Neutral Citation: [2016] IEHC 479

THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 165 JR]

BETWEEN

KEVIN MARTIN

APPLICANT

AND

THE DATA PROTECTION COMMISSIONER

RESPONDENT

JUDGMENT of Mr. Justice Haughton delivered on the 10th day of August, 2016

Introduction

1. In this application for judicial review the applicant seeks a number of declaratory and injunctive reliefs against the Data Protection Commissioner ("the respondent" or "the Commissioner") arising from a letter dated 16th February, 2015 from the respondent's investigating officer Mr. Frank Bergin ("Mr. Bergin") to the applicant's solicitors wherein the respondent's office refused to further investigate the applicant's data protection complaint by means of an oral hearing to enable the respondent to form its own view on an unresolved conflict of evidence, namely whether the alleged breach of the applicant's data protection rights had occurred.

2. The applicant seeks:-

> i) a declaration that the decision of the respondent contained in the 16th February, 2015 letter outlined above breached the applicant's constitutional right to fair procedures;
>
> ii) an order of *certiorari* quashing the decision of the respondent;
>
> iii) an order of *mandamus* directing the respondent to conduct an oral hearing in relation to the applicant's complaint to enable it to form a view on the unresolved conflict of evidence to enable it to determine whether a breach of the applicant's data protection rights had occurred;
>
> iv) an order of *mandamus* directing the respondent to make a formal decision on the applicant's data protection complaint; and
>
> v) damages and costs.

3. While a number of issues are raised in the Statement of Opposition, including whether the proceedings are moot, the substantive issue is whether the respondent is empowered by law to conduct an oral hearing to resolve a relevant conflict of interest arising on investigation of a complaint of contravention of the Data Protection Act, 1988 and 2003 ("the Acts", which term includes the Data Protection Act, 1988, as amended).

Factual Background

4. The Acts are intended to provide for the protection of individuals with regard to the control and processing of personal data. The respondent is required pursuant to s. 10 of the Acts to investigate, or cause to be investigated, whether any of the provisions of the Acts have been, or are being, or are likely to be, contravened in relation to an individual either where the individual complains to it or it is otherwise of the opinion that there may be such a contravention.

5. By way of a letter dated 20th December, 2012, solicitors acting on behalf of the applicant submitted a complaint to the respondent alleging that his data protection rights had been breached and asking that the respondent conduct an investigation into the alleged breach.

6. The circumstances of the complaint are as follows. The applicant is a member of St. Raphael's Credit Union, 1-2 Fox & Geese, Naas Road, Dublin 22 ("the Credit Union") since 2004. On or about January, 2012, the applicant received a letter from the Credit Union asking him to contact a named representative in relation to his loan account. The applicant is said to have attempted on a number of occasions to contact the representative but was unsuccessful. The Credit Union again wrote to the applicant in February, 2012 requesting him to contact the same representative regarding his loan account. It is averred that the applicant again attempted to contact the named representative but was unsuccessful.

7. On 5th March, 2012, the applicant emailed the named representative seeking to set up an appointment with the Credit Union and indicating his availability to meet. This is stated in the affidavit of the applicant dated 20th March, 2015 to be the last time the Credit Union contacted him before the events which were the subject of the data protection complaint.

8. In his affidavit dated 20th March, 2015, the applicant avers that he was contacted by his father on 17th November, 2012 by way of a telephone call during which he indicated that a Mr. Frank McGrath came to his home claiming to be from the Credit Union. The details of the telephone call and the complaint were outlined as follows in a letter dated 16th August, 2013 from the respondent to solicitors for the applicant:-

> "In correspondence received by this Office from your firm, Mr Martin outlines his version of events surrounding Mr. McGrath's visit to the home of his father :
>
> "*On the day that Mr McGrath called to Greendale road, I received a phone call from my father, he informed me that a man had called to the house claiming to be from the credit union, he said his name was Frank; had had no identification on view and did not offer any. He informed my father that he was from St Raphael's Garda credit union and that he was looking for Kevin Martin. My father told him that I did not live at that address and that I hadn't for many years. My father invited him into the house in order to give him my phone number. Mr. McGrath informed my father that I "had*

substantial loans with the credit union that were in difficulty" and that I was avoiding contact and not responding to correspondence. He was also in possession of documents which my father described as "looking like accounts statements and having St Raphael's credit union header" Mr McGrath did not leave any contact details, calling card etc""

9. The applicant further states at para. 7 of his affidavit dated 20th March, 2015 that Mr. McGrath "proceeded to show my father a folder containing my private and confidential financial statements. The man stated that my loans had been restructured and discussed my repayment schedule."

10. The applicant then issued the letter of 20th December, 2012 to the respondent detailing his complaint. He then received a letter dated 9th January, 2013 in which the respondent indicated that the Commissioner under s. 10 of the Acts would "investigate your complaint using our full legal powers if necessary to resolve the matter…". The investigation was carried out by Mr. Bergin, investigating officer, on behalf of the respondent.

11. By way of a further letter dated 31st January, 2013, the respondent informed the applicant's solicitors, Lawlor Partner Solicitors, that it had contacted the Credit Union as part of its investigations which acknowledged that its representative had gone to the applicant's father's house but denied that he had discussed or disclosed any sensitive or personal information.

12. The investigation continued, Mr. Bergin sent letters dated 12th June, 2013 and 12th July, 2013, requesting responses from the Credit Union, who replied by letters dated, *inter alia*, 28th June, 2013 and 6th August, 2013. From these responses it emerged that the Credit Union had no electronic record of the meeting between Mr. McGrath and Mr. Martin Snr., and only had Mr. McGrath's record of the outcome of the visit entered on their Credit Control System as of 30th November, 2012. This records the date of their meeting as being 24th November, 2012 as opposed to the applicant's assertion that it was on 17th November, 2012.

13. The letter of 16th August, 2013 provides details of the Credit Union's "version of events surrounding Mr McGrath's visit to Mr Martin Senior's home" as follows:-

> "I have spoken to Mr McGrath concerning the visit and he had informed me that he has a clear and accurate recollection of his discussion with Mr Martin's father. He has informed me that on the date in question he identified himself to Mr Martin Senior as an officer of St Raphael's Garda Credit Union Limited.
>
> He was invited into the gentleman's home. He informs me that the conversation was limited to inquiring as to the whereabouts and telephone number of Mr Kevin Martin. He recalls that he had attempted to telephone Mr Kevin Martin on the number provided to him by Mr Martin Senior immediately after he left the house. As the number provided by Mr Martin Senior appeared to be incorrect, he had to trouble Mr Martin once again in an effort to recheck the number. Mr McGrath is adamant that he did not at any time discuss with Mr Martin Senior, the reason for his visit or for requesting the current address and telephone number of Mr Kevin Martin. Mr McGrath has informed me that Mr Martin Senior was quite happy to convey this information without question."

14. Mr. Bergin then informed the solicitors for the applicant by letter dated 16th August, 2013, of the Credit Unions responses, and he then stated:-

> "It is not possible for this Office to form a definitive opinion on a complaint that concerns an allegation of verbal disclosure with one party stating one thing and the other party another. In the absence of documentary evidence, it would be impossible to prove that your client, Mr. Kevin Martin's personal information was unfairly disclosed in accordance with the terms of Data Protection Acts 1988 and 2003 by St. Raphael's Credit Union, as alleged in your client's complaint.
>
> However, if you have further information that was not previously presented to this Office and you feel may assist in our consideration of this matter, please do not hesitate to provide it to us.
>
> Yours sincerely
>
> Frank J. Bergin
>
> Investigations Office
>
> [*This letter is not a legal notice or a decision of the Data Protection Commissioner to which s. 26 of the Data Protection Acts 1988 & 2003 applies*]."

15. A shorter letter dated 8th October, 2013, was sent by Mr. Bergin to the Credit Union stating in similar terms that the respondent could not form "a definitive opinion", and adding that:-

> "Therefore, this Office now considers the matter of Mr. Martin's complaint to be finalised."

This letter also contained the same statement in parenthesis to the effect that the letter was not a legal notice or a decision of the respondent.

16. There was then no correspondence for a period of some eleven months. On 11th July, 2014, the applicant's solicitors wrote to Mr. Bergin indicating dissatisfaction with the position taken in the letter of 16th August, 2013, stating their client's belief that he had made contact with Credit Union staff immediately after Mr. McGrath called to his parents' home and that there may be an audio recording, and requesting interview of the complainant and requesting an oral hearing.

17. At this point, Mr. Bergin reopened the investigation, asking the Credit Union to search for any record or audio recording of any such call by Mr. Martin on 17th or 18th November, 2012. He wrote to the applicant's solicitors on 11th November, 2014, indicating that the Credit Union had searched its telephone audio recordings on request but had informed Mr. Bergin that it had been unable to discover any recording or telephone call between the applicant and Mr. McGrath on 17th or 18th November, 2012. In this letter, Mr. Bergin stated:-

> "Having reviewed the correspondence received from both parties, it is not possible for this Office to form a definitive opinion on a complaint that concerns an allegation of verbal disclosure with one party stating one thing and the other party another. In the absence of documentary evidence, it would be impossible to prove that your client, Mr. Kevin Martin's personal information was unfairly disclosed in accordance with the terms of the Data Protection Acts 1988 and

2003 by St. Raphael's Credit Union, as alleged in your client's complaint.

I note that in your letter dated 30th September, 2014, it is stated that:-

'We would be obliged for a decision as soon as is practicable.'

If you are requesting a formal decision of the Data Protection Commissioner, the procedure is that the Commissioner would review the file and the most likely outcome will be that the Commissioner will be unable to determine that a breach of the Data Protection Acts occurred in this instance. On this basis, I would be grateful if you would inform me if you wished to proceed with a formal decision in this case."

18. This is met with a response dated 27th November, 2014, from the applicant's solicitors asserting that the respondent had a duty to conduct an oral hearing, and again requesting an oral hearing. Similar requests were repeated in letters of 10th December, 2014 and 15th January, 2015. In the meantime, Mr. Bergin continued the investigation seeking details from the Credit Union of its procedures for house visits by staff, the training of staff and the training of Mr. McGrath, in particular, and details of "other complaints of this nature". The Credit Union replied to these requests on 13th January, 2015.

19. Mr. Bergin ultimately replied to Mr. Martin's solicitors by letter dated 16th February, 2015, in which he repeated the position as set out in his letter dated 16th August, 2013 (see above), and he then stated:-

> "In regard to your request for an oral hearing on this complaint, the position of this Office is that we have investigated the matter fully, based on the information provided by you and St. Raphael's Credit Union. We do not consider that any further discussion on the matter will result in us coming to a different conclusion. In addition, there is no provision or obligation in s. 10 of the Data Protection Act 1998 [sic, 1988] and 2003, which provides for the investigation by complaints submitted to the Data Protection Commissioner for the holding of an oral hearing such as you have requested.

Our position on this matter is as outlined to you previously i.e. it is not possible for this Office to form a definitive opinion on a complaint that concerns an allegation of verbal disclosure with one party stating one thing and the other party another. Accordingly, in the absence of documentary evidence, it would be impossible for us to conclude that your client, Mr. Kevin Martin's personal information was disclosed with a third party by a representative of St. Raphael's Credit Union, as alleged in your client's complaint."

This is the decision in respect of which the applicant seeks *certiorari*.

Leave to Seek Judicial Review – 23rd March, 2015
20. The applicant applied by way of an *ex parte* application for leave to apply for judicial review on 23rd March, 2015, and leave was granted by Noonan J. on that day.

21. The reliefs which the applicant was granted leave to seek are already outlined above in this judgment. The Statement of Grounds having set out the factual background asserts that:-

> "11. The respondent has still not made a formal decision in relation to the Applicant's data protection complaint."

The Grounds assert that the respondent failed to carry out a full and proper investigation pursuant to s. 10 of the Acts in accordance with the requirements of constitutional and natural justice, and that these required the respondent to conduct an oral hearing to resolve a disputed issue of fact.

Formal Decision of the Commissioner dated 23rd March, 2015
22. As it happens, also on 23rd March, 2015, under the hand of the Commissioner, the respondent issued her "formal statutory decision" in relation to the complaint. This comprehensive seven page document details the "Complaint", "Investigations" and "Findings" and "Decision". The respondent on p. 6 makes the following findings:-

> "The issue for consideration in this case is whether the Data Protection Acts were contravened by the Credit Union during the conduct of the home visit by the alleged disclosure of Mr. Kevin Martin's personal information to his father without his consent.
>
> During the course of our investigation, the Credit Union stated repeatedly that its Director who conducted the home visit did not disclose any of Mr. Kevin Martin's financial details to his father during that home visit. It also provided this Office with confirmation that its Director had participated in a training seminar for volunteer directors undertaking home visits. Furthermore, it also has a guidance document in place outlining the procedural steps to be followed in respect of such home visits. On that basis, I am satisfied that the Credit Union had taken appropriate steps to ensure that its volunteers who conduct home visits were trained and that procedural steps were in place at the Credit Union in respect of the conduct of home visits.

The disclosure which is alleged in this case was a verbal one. It was not witnessed. While the complaint alleges in a clear manner that a disclosure of personal data occurred during the home visit, the only evidence of this is the word of the complainant's father. On the other hand, the response of the Credit Union and its Director, Mr. McGrath, is that no such disclosure took place.

If the Credit Union Director did disclose personal data relating to Mr. Kevin Martin's financial situation to Mr. Kevin Martin's father, as is alleged, that would constitute a contravention of s. 2(1)(c)(ii) of the Data Protection Act.

In this case, I have an allegation by a data subject of a verbal disclosure by a data controller, a denial of that allegation by the data controller and no proof of either the allegation or the denial, nor have I the means to obtain any proof of either in circumstances where the alleged verbal disclosure was not witnessed or recorded by means of video or audio equipment. I am satisfied that my Office has fully investigated this complaint. Despite that full and lengthy investigation, there is no means by which proof of the alleged breach can ever be established. It should not, however, be construed from the absence of proof, that I disbelieve the allegation of the verbal disclosure or the denial of the alleged verbal disclosure. In summary, having conducted a full investigation, I am unable to form a conclusion in relation to the alleged disclosure of personal data."

23. The remainder of that letter reads:-

"Decision

I am of the opinion, following the investigation of the complaint submitted by you on behalf of your client, Mr. Kevin Martin, that there is no proof in existence of the alleged verbal disclosure of Mr. Kevin Martin's personal data to his father by St. Raphael's Garda Credit Union Limited. Accordingly, in the absence of such proof, I am unable to uphold the complainant's assertion that a breach of the Data Protection Acts did occur.

Notice of Right of Appeal
You are hereby informed that you are entitled, if aggrieved by this decision in relation to your complaint against St. Raphael's Garda Credit Union Limited to appeal it to the Circuit Court under s. 26 of the Acts within 21 days of receipt of this notification.

Section 7 of the Data Protection Acts
Data Controllers may be liable under s. 7 of the Data Protections Act 1988 and 2003 to an individual for damages if they fail to meet the duty of care they owe in relation to personal data in their possession. It is a matter for any individual who feels s/he may have suffered damage from a contravention by a data controller of its data protection responsibilities to take legal advice as appropriate. This Office has no function in relation to the taking of any such proceedings under this Section or in the giving of any such legal advice.

Yours sincerely

Helen Dixon

Data Protection Commissioner"

The Subsequent Process
24. The applicant failed to serve an originating notice of motion within seven days from the date of perfection of the order of 24th March, 2015, granting leave. Accordingly, the applicant applied on an *ex parte* basis to the High Court on 13th April, 2015 extending the time for service of the notice of motion, which was granted. The notice of motion was then filed in the Central Office of the High Court on 15th April, 2015. The matter came on before this court on 11th July, 2016, during a sitting of the High Court in Cork. In circumstances where there is no challenge in the Statement of Grounds to the "formal statutory decision" dated 23rd March, 2015, and there has been no application for an amendment, the Statement of Opposition raises an issue that the proceedings are moot.

25. In the Statement of Opposition, the respondent asserts:-

(i) That the reliefs sought are misconceived and/or moot in circumstances where the final decision was made by the respondent on 24th (was in fact 23rd) March, 2015.

(ii) That the decision of 23rd March, 2015 is final and cannot be the subject of collateral attack which does not challenge its merits.

(iii) That the applicant has available an alternative, more appropriate remedy, namely appeal to the Circuit Court pursuant to s. 26 of the Acts.

(iv) That the court should exercise its discretion to refuse relief on the basis that when seeking an extension of time to service the notice of motion, the grounding affidavit did not advert to the fact that a final decision was made on 23rd March, 2015, and that the reliefs the subject matter of the leave application were now moot.

(v) Delay issues also are raised arising out of the lapse of eleven months from Mr. Bergin's letter of 16th August, 2013, and the applicant's solicitors' letter of 11th July, 2014, which first sought an oral hearing.

Mootness
26. The first issue that the court must determine is whether the proceedings are moot. In submissions, counsel for the respondent submitted that the applicant is strictly confined to the case on which he sought and obtained leave, and reliance is placed on *A.P. v. DPP* [2011] IESC 2. It was submitted that even if the applicant was successful in his challenge to the decision made on 16th February, 2015, the final decision of 23rd March, 2015 would still stand, thus infringing the principle that the courts will not make an order by way of judicial review that is futile.

27. Counsel for the applicant responded that the mootness argument was misconceived because the proceedings commenced prior to the leave decision being made and argued that the challenge being pursued is to the decision-making process, and the refusal to conduct an oral hearing. Material non-disclosure at the time of seeking an extension of time for service of the notice of motion was denied on the basis that all that was sought on 13th April, 2015 was an extension of time to serve the notice of motion, and even if there was an omission it was not deliberate or material.

Discussion
28. I have come to the conclusion that the applicant's challenge to the "decision of the Respondent contained in the letter dated 16th February, 2015" is indeed moot, and that these proceedings cannot be maintained. There are a number of reasons for this.

29. Under s. 10(1) of the Acts, the respondent has the duty to investigate complaints of contravention by a data controller or data processor, and under s. 10(1)(b)(ii), it is provided:-

"(ii) if he or she [the Commissioner] is unable to arrange, within a reasonable time, for the amicable resolution by the parties concerned of the matter the subject of the complaint, notify in writing the individual who made the complaint of his or her decision in relation to it and that the individual may, if aggrieved by the decision, appeal against it to the [Circuit] Court under section 26 of this Act within 21 days from the receipt by him or her of the notification."

Accordingly, the decision must be that of the Commissioner, not of a member of her staff, and it is from that decision only that there is a right of appeal to the Circuit Court.

30. The letter of 16th February, 2015, was from Mr. Bergin, the Investigations Officer, and not from the Commissioner, albeit that it

was sent on behalf of the Office of the Commissioner. In its own terms it is not a decision on the complaint. Mr. Bergin states:-

> "Our position on this matter is as outlined to you previously i.e. it is not possible for this Office to form a definitive opinion on a complaint that concerns an allegation of verbal disclosure with one party stating one thing and the other party another…"

31. I fully accept that the decision of the respondent communicated in the letter of 23rd March, 2015, was not to hand – and had, as a matter of probability, not been made or completed – at the time that the application for leave to seek judicial review was moved on that day before Noonan J. However, that letter of notification was addressed to the applicant's solicitors and the court was informed that it came to the notice of the applicant/his solicitors late on 23rd March, 2015.

32. The letter of 23rd March, 2015, is a "formal statutory decision" of the respondent made pursuant to the Acts, and is expressly made "under section 10". It is very comprehensive; it recites the complaint, and the lengthy investigation and it makes findings which have been quoted earlier in this decision. It decides that the respondent is "…unable to form a conclusion in relation to the alleged disclosure of personal data", and that in the absence of proof of the existence of the alleged verbal disclosure "I am unable to uphold the complainant's assertion and that a breach of the Data Protection Acts did occur".

33. I am satisfied that the decision of the respondent dated 23rd March, 2015 was made within jurisdiction, as it is a "decision in relation to" the complaint, as contemplated by s.10(1)(b) of the Acts made after "such investigations as [the Commissioner] considers appropriate…to identify any contravention…" as provided for in s.10(1A).

34. The applicant and his legal advisers were aware of the decision of 23rd March, 2015 at the time that the applicant's counsel applied on 13th April, 2015 to Noonan J. for an extension of time to serve the notice of motion. Leaving aside the question of whether there should be any criticism of the failure to bring to the court's attention the fact that the respondent made and notified a formal statutory decision on 23rd March, 2015, it is a fact that no application was made at that time, or on any subsequent occasion, to amend the Statement of Grounds to challenge the decision dated 23rd March, 2015 – whether on the basis that the respondent failed to conduct an oral hearing to resolve disputes of fact, or on any other ground. Thus, the plea at para. 11 that the "Respondent has still not made a formal decision in relation to the Applicant's data protection complaint", which is repeated at para. 20, was allowed to stand uncorrected.

35. As no amendment application or fresh application for leave to seek judicial review of the decision of 23rd March, 2015 was brought at any time, the three month period within which leave might have been sought has long since expired. No application has been made before this court to amend the Statement of Grounds. It is fair to assume that at this remove in order to obtain an extension of time the applicant would face insuperable difficulties in satisfying the requirements of O. 84, r. 21(3) of the Rules of the Superior Courts under which he would have to show (1) good and sufficient reason for the delay since June, 2015, and (2) that the circumstances resulting in the failure to seek leave within the three month period were outside his control or could not reasonably have been anticipated by him.

36. The court is left in a situation where, if it was disposed to grant the reliefs sought and direct the respondent to conduct an oral hearing, this would be of no avail because a formal statutory decision has already been taken. The applicant tries to circumvent this by emphasising that the challenge is to the decision making process. But this is no answer because the 'process' before the respondent ended with her decision of 23rd March, 2015 after she was satisfied that the complaint had been "fully investigated" by her office, and it was concluded without an oral hearing. Accordingly, I must find that this application for judicial review is moot.

37. In making this decision, I do not take into account the delay of some eleven months that took place between Mr. Bergin's letter of 16th August, 2013 and the applicant's solicitors' first request for an oral hearing on 11th July, 2014. The reason for this is that Mr. Bergin, thereafter, as a matter of fact, reopened the investigation and pursued it until his letter of 16th February, 2015. Moreover during that period of further investigation the applicant's solicitors consistently requested an oral hearing on a number of occasions.

38. I also do not decide this case on the basis of the suggested material non-disclosure on 13th April, 2015, when the applicant sought an extension of time to serve a notice of motion. While, undoubtedly, there is a duty of disclosure when making a leave application, and arguably that extended into the application for an extension of time, I am not satisfied that this was deliberate or intended to deceive the court, or that it was anything other than an oversight.

39. While later in this judgment I consider the issue of 'alternative remedy', this is not a factor I take into account in determining that the proceedings are moot.

The Substantive Issue – Is the Data Protection Commissioner empowered to conduct an oral hearing?
40. In case I am incorrect in the foregoing, and in deference to the extensive submissions, written and oral, of counsel, it is appropriate to express the court's view in relation to the substantive issue, which is whether under the Data Protections Acts 1988 and 2003, or under EU Law, the respondent has a power to conduct an oral hearing.

Party Arguments
41. The parties made a number of legal submissions. In summary the applicant argued that the respondent failed to protect his right to fair procedures in conducting the investigation into his complaint. In particular, the applicant asserted that fair procedures and natural justice require the respondent to conduct an oral hearing into his complaint in the circumstances where there is a conflict as to fact which the respondent accepted she was unable to resolve upon an examination of the materials before her.

42. Counsel for the applicant referred to Directive 95/46/EC of 24th October, 1995 "on the protection of individuals with regard to the processing of personal data and on the free movement of such data". Recital 63 of the Directive states:-

> "Whereas such authorities must have the necessary means to perform their duties, including powers of investigation and intervention, particularly in cases of complaints from individuals, and powers to engage in legal proceedings; whereas such authorities must help to ensure transparency of processing in the Member States within whose jurisdiction they fall."

Counsel submitted that "necessary means" includes the power to hold an oral hearing.

43. Furthermore, Chapter VI headed "Supervisory Authority and Working Party on the Protection of Individuals with regard to the Processing of Personal Data" contains certain provisions upon which the applicant relied:-

Article 28.3 provides, so far as relevant:-

> "3. Each authority shall in particular be endowed with:
>
> – Investigative powers, such as powers of access to data forming the subject-matter of processing operations and powers to collect all the information necessary for the performance of its supervisory duties"

Article 28.4 provides:-

> "4. Each supervisory authority shall hear claims lodged by any person, or by an association representing that person, concerning the protection of his rights and freedoms in regard to the processing of personal data. The person concerned shall be informed of the outcome of the claim.
>
> Each supervisory authority shall, in particular, hear claims for checks on the lawfulness of data processing lodged by any person when the national provisions adopted pursuant to Article 13 of this Directive apply. The person shall at any rate be informed that a check has taken place."

Counsel relied on the use of the word "hear" in respect of claims in support of the contention that the respondent should in appropriate circumstances be entitled to hold an oral hearing.

44. It should be noted in passing that counsel for the respondent relied on Art. 22 headed "Remedies" which provides:-

> "Without prejudice to any administrative remedy for which provision may be made, *inter alia* before the supervisory authority referred to in Article 28, prior to referral to the judicial authority, Member States shall provide for the right of every person to a judicial remedy for any breach of the rights guaranteed to him by the national law applicable to the processing in question."

It was argued that s. 26 of the Acts in providing for an appeal to the Circuit Court (and a further appeal to the High Court on a point of law) supports their contention that the Commissioner is not empowered to hold oral hearings.

45. Counsel for the applicant submitted in legal submissions that in investigating complaints the respondent has a broad discretion arising from legislation as to the form and conduct of the investigations arising under s. 10(1A) which provides:-

> "The Commissioner may carry out or cause to be carried out such investigations as he or she considers appropriate in order to ensure compliance with the provisions of this Act and to identify any contravention thereof."

46. Reliance was also placed on s. 24(2) of the Acts which gives authorised officers of the respondent powers to require the production of data material and information.

47. While acknowledging that the Acts were silent on the issue of oral hearings, counsel argued that the courts have in the past imposed obligations beyond the scope of relevant statutory regimes in order to satisfy the requirements of fair procedures. Particular reliance was placed on *The State (Boyle) v. The General Medical Services (Payment) Board & Ors*. [1981] I.L.R.M. 14. In that case the applicant medical doctor sought to challenge the decision of the respondent seeking to reduce his remuneration. Neither the agreements governing the Free General Medical Scheme nor the Health Services Regulations 1972 provided for an oral hearing before the appeal committee – although there was a right of appeal. Keane J. stated:-

> "Neither the agreement nor the regulations under consideration in the present case expressly provide for an oral hearing before the Appeal Committee. That is not to say, nor is it contended on behalf of the Respondents, that an Appellant can never be entitled to an oral hearing, in the sense of a hearing at which *viva voce* evidence is adduced and tested on cross-examination. No doubt, a case could arise in which the reliability or accuracy of material before the committee on which it proposed to act was challenged in such a manner as to make it imperative to have oral evidence in relation to it and to afford the Appellant an opportunity of cross-examining the witness or witnesses."

48. In further support of this approach counsel relied upon *Mooney v. An Post* [1998] 4 I.R. 288 and *Greenstar Ltd. v. Dublin City Council and others* [2013] 3 I.R. 510. Counsel also drew comparisons between the role of the Commissioner and the Financial Services Ombudsman ("the FSO") on the basis of the breadth of the respondent's discretion under s. 10 and the powers of investigation conferred on her authorised officers by s. 24 of the Acts. Counsel also relied upon *Davy v. Financial Services Ombudsman* [2010] 3 I.R. 324 and *Lyons & Murray v. Financial Services Ombudsman and Bank of Scotland Plc.* [2011] IEHC 454 which he submitted established that an oral hearing will be required where there are unresolved conflicts of fact in respect of any matter material to a ruling. Counsel asserted that there are two requirements, firstly that there be conflict of fact, and secondly that it be material to the resolution of the complaint. He asserted that both these criteria were satisfied in the present case from an analysis of the correspondence, and that it was not possible for the respondent to form a definitive opinion on the complaint of an allegation of verbal disclosure absent an oral hearing.

49. The respondent argued that the statutory framework governing the Commissioner and her office, and the statutory complaints resolution scheme operated by the respondent, do not provide for or contemplate an oral hearing. In reliance on *Private Residential Tenancies Board v. Judge Linnane* [2010] IEHC 476 counsel argued that the court can not amend a statute, by way of interpretation or otherwise, to provide for what the Oireachtas has not provided. It was argued that the respondent does not have any inherent power to hold an oral hearing, and that the provisions of the Directive and the Acts relied upon by the applicant cannot be broadly interpreted to permit an oral hearing as they only relate to "investigation" and the production of "data" and "information" to the investigating officer.

50. Counsel sought to distinguish the case law relied upon by the applicant. It was argued that the Acts do not give the respondent the power to administer an oath, compel the production of documents or compel the attendance of witnesses, unlike the statutory provisions relating to the FSO. Counsel also relied upon the fact, deposed by the respondent, that she does not provide for, nor have the facilities to conduct, an oral hearing, and that there is no established practice to conduct oral hearings amongst the data protection authorities of EU member states.

Discussion

51. I have come to the conclusion that neither the Directive nor the Acts, expressly or by implication, require or empower the respondent to conduct an oral hearing in relation to complaints made under the Acts. I also conclude that the requirements of natural and constitutional justice do not confer an inherent power on the respondent to conduct an oral hearing even in circumstances where there is a dispute of fact as to the existence or extent of an allegation of disclosure in contravention of the Acts. My reasons for this

are as follows.

52. While Recital 63 of the Directive indicated that the "supervisory authority" was to have "the necessary means to perform their duties, including powers of investigation and intervention", I do not consider that this is sufficient to indicate an intention on the part of the European Parliament and Council that such authorities have the power to conduct oral hearings. Further, I do not consider that Art. 28.4 in using the phrase "hear claims" was intended to mean that each Member State must set up a supervisory body that has the power to conduct oral hearings in relation to complaints. The phrase is used in Art. 28.4 in the context of a general reference to receiving and handling claims in relation to the processing of personal data. Had the Directive intended that its provisions would impose an obligation to hold oral hearings this would have been expressly stated. It is also noteworthy that there is no claim in these proceedings that the State has failed to properly transpose the Directive into domestic law by promulgating the Acts, and in particular the amending Act of 2003.

53. Article 28.3 is concerned with ensuring that each supervisory authority is endowed with appropriate "investigative powers". This obligation is fulfilled by s. 24 of the Acts which grants to the respondent's "authorised officers" the power to enter premises and to inspect and examine data (s. 24(2)(a)), to require a data controller or data processor to disclose/produce data in their power or control (subpara. (b)) to inspect and copy extracts from such data (subpara. (c)), and to require a data controller or data processor:-

> "to give to the officer such information as he may reasonably require in regard to the procedures employed for complying with the provisions of this Act, the sources from which such data are obtained, the purposes for which they are kept, the persons to whom they are disclosed and the data equipment in the premises." (subpara. (d))

54. It cannot be inferred from s. 24, or from s. 10(1)(a) of the Acts, which imposes on the respondent the duty to investigate and make a decision in relation to a complaint, that the respondent has the power to conduct an oral hearing.

55. Furthermore, s. 10(1A) provides:-

> "The Commissioner may carry out or cause to be carried out such investigations as he or she considers appropriate in order to ensure compliance with the provisions of this Act and to identify any contravention thereof."

It is notable that this subsection is worded in a way that gives the Commissioner discretion as to the manner in which she considers it appropriate to carry out the investigation, both for the purpose of ensuring compliance with the Acts, and to "identify any contravention". On the facts of the present case the respondent carried out the investigations that she (and Mr. Bergin) considered appropriate, and her conclusion was that she was unable to identify any contravention ("there is no proof in existence of the alleged verbal disclosure…in the absence of such proof I am unable to uphold the complainant's assertion").

56. In the absence of an express power, the court should be slow to find that there was an inherent power to hold an oral hearing. In *Director of Consumer Affairs v. Bank of Ireland* [2003] 2 I.R. 217, in considering the powers of the Director of Consumer Affairs pursuant to s. 149 of the Consumer Credit Act 1995, Kelly J. (as he then was) at pp. 237-238 stated:-

> "The purpose of statutory interpretation is to ascertain the intention of the legislature as expressed in the statute, considering it as a whole and in its context. The intention, and therefore the meaning of the statute, is primarily to be sought in the words used in it.
>
> The plaintiff is a statutory officer and is therefore strictly confined to the functions and powers conferred upon her under the Act. She has no inherent power. But she may have powers which, although not expressly conferred, may be regarded as incidental to or consequential upon those which the legislature has expressly authorised."

The power to hold an oral hearing is a significant one and in applying the *dictum* of Kelly J. (as he then was) I have come to the view that it could not be said to be incidental to the powers of investigation conferred on the respondent and her staff by the Acts.

57. Had the Oireachtas intended that the respondent should have the power to hold oral hearings this would necessarily have been accompanied by ancillary powers and protections which are entirely absent from the Acts. Singularly absent are:-

> (1) any powers to take evidence on oath or under affirmation, or even to administer an oath/affirmation;
>
> (2) a general power to compel discovery of records (apart from the power conferred by s. 24 on investigating officers to gather data and information), and in the event of non-compliance to apply to a court of law for an appropriate order compelling discovery;
>
> (3) a power to summons a person to attend to give evidence, or to issue a subpoena, or to apply, in default of attendance at an oral hearing, to a court of law to compel attendance;
>
> (4) a power providing for a full right of cross-examination of witnesses, and to call evidence in defence and reply;
>
> (5) a provision granting witnesses immunity from prosecution in criminal proceedings in respect of answers to questions given at an oral hearing;
>
> (6) a provision creating offences in respect of failure to answer a question, or failure to provide information, or giving an answer on oath amounting to perjury; or
>
> (7) any provisions creating an offence in the event that a witness or other party conducted themselves such that, if the respondent were a court of law, they would be in contempt of court.

58. In this respect it is useful to compare the office of the Commissioner with the position of the FSO established under s. 16 of the Central Bank and Financial Services Authority of Ireland Act, 2004. Under s. 57CG of that Act the FSO may receive information provided orally. Under s. 57CG(4) the FSO has the power to summons an officer, member, agent or employee of a financial services provider and may examine them on oath. Under subs. (5) the FSO "has the same powers that a judge of the High Court has" in hearing civil proceedings in relation to the examination of witnesses, and subs. (6) gives the witness the same "rights and privileges as a witness appearing in civil proceedings in the High Court". Under subs. (7) information provided by a witness is not admissible as evidence against him or her in criminal proceedings. Under s. 57CG(1) the FSO can apply to the Circuit Court for a compliance order if

a person has failed to comply with the FSO's requirements, or has failed to comply with a summons or otherwise obstructed the FSO, and obstruction/failure to attend etc. are criminal offences (section 57CH).

59. Because of these provisions, I do not find reliance by counsel for the applicant on case law concerning the FSO to be persuasive.

60. The applicant relied on *Davy v. Financial Services Ombudsman*, where the FSO had refused to hold an oral hearing to resolve essential conflicts of fact, contending that whether or not to hold an oral hearing was a matter within his discretion and that he was entitled to have regard to the requirement that complaints be dealt with in an informal and expeditious manner. In the Supreme Court Finnegan J. observed that there was a conflict in relation to the oral advice given by the applicant to the notice party, a credit union, and then quoted Costello P. in *Galvin v. Chief Appeals Officer* [1997] 3 I.R. 240 at p. 251:

> "(c) There are no hard and fast rules to guide the appeals officer or, on an application for judicial review, this Court, as to when the dictates of fairness require the holding of an oral hearing. The case (like others) must be decided on the circumstances pertaining, the nature of the inquiry being undertaken by the decision-maker, the rules under which the decision-maker is acting, and the subject matter with which he is dealing and account should also be taken as to whether an oral hearing was requested. In this case there is no doubt that an important right was in issue (that is the applicant's right to a pension for life). The statute gives an express power to hold an oral hearing and to examine witnesses under oath; a request for an oral hearing was made. What I have to decide is (as Keane, J. had to decide, in *The State (Boyle) v. The General Medical Services (Payments) Board* [1981] I.L.R.M. 14) is whether the dispute between the parties as to (a) the reliability of the evidence before the appeals officer, of the applicant and Mr. Higgins on the one hand and (b) the accuracy of the departmental records on the other, made it imperative that the witnesses be examined (and if necessary cross-examined) under oath before the appeals officer.
>
> (d) I have come to the conclusion that without an oral hearing it would be extremely difficult if not impossible to arrive at a true judgment on the issues which arose in this case."

61. In the case before him Finnegan J. agreed with the conclusion of the High Court in relation to the requirement of holding an oral hearing in that case and stated:-

> "I am satisfied that s. 57CE(5) empowers the respondent to proceed by way of examination and cross-examination of witnesses where that is appropriate. The respondent may of course restrict cross-examination to those issues on which there is a conflict. Central to the respondent's decision was his finding on the expertise of the members of the investment committee of the notice party. He formed this finding on the basis of witness statements which were not made available to the applicant. Fair procedures required that those officers of the notice party to whom the applicant gave oral advice should be produced for cross-examination. Likewise in relation to the nature and suitability of the bonds, the expert who reported to the notice party and whose reports were before the respondent, although not furnished to the applicant, should be made available for cross-examination".

This decision however must be considered in the context of the particular statutory provisions in detailing the FSO's functions and powers. Moreover, the FSO is confined to dealing with complaints linked to financial services providers whereas the Commissioner has a much wider remit.

62. The other FSO case relied upon by the applicant is *Lyons & Murray v. Financial Services Ombudsman*. In that case Hogan J. held that the FSO acted in breach of fair procedures in rejecting the necessity for an oral hearing to determine certain factual issues between the parties. At para. 39 he stated:-

> "In any event, none of this could take from this Court's bounden duty to uphold the constitutional rights of the appellants and to provide them with an effective remedy where (as here) such a right has been infringed …"

63. I was informed that that decision was appealed by the FSO, but the appeal was settled after the appellants and the notice party, the Bank of Scotland Plc., resolved their differences. In any event in his decision Hogan J. emphasises in his decision the importance of the FSO's decisions in that they are binding and can give rise to issue estoppel foreclosing litigation on the same points before a court of law. After quoting at para. 19 the finding of Charleton J. in *O'Hara v. ACC Bank Plc.* [2011] IEHC 367, where the learned judge stated:-

> "It would be contrary to the statutory scheme and it would also be unfair for parties to a complaint before the Financial Services Ombudsman to be later subjected to very similar litigation."

Hogan J. stated:-

> "20. It follows, therefore, that an adverse finding by the FSO rejecting a complaint can, in some circumstances at least, create a form of issue estoppel preventing the re-litigation of these issues in subsequent litigation, precisely because the adjudication on many such complaints is effectively replicating in one shape or another that which would be the staple diet of the judicial system. This in itself must have consequences for the Ombudsman's adjudicatory system."

At para. 38 Hogan J. concluded:-

> "Once, however, the Ombudsman proceeds to adjudication, a legal Rubicon is thereby crossed, not least having regard to the potential legal consequences of such an adjudicatory decision identified by Charleton J. in *O'Hara*. As agent of the State, the Ombudsman is thereby bound to uphold the constitutional right to fair procedures: see generally, *Dellway Investments Ltd. v. National Asset Management Agency* [2011] IESC 14."

64. The possible effect of an adjudication of the FSO by way of estoppel on core proceedings is a further point of distinction between that FSO's powers and functions, and those of the Commissioner. I refer later to s. 7 of the Acts which imposes an actionable duty of care on date controllers/processors. This new right of action makes it at least doubtful that a finding by the Commissioner that is adverse to a complainant is intended to estop any claim to damages under section 7. However, the principle distinction remains the specific statutory framework which in the case of the FSO expressly contemplates examination of witnesses under oath, and which is designed to accommodate an adversarial process.

65. Moreover, the courts have been quite prepared to require an oral hearing in those cases where there are express statutory provisions conferring powers to hold such hearings. This was the case in *Galvin v. Chief Appeals* Officer, where the statute gave an

expressed power to hold an oral hearing and to examine witnesses under oath.

66. Neither am I persuaded by the further case law cited by the applicant in support of his contention. As I have observed counsel placed much reliance on the *dictum* of Keane J in *The State (Boyle) v. The General Medical Services (Payment) Board* quoted *supra*. In Boyle the applicant appealed to the General Medical Services Board appeal committee and also sought "an oral hearing at a venue which might be suitable to hear evidence of the patients I attended". Keane J. noted that it was not:-

> "… contended on behalf of the respondents, that an appellant can never be entitled to an oral hearing…No doubt, a case could arise in which the reliability or accuracy of material before the committee on which it proposed to act was challenged in such a manner as to make it imperative to have oral evidence in relation to it and to afford the appellant an opportunity of cross-examining the witness or witnesses".

However, this was *obiter* and on the facts he rejected the claim on the basis that cross-examination was not necessary or appropriate. Moreover, he was there concerned with an appeal committee constituted on an *ad hoc* basis. By comparison the present case deals with complaints not appeals, and has a separate provision – s. 26 – which establishes the right to bring an appeal from the Commissioner's decision to the Circuit Court.

67. In *Greenstar* the applicant claimed that the respondents had breached fair procedures and Art. 6 of the European Convention on Human Rights by not having an oral hearing prior to making its decision to vary the Waste Management Plan for the Dublin Region 2005 – 2010. There was no requirement in the applicable legislation that there be an oral hearing. At para. 30 McKechnie J. stated:-

> "30. In this case I am satisfied that the procedure under consideration is not such as to require an oral hearing to uphold natural justice and fair procedures. The variation, or any variation, may affect personal rights, but it could not be said that determinations were being made on an individual basis, such that the affected parties might be entitled to have an oral hearing. I feel that the statutory requirements obliging the decision maker to consider the submitted materials are more than sufficient in this particular area, which is largely a matter of policy. Further it is clear that the decisions of the respondents are reviewable by way of judicial review, and indeed in such proceedings this court has held that the variation was vitiated for being biased, prejudged and contrary to competition law."

68. The judgment does not record argument on the question of whether it was compatible with the separation of powers to read into the Waste Management Act, 1996 a power or duty to hold an oral hearing in the absence of any expressed power in the legislation. The emphasis on the decision there being "largely a matter of policy" is also a point of distinction. Moreover, in the present case no argument was pursued that the failure to afford the applicant an oral hearing constitutes a breach of Article 6.

69. The decision in *Mooney* was based on very different facts. There the plaintiff had been employed by the defendant as a postman. Following complaints and investigations, criminal charges were preferred against the plaintiff, of which he was acquitted. Following his acquittal the plaintiff failed to answer certain queries raised by the defendant. He then sought an oral inquiry into the allegations made against him which was refused, and he was later dismissed. He contended that he was entitled to rely upon his acquittal in the criminal case to defeat the civil complaint against him, and argued that the dismissal was in breach of fair procedures as he was entitled to an oral hearing. The Supreme Court held that his acquittal on the criminal charges did not debar his employer from an attempt to establish the same proposition on the balance of probabilities. In a passage cited by the applicant in this case, Barrington J. stated at p. 298:-

> "If the contract or the statute governing a person's employment contains a procedure whereby the employment may be terminated, it usually will be sufficient for the employer to show that he has complied with this procedure. If the contract or the statute contains a provision whereby an employee is entitled to a hearing before an independent board or arbitrator before he can be dismissed then clearly that independent board or arbitrator must conduct the relevant proceedings with due respect to the principles of natural and constitutional justice. If however the contract (or the statute) provides that the employee may be dismissed for misconduct without specifying any procedure to be followed, the position may be more difficult."

70. In the present case the procedure which the respondent is mandated to follow in s.10(1)(a) is to "investigate" complaints and come to a decision. There is nothing stated in s. 9 (which establishes the office of the Commissioner and sets out her functions), or in s. 10 (concerning investigation of complaints and enforcement in cases of contravention), in relation to oral hearings. In *Mooney* Barrington J. at p. 299 held that the plaintiff was not entitled in the circumstances of the case to a hearing before the board of An Post or even to see the report of the investigating officer. At p. 300 he observed:-

> "To attempt to introduce the procedures of a criminal trial into an essentially civil proceeding serves only to create confusion.
>
> It is necessary also to consider the position of the defendant. It was not in a position to set up an independent tribunal with power to *subpoena* witnesses even had it wished to do so. At the same time it had received serious complaints from members of the public touching the integrity of the postal services. The defendant could not responsibly ignore these complaints even though the members of the public did not wish to become involved before any court or tribunal."

71. This passage serves to emphasis the difference between *Mooney* and the present case, but also points to the conclusion that the Commissioner is not in a position to set up a quasi-tribunal to conduct an oral hearing with sworn witnesses and cross-examination in the absence of appropriate express powers.

72. It must be accepted that the respondent's function under s. 10(1)(a) is to investigate possible contraventions of the Data Protection Acts. I also accept that Recital (63) of the Directive recites that the supervisory authority "must have the necessary means to perform their duties, including powers of investigation and intervention, particularly in cases of complaints from individuals…". However, no authority was cited for the proposition that the word "investigation" should be given a broad meaning to include the power to hold oral hearings.

73. Counsel for the respondent brought to my attention *Graham v. Albert* [1985] RTR 352 where May L.J. had occasion to consider the true construction of "investigation". At p. 357 he stated:-

> "The point which Mrs. Barnett makes, drawing a distinction between the present legislation and that which called so much trouble in earlier days, is that the use of the word 'investigation' in section 8 of the Road Traffic Act 1972 contemplates something much more formal than took place on this occasion. It contemplates, for instance, particularly in relation to a

potential offence under section 5, calling a doctor to examine the condition of the alleged offender. For my part, with respect, I cannot construe that word in section 8 as requiring any such greater formality than the ordinary plain meaning of the word 'investigation' would normally involve. What the station officer was doing on this occasion was investigating – inquiring into – whether the defendant had committed an offence under section 6 of the Act."

74. It seems to me that the natural and ordinary meaning of the word "investigate" is to carry out an inquiry into something so as to establish or attempt to establish the truth. I can not see any good reason for a very broad construction of the word "investigation", and indeed the construction contended for by the applicant is strained.

75. The Oireachtas has also seen fit to promulgate very detailed provisions regarding the holding of oral hearings in other legislative frameworks. Section 33BA of the Central Bank Act, 1942 relates to the holding of oral hearings in the context of an Administrative Sanctions Procedure and provides that the Central Bank may:-

"(1) Summons a person to attend to give evidence and to produce specified documents;

(2) Require the person to attend from day to day unless excused;

(3) Require a witness to take an oath and administer an oath to the witness;

(4) Require a witness to answer a question or produce a document;

(5) Tender a small statement instead of giving evidence."

The Central Bank is also given all the powers of a High Court judge with respect to examining witnesses and the witnesses are given the same rights and privileges of a witness before the High Court.

76. Similarly under s. 65(3) of the Medical Practitioners Act, 2007 it is provided:-

"(3) At the hearing of a complaint before the Fitness to Practise Committee—

(a) the chief executive officer, or any other person with leave of the Committee, shall present the evidence in support of the complaint,

(b) the testimony of witnesses attending the hearing shall be given on oath, and

(c) there shall be a full right to cross-examine witnesses and call evidence in defence and reply."

77. Another example cited to me is an inquiry under the Pharmacy Act, 2007. Under s. 43(7) various offences are created whereby a person who is summonsed fails to attend, or without reasonable excuse fails to take an oath or affirmation, or produce or allow inspection of records or documents, or refuses to answer a question that he or she is lawfully required to answer, or there is anything that would be the equivalent of a contempt of court.

78. These are all examples of the kind of legislative provisions that may reasonably be expected to feature in modern legislation if the Oireachtas intends that an administrative body is to have the power to hold effective oral hearings – and which are absent in the present case.

79. In this context it is notable that s. 24(6) of the Acts provides:-

"(6) A person who obstructs or impedes an authorised officer in the exercise of a power, or, without reasonable excuse, does not comply with a requirement, under this section or who in purported compliance with such a requirement gives information to an authorised officer that he knows to be false or misleading in a material respect shall be guilty of an offence."

There is no similar provision creating any criminal offence in relation to a failure to attend for a hearing, or a failure to answer a question. It would be entirely inconsistent for there to be a right to an oral hearing before the Commissioner, with no sanction for failure to attend or answer a reasonable question, or comply with discovery, while a criminal offence is created in relation to obstructing or impeding the respondent's authorised officer in undertaking the investigation.

80. Section 26(1)(d) provides that a decision of the Commissioner in relation to a complaint under s.10(1)(a) may be appealed to the Circuit Court within 21 days of service on the person concerned of the relevant notice. Clearly either the complainant or the data controller/processor could appeal a decision. Nothing in s. 26 restricts the manner in which the Circuit Court can hear such an appeal, and specifically there is nothing in the statute preventing an oral hearing on such appeal.

81. It is instructive to consider O. 60 of the Circuit Court Rules which sets out the procedures to be followed in relation to an appeal under the Acts. Under O. 60, r. 2 all appeals are made "by way of Motion on Notice grounded upon Affidavits sworn by the appellant …". This must exhibit the relevant decision of the Commissioner and the notification of same, and under rule 3 the appeal can be brought in the county where the appellant ordinary resides or carries on any profession or business or occupation, or at the option of the appellant in Dublin. Under rule 4 notice of the appeal must be given to the Commissioner. Order 60 then provides:-

"5. All appeals under Section 26 of the Act shall be heard upon Affidavit evidence only, *save where the Court shall otherwise direct*.

6. The Court may, upon application to it by any party to an appeal, direct that such other person or persons be joined as Notice Party(ies) to the appeal as the Court shall deem fit upon such terms as the Court shall direct."[Emphasis added]

82. Accordingly, there is nothing in O. 60 that prevents the Circuit Court firstly permitting the joinder of a data controller or data processor as a notice party to an appeal by a complainant. Secondly, there is nothing in O. 60 that prevents the court from hearing oral evidence. Indeed O. 60 r. 5 clearly contemplates the court directing that there be oral evidence, or at least limited oral evidence, or perhaps cross-examination on a party's affidavit.

83. Such a process could be followed in any case where a verbal contravention of the Acts is alleged and disputed, or indeed where

any other relevant dispute on fact relative to an alleged contravention arises. Given that such a procedure can be followed in appropriate cases, and that a complainant can thereby secure an oral hearing – or at least a limited oral hearing – on appeal, I am strongly disinclined to hold that there is any entitlement to an oral hearing at the first stage investigation before the respondent.

84. Also significant is s. 7 of the Acts, which provides, so far as relevant:-

> "(7) For the purposes of the law of torts and to the extent that that law does not so provide, a person, being a data controller or a data processor, shall, so far as regards the collection by him of personal data or information intended for inclusion in such data or his dealing with such data, owe a duty of care to the data subject concerned…"

85. This creates a new actionable duty of care; there is no need to show defamatory publication, breach of privacy, breach of confidence, or misfeasance in public office where *mala fides* might have to be established. A person who is aggrieved and has suffered loss or damage consequent on a contravention of the Acts by a data controller or data processor can now sue for damages. In that context a court hearing the claim will receive oral evidence, and be in a position to determine any dispute of fact.

86. This additional right opens up a new right of action that could reasonably be pursued by a person in the applicant's position if they have suffered loss or damage. It further persuades the court that the Acts did not intend and should not be construed as meaning that an oral hearing can be held before the Commissioner. In so finding it should be stated that I do not decide this case on the basis that the applicant has an 'alternative remedy' under section 7. What s. 7 does is confer on a complainant who has suffered damage an *additional* right to the right to have the respondent investigate the complaint of contravention. Rather, s. 7 is a further factor that leads to my conclusion on the substantive issue.

Appeal Remedy

87. I have already indicated that the right of appeal from the Commissioner provided by s. 26 provides an avenue for an oral hearing in an appropriate case. Thus, if the applicant had appealed the respondent's decision of 23rd March, 2015 application could in due course have been made to join the Credit Union as a notice party, and application could have been made to the court for oral evidence to be given by the applicant's father and Mr. McGrath as the main protagonists, and for the purpose of resolving the disputed facts in relation to the alleged disclosure. This is the process allowed for by the legislative framework. Had the applicant availed of it the dispute of fact could have been resolved, one way or another. I am satisfied that this is the remedy that the applicant could, and should, have pursued in this case.

Conclusion

> (1) The applicant's claims for reliefs arising out of the letter dated 16th February, 2015 was rendered moot by the issuance of the respondent's formal statutory decision dated 23rd March, 2015, which decision was made within jurisdiction.
>
> (2) The respondent is not empowered under the Data Protection Acts, 1988 and 2003 to hold an oral hearing in relation to disputed facts arising on investigation of a complaint, nor does the respondent have any inherent power to hold an oral hearing, and the applicant therefore had no entitlement to an oral hearing before the Commissioner.
>
> (3) The applicant could have appealed the Commissioner's decision dated 23rd March, 2015 to the Circuit Court, and that court could have joined the Credit Union as a notice party and determined the dispute after hearing oral evidence. That process would have afforded the applicant an oral hearing and would have resolved the factual dispute in relation to disclosure of personal data.

88. Accordingly, it is not necessary to consider the applicant's further claims, and these proceedings are dismissed.