WILLIAM FRY

LEGAL NEWS

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Welcome

Welcome to the April 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.

Ken Casey
Partner

Ramsay's Signature Nightmare

A UK Court has found that an individual can be bound by the terms of a guarantee executed by an agent using a signature writing machine.

The case concerned Gordon Ramsay's signature on a guarantee of a lease, which had been applied using a signature machine, by his father-in-law, Christopher Hutchinson. The guarantee provided that Mr Ramsay would be the guarantor of the annual rent under the lease. When the lease was assigned and Mr Ramsay was no longer the tenant of the property, he sought a declaration that he was not the guarantor of the annual rent, on the basis that he did not sign the guarantee.

In making its decision, the Court took into consideration the fact that Mr Hutchinson and Mr Ramsey had a long-standing business relationship for over 20 years. During this period, Mr Ramsay entrusted Mr Hutchinson to act for him personally and his companies in relation to his business affairs. The Court determined that this trust was "very extensive, if not total". The Court concluded that this was sufficient to find that Mr Hutchinson had been acting within the scope of the authority given to him by Mr Ramsay to act on his behalf. Therefore, Mr Ramsay remained as guarantor of the lease. The Court also ruled that Mr Ramsay was bound by the guarantee despite the absence of express authorisation to enter into it.

This case serves as a reminder to those who give authority to agents to act on their behalf to ensure that the parameters of that authority are clearly defined.

Contributed by Brian McElligott.

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Dude, That's My Logo!

The High Court of England and Wales recently decided on a case concerning the ownership in copyright of the famous innocent smoothie logo, the cartoon depiction of a face with a halo, otherwise known as the 'Dude'. The Court held that the owner of copyright in the logo was the owner of the Innocent smoothie brand, Fresh Trading Limited (**Fresh**), and not the successor-in-title to the company that designed the logo, Deepend Fresh Recovery Limited (**Deepend Fresh**).

Background

When Fresh was a start-up company (over 15 years ago), it engaged the services of a company called Deep End Design Limited (Design Company) to design numerous logos (including the famous 'Dude' logo). At the time the parties agreed that the Design Company would design logos and branding materials in return for shares in Fresh. Some important points regarding the arrangement are as follows:

- An agreement was drafted setting out these terms and was labelled "Heads of Agreement" and "Subject to Contract"
- The agreement provided that Fresh would receive full intellectual copyright of any work presented by the Design Company, that was approved by Fresh
- There was no proof that the agreement was ever signed
- The allotment of shares was never carried out by Fresh

Since that time, the logo has been used on every product sold by Fresh. In 2001, the Design Company became insolvent and was wound up. In 2009, the successor-in-title to the Design Company, Deepend Fresh purchased all of the Design Company's copyright interest, if any, in all works created by them for Fresh, including the Innocent design works.

Deepend Fresh subsequently brought a successful application to OHIM to invalidate the Innocent 'Dude' logo on the ground that it owned the copyright in that logo. Fresh appealed this decision and issued separate proceedings in the High Court to establish its ownership of the copyright.

The High Court decided that Fresh was the owner in equity of the logo. The Court held that an equitable assignment of the copyright works existed. This was despite the fact that neither party had evidence of a signed agreement, no shares had been allotted and the agreement was labelled "Heads of Agreement" and "Subject to Contract". In the Court's view, the 'promise' to allot the shares (rather than an actual allotment) was sufficient to validate the agreement.

This case highlights the importance of obtaining and retaining a copy of any design contract providing for the transfer of IP rights which has been executed by the entity/individual providing the design services.

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A Welcome Review of the Prospectus Regime

As part of the European Commission's "Capital Markets Union" action plan to unlock capital and create a single market for capital across the member states, the European Commission is undertaking a review of the current Prospectus regime and has launched a consultation process seeking feedback from interested parties.

The current Prospectus Directive has been in force in Ireland since July 2005 and sets out rules which aim to harmonise requirements for the drawing up, approval and distribution of a prospectus when securities are offered to the public or admitted to trading on a regulated market within a Member State of the EU.

The objectives of the review are:

- To reform the current regime to make it easier for companies (in particular SMEs) to raise capital throughout the EU and to lower the associated costs, while maintaining effective levels of investor protection
- To update the Prospectus Directive to reflect market and regulatory development

The consultation document identifies a number of shortcomings within the current regime from the point of view of both investors and issuers preparing prospectuses:

- The drawing up and approval of prospectuses is often perceived as overly expensive, complex and time-consuming, especially for SMEs.
- The application of the Directive is not harmonised across Member States.
- Prospectuses have become overly lengthy and complex documents, defeating the aim of investor protection.

Three central areas will be examined as part of the review:

- The circumstances in which a prospectus will be required – e.g. should exemptions be introduced for secondary offers? Should a prospectus be required for admission to trading on an MTF (multi-lateral trading facility)?
- Simplifying the information to be included in prospectuses – e.g. should the requirement for a summary be deleted? Should there be a tailor made regime for SME growth markets (with simplified content requirements)?
- Streamlining the approval process – e.g. should the "base prospectus facility" be extended to equity issuers (currently only available for non-equity securities)?

The Commission is seeking feedback on the consultation document by **13 May 2015**. Replies are sought from all types of individuals and organisations, but particularly from entities which have prepared a prospectus in the past (or have considered doing so), specialists in the area, relevant national authorities and organisations and investors who have used prospectuses for their investment decisions.

The Commission will decide how to progress the amendment of the Directive in the next number of months. The responses to the consultation will provide important guidance to the Commission when preparing, if considered appropriate, a formal Commission proposal.

Contributed by Ian Hutchinson, Ita O'Sullivan.

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Private Health Insurer Recovers Surgical Costs of Replacing Defective Medical Products

The European Court of Justice has held that a manufacturer of pacemakers and implantable cardioverter defibrillators must reimburse a private health insurer for necessary surgical costs of replacing defective products.

Two cases were referred to the ECJ for ruling. The first involved a pacemaker which was replaced following quality controls which indicated that the part used to hermetically seal the pacemakers could experience degradation with premature battery depletion. The manufacturer sent a letter to doctors recommending replacing the devices of affected patients. While the replacement pacemaker was free of charge, the patient claimed the cost of the associated surgery from private health insurance.

The second case involved an implantable cardioverter defibrillator. Quality control tests found that the defibrillator might be affected by a defect in a component which could limit the device's efficacy – a magnetic switch could become stuck in the closed position thereby inhibiting treatment of ventricular and atrial arrhythmias. The manufacturer recommended that doctors deactivate the magnetic switch in affected patients and in this case the patient had the device replaced prematurely.

The Court had to consider whether a medical device is defective if devices in the same group have a significantly increased risk of failure but a defect has not been detected in the specific device. The Court also had to consider whether the costs of the operation to remove the defective product constituted damage caused by personal injury.

The Court concluded that where products belonging to the same group have a potential defect, such a product may be classified as defective without there being any need to establish that the product has such a defect. In addition, it found that compensation for damage must cover, amongst others, the costs relating to the replacement of the defective product.

Contributed by Ruth Finnerty, Margaret Muldowney.

No Restriction for Nominal Director

A recent High Court decision appears to depart from established case law regarding restriction applications against non-executive or nominal directors.

In this case the Court was required to consider whether the payment of excessive director remuneration at a time of overall decline in the company's financial performance was sufficient to warrant a restriction declaration against either or both of the directors of the company. The decision is notable for two reasons.

Nominal directorship

One of the two directors of the company was the wife of the second director and pleaded that she did not play any part in the running of the business and was primarily motivated by 'ties of affection' when she agreed to act as director in the company. The Court noted that ordinarily the position was that a nominal director could not have themselves excused from accountability simply by virtue of being a 'nominal' director. However, the Court went on to state that this position did not mean that that a female director can never escape liability where she embarks upon a directorship primarily out of ties of natural affection nor that a passive director/nominal director can never be excluded from liability.

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Real moral blame

The Court concluded that, in such cases, for liability to attach there must be evidence of 'real moral blame' on the part of the director. In this instance, the Court noted that the relevant director played no real part in the running of the company nor did she draw a salary from the company. The Court did not find any real moral blame on her part to justify a restriction order. This decision contrasts with recent case law where 'nominal' directors were typically not relieved from restriction declarations.

While this decision is certainly noteworthy, it should be noted that the Companies Acts 2014, due to commence on 1 June 2015, will make it permissible for some companies to have a sole director and, as such, applications against 'nominal' directors of those companies will become much less frequent.

Restriction Declarations on Consent

The Court noted that where directors consent to restriction declarations, it is not always clear that such consent is 'informed' consent. The Court recommended that any such director complete a 'consent letter' in a very specific and detailed format suggested by the Court. The suggested form of consent contains very specific language and it remains to be seen if the Court will require consent to be provided in this format or if the Court will simply treat this as 'best practice'. In any event, restriction orders made on consent are likely to become a thing of the past when the Companies Act 2014 comes into effect as directors will be able, for the first time, to give voluntary restriction undertakings to the Director of Corporate Enforcement, thereby dispensing with the requirement for Court Orders in such circumstances.

Contributed by Craig Sowman.

Europe Moves Towards More Transparent Tax Regime

The European Commission has announced a package of measures aimed at increasing tax transparency between Member States. The central focus of the measures is the automatic exchange of cross-border tax rulings given by tax authorities.

Under current rules, Member States are obliged to provide details on their tax rulings to another Member State only if it is of relevance to that Member State. It is up to the Member State to decide whether a tax ruling is relevant to another Member State and, as a result, very little information is shared.

The proposed package completely removes this discretion and requires the Member States to automatically exchange information on their advanced cross-border tax rulings and transfer pricing arrangements. National tax authorities will have to send a quarterly report to all other Member States on any cross-border tax rulings that they have issued. The report must contain the following information:

- Identity of the taxpayer
- Identity of any persons in the other Member State who are likely to be affected by the ruling
- Content of the cross-border ruling
- In the case of advanced pricing arrangements, a description of the set of criteria used to make the transfer pricing determination

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The recipient Member States will have the right to request more detailed information where relevant.

The legislative proposals contained in this package have been submitted to the European Parliament and Council. It is expected that agreement will be reached by the European legislators by the end of 2015 with the legislation coming into force by the beginning of 2016.

Contributed by Brian Duffy.

Property Deals Potentially Caught by New Merger Control Regime

New legislation which came into effect on 31 October 2014, made a number of changes to the Irish merger control regime. In particular, the change to the financial thresholds triggering notification, together with the new approach of the Competition and Consumer Protection Commission (CCPC) to asset acquisitions, means that it is now more likely that property transactions will need to be notified to the CCPC for merger control clearance.

The legislation changed the rules on when an acquisition of assets will be caught by the merger control regime. A transaction will be caught where there is an acquisition of assets to which a turnover can be attributed. It appears that the CCPC considers that this new wording on asset acquisitions applies to pure property transactions. For example, in February 2015, the CCPC took the view that the acquisition of the Atrium Buildings (two office buildings in Dublin, with major tenants such as Salesforce and Microsoft) by the Blackstone Group constituted a notifiable transaction.

The legislation also changed the financial thresholds which trigger notification. The new financial thresholds are: combined turnover in the Republic of Ireland of all of the entities involved of at least €50 million; and turnover in the Republic of Ireland of each of two or more of the entities involved of at least €3 million. Previously there was a requirement for at least two of the entities involved to have world-wide turnover of at least €40 million. The new lower financial thresholds may also increase the potential for property deals to be caught; for example, the acquisition of a building in Ireland with a rent roll of greater than €3 million per year could satisfy the financial test if the acquirer's turnover in the Republic of Ireland is sufficiently high.

Failing to notify a notifiable transaction carries significant negative consequences, including voiding of the relevant transaction. As such, parties to property deals should bear in mind the potential application of merger control rules.

Contributed by Sarah Lynam.

Employee Awarded €15,000 Following Dismissal for Allegedly Striking Nursing Home Residents

An employee has been awarded €15,000 following dismissal for allegedly striking two residents of a residential care facility for the elderly. The incident was allegedly witnessed by a colleague who reported it to the employee's manager. The employee was immediately placed on paid suspension pending investigation.

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Both the investigation and disciplinary meetings were conducted by the employee's manager and the operations manager. While the employee claimed not to remember striking the residents, the managers found that on the balance of probabilities the employee did do so. The managers concluded that they had no choice but to dismiss the employee in light of their duty of care to the residents. Prior to the disciplinary meeting a letter of dismissal had been prepared.

The employee alleged that she was not afforded fair procedures during the investigation and disciplinary meetings, and that the decision was reached in a flawed and unfair manner. She felt there was no point in availing of the internal appeals procedure.

The Tribunal held that fair procedures and natural justice had not been applied in the decision to dismiss the employee. The Tribunal found that the dismissal was presented to the employee as a *fait accompli* and that she was not given an opportunity to properly respond to the allegations made against her. In awarding her €15,000, the Tribunal stated that the award could have been higher had the employee made more of an effort to look for alternative employment.

This case highlights the importance of following fair procedures, particularly in circumstances where it is alleged that an employee may be guilty of gross misconduct. While not specifically addressed in this case, it is best practice that the investigation and disciplinary stages be separate and carried out by different individuals.

Contributed by Alicia Compton, Nichola Harkin.

Ireland as a Location for International Financial Services

Ireland has long been a competitive location for international financial services companies. The recently released "IFS2020 – a Strategy for Ireland's Financial Services Sector 2015-2020" sets out the Government's vision for the future and presents a five year strategy to further develop Ireland as a global leader in this sector. Over the last 25 years, Ireland's international financial services sector has grown spectacularly, attracting significant levels of foreign investment which has both provided business opportunities for Irish companies and made a significant contribution to employment levels. Some of the key tax advantages that promote Ireland as a location for international financial services are set out below.

12.5% corporation tax rate for trading activities

The rate of corporation tax for trading activities is 12.5% with expenses generally tax deductible. While depreciation is not tax deductible, capital allowances (tax depreciation) is normally available for certain assets used for the purposes of the trade of the company. Plant and Machinery is depreciated over an eight year period on a straight line basis.

Special tax regime for regulated investment funds

Ireland's tax regime for regulated investment funds has been long established and ensures that the fund itself is essentially exempt from Irish tax on its income and gains. Tax generally only arises for the investors to the extent they are Irish individual investors. Various domestic withholding tax and stamp duty exemptions are available for Irish investment funds. The recent addition of the Irish Collective Asset Management Vehicle (ICAV) to the investment vehicles available adds to the attractiveness of Ireland as a location for investment funds. The ICAV is

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of particular interest to US investors due to its ability to make “check-the-box” elections for US tax purposes which results in more tax efficient returns for US investors.

Special tax regime for securitisation vehicles

Ireland’s special regime for securitisation vehicles has contributed to Ireland being a centre for asset back securities activities. Where securitisation entities meet a number of criteria, they are subject to tax at 25% and their taxable profits are computed in accordance with the tax rules which apply for a trading company. Consequently, they are entitled to a tax deduction for all “trade” type expenses which normally results in tax neutrality at entity level. If it were not for this regime, expenses such as interest paid would not normally be tax deductible as such companies are not generally considered as carrying on a trade. The securitisation regime also allows for the tax deductibility of profit participating interest subject to certain rules.

Ireland’s extensive tax treaty network

Ireland has a wide double tax treaty network which has doubled in recent years. With 72 signed agreements and 68 in effect, such an extensive treaty network provides scope for reducing any tax barriers which may inhibit cross-border trading and investment. One of the action points of the IFS2020 paper is to initiate negotiations for new agreements with other countries and to update existing agreements in the coming years.

Tax incentives for technological developments

Financial technology is a sector that has been cited in the IFS2020 paper as a key area in ensuring the continued development and operational efficiencies in the financial services sector. Ireland has a favourable Research & Development (R&D) tax credit which allows a 25% tax credit for companies for qualifying expenditure on R&D activities. This credit is in addition to a tax deduction (at 12.5%) for the R&D spend which gives an effective tax saving of 37.5% for qualifying expenditure. Capital allowances are also available for capital expenditure incurred on the creation and acquisition of “specified intangible assets” including the acquisition of Intellectual Property (IP). The scheme provides for a “wear and tear” allowance against the taxable income of the company.

In a move that is likely to enhance Ireland’s tax competitiveness in this area, the Department of Finance announced earlier this year its intention to introduce a new incentive to locate high-value IP jobs in Ireland – the Knowledge Development Box (KDB). It is understood that the KDB will provide for a preferential effective tax rate to income generated from IP where certain risks or functions are located in Ireland.

Dividend withholding tax and interest withholding tax exemptions

There are extensive dividend withholding tax exemptions such that in many cases, dividend withholding tax only applies to dividends paid to Irish resident individuals. In relation to withholding tax on interest payments, again, there are extensive exemptions available, one of which includes an exemption from interest withholding tax where the recipient of the interest is resident in the EU or a country that has a double tax treaty with Ireland (subject to meeting certain conditions).

Favourable tax treatment for receipt of certain dividends

Dividends received by Irish resident companies from Irish resident subsidiaries are generally not subject to Irish corporation tax. "Qualifying dividends" received by Irish companies from foreign companies are subject to corporation tax at 12.5% as opposed to the normal rate of 25% applicable to foreign dividends. Qualifying dividends are dividends paid out of a foreign company's trading profits where that foreign company is tax resident in a "relevant territory" or where the foreign company (or, where the company was a 75% subsidiary of another company, that other company) is quoted on one or more recognised stock exchanges in a "relevant territory" or territories, including Ireland. A “relevant territory” means an EU Member State, a tax treaty jurisdiction, or a

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country that has ratified the OECD Convention on Mutual Adminstrative Assistance in Tax Matters. Further, where the Irish company holds 5% or more of the ordinary share capital of a foreign company, Ireland will give a tax credit for both foreign withholding taxes paid on such dividends and for underlying corporate taxes paid by the paying company in its home jurisdiction, subject to certain limitations. This credit extends to state and local taxes. In the absence of an applicable treaty allowing these credits, the tax credits may be given unilaterally by Ireland, subject to certain limitations.

Employment incentive scheme for certain employees assigned to Irish operations

The Special Assignee Relief Programme (SARP) is an employment incentive scheme for certain employees assigned to Irish-based operations. A qualifying individual can claim a 30% tax deduction on their Irish employment income over €75,000 for up to five years under the new SARP scheme.

Although Ireland has many tax incentives and advantages to offer, we are not complacent. For Ireland to fully capture the future opportunities in the international financial services sector, continued action must be taken to grow and support the sector. The IFS2020 strategy indicates the Government's commitment to the continued expansion and growth of this sector.

Contributed by Ted McGrath, Winnie Liu.

Revised Client Asset Regime – Implications for the Financial Services Industry

On 31 March 2015, the Central Bank published revised client asset Regulations for investment firms (CAR) together with detailed Guidance. The publication of the Regulations and Guidance is the culmination of a lengthy review of the regulatory regime for the safe-guarding of assets which commenced in 2011 when the Central Bank commissioned a task force to carry out the review, followed by a public consultation in 2013.

The revised CAR contains the following seven core principles for investment firms:

- Segregation – the firm must physically hold or arrange the physical holding of client assets separate from the firm's own assets
- Designation and Registration – client assets must be clearly identified in the firm's internal records and in the records of third parties and separate from the firm's own assets
- Reconciliation – the firm must keep accurate books and records to enable it at any time and without delay to provide an accurate record of the client assets held by the firm for each client and the total in the client asset account. The firm must conduct daily and monthly reconciliations between its internal records and the external records of any third party holding client assets
- Daily Calculation – a daily calculation must be carried out by the firm to ensure that the balance in the firm's client bank accounts is equal to the amount it should be holding on behalf of clients. If there is a shortfall, this must be met out of the firm's own account
- Client Disclosure and Consent – the firm must provide information to its clients on how and where client assets are held and the resulting risks. Retail clients must be provided with certain information in a Client Assets Key Information Document including the circumstances in which their assets will and will not be subject to the CAR regime

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- Risk Management – the firm must have an appropriate risk management system in place. This includes the appointment of a Head of Client Asset Oversight which will be a Central Bank "pre-approval controlled function". The firm must also have a Client Asset Management Plan containing certain minimum provisions
- Client Asset Examination – an external audit must be conducted annually on the firm's safeguarding of client assets and an annual assurance report from the auditor submitted to the Central Bank

The Central Bank also published a separate set of investor money Regulations (IMR) for fund service providers (FSPs) together with detailed Guidance. The IMR relate to collection accounts operated by FSPs for monies transferred from an investor for onward transmission to the fund and likewise where money flows back from the fund to the collection account for onward transmission to the underlying investor. Collection accounts are not subject to the existing client asset requirements. Under the revised regime, the IMR will apply to money received by the FSP from an investor where it is held in a collection account in the name of the FSP or its nominee. FSPs include UCITS and alternative investment fund management companies, alternative investment fund managers, fund administrators and depositaries.

Once the money from the collection account is transferred to the fund it ceases to be covered by the IMR but becomes a fund asset, which is then subject to the relevant fund safekeeping regime.
It is anticipated that many FSPs (typically fund administrators) will put in place solutions which are outside the ambit of IMR but are nonetheless consistent with ensuring a satisfactory safekeeping solution for the fund's assets and those of its underlying investors.

The IMR contains six of the seven core principles referred to above, apart from 'Client Disclosure and Consent' (principally because there is typically no contractual relationship between a FSP and the underlying investor of a fund).

CAR and IMR will come into effect on 1 October 2015 and 1 April 2016 respectively, providing investment firms and FSPs some time to engage with clients and put in place the necessary systems, operational and contractual changes required for compliance with the new regime. Contraventions of the regime will attract various penalties, including sanctions under the Central Bank's administrative sanctions procedures. It should be noted that in February the Central Bank announced that CAR compliance would be one of its enforcement priorities for 2015.

Contributed by Patricia Taylor.

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