Please click here for a link to each of the 13 reports that have been released. They are as follows:

Action 1: Addressing the Tax Challenges of the Digital Economy
Action 2: Neutralizing the Effects of Hybrid Mismatch Arrangements
Action 3: Designing Effective Controlled Foreign Company Rules
Action 4: Limiting Base Erosion Involving Interest Deductions and Other Financial Payments
Action 5: Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance
Action 6: Preventing the Granting of Treaty Benefits in Inappropriate Circumstances
Action 7: Preventing the Artificial Avoidance of Permanent Establishment Status
Actions 8-10: Guidance on Transfer Pricing Aspects of Intangibles
Action 11: Measuring and Monitoring BEPS
Action 12: Mandatory Disclosure Rules
Action 13: Guidance on Transfer Pricing Documentation and Country-by-Country Reporting
Action 14: Making Dispute Resolution Mechanisms More Effective
Action 15: Developing a Multilateral Instrument to Modify Bilateral Tax Treaties

Implementation of the reports will be through a combination of amendments to double tax treaties and/or domestic legislation. The OECD and G20 have agreed to cooperate in areas that require further work in 2016 and 2017.

Contributed by Ted McGrath.

Impact of Finance Bill 2015 on the FS Sector

The Government published Finance Bill 2015 on 22 October 2015. The Bill contains the taxation measures announced in the Budget speech (13 October 2015) in addition to a number of other measures. The Bill introduces the following changes that impact upon the financial services sector:

- Changes to scope of income tax charge on income earned from assets transferred out of Ireland (s.19)
- Extension of deadline for making encashment tax return and related payments (s.20)
- Removal of requirement to complete Life Policy Non-Resident Declarations at inception of policy (s.21)
- Change to definition of "Collective Investment Undertaking" to remove uncertainty on availability of US Ireland Tax Treaty benefits (s.24)
- Clarification on tax treatment of non-resident AIFs which have Irish AIFMs (s.26)
- Confirmation of tax treatment of Additional Tier1 instruments (s.27)
- Introduction of the Knowledge Development Box regime (s.30)
- Proposal to introduce County by Country Reporting Legislation in line with OECD Model Legislation (s.31)
- Capital Gains Tax (CGT) deferrals on transfer of assets to an ICAV (s.37)
- Changes to Stamp Duty Charges on ATM / debit cards (s.61)
- Extension of Revenue Powers (s.71)
- Update to definition of "Financial Institution" as part of Central Bank (Supervision and Enforcement) Act 2013 (s.82)
- Abolition of the Pension Fund Levy
- Extension of the Bank Levy to 2021

For more information on any of the above changes, click on this link for a more detailed briefing.

Contributed by Ted McGrath.

In Short: Employment-related Budget 2016 Announcements

Budget 2016 saw the announcement of paternity benefit which will be paid to fathers at a rate of €230 per week for a two-week period. The Government announced this change with the aim of recognising *"the needs of modern families and the role of fathers in the household".*

This benefit is linked to the introduction of statutory paternity leave in the Family Leave Bill which is expected to be published in late 2015. It is anticipated that the changes will take effect from September 2016. Ireland will join many other European countries in introducing two weeks' paid paternity benefit, but will still lag behind Slovenia (13 weeks) and Finland (9 weeks).

In addition, it was announced that from 1 January 2016, the rate of the statutory minimum wage will increase by 50 cent from €8.65 per hour to €9.15 per hour. All other sub-rates will also increase accordingly. For example the rate for under-18s will rise from €6.06 to €6.41.

Contributed by Catherine O'Flynn and Nuala Clayton.

