THE HIGH COURT

[2024] IEHC 646

[Record No. H.JR.2024/81]

BETWEEN

GOOGLE IRELAND LIMITED

APPLICANT

AND

DATA PROTECTION COMMISSION

RESPONDENT

Ruling on Final Order and on Costs by Mr Justice Barr on this 5th day of November 2024.

1. This is a ruling on the terms of the final order that will issue from the court arising out of a judgment delivered by the court on 11 October 2024, reported at [2024] IEHC 577. This ruling also deals with the issue of costs.

2. The only point of disagreement between the parties in relation to the substantive terms of the final order concerns the submission made on behalf of the applicant, that having regard to the content of the court's judgment, it should proceed to make certain declarations in relation to the requirement that certain admissibility criteria be met before the respondent may embark on an inquiry into a complaint made to it under the Data Protection Act, 2018 (the "2018 Act"). The applicant suggests that the court should make a further declaration to the effect that the requirements of fairness demand that where the respondent has decided to hold an inquiry into a complaint, the data processor or controller, which is the subject of the complaint, should be provided by the respondent with the evidence on foot of which the respondent has satisfied itself that the admissibility criteria have been met.

3. The respondent has objected to the inclusion of these declarations in the final order on two grounds: firstly, it has been submitted that the declarations are not necessary, because the judgement is clear in its terms; secondly, the respondent submits that it would be

inappropriate for the court to make such wide-ranging declarations, when one considers the vast range of complaints that can be submitted to the respondent under the 2018 Act.

4. On this issue, I am satisfied that the submissions made by the respondent are correct. The judgment that has been delivered by the court addresses the issues that were raised by the applicant in these proceedings. It has reached substantive determinations in respect of those issues. The court is satisfied that it is not necessary, or appropriate, for this court to go further and make the declarations as sought by the applicant. The judgment is clear in its terms. It can be relied upon by other parties in future litigation, as and where necessary.

5. Secondly, the court is very conscious of the fact that in carrying out its statutory functions, the respondent has to deal with an enormous spectrum of complaints, which can range from an individual who has perhaps a relatively minor complaint in relation to the processing of their personal data on a one-off basis, right through to complaints that may come in from other countries, which are dealt with by the respondent in its capacity as the lead supervisory authority, which complaints may give rise to a very substantial inquiry into a range of matters, including the account creation process carried out by a very large multinational company.

6. The court is satisfied that, having regard to the enormous range of complaints that may come before the respondent for investigation and determination, it would be inappropriate for this court to set down hard and fast rules as to how such complaints should be investigated.

7. Accordingly, the court refuses to make the declarations sought by the applicant, in addition to the substantive determinations which relate to the notice of commencement of inquiry in the present case.

Costs.

8. The legal principles in relation to the awarding of costs in civil litigation are contained in

ss. 168 & 169 of the Legal Services Regulation Act, 2015 and in the recast O.99 of the Rules of the Superior Courts. These principles have been elaborated upon by the Court of Appeal in two cases: *Chubb European Group SE v Health Insurance Authority [*2020] IECA 183; *Higgins v Irish Aviation Authority* [2020] IECA 277. It is not necessary to recite these principles, as they are by now very well known.

9. In the present case, the applicant was successful in its core argument, which was to the effect that the respondent ought to have satisfied itself as to the existence of the admissibility criteria for the complaints that had been forwarded to it, before making the decision to commence a formal inquiry, which it did by notice of commencement of inquiry dated 23 October 2023.

10. The only reason that the applicant did not obtain all the reliefs that it sought in its notices of motion, was due to the fact that subsequent to the date of the notice of commencement of inquiry and in some respects subsequent to the commencement of these proceedings, the respondent obtained the necessary information and documentation, which established that, with one exception, the complaints that had been submitted to it were admissible under the 2018 Act.

11. It was only by the time that the case finally came on for hearing in July 2024 and having regard to the affidavits filed on behalf of the respondent, being the affidavit sworn by Ms Fleur O'Shea on 5 March 2024 and the affidavits sworn by Ms Ciara Hurley on 15 May 2024, 11 June 2024 and 11 July 2024, that the full picture in relation to the admissibility of the complaints finally emerged.

12. Thus, it can fairly be said that, while the applicant had a good case at the outset and while they were successful in their core submission that such admissibility criteria ought to have been established prior to the formal commencement of an inquiry by issuance of the notice of commencement of inquiry; their application for reliefs, was only defeated by the information which came into the possession of the respondent in the period December 2023 to February 2024, and indeed even subsequent to that time, right up to the eve of the

hearing of the action in July 2024.

13. I accept the submission that has been made on behalf of the applicant, that in determining what order for costs should be made, the court ought to have regard to the conduct of the parties both prior to and during the litigation. In this regard, it is noteworthy that by letter dated 20 December 2023, the applicant proposed that there should be a "standstill arrangement", whereby the investigation would be paused to allow the respondent to obtain all the necessary information to establish that the six complaints that were extant at that time, were admissible. As part of that proposal, the applicant requested that the respondent would undertake not to take any time point against it, should it subsequently be necessary for the applicant to institute judicial review proceedings.

14. The respondent was not prepared to give that undertaking. The proposal for the standstill arrangement was again requested by further letter dated 10 January 2024, when the applicant requested the respondent to reconsider its position.

15. Given that the respondent would not agree to pause the investigation and would not agree that it would not take any time point against the applicant if it were to institute judicial review proceedings, the applicant was left with no option but to commence its proceedings by making the *ex parte* application to the court, to determine its core submission that the admissibility criteria should be established prior to the respondent deciding to commence an inquiry. Had it not done so, it would have been out of time to commence judicial review proceedings to challenge the notice of commencement of inquiry that had issued in October 2023.

16. If the matter had rested there, and having regard to the fact that the court has found with the applicant on its core submission, I would be inclined to accede to the applicant's request that it be granted the entirety of its costs. However, as has been outlined in the judgment, in the months following the issuance of the notice of commencement of inquiry, the relevant information and documentation came to hand. This information came to hand over a protracted period and some of it came to hand after the proceedings

had been instituted.

17. By the time the case came to be heard in July 2024, and having regard to the content of the affidavits sworn on behalf of the respondent in March, May, June and July 2024, the position had shifted very substantially from that which applied at the time that the standstill arrangement had been first proposed in December 2023. I am satisfied that once that information had come to hand, albeit late in the day, but prior to the hearing of the within application, the applicant ought to have made a further offer to withdraw the proceedings, in light of the information that had come to hand prior to the hearing.

18. As the applicant did not make any offer on that basis, there has to be some deduction from the costs that it is entitled to recover, having regard to the fact that it did not obtain the reliefs that it sought, primarily due to the fact that information had come to hand which established the admissibility of the complaints, but had done so subsequent to the issuance of the notice of commencement of inquiry. In these circumstances the court is of the view that it is fair and reasonable that the applicant should recover 70% of its costs from the respondent.

19. The final order in the case shall be in the form proposed at paragraph 169 of the substantive judgment, to include the following:

    (a) Set aside the notice of commencement of inquiry dated 23 October 2023 insofar as it relates to the Czech complaint;

    (b) save as indicated at (a) above, refuse the reliefs sought by the applicant in its notices of motion filed on 12 February 2024 and 19 April 2024;

    (c) the applicant is entitled to recover 70% of its costs to include reserved and discovery costs from the respondent, such costs to be adjudicated by the Office of the Legal Costs Adjudicator in default of agreement;

(d) there will be a stay on the judgment and order for costs for 28 days and if a notice of appeal is lodged by either party within that period, the stay is to continue until the final determination of the matter before the Court of Appeal.

(e) In the event of a notice of appeal being lodged, the agreed suspension of the conduct of the inquiry is to continue pending the determination of the appeal.

Anthony Barr

5 November 2024