WILLIAM FRY

Legal News

Welcome to the May issue of Legal News. For further information on any of the topics covered in this edition, please call or email any of the key contacts or your usual William Fry contact person.

Patricia Taylor

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Losing the Battle but Winning the War? Plaintiff Awarded Two-thirds of Costs After Losing Case

"Costs follow the event". Every practitioner is accustomed to this rule and it is stated in fuller terms in Order 99, rule 1(4) as:

> "The costs of every issue of fact or law raised upon a claim or counterclaim shall, unless otherwise ordered, follow the event."

However, while a losing party in a case is usually the subject of an order for costs under Order 99 the court does retain a discretion to depart from it. This discretion was used recently by the High Court sitting as a divisional court in *Angela Kerins v McGuinness & Ors* [2017] IEHC 217.

In much publicised proceedings, Angela Kerins had taken a case against the members of the Public Accounts Committee (PAC) and others for damages because of her treatment when she attended before them voluntarily in 2014. She had argued that she was subjected to comment that was extremely damaging to her reputation both personally and professionally. In the substantive proceedings the Divisional High Court found against Ms. Kerins on the basis that Article 15(3) of the Constitution, which provides for parliamentary privilege, extends to utterances in committee as well as utterances in the parliamentary chambers.

Ms. Kerins then argued that the Court should depart from the normal rule regarding costs on a number of grounds, including that the proceedings raised issues of both special and general public importance, and that the court acknowledged that Ms. Kerins had been damaged but could not provide any redress to her because of the position of the PAC members. The respondents argued that the issues raised were not of exceptional public importance and that as Ms. Kerins had a personal interest in the case (she sought damages and not just declarations) this should militate against an award of costs in her favour.

The Court examined the previous case law on awarding costs to unsuccessful litigants in constitutional cases which were summarised in the case of *Collins v Minister for Finance & Ors* [2014] IEHC 79.

Previous such costs awards have been made in cases where the constitutional issues were fundamental and touched on sensitive aspects of the human condition – such as in *Norris v Attorney General* [1984] IR 36. Costs have also been awarded to losing plaintiffs in cases touching on aspects of the separation of powers – such as *Curtin v Dail Eireann* [2006] IESC 27. Further the Court noted that the fact that the litigation has not been brought for personal advantage and that the issues raised are of special and general public importance are factors that can be taken into account in making such awards of costs.

The Court was satisfied in this instance that the case raised issues of special and general public importance, was of some novelty, and further, that it was of importance for the respondents. It was of the view that it might have implications for PAC in the future given that the committee operates to a large extent on voluntary participation of witnesses. PAC functions as a public spending watchdog and plays a role in trying to ensure accountability in the way Government agencies spend and manage their finances. The Court accepted there was a personal interest on part of Ms. Kerins in bringing the proceedings but that this was not fatal to an application for costs.

The Court acknowledged it was rare for a losing plaintiff to be awarded full costs in these types of applications and awarded Ms. Kerins two-thirds of her costs against the PAC respondents. The Court seemed to be giving a warning to the committee that although they benefit from parliamentary privilege there can still be consequences for comments made at hearings, even if it is merely an order for the costs of court proceedings.

Contributed by Catherine Thuillier.

Ryanair's VAT Refund Claim on Costs Incurred in Failed Aer Lingus Bid Referred to CJEU

The Supreme Court has referred a question to the Court of Justice of the European Union (CJEU) on whether Ryanair is entitled to reclaim VAT incurred on legal and stockbroking fees relating to its failed attempt to acquire shares in Aer Lingus in October 2006. Revenue determined that Ryanair was not engaged in an economic activity in purchasing those professional services and refused Ryanair's VAT refund claim. Ryanair unsuccessfully appealed Revenue's decision to the Appeals Commissioner and the High Court. Ryanair then appealed to the Supreme Court on a point of law.

In order for VAT to be deductible there must be a direct link between the costs incurred and the activity being carried out. The High Court found Ryanair's intention to acquire shares in Aer Lingus and provide management services did not constitute an economic activity. As the takeover bid was ultimately unsuccessful the court stated that Ryanair did not "take any steps or do any act towards provision of management services", thus no direct link could be ascertained between the bid and Ryanair's core activity of air transport. The only activity which Ryanair had carried out was the bid itself and the court held that this did not qualify as an economic activity within the meaning of EU VAT Directives (the "Directives").

Ryanair argued that it did not intend to hold the shares as a passive investor, which would not entitle it to a VAT deduction, but instead intended to provide management services to Aer Lingus to improve productivity. The Supreme Court agreed with this finding and so in order to determine the appeal, the Supreme Court has asked the CJEU to determine whether Ryanair's intention to provide management services, although the bid was unsuccessful, mean that its preparatory work in trying to acquire the shares could be considered an economic activity for the purposes of the Directives. The CJEU ruling on this question should help the Supreme Court determine whether a VAT deduction in respect of costs incurred by Ryanair on the failed share acquisition may be permitted.

Contributed by Padhraic Mulpeter.

Nursing Assistant Unfairly Dismissed for Making Protected Disclosure

In a recent case before the Workplace Relations Commission ("the WRC") a nursing home employee who was dismissed after making a protected disclosure to the Health Information and Quality Authority (HIQA) was awarded two years' salary.

This case concerned an individual who had been employed as a nursing home assistant. Following some weeks of work at the nursing home, the employee began to have concerns regarding some of the practices that she observed. On finding a resident "tied with a walking belt into an ordinary chair in her room with the door closed and in a very distressed state" she completed an incident report form. However, soon after, she found that the entry on the incident had been removed. Following this incident, she perceived a marked change in the attitude of management towards her. She began to feel "frozen out".

The employee continued to raise concerns regarding certain practices at the nursing home in relation to medication and the competence of certain staff, however none of these concerns were addressed. Feeling that she had no other option, the employee made a protected disclosure to HIQA on 27 October 2015. Following this, HIQA made an unannounced inspection on 30 October 2015.

A couple of months later, in January 2016, despite the fact she was out of the country and on annual leave, the employee was requested to attend a disciplinary hearing regarding an allegation of withholding drugs from residents without consent. She subsequently received correspondence, on 4 February 2016, that her employment had been terminated in her absence.

The employee contended that there had been an orchestrated attempt to terminate her employment as quickly as possible before she accrued 12 months' service. She maintained that she was dismissed due to her protected disclosure to HIQA.

The employer refuted this and stated that the nursing assistant's dismissal for gross misconduct was solely based on serious and dangerous breaches of procedure by her.

The Adjudication Officer confirmed that a protected disclosure had been made under the Protected Disclosures Act 2014 (the 2014 Act). Furthermore, the Adjudication Officer decided that the nursing home instigated the disciplinary procedure in an attempt to dismiss the employee before she accrued 12 months' service, as a result of her protected disclosure to HIQA. It was therefore found that, had it not been for the protected disclosure made by the employee, she would not have been dismissed. Her dismissal was deemed unfair and she was awarded two years' salary (amounting to €52,416) in compensation.

The decision is important for a number of reasons. Ordinarily, pursuant to the Unfair Dismissals Acts 1977- 2015 (the UD Acts), an individual bringing a claim for unfair dismissal must have accrued at least 12 months' continuous service. However, there are a number of exceptions to this rule; one of those being if an employee is dismissed for making a protected disclosure under the 2014 Act. Pursuant to the 2014 Act, if an employee has less than 12 months' service they may still bring a claim for unfair dismissal.

The 2014 Act also increases the potential award available up to a maximum of five years' remuneration for employees found to have been dismissed after making a protected disclosure. This is in stark contrast to the maximum award available under the UD Acts (2 year's remuneration). Notably, the 2014 Act refers to compensation for infringement of the employee's rights. In this decision the award was not made subject to tax. Awards made pursuant to the UD Acts for loss of earnings are normally taxable.

In this case, two years' remuneration was deemed sufficient compensation. It will be interesting to see the compensation awarded for similar cases in the future.

This decision serves as a timely reminder to employers to put in place an effective whistleblowing policy, ensuring it complies with the Protected Disclosures Act 2014. Employers will now need to be in a position to show that any action taken against an employee who has made a protected disclosure is not connected to the disclosure itself. It is also vital that employers are alert to the fact that the 12 months' service requirement does not apply in these instances.

Contributed by Catherine O'Flynn.

Court Confirms Examiner's Appointment Despite Secured Creditor Opposition

A petition was recently filed in the High Court on behalf of two companies, Regan Development Limited (“Regan”) and McGettigan Limited (“McGettigan”) seeking the protection of the court pursuant to the Companies Act 2014 (the "Act"), and the appointment of an Examiner. Regan owns and operates the Regency Hotel on the Swords Road in Dublin and McGettigan owns and operates a licensed premise on Queen Street, Dublin 7 and four retail units in Bray, Co. Wicklow. On presentation of the petition the Court appointed Neil Hughes of Baker Tilly Hughes Blake as Interim Examiner.

Prior to the presentation of the petition the companies' secured creditor, OCM EmRu Debtco DAC ("OCM") had appointed a receiver to the secured assets of the companies including the Regency Hotel. A petition seeking the appointment of an examiner was subsequently presented by the companies to the Court. The petition was opposed by OCM, which objected to the appointment of an examiner on the grounds of alleged non-disclosure and improper purpose.

OCM argued that there was a material omission from the petition and grounding affidavit. It alleged that one of the company's directors had made a threat to the Receiver that he would remove the Hotel's IT facilities including IT platforms, telephone systems and email which operated the hotel booking system, on the basis that it was asserted that this system was owned by another company within the group. This was not denied by the petitioner, although it was argued that because the threat had been withdrawn the same day no material non-disclosure arose.

OCM also argued that the petition for the appointment of an examiner had been presented for improper motive and that the purpose of the petition was the protection of the shareholders' interest in the various business enterprises of the companies.

Baker J ultimately held that, while there was a material non-disclosure on the part of the companies when presenting the petition with regard to the threat to remove IT systems, the non-disclosure was not of an extent and nature that would warrant the refusal of the petition. Baker J was also not satisfied that the evidence pointed to an ulterior or improper motive for the presentation of the petition and, whilst it may be the wish of the shareholders to retain ownership of the companies, their wishes and expectations are not, nor can they be, central to the considerations of the examiner.

The Court ultimately granted the petition and the appointment of the examiner to the companies was confirmed.

William Fry act for the examiner, Neil Hughes of Baker Tilly Hughes Blake, in this matter.

Contributed by Craig Sowman.

Personal Insolvency Arrangements: The Non-engaging Spouse and Secured Creditors

In mortgage arrears cases separated couples have caused difficulties, in particular where one spouse has washed their hands from dealing with any debt. A recent High Court ruling has provided clarity in this area in relation to the Personal Insolvency Acts 2012-2015 and a secured creditor's position in relation to the non-engaging spouse.

Section 115A of the Personal Insolvency (Amendment) Act 2015 provides for the making of an order confirming the coming into effect of a Personal Insolvency Arrangement ("PIA") if the court is satisfied that there is a reasonable prospect that confirmation of the proposed PIA will enable the debtor not to dispose of an interest in or not to cease to occupy all or part of his or her principal private residence. However, up until now, there had been no judicial consideration of this section or the possible implications for creditors who have rejected such an arrangement.

In this case "JD" the debtor, along with her husband, R, had entered into a mortgage with EBS in 2007. The loan fell into arrears in 2013 after the breakdown of their marriage. The couple separated in 2012 but the husband had failed to make any contribution to the mortgage since that time. Adding insult to injury JD had also engaged the services of an insolvency advice service and was assured that progress was being made. This service later turned out to be fraudulent and unregulated. Eventually she sought the advice of a Personal Insolvency Practitioner ("PIP") and in a meeting of creditors in January 2016 the PIA proposed was rejected by EBS. JD then applied to the Circuit Court under s.115A of the Act by which the Court can approve the PIA despite the rejection by a creditor. EBS had sought both the written consent of R to the proposed treatment of the secured debt, and evidence as to his ability to meet maintenance payments but neither were forthcoming.

Under s.115A the court can make an order confirming the coming into effect of a PIA in the circumstances set out above, however this power is not absolute. The jurisdiction of the court may be exercised only if it is satisfied in accordance with the statutory provisions that the proposals are not unfairly prejudicial to the relevant interested parties. EBS argued that the proposed PIA contained an underlying unfairness in relation to the position of Mr. R as co-borrower and co-mortgagor: the fact that he had not engaged with the PIP, the Circuit Court or the High Court meant that there was considerable uncertainty as to what approach he might take in the future.

Under s.116 (3) of the 2012 Act a secured creditor cannot take any steps to enforce its security against the debtor while a PIA is in effect. However s.116 (6) provides:

> “Nothing in subsections (3) [and (4)] shall operate to prevent a creditor taking the actions referred to in that subsection as respects a person who has jointly contracted with the debtor or is jointly liable with the debtor to the creditor and that other person may sue or be sued in respect of the contract without joining the debtor."

R was not a party to the proposed PIA and EBS argued that s.116(6) of the Act was insufficiently broad in that it does not import any preservation of the rights of a creditor against a debtor who is *severally* liable for a debt.

Baker J. held that a PIA falls within the definition of "an agreement or an accord" as per s.17(1) of the Civil Liability Act 1961, which deals with joint and several liability, but that in this instance the PIA did not contain a term which would have shown an intention for EBS to forgive R as a co-debtor. Thus EBS was free to pursue R for the debt. Nor did the Court find that the proposed PIA would unfairly prejudice EBS in comparison to the likely outcome in bankruptcy. The Court held that the purpose of s.115A is the protection of the right to continue to enjoy residence in a person's home and that this should be kept in mind when considering the issue of prejudice. Although this right is not absolute, here where the scheme as a whole would provide a better outcome than bankruptcy to the secured creditor, as well as fulfilling the purpose of s.115A, the High Court held that the proposed PIA should be upheld.

This case is one of the first to deal with the relatively new section 115A of the Personal Insolvency (Amendment) Act 2015. It demonstrates that the courts will bear in mind the purpose of s.115A in relation

to any unfair prejudice claimed by a creditor in rejecting a PIA. It also confirms that a PIA involving one debtor does not, unless expressly agreed, give protection to a co-debtor, whether joint or severally liable, who does not fall under the PIA.

Contributed by Catherine Thuillier.

Judgment Day for "Death Bed Marriage" Rules?

Last December, four Labour party senators introduced the Pensions (Equal Pension Treatment in Occupational Pension Scheme) (Amendment) Bill 2016 (the "Bill") into the Seanad, as an antidote to the perceived unfair impact of the ruling in *Parris v Trinity College Dublin (Case C-443/15*) that a death bed marriage rule in an occupational pension scheme was not discriminatory.

A "death bed marriage" rule is a requirement that a member of a pension scheme must have married (or entered a civil partnership) before attaining a certain age for their survivor to qualify for benefits on their death. In the *Parris case,* Dr Parris had sought to establish that his civil partner should be entitled to receive a survivor's pension. Trinity College's pension scheme rules prescribed that a survivor's pension would not be available where a member had married or entered into a civil partnership after reaching the age of 60 (or after having retired). Dr Parris entered into a civil partnership in the UK in 2009 (at age 63) and retired in 2010 before civil partnership was available in Ireland. His case was unsuccessful; the rule was found not to be discriminatory. (See here.)

The proposed Bill seeks to amend the Pensions Act 1990, to provide that it would constitute a breach of the equal treatment principle (on the sexual orientation ground) in certain situations for a scheme to have a "death bed marriage" rule. The requirements being:

1. On or before the member reached the particular age condition:

    - The couple could not marry at the time - because they were of the same sex; or
    - The couple could not become civil partners at the time – as that option was not yet available in Ireland; or
    - Where the couple had entered into a formalised union in another country – that could not be recognised in Ireland; and

2. Once they reached the particular age condition they married (or entered into a civil partnership/their union in another country was recognised) within 3 years.

The government has not opposed the Bill, (which is a Private Members Bill) and it will now move to committee stage in the Seanad. Speaking about the proposed legislation in the Seanad, Minister for Social Protection, Leo Varadkar, raised retrospectivity as a key issue. While the draft legislation is targeted at a limited group - how the retrospectivity of pension benefits issue is resolved will be of wider interest.

Contributed by Jane Barrett.

London Investment Banker Loses Job over WhatsApp Boast

A former Jefferies Group LLC investment banker and managing director was fined £37,198 after divulging confidential client information via WhatsApp to a *"personal acquaintance and a friend"* in the UK's Financial Conduct Authority's (the "FCA") first action related to social messaging and employment.

The FCA Final Notice dated 29 March 2017 reports that Mr Niehaus, who had voluntarily turned over his phone to his employer, had shared confidential information regarding a client's identity, details of the work being performed and the fee being charged, over the popular messaging service on a number of occasions in an apparent attempt to *"impress"* others. He was suspended from Jefferies but later resigned before the completion of a disciplinary process by the company.

Mr Niehaus's penalty was reduced by 30% because he made a full admission of his actions to the FCA in an early interview. While Mr Niehaus stood to make no financial gain from the disclosure of the confidential information, the FCA imposed the penalty because of his *"failure to act with due skill, care and diligence."*

Workplaces are failing to keep up with new technologies

This fine comes as financial companies have begun cracking-down on the use of certain apps, either by restricting use or banning certain apps from company phones. As reported in the UK media, a Bank Chairman recently resigned his position several weeks after his daughter published Snapchats which he had sent her about being “bored” at work. While the Bank gave no reason for his departure, the risks associated with new media in the workplace are clear.

The FCA Conduct of Business Sourcebook states that firms should *“take reasonable steps to prevent an employee or contractor from making, sending or receiving relevant telephone conversations and electronic communications on privately owned equipment which the firm is unable to record or copy”.*

These incidents further highlight increasing concerns that workplaces are failing to keep up with the fast-changing world of rapid technological innovation. This worrying trend is evidenced by William Fry's Social Media Snapshot 2016 which suggests that less than half of employers have a social media policy in place while 78% of employees admit to using social media during the working day.

What steps should an employer take?

These issues raise important questions for employers as to how to monitor and ensure appropriate professional behaviour of staff while using devices overwhelmingly associated with personal use.

As good practice employers should have an up-to-date social media policy in place. This can also function as a potential defence to claims against the employer (via vicarious liability) for employee conduct related to private or workplace-related WhatsApp chat groups. Well-defined policies also help to foster environments where employees are aware of what is acceptable professional behaviour and further are mindful that despite the new rapid media pace ethical and professional standards should be ensured across all areas of the workplace.

For more information, please contact a member of our Employment & Benefits team.

Contributed by Catherine O' Flynn.

European Parliament Adopts Medical Devices and In Vitro Diagnostic Medical Devices Regulations

On 5 April 2017, four and a half years after the European Commission first proposed measures to replace the existing directives governing medical devices and in vitro medical devices, the European Parliament formally adopted the Medical Device Regulations and In Vitro Diagnostics Regulations (the "Regulations"). The Regulations aim to enhance patient safety and modernise public health by introducing an enhanced governance framework around the definition, supervision, traceability and risk based classification system for medical device equipment.

Some key elements of the new legislation include:

- *Expansion of definition of medical devices:* The breadth of medical devices has been significantly expanded and includes certain products which previously did not fall under the definition of a medical device, for example, eye contact lens solution, liposuction equipment and laser equipment used for hair and tattoo removal.
- *Enhanced vigilance and market surveillance:* Once devices are available for use on the market, manufacturers will be obliged to collect data about their performance and EU countries will coordinate more closely in the field of market surveillance. For traceability purposes, most medical devices will have to have unique identifiers with these details being recorded in an EU database.
- *Tighter controls:* The new rules will impose tighter pre-market controls on high-risk devices and apply a more stringent approach to the conduct of both clinical evaluation and the clinical investigation of clinical trials. EU cross-border clinical trials will be subject to a single coordinated assessment. Stricter requirements on the use of hazardous substances are also introduced. The legislation will also demand a more in depth review on the bodies that can approve the marketing of medical devices. Notably authorised bodies will provide more frequent, unannounced and in depth manufacturing site inspections.
- *Introduction of a risk based classification system*: A new system for risk classification in line with international guidelines will apply to *in vitro* diagnostic medical devices in addition to a wider medical device classifications definition for all products. The legislation will also require EU member states to inform patients of the consequences of DNA tests taking into consideration ethical requirements.
- *PMSS:* As part of their quality management system, manufacturers must also establish a "post-market surveillance system" (PMSS), which should be proportionate to the risk class and the type of device in question. Medical device manufacturers will be required to designate at least one person with responsibility for regulatory compliance who possesses the requisite expertise in the field of medical devices.
- *Strengthening transparency of information for consumers:* The new regulations will ensure vital information is easy to find. For instance, patients will receive an implant card with all the essential information, and a unique device identifier will be mandatory for every product so that it can be found in EUDAMED - the new European database of medical devices.
- *Financial compensation measures must be in place:* The Regulations require manufacturers to have measures in place to provide sufficient financial coverage in respect of their potential liability. Such financial coverage shall be proportionate to the risk class, type of device and the size of the enterprise.

Following their publication in the Official Journal of the EU (OJ), the new Regulations will have a staggered transitional period, with some aspects becoming legally binding after 6 months. However, all legislation in relation to medical device products will be entered into force three years (2020) after the publication in the OJ, and after five years for In Vitro diagnostic medical devices (2022).

Contributed by Cliodhna McDonough.

