WILLIAM FRY

LEGAL NEWS

Welcome

Welcome to the September 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.

Patricia Taylor

Partner

Regulation of Lobbying Act 2015 - Who is lobbying whom about what?

On 1 September 2015, the Regulation of Lobbying Act 2015 came into force. The Act aims to make the practice of lobbying more transparent by making information publicly available through a new web based Register of Lobbying. The Standards in Public Office Commission (SIPO) is now the regulator of lobbying in Ireland.

The Act is designed to increase high public standards and the healthy functioning of democracy through making the following information publicly accessible:

- Who is lobbying?
- Who is being lobbied?
- What are the issues being lobbied about?
- What is the intended result of the lobbying?

Are you lobbying?

A three step test is set out below to determine whether you are engaged in lobbying activities and whether you must therefore register as a lobbyist:

1. **Are you one of the following?**

- An employer with more than 10 employees where the communications are made on your behalf
- A representative body with at least one employee communicating on behalf of its members and the communication is made by a paid employee or office holder of the body
- An advocacy body with at least one employee that exists primarily to take up particular issues and a paid employee or office holder of the body is communicating on such issues
- A professional lobbyist paid to communicate on behalf of a client (where the client is an employer of more than 10 full time employees or is a representative body or an advocacy body which has at least one full-time employee)

  Note that this definition includes lawyers and accountants etc. who may be lobbying on behalf of clients
- Any person communicating about the development or zoning of land

2. **Are you communicating about a relevant matter?**

A relevant matter relates to:

- The initiation, development or modification of any public policy or of any public programme
- The preparation or amendment of any law
- The award of any grant, loan or other financial support, contract or other agreement, or of any licence or other authorisation involving public funds

3. **Are you communicating either directly or indirectly with a designated public official?**

The current list of designated public officials, which may be extended over time, includes the following:

- Ministers and Ministers of State
- TDs and Senators
- MEPs for constituencies in this State
- Members of local authorities
- Special Advisers
- Secretaries General, Second Secretaries, Deputy Secretaries, Assistant Secretaries or Directors in certain public bodies
- Chief Executive, Assistant Chief Executive, Director of Services, Head of Finance or Head of Human Resources in Dublin City Council
- Chief Executive, Director of Services or Head of Finance in any other Local Authorities

If you answered **"Yes"** to all three questions then it is likely you are lobbying.

Next steps – what this means for you?

Under the Act, if you are carrying on lobbying, which does not involve an excepted or exempted communication, you will be required to register as a lobbyist and file your first lobbying return by **21 January 2016**. Thereafter, you will be required to file a lobbying return three times a year.

A broad range of organisations and individuals will be captured by the Act, with the onus for compliance on the lobbyist not the lobbied. Therefore, in order to prepare for complying with the Act, you should now take steps to do the following:

- Review your organisation's arrangements for recording relevant communications which might fall within the scope of the Act.
- Identify the key personnel involved in the relevant communications.
- Where necessary, put in place arrangements to record such information from 1 September 2015.
- Identify individual(s) responsible for registration and compilation of returns. You should note that it will be possible to have data entered on the register on an ongoing basis by more than one employee and saved in draft form (on a private area of the register) prior to its formal submission.
- Nominate someone within your organisation to submit the final return at the end of each reporting period and confirm that the information is correct.

Enforcement

The Act's enforcement provisions, which range from monetary fines (between €200 and €2,500) to terms of imprisonment (up to 2 years) are due to come into force in September 2016, one year after the registration provisions. For the moment, however, SIPO has indicated that a collaborative approach with the Act is preferred in order to promote compliance and prevent contraventions.

Head of Lobbying Regulation addresses William Fry CounselConnect Session

Sherry Perreault, Head of Lobbying Regulation, informed a William Fry CounselConnect Session on 1 September 2015 that lawyers lobbying on behalf of a client must register with SIPO and submit a return detailing the lobbying activities. However, she stated that while the lobbying subject matter must be disclosed on a return, legal privilege need not be breached necessarily.

Contributed by Sarah Twohig.

Companies Act 2014 – Single Member Companies and Annual General Meetings

Previously, the Irish Regulations which gave effect to the Twelfth Company Law Directive on single member private limited companies permitted the sole member of a single-member company to dispense with holding an AGM if that member so wished. The decision to dispense with holding the AGM was drawn up by the member in writing and notified to the company and could have effect for the year in which it was made and subsequent years.

As a result of changes brought about by the Companies Act 2014, it would appear that, if a single member company wishes to dispense with holding an AGM, it will need to make a written decision to do so on an annual basis. A one-off decision to dispense with all future AGMs will no longer be possible.

In any year where a single member company wishes to dispense with holding an AGM, it will be necessary for the single member to sign a resolution:

- Acknowledging receipt of the financial statements that would have been laid before the AGM
- Resolving all such matters as would have been resolved at the AGM
- Confirming there is no change in the person (if any) appointed as statutory auditor of the company

Single member companies with a pre-existing decision to dispense with all AGMs are advised to take note of these new provisions.

Contributed by Barbara Kenny.

High Court Rules Receivers Not Validly Appointed

The High Court recently determined the extent to which a secured creditor must comply strictly with the formalities set out in a security instrument when executing a Deed of Appointment of a receiver. The Court ruled that strict compliance is required and that, in this case, this had not occurred.

Background

The borrower, Mr McPhillips, had granted a mortgage to ACC Bank (ACC) over certain assets permitting it to appoint a receiver over those assets in the event of a default. An event of default had occurred and ACC appointed a receiver over the assets of Mr McPhillips as secured in the mortgage. Mr McPhillips challenged the appointment of the receiver, on the grounds that ACC had not complied with the “exact terms” set out in the mortgage when executing the Deed of Appointment.

The mortgage provided for the appointment of a receiver by ACC "by writing under its hand". The receivers were appointed by ACC under seal. The Court re-iterated the common law position that a receiver must be appointed in accordance with the terms of the security instrument and that a receiver who is not appointed in accordance with those terms is not validly appointed. ACC submitted that the requirement to appoint the receiver "by *writing under its hand*" should be satisfied by the affixing of the common seal where the affixing of the common seal includes a signature of authorised signatories.

The Court did not accept this submission and pointed out that ACC had authorised six different people to witness the affixing of the seal but had only authorised three specific people to sign documents which are required to be "by writing under its hand". In this case, the Deeds of Appointment were not signed by one of these three individuals. The Court concluded that the exact terms of the debenture had not been complied with and the appointments of the receivers were therefore invalid.

It remains to be seen what impact this decision will have on cases where the same individuals are authorised to execute documents "under hand" and "under seal". However, the Court noted that it would be "*unwise to conclude as a general principle*" that a deed executed under seal and signed as part of the process must be regarded as incorporating the requirement of "*by writing under its hand*".

This decision may be appealed.

Contributed by Craig Sowman.

European Wills Need to Be Reviewed

On 17 August 2015 an EU Succession Regulation came into force, which seeks to harmonise succession law in Europe. Ireland, the UK and Denmark opted out of the Regulation so that the rules do not affect property in those countries but the new rules still have relevance to people with property in the other EU Member States affected by the Regulation, including Irish nationals.

Previously all EU Member States had their own succession rules and administration processes, some of which were radically different from each other and from what we are familiar with in Ireland. Those differences often led to very complex conflict of law problems for property owners in the EU and elsewhere. Forced heirship rules in some jurisdictions give children automatic rights to share in their parent's estate while other jurisdictions have complete testamentary freedom. Often these rules overlap and conflict making it very unclear who has the right to estates and potentially causing significant tax exposure where there are unintended results.

From 17 August 2015 under the Regulation, generally the succession law of your habitual residence applies to your estate unless you opt for the law of your nationality to apply by including an appropriate choice of law clause in your will. There will also be an EU certificate of succession, which is aimed at making post-death administration easier in EU jurisdictions affected by the Regulation.

Given the Regulation is only at the early stages of implementation and there are differing opinions on how it will be interpreted, EU succession experts are advising that the best approach is to include a choice of law clause in your will if you wish the law of your nationality to apply regardless of your habitual residence. For example, an Irish person with property in France would include a choice of law clause in their will so that Irish succession law would apply to the French property. It is particularly important to also review inheritance tax plans to verify whether those plans are affected by the Regulation.

Contributed by Nora Lillis, Tina Curran.

Time Waits For No Man

On 27 July 2015, the Irish Times lost a bid to stop Times Newspapers Limited, the publisher of “The Times” (commonly known as the London Times in Ireland), from publishing a digital version of “The Times” under the name “The Times Irish Edition”.

The Irish Times was seeking to restrain the publication of the digital edition using the name “The Times Irish Edition” and other names confusingly similar to The Irish Times until the main hearing of the proceedings. It alleged that the launch of “The Times Irish Edition” amounted to trade mark infringement and passing off. Times Newspapers Limited contended that there had been unreasonable delay in bringing the injunction application as it was common knowledge that it intended to launch a digital edition for some months.

Evidence was adduced that senior members of staff within the Irish Times knew of the intended launch for a number of months prior to the injunction application. The Court was satisfied that the launch was common knowledge in journalistic circles and ruled that the injunction should be refused on grounds of delay.

Due to the delay in seeking the injunction, it was not necessary to consider whether or not the Irish Times had an arguable case, the adequacy of damages or where the balance of convenience lay. The matter will now proceed to a full hearing.

The Irish edition of the Times digital newspaper launched on 7 September 2015.

Contributed by Charleen O’Keeffe.

Twitter Acts against Tweet Stealers

Twitter has begun to remove tweets containing allegedly plagiarised jokes. As a result, tweeters will no longer be able to steal the witticisms of others and pass them off as their own.

Twitter, like most companies that host content on the web, has a dedicated system for handling claims of copyright infringement. Under the US Digital Millennium Copyright Act (DMCA), Twitter, as an intermediary, is provided "safe harbour" from copyright infringement liability provided that it follows certain rules including the removal of potentially infringing material once it is put on notice.

Twitter has a dedicated Copyright and DMCA policy whereby anyone can submit a complaint. All an aggrieved tweeter needs to provide is the copyright holder's signature, a link to the original work, identification of the infringing material, contact details and a statement confirming that "*the notification is accurate, and, under penalty of perjury, that* [the person is] *authorised to act on behalf of the copyright owner*".

Twitter does not claim to be the arbiter of the law, stating that “*if you are unsure whether you hold rights to a particular work, please consult an attorney*..." It places the responsibility on the complainant warning that anyone who knowingly makes a false accusation may be liable for damages including costs and attorney’s fees.

While jokes have been susceptible to ‘attribution erosion’ since time immemorial, the internet appears to have exacerbated this issue and potentially paved the way for many more legal disputes.

This move by Twitter adds to recent case law in this area. In the Meltwater case, which we reported on here, the English Court of Appeal, having consulted the Court of Justice of the European Union, found that hyperlinked newspaper headlines may be protected by copyright as original literary works if they contain elements which were the expression of the intellectual creation of the author. It may be the case that such protection could extend to a 140 character tweet provided the joke is sufficiently original.

Contributed by Leo Moore and James Quaine.

Supreme Court Rules on Bias

The Supreme Court recently quashed three High Court judgments relating to a dispute between Good Concrete and CRH plc (CRH) on the grounds that there was objective bias arising out of the trial judge's ownership of shares in CRH.

Goode Concrete claimed that the trial judge should have been automatically disqualified from hearing the case because of his pecuniary interest in CRH and any exception to this could not apply because of the extent of the shareholding.

Notably, the trial judge had disclosed in open court that he had a *"vague feeling that a very small number of CRH shares feature somewhere in my pension fund"* when the case first came before him.

CRH therefore argued that Goode Concrete was at all times aware of the trial judge's shareholding in CRH and chose not to object, thereby waiving its rights to complain.

Goode Concrete submitted that given the nature of the declaration, and the fact that it would not be unusual for a person to hold a very small number of shares of a public company in a pension fund, it had no difficulty with the trial judge hearing the matter. Goode Concrete submitted that it became apparent later that the full extent of the financial interests held by the trial judge had not been revealed as an additional purchase of shares in CRH had been made by the trial judge after he took up the case.

The Appeal was issued some two years after the High Court judgments were handed down, far exceeding the required timeframe for appealing.

In allowing the appeal, the Supreme Court stated that it is the responsibility of the judge to make inquiries into any shareholding relating to a case before him and inform the parties so that the issue of disqualifying himself can be considered. If a judge holds shares (as opposed to shares held in a pension plan), then in general he or she should disqualify themselves from hearing the action.

The Supreme Court quashed the three judgments under appeal and remitted them to the High Court to be re-heard by another judge. The Court added that the granting of the appeal was not a reflection on the integrity of the trial judge.

Contributed by Sarah Twohig.