

**THE CIRCUIT COURT
AN CHÚIRT CHUARDA**

DUBLIN CIRCUIT

**COUNTY OF THE CITY
OF DUBLIN**

**IN THE MATTER OF THE DATA PROTECTION ACTS 1988 & 2003 AND IN
THE MATTER OF AN APPEAL UNDER SECTION 26 OF THE DATA PROTECTION
ACTS 1988 & 2003**

Record No. 2020/03165

Between:

JOHN HEALY

APPELLANT

AND

**HELEN DIXON acting as DATA PROTECTION
COMMISSIONER**

RESPONDENT

**Judgment of His Honour Judge John O'Connor delivered on the 29th day of March,
2023**

1. Facts

1.1 The Appellant was previously an employee of Irish Life Assurance. He became a member of the Irish Life Staff Pension Scheme in 1985. There was a public offering of shares in Irish Life Assurance in 1990. Arising from this, the assets and liabilities of the Irish Life Staff Pension scheme (including the Appellant's pension) were transferred to the Irish Life Benefits scheme ("the Scheme") by Order of the High Court on 6 November 1990. The Appellant ceased employment with Irish Life Assurance in May 2011. Later that year the Appellant moved to the United Kingdom. In 2013, while living in the UK and on his petition, he was declared bankrupt. The Trustees in Bankruptcy (the Trustees) were appointed, and they subsequently sought information of the Appellant's pension from Irish Life as trustees.

1.2 The Appellant contends that the Trustees subsequently used personal data in later proceedings against the Appellant in which the Trustees claimed that the pension formed part

of the Appellant's bankruptcy estate. The Respondent states that any use of the data by the Trustees in the UK during the course of the Appellant's English bankruptcy falls outside the Commissioner's remit and therefore was not and could not have been part of the Commissioner's decision.

1.3 The parties are agreed that the information disclosed was personal data and that processing took place in this jurisdiction.

1.4 The question for this Court is whether the processing of the information furnished to the Trustees in Bankruptcy was in breach of the Data Protection Acts.

2. The Legal Framework

2.1 The events that form the substance of this complaint predate the commencement of the Data Protection Act 2018 and so the appropriate legislative framework for the Decision by the Respondent was under the Data Protection Acts 1988-2003 (the Acts). This is specifically provided for in section 8 of the Data Protection Act 2018.

3. Summary of the Decision of the Commissioner

3.1 The decision of the Commissioner is dated the 7th of May 2020. There were two issues considered by the Respondent in its decision. The first related to consent. Although the Appellant had given his consent to the disclosure of his Data which the Receiver may reasonably require, the Respondent in its decision held that the consent in the format provided was not sufficiently specific or informed and could not be relied upon. Accordingly, the Respondent held in the Appellant's favour in this regard.

3.2 The second ground was what has been termed "legitimate interests". This arises under Section 2A(1)(d) of the Acts which provides where the processing is necessary for the purposes of the legitimate interests pursued by the data controller or by a third party or parties to whom

the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the fundamental rights and freedoms or legitimate interests of the data subject.

3.3 The Respondent in its decision accepted that the Trustees could validly rely upon Section 2A(1)(d) as the Trustees identified the legitimate interest pursued by a third party, namely the Trustee in Bankruptcy performing its functions with respect to the administration of the Appellant’s estate. It held the legitimate interest was lawful as the Respondent understood that the Trustee in Bankruptcy was required to consider the Appellant’s assets in order to properly inform decisions it made in respect of the bankruptcy. Furthermore, it held the disclosure was not unwarranted by reason of any prejudice to the Appellant’s fundamental rights and freedoms or legitimate interests, since the Appellant was partaking in a voluntary bankruptcy process and as part of that the assets were to be realised and therefore it was not unreasonable to expect that the pension assets would be considered part of that process.

4. Standard of Review

4.1 In *Nowak v. Data Protection Commissioner* [2016] 2 IR 585, (“**Nowak**”) the Supreme Court (O’Donnell J.) held that the test to be applied on any appeal pursuant to the Data Protection Acts 1988-2003 (the ‘Acts’) is that promulgated by Keane CJ in *Orange v. Director of Telecommunications Regulations* [2000] 4 IR 159 at pages 184 to 185 (“**the Orange Test**”). The effect of this, is that an appeal is not a full re-hearing on the merits and is limited in nature.

4.2 The test promulgated by Keane CJ in the decision of *Orange Communications v. The Director of Telecommunications Regulation and Another No. 2* [2000] 4 IR 159 is commonly referred to as the Orange Test. The Appellant must establish, as a matter of probability that the decision reached by the Respondent was vitiated by a serious and significant error or a series

of such errors, and in arriving at a conclusion on such an issue, the court must have regard to the degree of expertise and specialised knowledge available to the tribunal/decision-maker.

4.3 At page 184 of the judgment, Keane CJ states “*in short, the appeal provided for under this legislation was not intended to take the form of re-examination from the beginning of the merits of the decision appealed from culminating, if may be, in the substitution by the High Court of its adjudication for that of the first defendant. It is accepted that, at the other end of the spectrum, the High Court is not solely confined to the issues which might arise if the decision of the first defendant was being challenged by way of judicial review. In a case of this legislation at least, an applicant will succeed in having the decision appealed from set aside where it establishes to the High Court as a matter of probability that, taking the adjudicative process as a whole, the decision reached was vitiated by a serious and significant error, or a series of such errors. In arriving at a conclusion on that issue, the High Court will necessarily have regard to the degree of expertise and specialised knowledge available to the first defendant.*”

5. Summary of the Case Law

5.1 In the course of his appeal, the Appellant referred to the decision of the High Court of England and Wales in *Wilson v McNamara* [2020] EWHC 98 (Ch) (Mr. Justice Nugee). In that case the Court considered whether the EU principle of freedom of establishment requires that a pension held in another EU member state (Ireland) should be excluded from a bankruptcy estate under UK law in the same manner as a UK pension would be in a UK bankruptcy. Mr Justice Nugee held that in order to decide the case the Court needed to refer a preliminary reference to the Court of Justice of the European Union (CJEU) on a question of EU law.

5.2 The CJEU has found that the inclusion of overseas pension rights as an asset that falls within a bankrupt's estate under UK law is a restriction on freedom of establishment which

could not be justified as being in the public interest. It noted that UK law (the Welfare Reform and Pensions Act 1999 ("WRPA 1999")) excludes UK pension rights from falling within the bankrupt estate. The CJEU found that the provision of the WRPA 1999 which makes the exclusion of pension rights contingent on such rights arising from an approved scheme in the relevant Member State was contrary to the EU law. It was held that it would be discriminatory for the Irish pension to be included in the bankruptcy estate. If Mr McNamara had held a UK pension, it would not be included and would not vest with the Trustee in Bankruptcy. Including pensions in the bankruptcy estate where they did not arise from an approved scheme would restrict the freedom of establishment, which underpins the mobility of businesses and professionals within the EU. Such a restriction could only be justified if it was found to be in the public interest.

5.3 The CJEU furnished its judgment on 11 November 2021 under the name *BJ and OV[1] v. Mrs M & others* (Case C-168/20) EU:C:2021:907. Subsequently the High Court of England and Wales gave its judgment in *Wilson & Anor v McNamara* [2022] EWHC 243. This judgment was upheld by the UK Court of Appeal in [2023] EWCA Civ20 when it refused to allow the Trustee in Bankruptcy an opportunity to argue justification of unlawful discrimination.

6. Appellant's Submission

6.1 The Appellant argues that the Data Protection Commissioner (DPC) based this legitimate interest on a UK statute. However, pensions registered in UK were excluded from the estate of bankruptcy. Therefore, this, he submits simply means there was no legitimate interest. However, because the UK Statute said only UK pensions, Irish Life and DPC believed the Trustee in Bankruptcy did have a legitimate interest in the pension and had a right to that information. The Appellant submits that is not correct and subsequent decisions of the CJEU

and the UK Courts bear this interpretation out. In short, he states that to read that statute in a manner that excludes pensions in other member states is incompatible with EU law and therefore Irish law.

6.2 The Appellant states that the law is definitive, and this court is bound by the EU ruling. Therefore, the UK Statute does not give rights over a UK pension. In addition, he submits that the UK courts say that it should be read as excluding Irish pensions and therefore there is no legitimate interest.

7. Respondent's Submissions:

7.1 The Respondent submits that the correct test for the court to apply is the Orange Test as outlined in paragraph 4.2 of this decision.

7.2 The Respondent agrees that the data is personal data, and that processing took place in this jurisdiction. The issue, it submits, for the Court is whether the processing was lawful.

7.3 In this regard it pointed out that even though the consent issue was argued on but not upheld in the Decision the issue for the court is purely the legitimate interest test. In this regard it stated there are three questions which the Commissioner considered:

- a. Is there a legitimate interest being pursued by trustees?
- b. Was there necessity of disclosure?
- c. Is it unwarranted by reasons of the prejudice to the rights and freedoms of the Appellant?

7.4 It submits that the Decision of the Commissioner confirms that these elements were satisfied in that:

- a. The Trustees in Bankruptcy in performing their function were required to consider the Appellant's assets to make proper informed decisions.

- b. It was voluntary bankruptcy process. Therefore, it was not unreasonable for the Appellant to expect his pension funds would be considered in the process.

7.5 In respect of the Judgments of the CJEU and the UK Case law, the Respondent pointed out there is still a legitimate interest in disclosure. They also submitted the following:

- First, at the time the decision was made the English High Court had determined that the Appellant's Irish Life pension forms part of the English Bankruptcy estate. However, they submit that the Commissioner or the Dublin Circuit Court do not have the ability to review an order made by the English High Court and that it was a matter for an English Court of competent jurisdiction to make that determination.
- Secondly, even had the Commissioner accepted the pension did not vest in the UK Bankruptcy Trustee, nevertheless the Bankruptcy Trustee would still have a legitimate interest in seeking information from the pension trustees. They point out as a matter of English law even where the pension is excluded the Trustee in Bankruptcy would have an interest in obtaining information. In other words, while there is a high level of protection to a bankrupt in English law it is not absolute. Under the Insolvency Act, an English Trustee in Bankruptcy has the power to "claw back" excessive pension contributions made by the Bankrupt where such contributions have unfairly prejudiced the bankrupts' creditors. In addition, an English Trustee in Bankruptcy has the power to apply for an income payments order requiring among other things, protected pension income to be paid to the bankruptcy estate.
- Thirdly, regarding the decision of *Wilson v. McNamara*, the Commissioner's Decision was delivered more than 18 months before the CJEU decision in 2021 and post-dated disclosure by Irish Life of 8/9 years. They reject that Irish Life ought not to apply the law at the time but instead should have anticipated that the law would be interpreted by the CJEU in a different way in the future. They state that cannot be a correct

interpretation. Parties are entitled to rely on the law at the time and proceed on that basis.

8. Appellant's Reply to the Respondent's submission

8.1 The Appellant in reply submitted that it is clear there is a serious error which in the circumstances was understandable. However, he states the law has not changed, it was clarified by the CJEU. It is only the law in Ireland that applies as the processing was in Ireland. As the law stands the Trustees in Bankruptcy had no interest in the pension.

8.2 In relation to the bankruptcy proceedings, he submits that they are not seeking to undo the order although he states that it is apparent there is a problem. He simply wants to know whether the processing was in breach of the Data Protection Acts. In this regard he states it is not appropriate for the Respondent to say the court is bound by the English Court decision. Rather he states it is irrelevant. He submits that this court is bound by the decision of the CJEU. Therefore, he suggests that this Court must look at the Commissioner's Decision afresh and therefore determine the law that the DPC should have applied to the decision. It is further submitted by the Appellant that it is obvious that the trustees had no right to this information and therefore it is obvious that the DPC made a serious error.

9. The Court's Decision

9.1 In this case the Court prefers the Respondent's argument. This case is not about whether the pension assets were part of his bankruptcy proceedings but rather whether the Commissioner in her decision was correct to uphold that Irish Life had a legitimate interest in disclosing the information concerning the pension assets to the Trustee in Bankruptcy. The case law both then and now does not prevent disclosure. The law has been clarified now as to ownership.

9.2 However, disclosure is a different matter. This was a voluntary bankruptcy initiated by the Respondent. In simple lay man terms “it is all cards on the table”. There are many occasions in law where assets cannot be distributed but disclosure is required. For example, an interest in a fixed trust or a potential interest in a discretionary trust is relevant in family law proceedings in determining “proper provision” in Ireland.

9.3 In bankruptcy proceedings, I accept the two examples proffered by the Respondent namely that:

- Under the Insolvency Act, an English Trustee in Bankruptcy has the power to “claw back” excessive pension contributions made by the Bankrupt where such contributions have unfairly prejudiced the bankrupts’ creditors.
- Under English Insolvency an English Trustee in Bankruptcy has the power to apply for an income payments order requiring among other things, protected pension income to be paid to the bankruptcy estate.

9.4 More particularly applying “the Orange Test”, I am satisfied looking at the decision as a whole and considering the specialist knowledge of the Commissioner in reaching her decision, I am satisfied that the decision was not vitiated by any serious error.

Accordingly, I dismiss the Appellant’s appeal.