



ByrneWallace LLP, one of Ireland's leading law firms with unrivalled experience advising the retail sector, highlights key legal issues which retailers should be aware of during 2022.

## Must Know Legal Facts for Retailers

### No Partial Frustration

While the enforced closure of "non-essential retail" has ended, disputes remain between landlords and tenants regarding non-payment of rent for periods when businesses were required to close due to the COVID-19 restrictions. The High Court recently rejected one tenant's claim that it should not be obliged to pay rent for the periods of closure, as the lease had been partially frustrated.

The doctrine of frustration applies where an event (not involving default by either party) occurs, that so fundamentally changes the nature of the bargain between the parties that the contract is treated as at an end. In *Foot Locker Retail Ireland Limited v Percy Nominees Limited*<sup>1</sup>, the tenant claimed to be entitled to remain in the premises, but to pay no rent for the period of closure, as the lease had been "partially frustrated".

The judge confirmed that "partial frustration" is not a legal concept that applies in Irish law, noting that the tenant's claim that it was free from the obligation to pay rent but entitled to occupy the premises "does violence to the fundamentals of the doctrine" of frustration. He reaffirmed that the obligation to pay rent is an integral requirement of any lease and cannot be severed from the lease.

This judgment provides clarification for both landlords and tenants still grappling with disputes over unpaid rent for the periods of closure.

### Outdoor seating areas for pubs and restaurants

In response to the initial COVID-19 restrictions prohibiting indoor drinking and dining, many local authorities and licensed businesses created outdoor seating areas adjacent to pubs and restaurants to facilitate outdoor drinking and dining. The Irish public

has embraced outdoor hospitality and there is an appetite to retain an outdoor culture post-pandemic.

It became apparent in 2021 that many new outdoor seating areas adjoining pubs and restaurants were not licensed for the sale of alcohol. The *Civil Law (Miscellaneous Provisions) Act 2021* (the "Act") resolved



this issue by providing for the temporary licensing of these outdoor seating areas. An outdoor seating area, whether on private or public land, is deemed to be part of the licensed premises and therefore authorised for the sale of alcohol, subject to conditions in the Act.

Although licensed premises have returned to full trading hours, alcohol cannot be sold or consumed after 11 p.m. in outdoor seating areas on private land. Local authority permits set trading hours on public land, while any outdoor area within the licensed premises is governed by the licence.

This temporary legislation has been extended until 31 May 2022. For the longer term, the issue of outdoor seating areas adjoining licensed premises will be considered as part of the proposed reform of licensing laws in 2022.

### Reform of licensing laws

Reform and modernisation of the licensing laws in Ireland has been on the legislative agenda for many years, but is expected to finally proceed this year. A public consultation on the modernisation of

Ireland's licencing laws closed in January, with an outline of the reforming legislation due to be published early in 2022.

### Lay-Off, Short-Time and Redundancy Entitlement

In response to the COVID-19 pandemic, emergency legislation amended the *Redundancy Payments Acts 1967-2014* by temporarily suspending the right of employees placed on lay-off or short-time to claim redundancy payments, where the lay-off/short-time was due to the effects of measures taken in the context of COVID-19. As of 30 September 2021, employees may again claim redundancy payments in lay-off and short-time situations, subject to the specific rules which govern such claims.

### Gender Pay Gap Information Act

The *Gender Pay Gap Information Act 2021* (the "2021 Act") was signed into law on 13 July 2021. Although the 2021 Act has not yet commenced, once it takes effect, it will provide for the making of ministerial regulations (the "Regulations"), which will require certain employers to publish information relating to the remuneration of their employees by reference to the gender of those employees.

The purpose of this requirement will be to:

- show whether there are differences in such remuneration referable to gender, and if so, the size of such differences;
- require those employers to publish statements setting out the reasons for such differences; and
- show the measures (if any) being taken, or proposed to be taken, by those employers to eliminate or reduce such differences.



The reporting obligations in the 2021 Act will not apply to employers with less than 50 employees. Indeed, those obligations will initially only apply to employers with 250 or more employees. However, from the second anniversary of the making of the Regulations, the obligations will extend to employers with between 150 and 249 employees and, on the third anniversary, to employers with between 50 and 149 employees.

<sup>1</sup> [2021] IEHC 749

## Sick Leave Bill

In November 2021, the Government published draft legislation, which confers a new statutory right on employees to be paid by their employers while on sick leave.

The draft *Sick Leave Bill 2021* (the “**Bill**”) envisages an initial entitlement to three days’ paid sick leave per year (as of 2022). It is intended that over time, the level of coverage will increase incrementally - rising to five days in 2023, seven days in 2024, and 10 days in 2025.

The rate of sick pay envisaged by the Bill is 70% of an employee’s wage, subject to a daily threshold of €110, and this rate can be revised over time by ministerial order.

The Bill will only confer an entitlement to paid sick leave on employees who have completed 13 weeks’ continuous service with their employers. To be eligible for statutory sick leave, employees will also need to be certified as unfit to work due to illness or injury by a medical practitioner.



## EU Whistleblowing Directive

A general scheme for a proposed *Protected Disclosures (Amendment) Bill* (the “**Proposed Bill**”) was published on 12 May 2021. The Proposed Bill would significantly expand the range of subjects who can invoke protected disclosures law (by including the likes of volunteers, and job applicants), while increasing the range of remedies available to people who allege that they have been penalised for making a protected disclosure.

The Proposed Bill would impose an obligation on all private sector organisations with 50 or more employees to establish formal channels and procedures for employees to make protected disclosures (although those that employ between 50 and 249 employees would have until 17 December 2023 to do so).

## Marketing High Fat, Salt and Sugar Food and Drink Products to Children

On 1 December 2021, the Advertising Standards Authority for Ireland (“**ASAI**”) introduced new rules on marketing High Fat, Salt and Sugar food and drink products (“**HFSS products**”) to children.



These new rules update the existing ASAI Code of Standards for Advertising and Marketing Communications (the “**Code**”) introducing rules for advertising HFSS products in non-broadcast media (all forms of digital media, out of home media<sup>2</sup>, print media and cinema).

Retailers engaging in non-broadcast media advertising are subject to the Code and should be aware of their obligations which include:

- No medium can be used to advertise HFSS products if more than 50% of its audience is under 15;
- For print media, marketing of HFSS products will only be carried in consumer publications where the adult readership is 75% or greater;
- Where a marketing communication for HFSS products is permitted, it is restricted to 25% of the total advertising space;
- Marketing of HFSS products targeted at children should not include promotional offers, competitions, licensed characters or celebrities. More importantly, for retailers, this restriction does not apply to: point of sale displays, packaging, wrappers, labels, tickets, timetables and menus;
- Marketing communications for collection-based promotions should not urge children to buy excessive quantities of food;
- Locations, including crèches, family clinics, schools, playgrounds and youth centres are prohibited from running any form of marketing communication for HFSS products; and
- Billboards displaying HFSS products are not permitted within 100 metres of a school gate.

A link to the new rules can be found at [www.asai.ie/asaicode/](http://www.asai.ie/asaicode/).

<sup>2</sup> This includes billboards or hoardings, public transport stops or shelters, interiors and exteriors of buses or trains, or building banners, both on printed formats and digital display screens.

## ABOUT THE FIRM

ByrneWallace LLP is one of Ireland’s largest full service law firms. A forward thinking firm, they focus on securing the best possible outcome for their clients and are dedicated to the provision of expert legal services. Offering a diverse range of expertise covering all areas of Irish law, they advise a range of businesses and industry sectors including retail. These services include advising on:

- Advertising, branding and promotional requirements
- Handling official customer complaints
- Defamation
- Online retailing
- Consumer law
- Licensing law
- Health and safety
- Property issues (commercial lease negotiation, landlord and tenant issues)
- Employment
- IP (trademarks and copyrights)
- Data protection
- Crisis management
- Sustainable finance
- Corporate compliance and commercial contracts

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