[2020] IEHC 509

THE HIGH COURT

[Record No. 2015/9954 P]

BETWEEN

GRANT THORNTON (A FIRM) AND GRANT THORNTON CORPORATE FINANCE LIMITED

PLAINTIFF

AND

GERALDINE SCANLAN

DEFENDANT

JUDGMENT of Ms. Justice Pilkington delivered on the 2nd day of June , 2020.

1. This matter has had a complex procedural background, but in any event, there are three separate applications before the court, one of which appears to have now been overtaken by events.

2. In these proceedings, the defendant appears as a litigant in person.

3. I was informed by counsel for the plaintiff that, to date, there have been 11 separate interlocutory applications, some 40 affidavits have been filed and this case has had 70 separate court listings.

4. Within these proceedings the plaintiff seeks permanent injunctive reliefs restraining the defendant (and any other person having notice of the order) from disseminating, communicating or processing certain data and requiring the defendant to deliver all of the documents containing the confidential information to the plaintiffs. Other consequential orders are also sought. Any claim for damages has been waived.

5. The defendant takes issue with a number of these matters, as set out within this judgment.

6. In setting out the procedural background facts and circumstances of this matter, I was directed to the decision of the Court of Appeal [2019] IECA 276 in these proceedings, being the judgment of Baker J. on 31st October, 2019. Both parties agree that the background facts as summarised by Baker J. within that judgment, comprise a fair summary and accordingly, under the heading "Background Facts", I can do no better than quote the learned judge as follows:-

> "3. The background facts giving rise to the present proceedings are relatively straight-forward but the proceedings themselves are complex and have resulted to date in a number of applications, orders and rulings by different High Court judges and by this Court.
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> 4. The Bank obtained judgment against Ms. Scanlan on 25th February, 2016, following the decision by Fulham J. of a reserved judgment, *Danske Bank A/S (t/a Danske Bank) v. Scanlan* [2016] IEHC 118, and he thereafter struck out associated proceedings against both the Bank and Stephen Tennant of Grant Thornton who had been appointed by the Bank as receiver on 15th August, 2013 on foot of the powers contained in its security.

5. What gave rise to the present proceedings followed the making by Ms. Scanlan of a data protection access request to Grant Thornton on 15th September, 2015 and the furnishing by Grant Thornton to her of a compact disc ("the CD") containing certain information and data pertaining to her, but also what is accepted to have been confidential and personal data relating to third unconnected parties, and confidential proprietary information belonging to Grant Thornton. For the purposes of the proceedings and this judgment, that data not pertinent to Ms. Scanlan will be referred to as the "confidential information".

6. Ms. Scanlan refused the request made by Grant Thornton to return the confidential information and her refusal led to the institution of these proceedings on 27th November, 2015, in which injunctive relief was sought requiring her to deliver up all data comprising the confidential information and restraining her from disseminating, communicating, or otherwise making use of that data. The proceedings also sought damages for breach of confidence, misuse of private information, breach of privacy, and breach of statutory duty. Ms. Scanlan accepts, and had accepted for some time before the proceedings were instituted, that she did send some documents forming part of the confidential information to third parties, and she asserts that she was, and remains, under a legal obligation to do so and to inform the affected parties that she has the information and the manner in which it was disclosed to her.

7. On 27th November, 2015, Grant Thornton obtained interim injunctive relief against Ms. Scanlan. When the matter came on for hearing at interlocutory stage on 4th December, 2015, Ms. Scanlan consented to an order restraining her from making use of the confidential information or any part thereof pending the determination of the proceedings, and to an order to deliver up all documents and records comprising the confidential information and an order to destroy, erase, and delete any of the confidential information remaining in her possession".

8. Ms. Scanlan now describes that order as a "gagging order" but she did hand over to Grant Thornton's legal advisors the CD and two USB sticks on which she had uploaded the information.

9. The order of 4th December, 2015 was not appealed.

10. Thereafter, Ms. Scanlan refused a request by the solicitors acting for Grant Thornton that the interlocutory orders be made permanent and the matter has proceeded to the point that a defence and counterclaim was delivered by her on 30th June, 2016."

7. In respect of the pleadings the plenary summons issued on 27th November 2015, the Statement of Claim was delivered on 23rd February 2016, the defence and counterclaim on 3rd June 2016. This is the pleading which formed part of the hearing before Gilligan J. on 18th May 2007. He delivered judgment on 27th July 2017 [2017] IEHC 648. The

judgment of Baker J. referred to and quoted (in part) above was the defendant's unsuccessful appeal against that judgment.

8. Pursuant to the directions and Order of Gilligan J., what I am going to describe as a revised defence and counterclaim was delivered on 20th December, 2017.

9. Thereafter, the procedural journey of this application would appear to be as follows:-

   (a) In addition to the appeal from the judgment of Gilligan J., Ms. Scanlan issued two interlocutory applications before the Court of Appeal seeking, initially, a stay on the order of Gilligan J. of July, 2017. That application was refused by the Court of Appeal in November, 2017.

   (b) Thereafter Ms. Scanlan brought a motion, including a number of reliefs seeking again that orders and determinations by Gilligan J. be set aside. Those reliefs were refused in their entirety with the then President, Ryan J., describing the application as misconceived.

   (c) Ms. Scanlan then issued a motion before the High Court on 26th January, 2018 seeking to strike out the plaintiff's claim on the grounds that it failed to disclose a cause of action and/or pursuant to RSC O. 19, r. 28. The motion was heard before Stewart J. on 12th April, 2018. The reliefs sought were refused.

   (d) A hearing date for the proceedings was sought thereafter and fixed for 4th October, 2018.

   (e) Thereafter, Ms. Scanlan issued a voluntary discovery request seeking 74 categories of documents. Upon a refusal to make voluntary discovery by the plaintiff, the defendant issued a motion.

   (f) Pursuant to the order of Gilligan J. a revised defence and counterclaim was delivered by the defendant on 20th December 2017.

   (g) In essence, the difficulty was that, by that time, there was no judge available to hear the discovery motion in late July, 2018, it was deemed a matter unsuitable to heard within the summer long vacation list.

   (h) Therefore, in October, 2018, both the hearing and the discovery application came before Ní Raifeartaigh J. At that time complaint was also made by the plaintiff in respect of the amended defence and counterclaim.

10. The hearing did not proceed on the 4th October, 2018. Ní Raifeartaigh J. however considered the matter in some detail and in a document entitled 'Ruling' issued a very careful and considered written review of the position and how it might be managed thereafter. She proposed, in the first instance, that a timetable be fixed in the preparation of the ultimate trial of this matter by:-

(a) A motion to be issued by the plaintiff in respect of its allegations with regard to the deletion of certain paragraphs of the revised/amended defence and counterclaim.

(b) The timetable was then fixed for filing motion papers and legal submissions in respect of the above and a date fixed for its hearing. This motion described as a "scope of defence" application / issue comes before this Court today.

(c) Thereafter, it was envisaged that the court would give directions as to how the discovery motion might be dealt with, in light of matters that might arise within the scope of defence application. This does not concern the court today.

(d) It was also suggested that an issue paper might be prepared upon the close of pleadings in this case.

(e) Thereafter, it was envisaged that the case could proceed to a trial date. The court suggested (without it being binding upon any party) that the case might proceed in what appears to be some modular form but that is not a matter that concerns this Court today.

Ní Raifeartaigh J. concluded as follows:-

> "The situation in this case is unfortunate, particularly in terms of the costs that have presumably been incurred because the trial date was not vacated. I note that the plaintiff made it clear in court yesterday that their claim is now a very narrow one and the defendant could easily avoid a hearing on it if she were to agree to the injunctive relief sought, because they are no longer pursuing their claim in damages. I enquired of the defendant yesterday what her position was in this regard and she was emphatic that she wished to oppose the injunctive relief sought. It is her entitlement to litigate this issue but, as I am sure she is aware, if the reliefs are ultimately granted, there will be cost implications down the road. I think it is important to place on record at this point in time the narrowness of the reliefs now sought by the plaintiff (including the abandonment of their claim for damages) and the fact that the defendant has refused to consent to permanent injunctive relief at this point in time.
>
> I also hope that by setting out a timetable as described above, future decisions on cost will be facilitated insofar as the costs of different aspects of this case will be transparent.
>
> If the parties are agreeable, I will retain seisin of the case to trial, hopefully within this legal term".

11. The intention of Ní Raifeartaigh J. to retain seisin of the case to trial, did not, in the events that have happened, occur.

12. What appears to have happened thereafter is that the defendant Ms. Scanlan then issued two further motions; one being described as the "jurisdiction motion" and what appears

to have been an *ex parte* application before the President of the High Court seeking an interim injunction requiring, ordering or directing the jurisdiction motion to be heard first (presumably in advance of the scope of defence motion). Ultimately the scope of defence and jurisdiction motions both come before this court.

13. Therefore, before this court, two motions require adjudication; the jurisdiction motion issued by the defendant Ms. Scanlan and the scope of defence motion. As counsel for the plaintiff raised no objection to the defendant's motion proceeding initially then any reliefs sought as to the order of the hearing of these motions is now moot.

The Jurisdiction motion

14. The defendant's motion seeks:-

> "1. An order pursuant to RSC O. 25, r. 1 and r. 2 determining the defendant's fundamental right to be heard in the first instance in the jurisdiction of the Data Commissioner regarding the plaintiff's claim for breach of the Data Protection Act, 1988 and 2003 and damages as claimed under s. 7 of the Acts.
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> 2. An order pursuant to RSC O. 25, r. 1 and r. 2 determining the plaintiff had no *locus standi* or statutory authority over the disclosed private data to take legal proceedings in the High Court or any court.
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> 3. An order pursuant to the inherent jurisdiction of the High Court to have the within motion heard prior to any other listed motions.
>
> AND should the first and second reliefs be awarded
>
> 4. An order pursuant to RSC Order 25, rules 1 and 2 determining the legitimacy and the enforceability of the court order awarded to the plaintiff on the 4th December, 2015.
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> 5. An order pursuant to RSC Order 25, rules 1 and 2 determining the defendant's fundamental right under Article 41 of the EU Convention of Fundamental Rights to correct and good administration regarding the issue of jurisdiction and *locus standi* regarding the plaintiffs' claim in light of Article 28 of EU Directive 95/46/EC regarding lawful authority as bestowed on the Data Commission as State authority to hear those matters.
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> 6. An order pursuant to RSC Order 25, rules 1 and 2 for a determination regarding the defendant's fundamental and constitutional right to be treated in fairly and equally in law, set out by Article 40 of the Irish Constitution.
>
> 7. An order pursuant to RSC Order 25, rules 1 and 2 to remit any matters of breaches of the Data Protection Acts, 1988 and 2003 to the correct jurisdiction of the Data Commission for immediate section 10 legal determination as provided by EU Directive 95/46/EC and on which the Data Protection Acts, 1988 and 2003 are based.

AND/OR IN THE ALTERNATIVE

8. An order to refer above matters for legal clarification and determination from the High Court of Ireland to the European Court of Fundamental and Human Rights.

Any further order by this Honourable Court."

15. The reliefs at 4 to 7 (and possibly 8) above, I interpret as requiring adjudication only if the first two reliefs are granted by the court. Relief 3 is now moot as the plaintiff stated that they had no objection to this motion being adjudicated initially.

16. RSC O. 25, r. 1 and r. 2 state as follows:-

"1. Any party shall be entitled to raise by his pleading any point of law, and any point so raised shall be disposed of by the Judge who tries the cause at or after the trial, provided that by consent of the parties, or by order of the Court on the application of either party, the same may be set down for hearing and disposed of at any time before the trial."

"2. If, in the opinion of the Court, the decision of such point of law substantially disposes of the whole action, or of any distinct cause of action, ground of defence, set-off, counterclaim, or reply therein, the Court may thereupon dismiss the action or make such other order therein as may be just."

17. Essentially, RSC O. 25 r. 1 and r. 2 provides for the determination of a point of law as a preliminary issue. One of the principal reasons for directing any trial of a preliminary issue is an endeavour to save time and costs and more effectively dispose of the entire proceedings.

18. In respect of this motion the defendant stated in court that she intended by the terms of her motion, to have the issue within reliefs RSC Orders 1 and 2, adjudicated before this court, as opposed to seeking its determination elsewhere including at the hearing of this matter.

19. The defendant maintains that this plaintiff has no standing or authority to bring these proceedings in the High Court and, accordingly, no jurisdiction to hear and determine the claim, which claim(s) can only be heard before the Data Protection Commissioner ('DPC').

20. As set out above Gilligan J. initially granted interim interlocutory reliefs on 27th November 2015. On 4th December Gilligan J. made final orders in respect of the Notice of Motion seeking injunctive relief issued on 27th November 2015 (the date of the issue of these proceedings). The Order clearly records that the parties had reached agreement and proceeded to make certain orders by consent. I do not think it necessary to recite them here, but the orders made were comprehensive in their terms.

21. By open letter dated 25th February 2016 solicitors for the plaintiff wrote in respect of the Order of 4th December 2015 seeking to resolve these proceedings by requesting that the

defendant agree to making permanent reliefs 1 and 2 in the Order of 4th December, with the other orders to remain in place. Ní Raifeartaigh J. within her ruling, as quoted above, notes the defendant's emphatic insistence that she wished to oppose the application for permanent injunctive relief. The plaintiff's open offer was renewed subsequently, but again declined. That, I understand, remains the position adopted by the respective parties to this litigation.

22. Within the proceedings the defendant has entered an appearance (thereby conclusively accepting the jurisdiction of the court), agreed to consent Orders for interim interlocutory reliefs before Gilligan J., delivered a substantial defence and counterclaim and issued a letter seeking extensive discovery and thereafter a motion. This matter had obtained a trial date. This defendant has consented to the jurisdiction of this court.

23. Relief 1 of the notice of motion seeks initially that there must be some adjudication that the defendant has, what she describes as, a "fundamental right" to be heard initially before the Data Protection Commissioner ('DPC') and more broadly in relief 2 questioning the plaintiff's *locus standi* over the data to enable it to take proceedings at all. She claims a denial of her constitutional rights and pursuant to the ECHR (I presume this is the body referred to) in not being permitted an initial adjudication before that body (DPC).

24. The defendant takes very serious issue with her entitlement to have this matter adjudicated by the DPC. She has previously sought, and the judgment of Gilligan J. deals with, her seeking to have the Data Commissioner joined to these proceedings. In his judgment, Gilligan J. stated as follows:-

> "There is also an application to join the Data Protection Commissioner as a party to the proceedings. It does appear that no cause of action is demonstrated as against the Commissioner and no relief as such is sought against her. It is contended by Mr. Fennelly on behalf of the Data Protection Commissioner that no basis is set out as to why the Data Protection Commissioner should be joined as a party to these proceedings or as a defendant to any proposed counterclaim.
>
> As regards the possibility of the Data Protection Commissioner being given a role as *amicus curiae*, Mr. Fennelly contends on behalf of the Commissioner that it would be wholly inappropriate as she is an independent regulator who acts in a statutory role and there is a pending investigation involving the parties to these proceedings ongoing at this very point in time in respect of which once a finding is made an appeal can be taking to the Circuit Court and thence by way of a point of law to the High Court. It also appears from Mr. Fennelly's submissions to the Court that there is engagement between the parties in relation to the complaint before the Data Protection Commission with a view to ascertaining if it would be possible to reach a resolution of the issues prior to formal enforcement action.
>
> In all of these circumstances it does not appear to this Court to be appropriate that the Data Protection Commissioner should be involved in any way either as a party

or as an *amicus curia*. Accordingly, the application to join the Data Protection Commissioner in some way to these proceedings is declined".

25. The appeal was in respect of the entirety of Gilligan J.'s judgment in July 2017, which includes the application to strike out portions of the defendant's defence and counterclaim, to which I shall revert.

26. Baker J. makes it very clear that, with regard to the defendant's arguments as to the constitutional injustice suffered by her (she had also sought the joinder of the Attorney General) in the denial of constitutional rights, states as follows:-

> "The data protection rights from the then relevant Data Protection Act 1988, as amended, are rights that vest in all citizens. However, the claims in the present proceedings are private law claims and the fact that what is asserted are rights which belong to all citizens or to a cohort of citizens, does not make the proceedings, in their nature, public law proceedings or those in which the Attorney General has a role.
>
> The arguments are without substance and ought to be dismissed.".

27. The Court of Appeal also dealt with significant allegations of bias alleged by this defendant against the trial judge, a named senior counsel and another named individual.

28. The court then adverted to a motion brought before the Court of Appeal on 17th November, 2017 seeking to "set aside all orders and determination" made by the trial judge (Gilligan J.), which motion was heard by the Court of Appeal and dismissed by Ryan P. (as he then was) in an ex tempore ruling in January, 2018, taking the view that they had no jurisdiction to entertain the motion.

29. After dealing with and dismissing the allegations of bias raised by the defendant, the Court of Appeal then considered the application to join the Data Protection Commissioner ("DPC"). In doing so it quoted from a letter of 26th April, 2016 from the information officer of the DPC to the following effect:-

> "[A] Private individual who receives personal data in error from an organisation, would not be considered a data controller under the Data Protection Acts 1988 and 2003. Therefore, there is no statutory process for individuals on how to handle this information or penalties for failing to be aware of data protection protocol and I can also confirm that it is not referenced in the Acts".

30. The defendant's view is that this position adopted by the DPC is correct. Within her submissions she maintains that the DPC should not and could not be afforded the 'luxury' (as it was described) of not being joined as party and suggests the it a dereliction of the DPC's duty in not being a party.

31. Returning to the judgment of the Court of Appeal, after it made an express finding that the reliefs sought are by way of private law remedy (the injunctive relief sought by the plaintiff and damages by the defendant counterclaimant) the court states:-

> "The appellant has not made any case that would warrant the joinder of the DPC to that action which is a private law action pursuant, *inter alia*, to s. 7 of the Data Protection Act 1988 and is separate and independent of any investigation or enforcement by the DPC against the controller under her statutory powers".

Having considered the case law on the joinder of amicus curiae, the court continued:-

> "It is apparent, from the correspondence from her Office to Ms. Scanlan, that no further engagement by the DPC with Ms. Scanlan is envisaged. In those circumstances, I cannot accept the argument of Ms. Scanlan that the DPC should be joined as a party to the proceedings or be compelled to act to make submissions to the Court as *amicus*.
>
> Counsel for the DPC was permitted to make submissions to the Court in the same manner in which this was done on behalf of the Bank.
>
> The argument made on behalf of the DPC is, in my view, correct. The action here is a private law action by which the controller, or the agent of the controller, to adopt for a moment the characterisation for which Ms. Scanlan contends, has sought the return of certain confidential information disclosed in error to Ms. Scanlan. The cause of action is a private law injunction and damages for negligence and breach of contract...
>
> In the circumstances, it seems to me that no case is made out which would justify the joinder of the DPC to the proceedings, whether as amicus curiae or otherwise. No cause of action has been asserted against the DPC and the trial judge was perfectly correct in that conclusion. That the DPC does not seek to be joined as *amicus* is another factor which must weigh strongly in any consideration of the appeal".

32. Any decision of the Court of Appeal is binding on this Court and the issue of the DPC and its joinder or otherwise to these proceedings has already been aired (and dismissed) before that court. Before this Court, the defendant argued strongly that she disagreed in the strongest possible terms with the judgment of the Court of Appeal and intended to appeal. That of course is her prerogative (assuming she obtains leave to do so). However, it does not under any circumstances afford her an entitlement to seek to reopen or revisit the role of the DPC or to again, by utilisation of an alternative form of words, seek to again argue against the decisions of Gilligan J. and Baker J. Accordingly, to the extent that the defendant's submissions deal extensively as to why the decisions not to join the DPC is incorrect, that is not a matter for this court.

33. The Court of Appeal was satisfied that there was no entitlement in this defendant in having the DPC joined, by way of *amicus curiae* or otherwise. Likewise, I can see no constitutional imperative to suggest that this defendant is entitled to, or that these proceedings must in some way await any adjudication by the DPC, prior to or to the exclusion of this litigation.

34. The reliefs sought against the defendant are clear in their terms. I agree with Baker J. that they constitute private law rights. There is no jurisdiction within the DPC to grant injunctive reliefs of the type sought by the plaintiffs. Section 10 of the Date Protection Act 1998-2003 (the operative legislation at the time), refers to enforcement procedures (and an enforcement notice) not the grant of permanent injunctive reliefs. I have not been referred to any section of legislation which entitles the DPC to grant interlocutory injunctive reliefs (with the possibility of additional court sanction) of the type sought by these plaintiffs. In these proceedings that is the preserve of the High Court and the plaintiff is entitled to seek to avail of its jurisdiction to seek equitable injunctive reliefs against this defendant.

35. The High Court is the court of original jurisdiction, as defined in Article 34 of the Constitution. That in and of itself entitles this plaintiff to issue these proceedings within this jurisdiction. The plaintiff's reliefs are clear and straightforward and raise a valid cause of action. In such circumstances, in my view, there is no impediment in this Court adjudicating those issues.

36. To suggest that any such issues should either preclude this matter from proceeding or be raised by way of initial trial of a preliminary action is, in my view, to seek to revisit issues that have already been litigated and more importantly adjudicated in this matter.

37. The reliefs sought by this defendant way of a trial of a preliminary issue or an invocation of alleged failure to permit her to initially have her matter dealt with by the DPC are rejected in their entirety.

38. Within her submissions the defendant very clearly stated that the DPC did not have the luxury, as she described it of deciding whether she wished to be joined that she had a duty, indeed, a statutory duty to be joined to these proceedings. It is not open to this defendant to seek to re-litigate issues before different judges by simply issuing fresh motions. The issue of the joinder of the DPC to these proceedings has been determined by the Court of Appeal and that judgment binds this court.

39. The defendant believes and takes a considerable amount of time, both within the revised pleading and otherwise in arguing the point as to whether, she is a 'data controller' within the Data Protection Acts 1988-1993. That relief is not sought by these plaintiffs within its Statement of Claim.

40. The defendant has accepted the jurisdiction of this court. There is no basis for the defendant's contention that these proceedings be heard initially before DPC (who cannot grant the reliefs sought in any event). Relief 1 to the defendant's motion is declined. In

respect of Relief 2 the plaintiff has *locus standi* to take the High Court proceedings and this relief is likewise declined. Relief 3 is moot. Reliefs 4 to 7 do not arise. For the avoidance of doubt relief 8 is also declined; no proper basis has been advanced for any reference to the ECHR.

41. For the avoidance of doubt, any trial of these matters by way of preliminary issue on the basis of saving time and costs, is on the facts of this case, likely to result in precisely the opposite outcome and accordingly the reliefs pursuant to RSC Order 25 r. 1 and 2 are, for the reasons set out above, rejected.

42. All of the reliefs within the defendant's motion are declined and I will hear the parties as to any consequential or other orders that may be required, including any as to costs.

Scope of defence motion

43. Within this application, the plaintiffs' seek:-

> "(1) An order pursuant to RSC O. 19, r. 27 and/or the inherent jurisdiction of the court, striking out those paragraphs of the defendant's revised defence and counterclaim delivered on 18th December, 2017 more specifically identified in the submissions exhibited as Exhibit "FOB1" to the affidavit of Fiona O'Beirne sworn on 18th October, 2018 and in particular appendix 3 to those submissions on the grounds that:
>
> (i) Those paragraphs are not in compliance with the judgment and order of this Honourable Court (Gilligan J.) dated 27th July, 2017; and/or
> (ii) The defendant does not have the requisite standing to maintain the claims advanced in those paragraphs; and/or
> (iii) Those paragraphs contain pleas which are unnecessary and/or scandalous and/or which may tend to prejudice, embarrass and delay the trial of the action and/or disclose no reasonable cause of action or answer and/or are frivolous and/or vexatious."

44. Before dealing with the judgment of Gilligan J., it is important to note the terms of his order dated the 27th day of July, 2017. Aside from a timetable for the delivery of pleadings, the court made the following order:-

> "Accordingly and the court being satisfied
>
> **IT IS ORDERED**
>
> A. That the defendant is entitled to deny and traverse the content of the plaintiffs' plenary summons and statement of claim and that is to be done by way of simple denials if they be appropriate.
> B. That the following paragraphs of the defence are allowed to stand as pleaded 35, 44, 53, 54, 103,104, 111, 112, 113, 114, 115, 123, 124, 125, 126, 128, 129, 130, 131, 132, 133, 134, 137, 138, 140, 141, 142, 143, 144, 145, 146,

147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 164, 165 and 167.

C. That the entire of the defendant' counterclaim is not allowed stand save for the singular aspect in respect of a claim pursuant to section 7 of the Data Protection Acts, 1988-2003."

45. Within the counterclaim considered by Gilligan J., at para. 13 there is the following pleading:-

> "The defendant counterclaims against the plaintiff for damages pursuant to section 7 of the Data Processing Acts, 1988 and 2003."

46. The remaining sixteen paragraphs of the counterclaim were deleted by order of the court.

47. In respect of this aspect of the matter, the Court of Appeal stated, under the heading 'Appeal against order striking out parts of counterclaim and defence' the following:-

> "69. No specific ground of appeal is directed to the order of the trial judge that portion of the defence and most of the counterclaim be struck out, although it could be said that Ms Scanlan's argument that the trial judge's orders ought to be set aside on the grounds of objective bias encompasses an appeal against these orders. For the reasons stated above, I do not consider that this ground has any substance.
>
> 70. The appeal of those orders of Gilligan J., insofar as they may be encompassed within the general grounds of appeal pleaded, should, for that reason, be dismissed."

48. Accordingly, the Judgment and Order of Gilligan J. stands in its entirety.

49. In the revised version of this pleading, both the defence and to an even greater extent, the counterclaim, is now pleaded significantly differently and raises wholly new claims which were not previously before the court and certainly not within the pleading subject to adjudication before Gilligan J. This is not an opportunity for the defendant to issue a fresh pleading to once again have it adjudicated by the High Court. At no point has there been any application for the amendment of any pleading.

50. Prior to the adjudication of Gilligan J., the defence ran to 167 paragraphs and her counterclaim to 17 paragraphs. The revised defence and counterclaim delivered on the 18th day of December, 2017, is a shorter document but still substantial.

51. At paragraph 25 of his judgment Gilligan J. states:-

> "The statement of claim in these proceedings only relates to the content of the CD that was furnished in error by Grant Thornton to the defendant and which concerns third parties. The particulars referred to breaches of the Data Protection Act. The central allegation is that the defendant has misused the private and confidential information of the plaintiff and has acted in breach of confidence, in breach of duty and in breach of statutory duty to the unlawful processing of personal data and that

the defendant has failed and/or refused to supply the relevant information to the plaintiff as regards the confidential information that was on the disc and the plaintiff seeks the reliefs as previously referred to. The content of the statement of claim does not go outside this remit".

The court continued:

"Having read and considered the first 34 paragraphs of the defendant's defence it is quite clear that they contain no denial of any matter as pleaded in the plaintiff's plenary summons and statement of claim and are a prolix account of complaint that the defendant wishes to voice".

52. I respectfully endorse the comments of the learned judge in their entirety.

53. In Biehler, McGrath and McGrath, *Delany and McGrath on Civil Procedure*, 4th ed., the function and contents of a defence are considered in the following terms:-

"5.54 The function of the defence is to put the plaintiff on proof of those matters which the defendant requires him to prove and also to set out the defence of the defendant to the proceedings including any setoff or counterclaim he may have.

5.56 The defence must clearly and intelligibly set forth the defendant's defence to the proceedings including any setoff or counterclaim which it is sought to assert. Where appropriate, the defence shall admit matters that the defendant is not in a position to controvert and a blanket traverse of the plaintiff's claim should be avoided. If the defendant seeks to assert several distinct defences and/or counterclaims founded on separate and distinct grounds, they should be stated, so far as possible, separately and distinctly. If the defendant so wishes, he may set up mutually inconsistent defences. A defendant may also raise in his defence any ground of defence which has arisen after the institution of the proceedings. It is not necessary to deny damages claimed or their amount because these are deemed to be put in issue in all cases unless expressly admitted".

The Defence

54. With regard to the defence, the plaintiffs appear to advance their motion on two grounds:-

(a) The judgment of Gilligan J. referred to and set out above. His judgment was upheld on appeal.

(b) Independently they appear to also seek leave of the court to have certain paragraphs struck out on the basis of the defendant's standing and/or that the paragraphs contain pleas which are unnecessary and/or scandalous as set out within the terms of their notice of motion.

55. I appreciate that this defendant represents herself throughout. She presented as an intelligent and capable person. Within her submissions, documentation and affidavits filed

before this and other courts she has expressed very strong views with regard to these matters which have been highlighted above. However, notwithstanding this fact, to which I have had careful regard, this defendant cannot seek, to merely redraft a defence and counterclaim to introduce new points and new issues with regard to her pleading. The matter must be properly and appropriately pleaded in accordance with the Order of Gilligan J.

56. In seeking to assess the pleading, in my view the revised pleading is significantly different from the previous one and there is therefore considerable difficulty in seeking to align or consider the "old" defence and counterclaim, the Order of Gilligan J., its adjudication by the Court of Appeal, and the new/revised/defence and counterclaim.

57. Within her submissions the defendant argued that both the defence and counterclaim should be permitted to remain in their entirety, but did not deal specifically with every paragraph or issue pleaded, but rather made submissions in a global manner.

58. I am using as the document to which I will now make reference, the revised defence and counterclaim delivered on 18th December 2017 within Appendix 3 to the affidavit of Fiona O'Beirne sworn on 18th October 2018 which grounds this application.

59. Appendix 3 contains the deletions contended for by the plaintiff and within their submissions they set out in detail the reasons they advance in respect of each proposed amendments.

60. The references I make will be to Appendix 3, but I do so as if it is presented without deletions. Accordingly, having considered the initial defence and counterclaim delivered on the 30th June 2016, the careful judgment and order of Gilligan J. in respect of it, the judgment of the Court of Appeal, the directions of Ní Raifeartaigh J. regarding the plaintiffs' issuing a motion in respect of the revised defence and counterclaim, the revised defence and counterclaim itself and the submissions made on foot of it, the amendments are as set out below.

61. In respect of this revised pleading, I make the following orders:-

    1. Paragraphs 1-3 to be allowed stand in their entirety.

    2. Paragraphs 4 will be struck out in its entirety – a similar deletion was ordered by Gilligan J. in respect of the initial pleading.

    3. Paragraph 5 will be struck out in its entirety – this does not relate to any matter pleaded within the plaintiffs' statement of claim.

    4. Paragraph 6 to be allowed to stand in its entirety.

    5. Paragraph 7 to be allowed to stand in its entirety.

    6. Paragraph 8 to be allowed to stand in its entirety.

7. Paragraph 9 – the first two sentences of that paragraph to be allowed to stand (up to the phrase "unconnected properties and unconnected parties"). The remainder of the paragraph to be struck out.

8. Paragraph 10 – the pleading is allowed to stand, up to and ending with the sentence (it appears to be the eleventh line of this pleading):

> "The defendant admits they took all appropriate action given the circumstances, even though the defendant is not lawfully required or obliged to do so". The remainder of paragraph 10 to be struck out in its entirety.

9. Paragraph 11 to be allowed to stand in its entirety.

10. Paragraph 12 – the first paragraph and the first sentence of the second paragraph being: "The defendant denies they were under any statutory obligation not to process the confidential information other than in accordance with the Data Protection Acts") are allowed to stand - the remainder of this paragraph to be struck out .

11. Paragraph 13 – the denial of the plea will be permitted but not the submission that follows it. Accordingly, the first two sentences of that paragraph will be allowed to stand ending with the phrase "confidential information" – the remainder of the paragraph to be struck out.

12. Paragraph 14 – this is an extremely long pleading, the bulk of which is not a pleading but a lengthy submission – the particulars accompanying it run to three closely typed pages.

13. In respect of paragraph 14 the portion ending with the phrase: "… within the meaning of the Data Protection Acts and/or be within any context asserted by the plaintiff". – up to that point the pleadings to be allowed to stand. The remainder of the pleading within paragraph 14, prior to the particulars, is to be struck out.

14. With regard to the substantial particulars set out in paragraph 14 these are akin to submissions and do not in large part deal with matters raised in the defence at all. Again, this portion is prolix in the extreme and is largely a submission of her case and within it there is very little attempt to deal with the statement of claim and the matters pleaded within it.

15. However, in respect of the matters set out in the particulars appears to be the third paragraph (the formatting appears a little unusual) I am permitting the following to stand: "the defendant vehemently denies disseminating any information to any other party at any time within the meaning of the Data Protection Act or in any context as purported by the Plaintiff ,down to the phrase 'are lawfully obliged to adequately secure', which comprises the first two sentences of that paragraph – they are allowed to stand, the particulars up to that point and within the remained of that paragraph are to be struck out.

16. With regard to what appears to be paragraph 4, or possibly paragraph 5 (again there is no numbering) I am permitting the following to stand: "The defendant further denied issuing any information to a Mr. William McKeogh at all". – save for these matters the remainder of the particulars to paragraph 14 are to be struck out.

17. *There again (it appears within again within a paragraph 14) there is a further additional heading which again runs to one and a half pages of closely typed text under the heading: "Additional Particulars of breaches of Data Protection Act" – as a general proposition I do not understand their relevance within the defence – again these are submissions by the defendant as to case and are views of the law particularly with regard to the Data Protection Act and her view as to the plaintiff's breaching of it. They bear no relation to any pleading of the plaintiff within its statement of claim and this section is to be stuck out in its entirety.*

18. With regard to paragraph 15 the initial paragraph down to the words "personal data" to be permitted to stand – the remainder of that paragraph to be struck out in its entirety.

19. With regard to paragraph 16 the first sentence to be allowed to stand, the remainder of that paragraph to be struck out - it is simply a submission and does not deal with the statement of claim in any manner at all.

20. The first sentence of paragraph 17 is allowed to stand – the remainder of that paragraph to be deleted in its entirety. Within this as in other matters the defendant is attempting to make a case by way of submission, rather than utilise the defence as a legal pleading. I also note that the claims echo that portion of the defence struck out by Gilligan J. in respect of the original pleading.

21. Paragraphs 18 – 22 are allowed to stand.

22. With regard to paragraph 23, the first two sentences are now moot as damages are now no longer being sought. They can be deleted.

23. After that appears the phrase "particulars of loss and damage" – it appears to be also styled as paragraph 24. I again note that the claims echo that portion of the defence struck out by Gilligan J. in respect of the original pleading - the remainder of this paragraph (comprising paragraph 24 'particulars of loss and damage') is to be struck out in its entirety.

The Counterclaim

62. With regard to the counterclaim, Gilligan J. at para. 59 of his judgment is entirely clear when he states:-

> "There is only one aspect of the proposed counterclaim in my view which is capable of being left to stand and that is the defendant's claim as against the plaintiff for damages pursuant to s. 7 of the Data Processing Act 1988-2003. This claim

however must necessarily arise out of the actual facts of the giving of the disc to the plaintiff with her own information thereon in addition to information relating to third parties with whom the plaintiff has no connection".

63. At para. 61, the court continued:-

> "The entire of the defendant's counterclaim will not be allowed to stand save for a singular aspect in respect of a claim pursuant to s. 7 of the Data Protection Acts, 1988-2003 and, in this regard, the defendant shall succinctly set out the nature of the extent of the claim which he is making and the basis for that claim which is to be particularised in detail".

64. The operative portion of the defendant's counterclaim which, in my view, in accordance with the judgment of Gilligan J., is allowed to stand, is set out at para. 1 which is as follows:-

> "The defendant claims substantial damages pursuant to section 7 of the Data Protection Acts ("the Acts") for the plaintiffs' failure to provide the defendant data access request within the statutory time permitted or within any reasonable time at all, in violation of and contrary to section 4 of the Acts and consequentially in violation of the defendant's fundamental rights as enshrined in Article 8, which concealed material facts from the defendant and had a consequential detrimental effect on the defendant's litigation."

65. Within the revised counterclaim, there is reference to s. 7 of the Data Protection Act but, thereafter, that wording (`damages pursuant to section 7 of the Data Protection Acts ("the Acts") simply appears to be utilised as a device for including other and separate heads of claim within the counterclaim after the formulation of the words set out by Gilligan J. Accordingly I will allow paragraph 1 of the counterclaim to stand, paragraphs 2-8 are to be deleted in their entirety.

66. The matters within the defendant's counterclaim at paras. 9, 10, 11, 12, 13, 14 and 15 do not come within the ambit of the order of Gilligan J. at all. Indeed, they relate to matters specifically prohibited by Gilligan J. within this judgment. Accordingly, they are also to be struck out in their entirety.

67. I will also permit the reliefs sought at paras. 16 and 17 (comprising the usual reliefs of interest pursuant to statute and thereafter, further and other relief and costs).

68. The judgment of Gilligan J. is clear in its terms and the defendant's appeal against it, in respect of any amendment of her defence and counterclaim, was unsuccessful. It is therefore impermissible to seek to expand the counterclaim, not to amend it in the manner very clearly set out by Gilligan J. and affirmed on appeal. It also attempts to introduce new matters that were not pleaded within the original counterclaim.

69. Accordingly, in respect of the defendant's revised/amended counterclaim, the matters set out at paras. 1, 16, 17 and 18 are allowed to stand. The remainder are not and are to be struck out.

70. In my view, the court is now considering a wholly new pleading which is at significant variance with the pleading adjudicated before Gilligan J. and therefore the deletions provided for within his judgment. Gilligan J. has carefully and exhaustively examined the defence and counterclaim; it certainly seems unusual that a second High Court judge is required to undertake a similar exercise with a revised defence and counterclaim which differs significantly from the 'original'.

General

71. In her submissions, the defendant, after dealing with what she perceives as the unfair manner in which the plaintiffs have conducted this litigation denies that the defence and/or counterclaim requires any other amendment. However, the bulk of her comprehensive replying affidavit deals extensively with the actual facts and issues of the litigation itself.

72. It is clear that this defendant, who appeared to have an exceptionally fine grasp of the issues and presented her application in a clear and cogent fashion, nevertheless, does not (and in the circumstances very understandably) understand the role and function of pleadings within the litigation process. By way of example, at para. 16, she avers:-

> "On that basis, I say the plaintiffs abused court process for three years using the High Court to bully this deponent. I was entitled to due process of the normal investigatory powers of the DPC. It appears the jurisdiction of the DPC was not brutal enough for the plaintiffs who sought to make a huge impact on this deponent to frighten them. I am convinced had I been afforded due process and the right to be heard, the DPC would have formally determined this deponent had no statutory duty whatsoever within the meaning of the DPA and I had not behaved unlawfully with private data. I can say this with confidence in light of an email issued by the DPC setting out their position as early into these proceedings as April 20th, 2016….."

This letter is quoted above at paragraph 29 above.

73. With regard to the amendment of pleadings, Ms. Scanlan avers that it is:-

(a) Unjust to expect the deponent to revisit the defence and counterclaim in light of the defendant discovery motion – this matter has now been resolved in that the discovery motion is not as yet before the court. Of course, I note that no discovery motion can proceed until pleadings have closed.

(b) It is unfair for the plaintiff sto seek, to restrict and limit the scope of the defence and they should be compelled to accept what was submitted.

(c) That she is lay litigant, but the plaintiffs have no excuse.

(d) That the plaintiff has not conducted this case properly

(e) That the plaintiff seeks to compel the court or persuade the court to prohibit the defence from addressing the deponent's concerns that came to light as a result of an unlawful disclosure in 2015.

74. She also avers that the plaintiff and its legal advisors through their combined efforts have made her life, and that of her family, a misery.

75. I am satisfied that the amendments that I have ordered to the defence and counterclaim should now enable that pleading to be delivered and the matter to proceed. The original pleading was comprehensively dealt with by Gilligan J., consideration was afforded the revised pleading by Ní Raifeartaigh J. and a motion in respect of the revised pleading now again considered by this court; a situation that, as I have already noted, is unusual to say the least.

76. I am conscious, as are all the parties, that this matter was allocated a trial date in October, 2018. There are still significant interlocutory matters to be dealt with, prior to its ultimate adjudication. That is regrettable.

77. In respect of the scope of defence and jurisdiction motions I will hear the parties as to any consequential or other orders that may be required including any as to costs.