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

Sports Website Guilty of Copyright Infringement

Can 8 seconds of any sporting event constitute a substantial part? If it involves Usain Bolt then the answer is a clear "yes". But what if it is a soccer game, a rugby match or even test cricket? The UK High Court recently tackled this issue and the decision may have wide reaching consequences for both broadcasters and technology companies.

The England & Wales Cricket Board ("EWCB") and Sky brought an action against a technology company, Tixdaq, for copyright infringement. Tixdaq provided a website and app that allowed users to record, upload and share 8 second clips of sporting events.

The EWCB claimed this business model infringed their copyright in the broadcast. However Tixdaq argued that the posts were covered by an exemption for the reporting of current events and that it could rely on the mere conduit defence.

The Court first considered whether 8 seconds could constitute a "substantial part" of a sporting event – which is a key element of copyright infringement. The Court focused on the qualitative nature of the content rather than the quantitative. The majority of clips uploaded contained action replays of key moments in games and so significantly undermined the investment made by the EWCB and Sky in producing this content.

The Court was of the view that Tixdaq could not rely on the relevant exemption as the primary purpose of the app was the sharing of content, not commentary. The argument that it was a mere conduit was also rejected.

This decision will be welcomed by all copyright owners, especially sports broadcasters and the promoters of events such as concerts. As sports streaming services and content sharing platforms grow in popularity, this decision provides greater certainty of protection around the reproduction of broadcasts. It also provides important guidance to any technology companies operating in this space. While businesses of this kind are not automatically prohibited it is vital that they be structured in such a way as not to infringe copyright – even if it is only for 8 seconds at a time.

Contributed by Stephen Tallon.

 Copyright © William Fry 2016. 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.

€100,000 Award to Plaintiff Involved in 5mph Car Accident

A recent decision of the High Court is a discouraging and disappointing one for those defending personal injuries claims. The plaintiff was involved in a minor car accident in October 2012 where the speed of impact was 5mph, resulting in little or no damage to either car. Despite this the plaintiff alleged that, as a result of injuries to her lower back, she had to give up work and was predominantly house bound. Her husband also gave up his employment and was essentially her carer. Video footage from a private investigator hired by the defendant showed the plaintiff walking in and out of her house without much difficulty, hanging out clothes on the washing line and carrying a laptop on one occasion.

The judge accepted that there were inconsistencies in the plaintiff's presentation and that her pain complaints did not correspond with any known neurological or orthopaedic pattern. However, he accepted the description of "*catastrophisation*" offered in medical evidence as the most probable explanation for the plaintiff's symptoms. Catastrophisation is a term used by psychologists when an individual "*assumes a worse conclusion than they have adequate evidence to support and it involves an emotional reaction which is proportional to that dire conclusion*". The judge believed that it was essentially the plaintiff's position that "*a minor impact produced a small physical finding … and she has essentially had a psychological reaction to that minor physical ailment out of all proportion to the physical findings*". On the basis of this he found that the plaintiff *subjectively* believed she was in a far worse position than she actually was and held that she was entitled to be compensated for this subjective position in the sum of €100,000. It is implied in the judgment that the damages awarded were far less than the plaintiff's claim which included a significant future loss of earnings element.

An appeal has been lodged with the Court of Appeal.

Contributed by Mary Cooney.

 Copyright © William Fry 2016. 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.

Landlords, Why "No" Is No Longer Enough

A Commercial Court decision, relating to the Café en Seine premises on Dawson Street in Dublin, changes the landscape for landlords wishing to refuse applications for consent to assign/change use. In *Perfect Pies Limited (in receivership) and Pearse Farrell v Chupn Limited [2015]* a landlord was held to have unreasonably withheld consent to a tenant's application for consent to assign its lease on the basis of ulterior motive.

It had been the position that a landlord could provide valid reasons in Court for refusing consent where it had previously failed to provide a reason or it had previously given an invalid reason. In this case the Court held:

- **The Landlord could not rely on otherwise justifiable reasons if it refused consent for improper motive**

  The Court decided that the landlord's stated reasons for refusal of consent, namely non-repair and lack of consent to licensees were spurious and not bona fide objections. The ulterior motive was the landlord's own desire to obtain possession of the premises. Because of this action, the landlord could not rely on financial strength reasons, which might otherwise have been deemed acceptable reasons to withhold consent.

- **The Landlord could not rely on an otherwise justifiable reason if it produced such justifiable reason "*like a rabbit out of the hat*" having up to that point failed to provide such valid reason to the tenant**

  The landlord could not rely on financial strength reasons, which might otherwise have been deemed acceptable reasons to withhold consent, as they did not advise the tenant of such reasons, instead relying on "*spurious reasons*".

The findings of the Court should instruct landlords' behaviour in consent applications. Landlords should now ensure that:

- Their motives in refusing consent cannot be said to be improper
- The tenant is advised of their reasons for refusal in a timely manner

Contributed by Tara Rush.

 Copyright © William Fry 2016. 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.

Who Bears the Costs of Restoring a Company to the Register of Companies?

In a recent High Court case NAMA was ordered to pay the costs of preparing and finalising company accounts where an order had been made restoring the company to the Register.

The company's loans were acquired by NAMA in 2010. Receivers were appointed to the company by NAMA on 28 March 2014 and the company was struck off the Register of Companies on 28 March 2014 for its failure to file annual returns. NAMA wanted the company to be restored to the Register so that the receivers could take steps to realise the company's assets.

A director of the company stated on affidavit that he had no objection to the company being restored and he was willing to co-operate with the receivers. However, he further stated that the company had been struck off because NAMA had appropriated the revenue and income of the company. He added that although NAMA had instructed the company's accountants to prepare the annual returns it had not approved payment of such work by the company to the accountants and ultimately the returns had not been filed. It was argued on behalf of NAMA that payment of the accountants had been approved and notwithstanding this fact the outstanding returns was entirely a matter for the directors and such responsibility was never taken on by NAMA.

The Court made the order on the basis of a section of the Companies Act, which allows the Court to make such orders "*as seem just*" for placing the company and all other parties in the same position as if the company had not been struck off. The Judge said that "*all other persons*" included NAMA and the directors of the company. He stated that it was clear that NAMA had agreed to pay the accountants' fees for preparing the annual returns in 2010 and 2011 in order to protect its security and as a result NAMA should bear the costs of the returns for those years. He said that on the basis of commercial logic it was likely that NAMA would have continued this arrangement of funding for the next two years but he had heard no evidence of such an agreement by NAMA. He concluded that it would be just and fair to order that the costs for preparing the returns for 2012 and 2013 be borne 50:50 between NAMA and the directors.

This decision derives from the specific relationship between NAMA and the company in this case. However it serves as a cautionary judgment for any lender or creditor who takes similar steps to protect its security.

Contributed by Niamh Cacciato.

 Copyright © William Fry 2016. 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.

Market Abuse Update

One of the key provisions under the new Market Abuse Regulation (MAR), which applies from 3 July 2016, is an enhanced requirement to maintain insider lists.

Under the MAR, issuers or persons acting on their behalf must:

1. Prepare a list of all those with access to inside information, to include both employees and advisors (for example, accountants and legal advisors).
2. Maintain the insider list by updating it when required (for example, when an additional person accesses the inside information, or a person ceases to have such access).
3. State the date and time when the change triggering the update occurred.
4. Provide the insider list to the relevant competent authority (for example, the Central Bank of Ireland) as soon as possible upon its request.

Issuers are also obliged to take all reasonable steps to ensure that all those with access to inside information (“insiders”) acknowledge their duties in this regard and are aware of the applicable sanctions relating to insider dealing and the unlawful disclosure of inside information.

Precise content of insider lists

MAR does not introduce the obligation to maintain insider lists. There is a similar, albeit less prescriptive, requirement under the existing market abuse regime. However, the application of this requirement under the current regime has resulted in a lack of uniformity across Member States leading to increased costs and inefficiencies for issuers and advisors located in multiple jurisdictions.

The key change that MAR will bring about in the context of insider lists is that the level of information that will be required to be provided by the issuer will be more burdensome. In this regard, the European Commission has recently adopted an implementing regulation (to supplement the MAR) specifying the precise format of insider lists. Insider lists are required to be prepared on a deal-specific/event-specific basis, and maintained in electronic format in accordance with Template 1 of Annex 1 here. Further, issuers are given the discretion to maintain a supplemental list of "permanent insiders" who, due to the nature of their function, have access at all times to inside information. The permanent insider list should also be maintained in electronic format in accordance with Template 2 of Annex 1 here.

Specifying the exact form and content of the information to be provided is expected to ensure greater harmonisation across member states, which will benefit issuers and their advisors by reducing compliance costs.

Can ‘insiders’ deal in the issuer’s shares?

There are limited circumstances in which insiders can deal in the shares of the issuer. One example is where a person, in the normal course of their employment, is authorised to execute third-party orders and the dealing results from carrying out such transactions.

In light of the extremely limited scope for insiders to legitimately deal in the issuer’s shares, (and the express updating requirements under MAR), it is very important that insider lists are updated regularly. If an insider list is not promptly updated, a person could inadvertently fall foul of the prohibition on insider dealing despite not actually being in possession of inside information, all because the insider list that had previously shown him to hold inside information had not been updated to reflect the fact that he had ceased to hold such information.

Copyright © William Fry 2016. 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.

Next steps

Issuers and their advisors need to consider the necessary internal procedures required to ensure the initial preparation and subsequent prompt updating of insider lists. Issuers should also discuss with their advisors how best to manage the flow of inside information between their respective organisations. It is noteworthy that the issuer remains fully responsible for complying with the insider lists requirement even if the issuer's advisors assume the task of preparing and updating the advisors' own insider lists.

Contributed by Niall Keane.

 Copyright © William Fry 2016. 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.

Managers' and Issuers' Obligations to Disclose Transactions under Market Abuse Regulation

The new Market Abuse Regulation (MAR) introduces a more robust, wide-ranging and prescriptive regime for the notification of managers' transactions than currently applies.

Article 19 of MAR obliges persons discharging managerial responsibilities (PDMRs) and persons closely associated with them to notify both the issuer and the relevant competent authority of every transaction (conducted on these persons' accounts) relating to the shares or debt instruments of that issuer, or to derivatives or other financial instruments linked thereto.

Who is a PDMR?

A PDMR is:

1. A member of the administrative, management or supervisory body of the issuer (or other specified entity); or
2. A senior executive with regular access to inside information and the power to take managerial decisions affecting the future developments and business prospects of the issuer.

Who is a closely associated person?

A closely associated person is:

1. A spouse, or a partner considered to be equivalent to a spouse under national law
2. A dependent child
3. A relative who has shared the same household for at least one year on the date of the transaction
4. A legal person, trust or partnership, the managerial responsibilities of which are discharged by a PDMR or by a person referred to at (1) – (3) and which is:
    a. controlled by that person;
    b. set up for the benefit that person; or
    c. the economic interests of which are substantially equivalent to those of that person.

Application

The notification requirements apply to a wide-range of transactions. For example, should a PDMR or closely associated person pledge or lend financial instruments in the issuer as collateral for a credit facility, this will amount to a notifiable transaction under MAR which is not the case under existing Irish market abuse law. Notifications must be made promptly and in any event no later than three business days after the transaction. PDMRs must notify closely associated persons, in writing, of their obligations under MAR and PDMRs must keep a copy of this notification.

Notification is not required until the transaction(s) reach a cumulative value of €5,000 within a calendar year. The competent authority of each member state has the power to increase this threshold to €20,000, but must inform the European Securities and Markets Authority of this decision and its justification in advance of the application of the threshold.

The issuer's obligations

Issuers are obliged to ensure that the notifications they receive are promptly made public and in any event no later than 3 business days after the transaction. It is worth noting that MAR permits domestic legislation to provide for the competent authority, rather than the issuer, to make the notifications public. However, it is not yet clear whether Ireland will adopt such a provision.

Copyright © William Fry 2016. 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.

Content of the notifications

MAR prescribes the information to be contained in notifications by PDMRs and closely associated persons to issuers and the relevant competent authority. This includes party names, the reason for the notification, a description of the financial instrument in question and the price and volume of the transaction. The European Commission has recently adopted an implementing regulation relating to PDMR notifications, which provides the template to be used for the notification of transactions. This template can be viewed here (at the Annex). As you will note, the template requires information on all transactions conducted on a particular day, both on an individual and aggregated basis.

Closed periods

MAR stipulates that, subject to limited exceptions, a PDMR must not carry out any transactions on its own account or for the account of a third party during a closed period of 30 days before the announcement of interim or year-end results.

Next steps

Issuers should consider how their share dealing code will be affected by these rules. They should also prepare a list of PDMRs and closely associated persons, together with a procedure for ensuring that this list is accurately maintained at all times. Thought should be given to requiring PDMRs and closely associated persons to notify the issuer of all transactions carried out rather than just those above the value threshold so as to avoid an inadvertent breach by the issuer or, indeed, the PDMR or closely associated person.

Issuers should also consider whether it may be appropriate to set a shorter internal deadline for the notification of transactions, so as to ensure sufficient time to make the public disclosure within the 3 day timeframe.

Finally, issuers should offer training to PDMRs to ensure that they are fully aware of their notification obligations.

Contributed by Niall Keane.

 Copyright © William Fry 2016. 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.

Irish Competition Body Suffers Dawn Raid Setback

The High Court has ruled that the Competition and Consumer Protection Commission (CCPC) (formerly the Competition Authority) seized documents to which it was not entitled in a dawn raid.

Under Irish competition legislation, the CCPC can conduct unannounced inspections (dawn raids) at business premises and can seize and inspect documents (including electronic documents). To do this, the CCPC must first obtain a warrant from a District Court judge.

In May 2015, as part of its investigation into the practices of Irish Cement Limited (ICL), the CCPC conducted a dawn raid at the company's premises in Platin, Co Meath. During the raid, the CCPC took a copy of various documents, including e-mails in an account belonging to Mr Seamus Lynch. Mr Lynch was the former Managing Director of ICL and at the time of the raid was a senior executive in ICL's parent company, CRH plc (CRH). The e-mail account accessed was a CRH account, not an ICL account.

In November 2015, Mr Lynch, ICL and CRH sued the CCPC. Among other claims, they alleged that the authority had exceeded the scope of the warrant authorising the dawn raid by seizing Mr Lynch's crh.com account. In his judgment of 5 April 2015, Mr Justice Barrett agreed. He noted that Mr Lynch's crh.com e-mail account was likely to contain Mr Lynch's private information, which the CCPC was not entitled to see. He therefore granted an injunction preventing the CCPC from reviewing or making any use of the materials until an agreement could be reached with the plaintiffs on an appropriate sifting process.

The judgment confirms that the CCPC must always act within the scope of a warrant and sets a useful precedent for businesses seeking to resist the seizure of material during a dawn raid.

Contributed by Eoin O'Cuilleanain.

 Copyright © William Fry 2016. 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.

Construction Contracts Act 2013 Signed into Law – What Do You Need to Know?

On 13 April 2016, Statutory Instrument no 165 of 2016 was signed, finally appointing the commencement date of the Construction Contracts Act 2013 (the "Act"). The Act will apply to construction contracts entered into after 25 July 2016 and will, for the first time in Ireland, introduce a statutory dispute resolution mechanism for construction contract disputes, through adjudication by an independent third party.

Scope of the Act

The Act applies to agreements to carry out or procure construction operations. Broadly defined, this includes a comprehensive list of works or advices including on construction, alteration, repair, maintenance, extension, demolition or dismantling of works ranging from buildings, road-works and utilities, to scaffolding and landscaping and painting. It excludes manufacture or delivery of building or engineering components or equipment, materials, plant or machinery (except where the contract also provides for their installation). It will also apply to agreements to carry out professional ancillary services including architectural, design, surveying, engineering or project management services.

The Act will apply irrespective of whether parties to a construction contract attempt to limit or exclude its application and/or whether the applicable law is Irish.

Exclusions from the Act

In addition to that noted above, the Act will exclude construction contracts:

- With a value below €10,000
- Between a State Authority and its partner in a PPP arrangement
- Relating to a residential dwelling with a floor area not greater than 200 sqm and where one of the parties will occupy the property as their residence
- Of employment nature

Changes to payment provisions

The Act will also introduce changes to payment provisions, as set out below:

- Interim and final payment mechanisms set out will apply to construction contracts including payment claim notices (unless already specified in the construction contract).
- "Paid when paid" clauses will be prohibited.
- Parties to construction contracts cannot withhold payment of money due unless they have responded in writing within 21 days to a payment claim notice.
- There will be a new limited statutory right to suspend work for non-payment until full payment is made (subject to requirements including serving notice on the defaulting party).

This is of particular relevance to the contractor/sub-contractor agreements.

Copyright © William Fry 2016. 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.

Adjudication

The Act will introduce a statutory adjudication process for dispute resolution in Ireland. Under the Act:

- Parties can refer payment disputes to adjudication following 7 days notice.
- Adjudicator's decisions must be reached within 28 days of referral, or 42 days with the referring party's consent.
- An adjudicator's decision is binding on both parties until the dispute is resolved through agreement, arbitration or litigation.
- Parties must therefore comply with an adjudicator's decision, even if they object to it, while continuing to pursue the matter through arbitration or litigation.
- Adjudicators must act in good faith and impartially and can be appointed by agreement of the parties or from a statutorily appointed Panel, which has now been constituted. A statutory code of practice for conducting adjudication will shortly be published.
- Parties bear their own legal and other costs in connection with the adjudication.

The impact of the Act is likely to be far reaching within the projects and construction industry. Now that commencement of the Act is imminent, parties will need to familiarise themselves with the Act and its implications for construction contracts, particularly those relating to payments and dispute resolution.

Contributed by Cassandra Byrne and Jarleth Heneghan.

Copyright © William Fry 2016. 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.

In Short: Growing Concern among Landowners Following Hill Walker Judgment

A recent decision awarding €40,000 in damages to a hill walker in Wicklow against the National Parks and Wildlife Service has been the subject of much debate. The hill walker was injured when she fell on a rotting boardwalk on the Wicklow Way. Legislation provides that landowners must ensure that they do not injure recreational users intentionally or act with reckless disregard for the recreational user. Where a structure is provided for use primarily by such recreational users, landowners owe a duty to take reasonable care to maintain the structure in a safe condition. The matter is to be appealed to the High Court whose decision will be of great interest to landowners of property used without charge for recreational activity. An analysis of the appeal will be published in a future issue.

Contributed by Tara Rush.

In Short: New General Data Protection Regulation Voted Into Law by European Parliament

The European Parliament has voted into law the new General Data Protection Regulation (GDPR) that will replace the current EU Data Protection Directive as of spring/summer 2018. As reported here, the draft text of the GDPR was published the end of 2015, marking the biggest overhaul of privacy laws in the EU since 1995.

The final text of the regulation was released for approval on 6 April 2016 along with the text of its sister law, the EU Policing and Criminal Justice Data Protection Directive, which has also been approved by the European Parliament. The GDPR will now take effect twenty days from its post-vote publication in the Official Journal, triggering a two year transition period before its full entry into force.

With the transition period fast approaching, it is important for organisations to begin preparing for what will be the biggest change to data protection laws in over 20 years.

Follow us on Twitter @WFIDEA

Contributed by John Magee.

 Copyright © William Fry 2016. 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.