WILLIAM FRY

# LEGAL NEWS

## Welcome

Welcome to the May 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.

Paul Murray

Partner

## First UK Case on E-cigarettes in the Workplace

In March of last year we looked at the issue of electronic cigarettes (e-cigarettes) in the workplace and some pending cases in the UK. The Employment Tribunal in the UK recently issued a decision arising from a claim by an employee for constructive dismissal resulting from the use of electronic cigarettes.

The employee in this case, a school catering assistant, was suspended for alleged gross misconduct pending a disciplinary hearing to examine her use of e-cigarettes in front of pupils. The employee resigned in response to this as she felt she was being victimised and issued a claim against her employer. The UK Employment Tribunal dismissed the employee's claim finding that there had been no breach of the employee's contract in inviting her to attend a disciplinary hearing.

Although the Tribunal dismissed the employee's claim, it went on to make some interesting remarks noting that the employee's actions did not amount to gross misconduct in line with the respondent's smoking policy as it did not expressly ban the use of e-cigarettes. This was a result of the policy being based on the UK's Health Act 2006 which only covers tobacco products. Similarly Irish legislation which prohibits smoking in the workplace only prohibits tobacco products; e-cigarettes would accordingly not be covered.

This means that had the employee in the above case been dismissed, that dismissal may have been deemed unfair since the employee would technically not have breached the employer's smoking policy.

This case highlights the need for employers to revise their employee handbook to include a policy in relation to e-cigarettes and to clearly communicate that policy to all employees.

Contributed by Catherine O'Flynn.

www.williamfry.com Copyright © William Fry 2015. All Rights Reserved In Association with Tughans, Northern Ireland

This publication is intended only as a general guide and not as a detailed legal analysis. It should not be used as a substitute for professional advice based on the facts of a particular case.

## Regulation of Lobbying Act 2015

The Regulation of Lobbying Act 2015 was signed into law by President Michael D Higgins on 11 March 2015.

The Act establishes a web-based register of lobbying, making information available to the public on the identity of those who are communicating with Government and senior civil and public servants on public policy matters.

### What is lobbying under the Act?

The Act describes lobbying activities (**relevant communications**) as the making of communications, either written or oral, personally (directly or indirectly) to a designated public official which are not exempted communications and which concern the initiation, development or modification of any public policy, the preparation of legislation, or the award of any grant, loan contract, licence etc. involving public funds.

Lobbying activity is carried out by:

- Persons in the course of their business in return for payment by a client
- An employer, or their agent or employee, on behalf of the employer
- Any person about the development or zoning of land

### Who does it apply to?

The Act covers the lobbying of Ministers, TDs, Senators, MEPs, local Councillors, special advisers, and designated public officials.

Each public body will have to maintain an up-to-date list of designated public officials.

### Registration and returns

The Act requires those engaged in lobbying activities to register their activities on a public register maintained by the Commission for Standards in Public Office (**SIPO**).

A registered person must make three returns per year setting out any lobbying activities. That return must include details such as:

- If lobbying was done on behalf of a client, information about the client
- To whom the lobbying was made
- The subject matter of the communications and the results they were intended to secure
- The name of the person with primary responsibility for carrying on the lobbying activities
- The name of any person who is or has been a designated public official employed by, or providing services to, the registered lobbyist

An application can be made to SIPO for delayed publication of the material contained in the return if it could have a serious, adverse effect on business interests or cause a material financial loss or seriously prejudice a person's competitive position.

 Copyright © William Fry 2015. All Rights Reserved 

This publication is intended only as a general guide and not as a detailed legal analysis. It should not be used as a substitute for professional advice based on the facts of a particular case.

## Investigation, offences and penalties

Contraventions set out in the Act include carrying on lobbying activities without being registered, failing to make a return, providing inaccurate or misleading information to SIPO and failing to comply with or obstructing an investigation.

SIPO can carry out investigations of alleged contraventions and have extensive powers to demand information, explanations and documents. It also has powers of search and seizure. Documents which are covered by legal professional privilege do not have to be handed over.

Penalties under the Act range from a fixed payment of €200 to fines of up to €5,000 and/or imprisonment for a maximum of two years.

It shall be a defence for the person to prove that they took all reasonable steps to avoid the commission of the offence.

Directors and other officers of a company can be held personally liable for offences by that company where the offence was committed with the consent or connivance of the director/officer of the company.

## Key dates for the Regulation of Lobbying Act are:

- The web-based register launched on **30 April 2015** (it is available for a trial period from 1 May – 31 August 2015 to allow potential registrants to pre-register and familiarise themselves with the system).
- The Act will come in to effect on **1 September 2015.**
- The first return is required by **21 January 2016.**

Anyone covered by the legislation must register and make a return in respect of lobbying activities carried out in the period **1 September 2015 to 31 December 2015**. The first return must be submitted to SIPO by **21 January 2016**.

## Next steps

SIPO has issued a Quick Guide to the Act and a Three Step Test to help interested parties decide whether an activity is covered by the Act.  However, it may not always be clear whether an activity is caught under the Act and advice should always be sought where there is any doubt.

Consideration should also be given as to how internal processes may need to be adapted to comply with the new requirements. Given that details contained in the register will be publicly available, they will undoubtedly be of interest to the media and competitors. Care should be taken to avoid any unnecessary registrations.

Contributed by Ross Little.


Copyright © William Fry 2015. All Rights Reserved

This publication is intended only as a general guide and not as a detailed legal analysis. It should not be used as a substitute for professional advice based on the facts of a particular case.

## New Commissioner Highlights Civil Action Rush

Ireland's new Data Protection Commissioner has highlighted a notable increase in the number of civil actions taken against organisations for a failure to protect the data protection rights of individuals.

Under Irish data protection law, a duty of care is owed to individuals by organisations that hold and process personal data. At a recent conference, the Data Protection Commissioner, Helen Dixon, referred to a number of recent cases taken against public and private sector organisations, the majority of which have settled out of court.

The cases included the disclosure by a pharmacist of CCTV footage of a woman buying a pregnancy test and the disclosure of excessive medical data by a GP to an insurance company.

The broad mix of sectors and organisations that have been affected by such actions is evidence of a heightened awareness amongst the general public of data protection rights and a growing willingness to enforce these rights by any means available.

Furthermore, 2014 also saw for the first time cases in which directors were personally prosecuted for an organisation's breach of data protection.

Failure to comply with data protection laws can lead to regulatory sanction, financial loss and reputational damage for organisations. It is essential that an organisation understands the obligations it has to its customers, staff and any other individuals whose personal data it holds and processes.

Appropriate measures such as internal policies and procedures, physical and IT security as well as staff training should be put in place. Only these steps will help reduce the risk of civil action and director or management level prosecution.

Contributed by John Magee, Niamh Gavin.

## Employer's Failure to Reasonably Accommodate Employee Leads to €20,000 Award

The Equality Tribunal recently held that an employer failed in its obligation to provide reasonable accommodation to an employee with MS when it changed her role without adequate consultation and consideration.

The employee commenced employment in 1978. In 2006, she was diagnosed with MS. Following a number of periods of sick leave in 2012 and 2013, her employer moved her to a new department.

The employee claimed that she found the new role to be boring and degrading and stated that there were no responsibilities attaching to the role. The employer maintained that the move involved no decrease in the employee's remuneration and no detriment to her conditions of employment. It claimed that the move was "reasonable and effective" as it removed the employee from the stress of imbalanced workloads.

The employee referred a claim of discrimination to the Equality Tribunal in April 2013.

The Tribunal emphasised that an employer must be proactive in considering how to accommodate an employee with a disability. It stated that the employer must carry out a full assessment of the needs of the employee and must consult with the employee throughout the process. According to the Tribunal, the

 Copyright © William Fry 2015. All Rights Reserved 

This publication is intended only as a general guide and not as a detailed legal analysis. It should not be used as a substitute for professional advice based on the facts of a particular case.

employer must become fully aware of the needs of the employee and what is required by way of occupational or medical assessment.

In this case, the Tribunal held that the employer did not carry out a thorough assessment in relation to the needs of the employee. The Tribunal stated that instead of carrying out a risk assessment of the job and duties based on the employee's illness, that management simply moved her to a different department. Crucially, the decision to move the employee was made in the absence of any medical evidence and was based on an assumption by her manager. Furthermore, the employee was not allowed a full opportunity to participate in the process.

The Tribunal ordered that the employer reinstate the employee to her former position and awarded her €20,000 in compensation.

This case highlights that in order to comply with its obligations under the Employment Equality Acts, an employer must be proactive in assessing how it can accommodate an employee with a disability. An employer must fully consider all options available to it, consult with the employee throughout the process and, crucially, ensure that any decisions are based upon appropriate medical advice.

Contributed by Catherine O'Flynn, Nichola Harkin.

## MasterChef US: A Recipe for Uncertainty

The Commercial Court of England & Wales has recently ruled that an unsigned agreement can bind parties, even where it is expressly stated in the agreement that a signature is required. Referring to the long-established principle that a contract can be accepted by the conduct of the parties alone, the Court made clear that a party cannot always walk away from a contract on the basis that it has not been signed.

### Background

A TV company and a distributor of cookware were negotiating the licensing of IP rights in relation to MasterChef US. Negotiations had begun in relation to a short agreement, which was in time intended to be replaced by a longer agreement. Work commenced, though the agreement was never signed. The TV company brought a breach of contract action against the distributor, which in turn sought to avoid the agreement.

The TV company contended that a binding agreement was in place. However, the distributor argued otherwise on the following grounds:

- The short agreement expressly stated that it was not binding unless signed.
- Any steps taken were in anticipation of agreement being reached, rather than constituting acceptance of the agreement by conduct.
- Even if binding, the agreement was subject to a condition precedent, which had not been fulfilled.

In reaching its decision, the Court looked at the extent of work already carried out by the parties. While the distributor had argued that any work carried out was merely in anticipation of an agreement being concluded, the Court found that the acts reached a level of significance so as to be consistent with the parties recognising that they were contractually bound. Further, the existence of the deal had been communicated to third parties and there was an acknowledgement of amounts due in the form of invoices.

 Copyright © William Fry 2015. All Rights Reserved 

This publication is intended only as a general guide and not as a detailed legal analysis. It should not be used as a substitute for professional advice based on the facts of a particular case.

**Significance**

While it is generally commercially accepted that parties may commence some work pre-contract, it is recommended to have signed terms in place as soon as possible. This decision shows that any substantial performance of an un-signed contract could lead to a determination that the parties have waived requirements for signature and have demonstrated by their conduct that they intended to be bound by the contract.

Contributed by Brian McElligott.

## Supreme Court Dismisses Appeal Challenging Appointment of Receiver

The Supreme Court has upheld a High Court ruling dismissing technical challenges to the appointment of a receiver. In December 2013 we reported on a High Court case in which the borrowers unsuccessfully argued a number of technical points challenging the appointment of a receiver including the substantive argument that the underlying security held by Bank of Scotland (Ireland) Limited (BOSI) did not form part of the assets which were transferred to Bank of Scotland plc (BOS) when the two entities merged.

In appealing the High Court decision, the borrowers argued that the relevant security was not captured by the Directive on cross-border mergers and did not transfer across to BOS by operation of the merger. It was on this ground of appeal that the Supreme Court afforded priority to the appeal because this issue had the scope to be of significant importance well beyond this case and had the potential to impact all cross-border mergers.

The Supreme Court ultimately concurred with the High Court that there was no basis for concluding that the Directive on cross-border mergers intended that a security instrument would not be an "asset" (within the meaning of the Directive) that transfers on a merger. The Court held that if that was the effect of the Directive, the cross-border regime would have little or no application in the case of secured lenders and would result in the "direct opposite intention" of the Directive which was to facilitate cross-border mergers.

A second ground of appeal centred on an argument that BOSI (and now BOS) was not entitled to call in the relevant loans by virtue of an alleged agreement between BOSI and the borrower that BOSI would not call in its loans until one of the secured assets had been sold. The Court decided that there was no legally binding agreement in place such that prevented BOSI (and now BOS) from enforcing the loans.

The third substantive ground of appeal, also of potentially wider significance, was the question of whether the failure to specifically register BOS as the registered owner of the underlying security following the merger had the effect, at least in the land registry, of preventing BOS from enforcing that security. The Court decided that BOS had a **contractual** power under the underlying security instrument to enforce the security and appoint the receiver. However, the judge remarked that if BOS had sought to rely on its **statutory** powers of enforcement under the Registration of Title Act 1964, it would have had to become registered as owner of the security.

This remark by the judge should be taken into account by lending institutions merging with any entity which holds secured assets. While the majority of receiver appointments and enforcements are made on foot of an underlying security instrument, it would be prudent to ensure that a lending institution that acquires a security interest in registered land is registered as the owner of that security.

Contributed by Craig Sowman.

 Copyright © William Fry 2015. All Rights Reserved 

This publication is intended only as a general guide and not as a detailed legal analysis. It should not be used as a substitute for professional advice based on the facts of a particular case.

## Directors Personally Liable for Company Debts Arising from Reckless Trading

The High Court has found two former directors of a car dealership in Dublin, Appleyard Motors Limited (In Liquidation) (Appleyard), personally liable to a former customer who paid for but did not receive three vehicles in the weeks leading up to the company's liquidation. This case is particularly noteworthy as it is only the second time a director has been held personally liable for a company's debts for reckless trading.

The customer had agreed to purchase three vehicles from Appleyard and had transferred the full price of the vehicles to Appleyard's bank account. Appleyard had sourced the vehicles through another car dealership, however, when Appleyard sought to transfer the funds to the other dealership the bank refused. Appleyard sought to engage with the bank but having lost its support it ceased trading and went into liquidation later that month.

Appleyard had faced difficulties in the years leading up to its liquidation, including, the withdrawal of a significant car stocking facility. It was however established that Appleyard had obtained professional advice regarding the replacement of the stocking facility and the future of the company and had secured a limited guaranteed stocking facility with the other dealership.

The Court endorsed previous decisions that acknowledged the desirability that companies should be provided with a reasonable opportunity to trade out of their difficulties. However, given that the "*financial position of the company was deteriorating, not improving, and with no reasonable prospect in sight for improvement"*, the Court held that the directors were under an obligation to keep the overall position under review and, in particular, "*to keep creditors' interests to the fore"*.

The Court concluded that the directors were **deemed** to have engaged in reckless trading as, having regard to all of the information available to them, and to the general knowledge, skill and experience that may reasonably be expected of persons in their position, they ought to have known that their actions or those of the company would cause loss to its creditors.

Whilst the legislation governing reckless trading provides for a 'get out clause' where a director can satisfy the Court that he/she acted honestly and responsibly, the Court concluded in this case that the directors had failed to act honestly and responsibly throughout. The Court accepted that the directors acted honestly and responsibly up to a certain date when the guaranteed stocking facility was put in place. However, the Court suggested that the directors placed too much reliance on that facility and failed to obtain further professional advice regarding the future of the company. The directors should have taken appropriate measures to protect creditors or alternatively, have taken steps to wind up the company after that date in light of the deteriorating financial position of the company and the failure to secure either a long term stocking facility or outside investment.

The Court held that such conduct was, whilst honest, not responsible in light of all the information available to the directors. Consequently, the Court declared that the directors were personally liable for the amount paid for the vehicles to the customer.

Whilst we understand that the case may be subject to an appeal, it provides a useful illustration of how a court will examine the conduct of directors of insolvent or potentially insolvent companies and underlines the importance of keeping creditors' interests to the fore and obtaining professional advice when a company is in financial difficulty and not just on an ad hoc basis.

Contributed by Ruairi Rynn.


Copyright © William Fry 2015. All Rights Reserved


This publication is intended only as a general guide and not as a detailed legal analysis. It should not be used as a substitute for professional advice based on the facts of a particular case.

## TV Catchup Case Battles on with Second CJEU Referral

The long-running case brought by ITV and other broadcasters against TV Catchup Limited continues with a second referral to the Court of Justice of the European Union (CJEU). This time, the English Court of Appeal is seeking clarification on whether UK copyright law, previously found to permit live streaming of terrestrial TV in limited circumstances, goes beyond what is permitted under Article 9 of the Information Society Directive.

### Background

- Broadcasters (including ITV and Channel 4) allege that TV Catchup's online streaming service breaches their copyright in communicating their broadcasts live on the internet.
- A previous reference to the CJEU provided that the concept of a communication to the public within the meaning of the Directive included an unauthorised retransmission of a broadcast by way of internet streaming, both inside and outside the intended reception area of the original broadcast. This meant that broadcasters could, in theory, prohibit the re-transmission of their broadcasts online.
- However, the English High Court had previously found that the streaming service had a defence under UK copyright law, which allowed for an immediate re-transmission via cable in the original reception area. The High Court found that this defence did not cover streaming to mobile devices.
- Both parties appealed the decision. TV Catchup maintained that the defence under UK copyright law should go further to cover these mobile streaming services (rather than just domestic Wi-Fi), whereas the broadcasters felt that a defence originally intended for conventional cable networks should not be relied upon for internet streaming. They argued that the defence could only be relied on if it fell within the scope of Article 9 of the Directive, which preserves only certain provisions under national law relating to copyright protections.
- While the appeal by TV Catchup was dismissed by the Court of Appeal (who refused to allow streaming via mobile networks), the Court did feel that the scope of Article 9 was not clear, resulting in the need for a second reference.

If the CJEU advises that UK copyright law goes beyond the Directive, there is a risk that it will only be able to be relied upon by traditional cable networks thereafter. That outcome could have serious implications for owners of websites providing real time streaming of TV programmes, which may be prohibited from streaming certain content without a license.

Contributed by Brian McElligott.

## Irish Investors in Exchange Traded Funds

Exchange Traded Funds (ETFs) have gained huge popularity in recent times with Irish investors; however, there has been much complexity and uncertainty in relation to their tax treatment.

The concept of an ETF is not specifically provided for in Irish tax legislation. It depends on the legal form and characteristics of the ETF whether it falls under general Irish tax principles; the tax regime for Irish regulated funds; or the Irish offshore funds rules.


Copyright © William Fry 2015. All Rights Reserved
In Association with Tughans, Northern Ireland

This publication is intended only as a general guide and not as a detailed legal analysis. It should not be used as a substitute for professional advice based on the facts of a particular case.

## New Guidance

Revenue has recently published guidance on the tax treatment of ETFs providing more clarity on this area. While the same legislative provisions apply to a non-Irish fund irrespective of whether it operates as an ETF or not, it is understood that Revenue intends for the guidance to apply to ETFs only.

The guidance is a very significant and welcome development as it provides a clear analysis of the Irish tax consequences for Irish investors of investing in ETFs in different domiciles.

The Guidance considers three categories of non-Irish ETFs:

### *ETFs domiciled in the EU (other than Ireland)*

In Revenue's view, the tax treatment of this category of ETFs is similar to that of Irish domiciled ETFs i.e. the investor is required to self assess income and gains and eight year deemed disposals apply in respect of such funds. This tax treatment is on the basis that the EU ETF is regulated as a UCITS.

For EU domiciled ETFs that are not regulated as UCITS, Revenue has stated that they will treat the ETF investment in the same way as a UCITS where it has a comparable legal structure and is subject to comparable regulatory oversight.

While this approach leaves some uncertainty in relation to what is "comparable", non-UCITS ETFs are not common. However, Revenue appears open to considering specific alternative ETFs to determine their treatment on a case by case basis. This should allow ETF managers, investors and investment advisors to seek clarifications from Revenue in situations where there is doubt.

### *ETFs domiciled in the US, EEA and OECD countries which have a double tax agreement with Ireland*

In Revenue's view, US domiciled ETFs are not generally regarded as having structures and regulations that would be considered "similar in all material respects" to Irish funds. Therefore, such ETFs would generally fall outside the scope of the tax regime for offshore funds and normal Irish tax rules should apply on income and gains earned by Irish investors in US ETFs i.e. income tax, PRSI and USC on income payments and capital gains tax on realised gains.

The same treatment also applies to ETFs domiciled in an EEA state or in an OECD member state (other than the US) with which Ireland has concluded a Double Taxation Agreement.

### *ETFs domiciled in all other countries*

For ETFs which are not domiciled in Ireland, the EU/EEA or OECD countries which have a double tax treaty with Ireland, Revenue will, in general, view investments in these ETFs as constituting "a material interest in an offshore fund", therefore, income and gains in respect of such funds will be subject to income tax together with PRSI and USC (the key difference being that gains are subject to income tax and not capital gains tax).

## Conclusion

The taxation of investment income and gains in Ireland is complex which makes compliance with the rules a significant challenge for investors (particularly non-sophisticated retail investors). Revenue's guidance goes a long way in simplifying the treatment of investing in ETFs and brings more clarity and certainty to the area, even though complexity and uncertainty remain for other non-ETF offshore funds.


Copyright © William Fry 2015. All Rights Reserved


This publication is intended only as a general guide and not as a detailed legal analysis. It should not be used as a substitute for professional advice based on the facts of a particular case.

Contributed by Ted McGrath, Winnie Liu.

## In Short: Companies Act 2014 Commencement Order 2015

The Companies Act 2014 (Commencement) Order 2015 has been signed and is available online here. The Commencement Order confirms that, as expected, the vast majority of the Act will come into operation on 1 June 2015.

However, there are a limited number of provisions mainly related to the preparation of financial statements that will not come into effect on that date, including:

- The obligation on certain companies to establish an audit committee (or explain why they have not done so)
- The requirement for certain companies to produce a directors' compliance statement on an annual basis
- The requirement for the directors to state in the directors' report that all relevant audit information has been supplied to the auditors
- The new rules concerning disclosure of gains made by directors on the exercise of share options

These provisions will come into effect on the first day of a financial year of a company where that financial year begins on or after 1 June 2015.

For further information, please click here.

Contributed by Barbara Kenny.


Copyright © William Fry 2015. All Rights Reserved


This publication is intended only as a general guide and not as a detailed legal analysis. It should not be used as a substitute for professional advice based on the facts of a particular case.