[2024] IEHC 578

THE HIGH COURT

[2021 NO. 5535P]

BETWEEN:

DOMAGOJ OGNJENOVIC

PLAINTIFF

AND

COMMISSION FOR REGULATION OF UTILITIES

DEFENDANT

Judgment of Mr Justice Barry O'Donnell delivered on the 11th of October, 2024

INTRODUCTION

1. This judgment concerns an application by the defendant, the Commission for Regulation of Utilities (*CRU*) to strike out the plaintiff's proceedings, either in part or in whole, pursuant to Order 19, rules 27 and 28 of the Rules of the Superior Courts (*RSC*). The application was brought by a notice of motion dated the 29 November 2023, and was grounded on an affidavit sworn by Tara O'Beirne, sworn on the 29 November 2023. Ms O'Beirne is a manager at the CRU. A replying affidavit was sworn on the 7 February 2024 by Francis Rowan, who is a solicitor acting for the plaintiff. The court has had the benefit of helpful written and oral submissions made on behalf of the parties.

2. The plaintiff is an electrical contractor. As will be explained below, in broad terms the plaintiff's claims arose from a genuine concern that during the period between June 2018 and October 2018 his former employer acted improperly by submitting Completion Certificates regarding electrical installations that purported to have been certified by the plaintiff, when in fact this was not the case. The plaintiff commenced and later settled proceedings against his former employer. In these proceedings, the plaintiff seeks declaratory orders, mandatory relief and damages under multiple headings. The claims are made as against the CRU in its capacity as the statutory body with overall responsibility for the regulation of matters relating to electrical safety.

3. The CRU has now sought to the have the proceedings – or parts of the proceedings - struck out as bound to fail. That application is based on several assertions about the feasibility of the claims made in the pleadings, and also on the basis that many of the claims are properly characterised as public law claims that ought to have been pursued by way of an application for judicial review, and which, in that light, have been brought out of time.

4. For the reasons set out in this judgment I have concluded that a significant number of the plaintiff's claims must be struck out. The decision is grounded in findings, first, that certain reliefs amount to public law claims that the plaintiff could have asserted in an application for judicial review. It was an abuse of the court to claim those reliefs in a manner that significantly bypassed the relevant time limits in the Rules of the Superior Courts, without a proper explanation or excuse. Second, a number of claims for damages were made under different headings. The statement of claim set out no claims that the plaintiff suffered any recognisable loss or damage. In fact, by agreement between the parties, prior to the hearing of the application

the plaintiff further narrowed the claims that he suffered adverse consequences from the asserted breaches of duty to a claim that he suffered non-material damage. As such, the asserted tortious claims (other than claims pursuant to the Data Protection Act 2018) were found to be bound to fail. Third, certain of the heads of damage claimed in the prayer for relief simply were not connected to or grounded in any substantive pleas in the body of the statement of claim.

5. In order to understand the context for this judgment it is necessary to explain the claims made by the plaintiff in his statement of claim and to set out briefly the relevant statutory functions of the CRU.

THE UNDERLYING LEGISLATIVE SCHEME

6. The CRU is a statutory body formerly known as the Commission for Energy Regulation. For the purposes of these proceedings, the Energy (Miscellaneous Provisions) Act 2006 amended the Energy Regulation Act 1999 by the insertion of new sections that conferred functions on the CRU relating to electrical safety and the regulation of electrical contractors.

7. The primary functions with which these proceedings are concerned are found in new sections 9C and 9D of the 1999 Act. In general terms, these provide for the regulation of the activities of electrical contractors with respect to safety. That function is achieved, *inter alia*, by the CRU appointing a person to be a designated body referred to as an Electricity Safety Supervisory Body (*ESSB*). The members of the designated ESSB are described as "*registered electrical contractors*". In addition, the CRU is required to publish criteria relating to (i) electrical safety supervision, (ii) the safety standards to be achieved and maintained by electrical contractors, and (iii) the procedures to be adopted by an ESSB. The criteria are

required to contain "*information*" relating to a series of matters, including according to section 9D(5)(b)(vii) and (x):

> "*(vii) the matters to be covered by a completion certificate in respect of different categories or classes of electrical works and the circumstances in which each such class of certificate shall be used*;" and
>
> "*(x) the procedures to be followed, and the records to be maintained, by a designated body or its members (where appropriate), in connection with subparagraphs (i) to (ix).*"

8. A person cannot be appointed as an ESSB unless the CRU is satisfied that it has the capability and entitlement to carry out a further series of supervisory and review functions in relation to registered electrical contractors. By section 9D (12), where a registered electrical contractor carries out electrical works, the works shall be carried out in accordance with the safety requirements approved by the CRU from time to time.

9. The following matters were not in issue:

a. For the purposes of section 9D(1)(a) of the 1999 Act as amended, the CRU appointed the Register of Electrical Contractors of Ireland (*RECI*) as ESSB for the period 2016 to 2022. RECI, which also operated under the name "*Safe Electric*" and was a separate body from the CRU in terms of legal personality.

b. In April 2016, the CRU published criteria (*the Criteria*) pursuant to section 9D (5) of the 1999 Act, as amended.

c. Under the Criteria each registered electrical contractor is required to employ a suitable number of Qualified Certifiers. These persons are required to be trained

electricians and are permitted to certify electrical works. Each Qualified Certifier has a unique Qualified Certifier Number (*QCN*).

d. Each registered electrical contractor is required to certify any electrical works for which it is responsible. A Qualified Certifier is entitled to certify an electrical installation on behalf of the registered electrical contractor.

e. A certificate must be copied to the customer and a record of the certificate must be maintained by the registered electrical contractor. A copy must also be returned to the ESSB (RECI in this case). Those copies could be filed in hard copy or electronically. A feature of the system that operated until in or about January 2020 was that the electronic filing system did not expressly require details of the name, signature or QCN of the Qualified Certifier.

f. Pursuant to s. 9D(18) of the Act, the CRU is to specify the form for completion certificates, the procedures to be followed and the records to be maintained.

g. Paragraph 1.2.3. of the Criteria requires the CRU to specify the "Core Activities" which RECI was required to undertake. These include:

> *"(iii) Monitoring, Inspection and Audit of electrical contractors registered with the Body;"*
>
> *"(vi) Management of the distribution, sale, recording, control and the validation of Certificates;"* and
>
> *"(ix) Maintaining records of, and reporting on, the activities of the Body."*

h. In addition, according to Common Procedure No.1 in the Criteria, RECI is required to have a written procedure for the validation of completion certificates, which is to confirm that the certificates contain all the requisite information.

i. Common Procedure No.5 of the Criteria makes clear that RECI is obliged to have a checking and validation process for completion certificates.

j. For data protection purposes, the CRU is the "data controller" in respect of personal data relating to its core activities and RECI was a "data processor".

THE UNDERLYING PROCEEDINGS

10. The plaintiff commenced these proceedings by a plenary summons dated the 23 September 2021, and a statement of claim was delivered on the 29 November 2021. The plaintiff's claim as pleaded is lengthy and it was very difficult to connect many of the matters pleaded to the seventeen substantive reliefs that are set out in the prayer for relief. As will be set out below the chronology is important to certain aspects of this application, and the following appears to the court to constitute a short chronology of the material facts, which is unfortunately quite lengthy. The overwhelming majority of the matters set out are extracted from the statement of claim and a small number of matters emerged from Ms O'Beirne's affidavit.

CHRONOLOGY

11. The plaintiff is a qualified electrician who was a registered member of RECI. In June 2018, the plaintiff was employed by a registered electrical contractor, McHugh Electric (*McHugh*). Following his employment, McHugh appears to have obtained a QCN for the plaintiff from RECI. The plaintiff claims that during his period of employment he was not asked to certify any electrical works by McHugh.

1 October 2018: the plaintiff discovered that McHugh had used his QCN to certify an electrical installation that he had not worked on and that he had not inspected.

8 October 2018: by email, the plaintiff informed RECI of the improper use of his QCN. The relevant RECI officer responded on the same day advising that the email was being sent to the Chief Inspector of RECI and that his QCN had been removed from McHugh.

10 October 2018: the plaintiff, through his solicitors, wrote to McHugh requiring them to cease using his QCN and demanding a full list of all works in respect of which his QCN was used.

16 October 2018: McHugh agreed to those requests, but the list of works was not forthcoming.

15 November 2018: the plaintiff's solicitor wrote seeking *inter alia* copies of all data held by McHugh relating to the plaintiff or from which he might be identified directly or indirectly.

28 November 2018: the plaintiff commenced proceedings against McHugh. It appears that interlocutory relief was sought, and the matter was adjourned on a number of occasions.

3 December 2018: the plaintiff submitted a data subject request form to RECI seeking data held by RECI relating to the use of his QCN. That request was followed up by the plaintiff's solicitor on the 21 December 2018.

5 December 2018: McHugh sent the plaintiff a list of properties where the plaintiff's QCN had been used without his knowledge.

24 December 2018: RECI replied stating that only one form was found, and this was provided with some other documentation to the plaintiff, which the plaintiff considered illegible.

3 January 2019: following a further communication from the plaintiff's solicitor, RECI stated that all forms sent by McHugh had been submitted through the electronic portal and those forms did not contain data relating to the plaintiff.

4 January 2019: RECI stated that it was not possible to send more legible versions of the documents that had been sent previously because the documents held by RECI were not originals. However, RECI was satisfied that the documents did not include the plaintiff's data.

28 January 2019: the plaintiff's solicitor contacted RECI. It was stated that the electronic filing system did not seem to accord with the Criteria if there was no provision for a QCN. The solicitor asked RECI to conduct a search of its records relating to all certificates returned to RECI by McHugh since the 12 June 2018 (when the plaintiff commenced employment).

29 January 2019: RECI responded requesting that the plaintiff send on any documents that he had obtained from McHugh and also noting that because the plaintiff's QCN was not on the forms submitted electronically to RECI, the body did not hold personal data relating to the plaintiff for the purposes of the General Data Protection Regulation (*GDPR*), and therefore had no obligation to provide the materials requested.

14 February 2019: the plaintiff's solicitor sent RECI a copy of the list provided to the plaintiff by McHugh in December 2018. The solicitor noted that under

the Criteria RECI had the power to inspect documents held by a registered electrical contractor and requested that RECI inspect all documents held by McHugh containing the plaintiff's QCN. The solicitor reiterated his view that the electronic filing system did not comply with the Criteria.

1 March 2019: the CRU Data Protection Officer wrote to the plaintiff's solicitor. She referred to the correspondence with RECI and noted that RECI acted as data processor for the CRU. The correspondence stated that the CRU had reviewed the prior correspondence. The Data Protection Officer made two main points: first, that the CRU would release records to the plaintiff if they contained personal data relating to him; and second, that the CRU was reviewing the process around the submission of forms through the electronic portal.

1 March 2019: The plaintiff's solicitor replied to the letter from CRU. Among other matters, the letter requested the CRU to cross check the use of the plaintiff's QCN with RECI and demanded that the CRU direct RECI to inspect the completion certificates issued by McHugh. The letter also demanded an explanation why RECI had no record of instances where the plaintiff's QCN was used by McHugh.

30 May 2019: the plaintiff's proceedings against McHugh were struck out by consent following a compromise. This court was not provided with the terms of that compromise. In parallel with pursuing McHugh the plaintiff also made enquiries with RECI and, later, the CRU.

12. In her affidavit Ms O'Beirne stated that the letter of 1 March 2019 was not replied to due to an oversight. She averred that in March 2019 the CRU in fact reviewed the records held by RECI and confirmed that RECI had already provided all relevant documents to the plaintiff. There was no further communication between the parties for the 30 months following 1 March 2019, and it can be noted that the proceedings with McHugh were compromised in or about May 2019.

13. In the January 2020 edition of its newsletter, RECI / Safe Electric published a notice stating that it was now a requirement that details of the relevant Qualified Certifier and their QCN should be recorded in a free text section on the electronic forms.

THE STATEMENT OF CLAIM

14. The proceedings were commenced on the 21 September 2021. The plaintiff makes a number of general complaints about the manner in which the issues that arose were dealt with by the CRU and RECI. He contends at paragraph 48 of his statement of claim that the CRU "*has concealed from the Plaintiff the regularisation of a matter central to the Plaintiff's complaints with the Defendant and with RECI*." In that regard, it appears from paragraph 53 of the statement of claim, that the plaintiff contends that he should be furnished with the copy of a report of an investigation carried out by the RECI Chief Inspector into his complaint about McHugh, as this would contain or relate to his personal data. He states at paragraph 49 that the requirement to have the record of the qualified certifier was always a requirement for electronic filing, notwithstanding the January 2020 notice.

15. At the hearing of this motion, the plaintiff's counsel placed emphasis on the extent of the plaintiff's concerns about what had transpired, and those concerns are expressed in the following way at paragraphs 51 and 52 of the statement of claim:

> "*51. The Plaintiff is extremely concerned to establish the full extent of the use of his QCN to certify electrical installations which he had not inspected or verified. This could result inter alia in him being penalised in the event of an electrical fault arising in any of the premises involved and his reputation and good standing being impugned and it has been and remains a matter of the utmost importance to the Plaintiff …*
>
> *52. The Plaintiff does not know and has not been informed if an investigation was carried out by RECI or by the Defendant and whether any of his personal data has been erased*."

16. Arising from the foregoing, the plaintiff's claims can be reduced to two broad categories of claim: First, that the CRU owed the plaintiff a statutory duty and a duty of care "*to ensure that his Qualified Certifier Number … was used only in relation to electrical installations inspected and certified by him as provided in the Criteria relating to electrical safety supervision*". Second, the CRU has a *"statutory duty arising from the General Data Protection Regulations 2016 and the Data Protection Act 2018 in regard to personal data relating to the Plaintiff held by or accessible by the Defendant*."

17. It must be noted that the data protection aspect of the claim was presented in a very unclear manner. As noted above, it is clearly pleaded that the plaintiff made a data subject access request on the 3 December 2018. That was responded to by RECI. At paragraph 41 of the statement of claim the plaintiff specifically pleads that RECI provided all personal data

held by it relating to him. The claim appears to be that the CRU as data controller is required to provide all data relating to him that McHugh held, even if that data had not been shared with RECI or the CRU. It is asserted that the CRU is under an obligation to procure that data from McHugh and then pass it on to the plaintiff.

18. More detail is provided in relation to the claims of breach of duty, but again there is a lack of clarity in showing how any alleged failure adversely impacted the plaintiff. From paragraphs 54 through to 101 inclusive of the statement of claim, the plaintiff sets out what he asserts to be the statutory functions of, respectively, the CRU, RECI, registered electrical contractors, the Electro Technical Council of Ireland (a now wound-up voluntary body that had a certification role recognised in the Criteria) and qualified certifiers. Those functions related to the certification of electrical works, record keeping, and inspection / audits.

19. The plaintiff claims that arising from those asserted various functions, the CRU breached a statutory duty and common law duty of care owed to him personally. That duty is framed generally in paragraph 102 as amounting to a duty to take steps to identify the use of the plaintiff's QCN during the time he was employed by McHugh. The claim originally was stated in the following way at paragraph 103:

> "*103. The Plaintiff was occasioned upset, distress and anxiety as a result of the failure by the Defendant to safeguard the Plaintiff against the misuse of his QCN, and the failure of the Defendant to identify the improper use of his QCN, and to investigate that improper use and keep the Plaintiff informed. The Plaintiff has a justified concern that in the event of a fire or shock hazard he would be identified by virtue of the misuse of his QCN as the QC who inspected*

and verified the installation. This continues to cause him upset and distress as the Defendant has since October 2018 failed to resolve any of the complaints by the Plaintiff in respect of the misuse of his QCN.

104. The Plaintiff as a Master Electrician in Croatia and an approved QC, is a person of principle who is deeply concerned about the public safety implications arising from the lack of record of verification by QCs in electronic Completion Certificates which have been submitted to RECI for validation."

20. The particularised alleged breaches of duty are set out below in paragraph 104. Eight particulars are given:

"(a) Contrary to the provisions contained in Common Procedure No. 5 of the Criteria, the Defendant … failed in its statutory duty to investigate or properly investigate, the complaint made by the Plaintiff to RECI on 8 October 2018 concerning the improper use of his QCN which entitles him to certify electrical installations.

(b) Failed or refused to advise the Plaintiff of the outcome of an investigation (if any) by Mr John Clare of RECI into the improper use of his QCN, as set out by the Plaintiff in his complaint to RECI made on 8 October 2018.

(c) Failed or refused to investigate or properly investigate the improper use of the Plaintiff's QCN in respect of the list of thirty-one electrical installations which was communicated to RECI on 14 February 2019…

(d) Failed in its statutory duty properly to validate Completion Certificates in respect of electrical installations by permitting a system to pertain whereby

Completion Certificates were validated by RECI without evidence of certification by an identified Qualified Certifier contrary to the safety provisions for the regulation of electrical contractors as expressed in the 1999 Act as amended, and set out in the Criteria.

(e) Failed to ensure that the RECI system of validation of Completion Certificates in accordance with the Criteria, as approved by the Defendant, identified the unauthorised, irregular and improper use of the Plaintiff's QCN by a REC to self-certify electrical installations which had not been inspected or certified by the Plaintiff.

(f) Failed to audit and inspect the records held by a REC in respect of the improper use of the Plaintiff's QCN and to communicate same to the Plaintiff.

(g) Failed to take account of the recommendations by the Electro-Technical Council of Ireland in relation to QCs being identified in Completion Certificates.

(h) Failed, refused and neglected to protect the Plaintiff's right to identify his personal data relating to the improper use of his QCN which the Defendant was aware, or ought to have been aware, was personal data relating to the Plaintiff.

These failures by the Defendant, its servants or agents, are a matter of public importance with regard to the safety of electrical installations."

21. There followed seventeen claims for substantial relief, together with ancillary claims. I will set out the specific reliefs below in the context of the specific arguments made by the CRU.

22. It should be noted that despite the apparent division of responsibility between the CRU and RECI provided for in the legislation and the Criteria, the plaintiff in his written legal submissions made clear that he was not claiming that RECI was in default of its obligations. In addition, the plaintiff volunteered, and the defendant accepted, that the claims should be amended to remove the use of the words "upset", "distress" "worried" and "anxiety" and their replacement by the words "concern" and "concerned". It was agreed that this motion should proceed on that basis. Moreover, the plaintiff clarified that he was not claiming to have suffered any "material loss". Despite the manner in which the plaintiff's case has been pleaded, the plaintiff characterised his case in his written submissions as essentially in the nature of a data protection claim.

THE JURISDICTION TO STRIKE OUT

23. The jurisdiction to strike out claims is now provided for in Order 19, rules 27 and 28 of the RSC, as amended pursuant to SI No. 456 of 2023. The amended text provides as follows:

> "*27. The Court may at any stage of the proceedings order to be struck out or amended any matter in any indorsement or pleading which is unnecessary or which amounts to an abuse of the process of the Court, or which may unreasonably prejudice or delay the fair trial of the action; and may in any such case, if it thinks fit, order the costs of the application to be paid as between solicitor and client.*
>
> *28. (1) The Court may, on an application by motion on notice, strike out any claim or part of a claim which:*
>
> *(i) discloses no reasonable cause of action, or*

(ii) amounts to an abuse of the process of the Court, or

(iii) is bound to fail, or

(iv) has no chance of succeeding.

(2) …

(3) The Court may, in considering an application under sub-rule (1) or (2), have regard to the pleadings and, if appropriate, to evidence in any affidavit filed in support of, or in opposition to, the application."

24. The recent amendments to O.19, r. 28 RSC have the effect of gathering together and, to some extent, clarifying existing principles that were applied by reference to the previous version of O.19, r. 28 of the RSC and the jurisprudence governing applications to strike out claims pursuant to the inherent jurisdiction of the High Court.

25. Those pre-existing principles were very well established, and recently they were helpfully summarised by Dignam J. in *Tucker v. The Property Registration Authority of Ireland* [2024] IEHC 491, where the court considered, *inter alia*, *Barry v Buckley* [1981] IR 306, *Salthill Properties Limited v Royal Bank of Scotland plc* [2009] IEHC 207, *Lopes v Minister for Justice, Equality and Law Reform* [2014] IESC 21, *Keohane v Hynes* [2014] IESC 66, *Clarington Developments Limited v HCC International Insurance Company plc* [2019] IEHC 630, *Kearney v Bank of Scotland* [2020] IECA 92, *Scotchstone Capital Fund Ltd & anor v Ireland & anor* [2022] IECA 23, and *McAndrew v Launceston Property Finance DAC & anor* [2023] IECA 43. Many of those cases were referred to in the written submissions filed by the parties in this case.

26. At paragraph 44 of his judgment in *Tucker*, Dignam J. summarised the main principles as follows, and I gratefully adopt that summary:

> "*44. In summary, the jurisdiction, whether under Order 19 Rule 28 or the Court's inherent jurisdiction, is subject to a number of overarching principles: first, the default position is that proceedings should go to trial and that a person should only be deprived of a trial when it is clear that there is no real risk of injustice; second, it is a jurisdiction to be exercised sparingly, given that it relates to the constitutional right of access to the courts; third, the onus is on the moving party to establish that the pleadings do not disclose a reasonable cause of action or that the case is frivolous or vexatious or bound to fail or that it is an abuse of process, and the threshold to be met is a high one; fourth, the Court must take the plaintiff's claim at its high-water mark; fifth, the Court must be satisfied not just that the plaintiff will not succeed but cannot succeed; and sixth, the Court must be satisfied that the plaintiff's case would not be improved by an appropriate amendment to the pleadings or through the utilisation of pre-trial procedures such as discovery or by the evidence at trial*."

27. Dignam J also referred to the explanation of the difference that then existed between applications under O. 19, r. 28 RSC and the inherent jurisdiction in *Lopes v The Minister for Justice*, where Clarke J. said at paragraph 2.3:

> *"The distinction between the two types of jurisdiction is, therefore, clear. An application under the RSC is designed to deal with a case where, as pleaded, and assuming that the facts, however unlikely that they might appear, are as asserted, the case nonetheless is vexatious. The reason why, as Costello J pointed out at p.308 of his judgment in Barry v Buckley* [1981] IR 306, *an*

inherent jurisdiction exists side by side with that which arises under the RSC is to prevent an abuse of process which would arise if proceedings are brought which are bound to fail even though facts are asserted which, if true, might give rise to a cause of action. If, even on the basis of the facts as pleaded, the case is bound to fail, then it must be vexatious and should be dismissed under the RSC. If, however, it can be established that there is no credible basis for suggesting that the facts are as asserted and that, thus, the proceedings are bound to fail on the merits, then the inherent jurisdiction of the Court to prevent abuse can be invoked."

28. It must be noted that in this case, with some very minor exceptions, there is very little dispute about the core facts. Instead, the CRU has focused on the legal basis for the claims and certain asserted defects in the pleadings whereby it has been asserted that many of the reliefs claimed in the prayer for relief are not grounded in the substantive pleaded case.

29. There is a further line of authority in this area that needs to be emphasised. This relates to the extent to which the court on an application to strike out can take account of documentary evidence. As noted above, in this case there are the facts pleaded by the plaintiff that relate to his interaction with his former employer, RECI and the CRU. However, there is also a reliance on a proposed construction of the Criteria published by the CRU in 2016. The jurisprudence relating to applications under the previous version of O. 19, r. 28 RSC required the court to accept the facts as asserted in the plaintiff's claim. If those facts, accepted as true, ground a cause of action then the proceedings should not be struck out, because they disclose a

potentially viable claim. Where the application is made pursuant to the inherent jurisdiction, there is scope for a limited analysis of the facts.

30. This was explained by Clarke J in *Keohane v Hynes* [2014] IESC 66, where he provided the example of a claim based on a contract. Hence, a plaintiff may assert that a written contract contained certain express terms. In that situation, the court may examine the contractual documentation and form a view that the plaintiff cannot establish the terms in fact are present; see also *Lopes v Minister for Justice, Equality and Law Reform* [2014] IESC 21, at para. 2.6. That situation should be distinguished from situations where the documents do not play a central role in establishing a claim – in the sense that they have a clear or critical legal meaning and effect - but where they merely cast light on the underlying facts – such as correspondence or minutes. As Clarke J put it, at paragraph 3.11, in *Salthill Properties Ltd v. RBS* [2009] IEHC 207:

> *"It is important, in that context, not to confuse cases which are dependent on documents themselves with cases where documents may be a guide, albeit often a most important guide, to the underlying facts which need to be determined in order to resolve the issues between the parties*."

31. The relevant pre-existing principles also were considered in detail by the Court of Appeal in *Scotchstone Capital Fund Ltd. v. Ireland and the Attorney General* [2022] IECA 23. Having addressed the case law relating to applications under the RSC and under the inherent jurisdiction, the Court of Appeal, at paragraph 290, identified the following essential principles:

> "*a) An application for a strike out of a plaintiff's claim on the basis of the inherent jurisdiction is not a substitute for summary disposal of a case;*

b) The jurisdiction exists, not to prevent hardship to a defendant from defending a case, but to prevent against an abuse of process of the court by the plaintiff, e.g. causing a manifest injustice to the defendant in being asked to defend a case which is bound to fail;

c) The burden of proof is on the defendant;

d) There is a degree of overlap between bound to fail jurisprudence and cases which are held to be frivolous and vexatious. However, the latter are cases which may have a reasonable chance of success but would confer no tangible benefit on a plaintiff or are taken for collateral or improper motives or where a plaintiff is seeking to avail of scarce resources of the courts to hear a claim which has no prospect of success;

e) The standard of proof is on the defendant/respondent to show that the claim is bound to fail or frivolous or vexatious;

f) Bound to fail may be described inter alia, as devoid of merit or a claim that clearly cannot succeed;

g) Frivolous and vexatious must be understood in their legal context as claims which are, inter alia, futile, misconceived, hopeless;

h) The threshold for the plaintiff successfully to defend such a motion is not a prima facie case but a stateable case;

i) It is a jurisdiction only to be used sparingly, in clear cut cases and where there is no basis in law or in fact for the case to succeed;

j) The court must accept that the facts as pleaded by the plaintiff in considering whether an Order pursuant to O.19, r. 28 may be made but in the exercise of its

inherent jurisdiction the court can to some extent look at and assess the factual basis of the plaintiff's claim;

k) Where the legal or documentary issues are clear cut it may be safe for a court to reach a conclusion on a motion to dismiss;

l) Even where a plaintiff makes a large number of points, each clearly unstateable, it may be still safe to dismiss; and

m) In some cases, even if the factual disputes are clear cut or may be easily resolved, the legal issues or questions concerning the proper interpretation of documentation may be so complex that they are unsuited to resolution within the confines of a motion to dismiss."

32. It can be seen that while the amended rules operate to mitigate the difficulties with approaching a strike out application by reference to two separate tests, albeit tests that overlapped in significant regards, the essential character of the application remains very similar. The onus to satisfy the court that the orders should be made is a heavy one and rests on the applicant. There is no suggestion that the default position is anything other than that a full trial is the proper vehicle to resolve contested cases, and the jurisdiction to strike out should be used sparingly and only in clear cases.

DISCUSSION

33. The CRU's application approached the different types of claims for relief in different ways. In the first instance, the CRU argued that the applications for declaratory relief at

subparagraphs 1 and 2 in the prayer for relief should be struck out. The orders sought are as follows:

> "*1. A Declaration that Completion Certificates submitted electronically to RECI were not in conformity with the Criteria relating to electrical safety and the regulation of electrical contractors with respect to safety published on 22 April 2016 by the Defendant (then named the Commission for Energy Regulation) pursuant to its statutory obligation under Section 9D(5) of the Electricity Act 1999 as amended by Section 4 of the Energy (Miscellaneous) Provisions Act 2006 by virtue of being unsigned by the Qualified Certifier who inspected the electrical installation concerned.*
>
> *2. A Declaration that Completion Certificates submitted electronically to RECI which did not identify the QC who inspected and certified the electrical installation concerned, either by name or QCN were not in conformity with the Criteria promulgated by Section 9D(5) of the Electricity Regulation Act 1999 as amended by Section 4 of the Energy (Miscellaneous) Provisions Act 2006*."

34. The CRU asserts that the reliefs claimed are in the nature of reliefs that should have been sought by way of judicial review, and as such the proceedings were commenced substantially out of time. The plaintiff responded by asserting that the claims were made in a data protection action. Given a data protection action is a form of tort, he claims that that the proceedings were commenced within the necessary 6 years limitation period.

35. In the first instance, the court cannot accept that what has been sought at reliefs (1) and (2) in the prayer for relief can be characterised as claim for relief of the type provided for in the General Data Protection Regulation 2016 (*GDPR*) or the Data Protection Act 2018 (*the 2018 Act*). Section 117 of the 2018 Act provides for judicial remedies for infringements of "*relevant enactments*". For the purposes of Part 6 of the 2018 Act, those enactments are defined in s. 105(1) as meaning either the GDPR or a provision of the 2018 Act or a regulation under the 2018 Act that "*gives further effect*" to the GDPR. Section 117(1) sets out that:

> "*Subject to subsection (9), and without prejudice to any other remedy available to him or her, including his or her right to lodge a complaint, a data subject may, where he or she considers that his or her rights under a relevant enactment have been infringed as a result of the processing of his or her personal data in a manner that fails to comply with a relevant enactment, bring an action (in this section referred to as a "data protection action") against the controller or processor concerned."*

36. It is true that the data protection action provided for in section 117 of the 2018 Act is deemed to be an action founded on tort, and that damages, declaratory relief and injunctions may be sought. However, the relief that may be claimed does not alter the essential contents of a data protection action: there must be an assertion that rights under the GDPR or 2018 Act have been infringed, and that the infringement is the result of the processing of personal data in a manner that fails to comply with a relevant enactment.

37. Here, the declaration sought at (1) in the prayer for relief is essentially that the electronic forms for Completion Certificates were not in conformity with the Criteria, which in turn were

provided for in statute. That is a general contention to the effect that the manner in which the CRU and / or RECI gave effect to the Criteria was not in accordance with the underlying legislation. Likewise, the declaration at (2) in the prayer for a relief is that, as a general matter, if electronically submitted Completion Certificates did not identify the relevant QC, they were other than as required by statute. These quintessentially are reliefs that could have been sought by way of judicial review.

38. The well-established position in this State is that although judicial review type relief can be sought in a plenary action, that does not absolve the plaintiff from complying with the procedural requirements that attach to an application for judicial review; see, for instance, *O'Donnell v. Dun Laoghaire Corporation* [1991] ILRM 301, *Hosford v Ireland* [2021 IEHC 133], and *Muldoon v. Minister for the Environment* [2023] IECA 61. As Clarke J. explained in *Shell E&P Ireland Ltd v. McGrath* [2013] 1 IR 247, at para. 43:

> "*... it would make a nonsense of the system of judicial review if a party could bypass any obligations which arise in that system (such as time limits and the need to seek leave) simply by issuing plenary proceedings which, in substance, whatever about form, sought the same relief or the same substantive ends."*

39. As noted, these proceedings were commenced in September 2021. The matters that gave rise to the plaintiff's interest in the legality of the manner in which Completion Certificates were submitted occurred by October 2018. Moreover, as appears from the form of relief, the CRU published the Criteria (including the provisions for Completion Certificates) in April 2016. The information that must be included in an electronically submitted Completion Certificate was updated and communicated to the public in January 2020.

40. Order 84, rule 21 RSC makes it clear that an application for leave to apply for judicial review must be made within 3 months from the date when grounds for the application first arose. Hence, even allowing for some generosity by fixing the date for when the grounds first arose in October 2018, these proceedings were commenced almost 31 months after the usual judicial review time period expired.

41. Even then, the court under Order 84, rule 21 may extend the time. However, that must be on the application of the applicant which must be by way of affidavit and which must set out sufficient evidence to satisfy the court that there is good and sufficient reasons for granting the extension and that the circumstances that led to the failure to make the application in time were outside the control of or could not reasonably have been anticipated by the applicant.

42. In this case, despite the fact that the issue had been clearly raised by the CRU in its defence and in this application, the plaintiff did not really engage with the point other than by asserting, erroneously, that the reliefs were part of a data protection action. There was no application for an extension of time. Acknowledging that granting or refusing relief in a judicial review action involves an exercise of the court's discretion, it seems to me that the relief claimed at (1) and (2) in the prayer for relief cannot be characterised as in the nature of a data protection action, and are reliefs alleging illegality that properly could have been brought by way of judicial review. In those premises and there being no application for an extension of time, and no satisfactory explanation for the delay, the court is satisfied that these claims should be struck out on the basis that they amount to an abuse of the process of the court and have no reasonable chance of succeeding.

43. The next aspect of the CRU application concerned the reliefs at (3) and (4) of the prayer for relief. Those reliefs are:

> "*3. A Declaration that the Defendant failed to comply with its statutory duty to oversee that RECI appointed by the Defendant as an Electrical Safety Supervisory Body/'Safe Electric' pursuant to section 9D(1) of the Electricity Regulation Act 1999 as amended by Section 4 of the Energy (Miscellaneous) Provisions Act 2006, keep proper and accurate records of Completion Certificates and associated test records so as to identify the QC who inspected and certified the electrical installations concerned.*
>
> *4. A Declaration that the Defendant failed to comply with its statutory duty to oversee and ensure RECI had proper procedures in place to identify that a Registered Electrical Contractor, namely McHugh Electric (Dublin) Limited, submitted Completion Certificates for validation without including details of the QC who had inspected and certified the electrical installations concerned*."

44. The CRU seeks to have those reliefs struck out on three grounds. First, the asserted statutory duties are not found in the relevant legislation. Second, that properly considered the reliefs concern the lawfulness of the manner in which the CRU complied with statutory obligations to oversee the actions of RECI in that entity's capacity as an ESSB appointed body pursuant to the 1999 Act. This was said to be in the nature of a public law type claim that properly was amenable to judicial review and therefore subject to the requirements, *inter alia*, of Order 84, rule 21. Third, it was argued that there was an illogicality in the plaintiff on the one hand not asserting that RECI had done anything wrong or illegal and on the other hand asserting a failure on the CRU to oversee RECI properly.

45. The plaintiff's response was relatively vague and unclear. In essence, the argument was that the plaintiff considered that there was an arguable basis for asserting that the structure and tenor of the amendments to section 9 of the 1999 Act allowed for an assertion that the CRU owed duties of the type contended for in this action. In written submissions, the plaintiff again asserted that this was not a public law case, or a case where public law remedies were sought, but instead formed part of a data protection action. Given the manner in which the claims for relief are phrased and the thrust of the plaintiff's claim – that the provisions of the 1999 Act as amended by the 2006 Act impose obligations on the CRU *qua* regulator - it cannot be said that these reliefs concern a claim where the plaintiff says that his personal data has been processed in a manner that fails to comply with the GDPR or 2018 Act. Instead, the claims are that the CRU has failed to comply with its obligations under the 1999 in respect of the regulation or overseeing of RECI.

46. I am not satisfied that the plaintiff properly explained how the asserted duties could be found in the relevant provisions. Nevertheless I consider that it would not be prudent in an interlocutory application of this type – divorced from the evidence that could be given at trial to ground the claim – to engage in the level of detailed analysis required to assess whether such statutory duties can be identified and, if so, whether they are owed to individuals such as the plaintiff or to the public at large. I am similarly concerned about engaging with the apparent illogicality of acknowledging an absence of fault on the part of RECI while at the same time asserting faults on the part of the CRU in overseeing RECI.

47. However, I consider that the court can safely form a view on the question of whether this aspect of the claim was in the nature of a public law claim that could have been advanced by way of judicial review. In that regard, I am satisfied that the claims articulated at (3) and (4) of the prayer for relief are essentially public law claims. The prayers for relief are framed as an assertion of general regulatory duties owed under statute by the CRU to oversee the actions of RECI, and that the CRU acted *ultra vires* those statutory functions. I agree with the defendant that the two reliefs could have been sought – and more properly ought to have been sought – by way of an application for leave to apply for judicial review. For the reasons set out above in respect of the reliefs at (1) and (2), I consider that the claims for declaratory relief set out at (3) and (4) in the prayer for relief should be struck out as an abuse of the process of the court and as having no reasonable chance of succeeding, on the grounds that the action was commenced far outside the time period provided for in Order 84, rule 21, and that no application for an extension was made.

48. The CRU next seeks to strike out the relief sought at (5) in the prayer for relief:

> "*5. An Order directing the Defendant itself or as controller to direct RECI to carry out an inspection and audit of the records held by McHugh Electric (Dublin) Limited, a former employer of the Plaintiff from 1 June 2018 to 1 October 2018, to identify all occasions when the plaintiff's QCN was used to certify electrical installations carried out by that company pursuant to the statutory authority of the Defendant and as provided for in the Criteria as authorised by statute*."

49. A number of grounds are set out for impugning this relief. It was said that the relief is premised on a contention that RECI ought to have but did not carry out the inspection and audit required, which is a matter for RECI (a separate body corporate) and not for the CRU. Secondly, as a matter of fact – as explained in the affidavit sworn by Ms O'Beirne – the CRU asserted that in fact RECI carried out inspections and audits of McHugh. The first inspection was in October 2018 and the plaintiff was provided with details of the audit in December 2018; and the second inspection / audit was carried out in March 2019 (to ensure that the relevant installations had been re-certified by another QC). The March 2019 report was exhibited by Ms O'Beirne, despite the fact that it contained none of the plaintiff's personal data. Thirdly, the CRU argued that there were no arguable grounds put forward by the plaintiff to establish the existence of a duty on the CRU to direct RECI to carry out that type of inspection or audit. Finally, the CRU asserted that what was sought by the plaintiff at this relief plainly amounted to a request for an order of mandamus: it was an order compelling a statutory body to exercise what was asserted to be a statutory power to require RECI to take certain steps.

50. The plaintiff responded by contextualising this aspect of the claim in the asserted data protection action. The argument was that the CRU was required to direct RECI to carry out the inspection in its capacity as data controller. The plaintiff located the relevant power to require RECI to carry out the inspection in section 9D(5)(b) of the 1999 Act which it was said required the CRU to make provision in the Criteria for the matters to be included in a Completion Certificate and the records to be maintained by an ESSB and a registered electrical contractor. In addition, it was asserted that RECI's terms of appointment required it to provide the CRU with full cooperation and assistance in relation to any complaint or request made in respect of any data. Strikingly, in his written submissions the plaintiff asserted that the CRU has "*a choice to undertake the inspection itself or to direct its Electrical Safety Supervisory Body to do so*."

That suggests that a discretion, and that the court is being asked to require the statutory regulator to exercise a statutory discretion.

51. This is an application to strike out the proceedings or parts of the proceedings. The court is entitled to consider documentary evidence to ascertain the proper scope of the legal obligations that are set out therein and whether they provide for obligations that support the claims made by a plaintiff. Nevertheless, the court is conscious of the need to make sure that the case made by the plaintiff is bound to fail, rather than weak or unlikely to be successful. Moreover, even in a case where the underlying obligations are located, on the plaintiff's case, in documents or legislation, a full trial may allow for a more comprehensive view to be taken in light of the overall evidence. In those premises, I am not satisfied that it is entirely clear that the CRU is correct that there is no arguable case to be made that the CRU does not have any function or obligation to require RECI to carry out an inspection or audit.

52. I am satisfied that what the plaintiff has sought in the pleaded case is in effect an order of mandamus requiring a statutory regulator to exercise a power that the plaintiff himself asserts originates in underlying statutory structure. If that relief was sought in judicial review proceedings the applicant would be required to comply with the provisions of Order 84. In this case, as explained above in relation to the other reliefs that are judicial review in nature, the proceedings were commenced well outside the three-month period provided for. Again, even if the court adopted an extremely generous approach to the calculation of that time period and found that the event occurred in December 2018 - when the plaintiff was provided with details of the inspection that had occurred in October 2018 - the plaintiff did not commence the

proceedings until September 2021. There was no application for an extension or time and no satisfactory explanation proffered on behalf of the plaintiff for the delay.

53. In those circumstances, I have concluded that this aspect of the claim is an abuse of the process of the court and has no reasonable prospect of succeeding.

54. I will address the application in respect of the reliefs sought at (6) to (9) and at (14) in the prayer for relief below, as these reliefs are rooted in what could be characterised as data protection type claims.

55. The remaining reliefs are as follows:

> "*10. Damages for breach of duty.*
>
> *11. Damages for breach of warranty.*
>
> *12. Damages for breach of statutory duty.*
>
> *13. Damages for misfeasance in public office.*
>
> *15. Damages for the infringement of the Plaintiff's legitimate expectation.*
>
> *16. Damages for infringement of the Plaintiff's constitutional rights.*
>
> *17. Damages for breach of the Plaintiff's rights pursuant to Section 3(2) of the European Convention on Human Rights Act 2003*."

56. The CRU seeks to have the damages claims struck out for a variety of reasons, and certain claims can be disposed of shortly. In the first instance, it can be noted that the statement of claim does not plead that the plaintiff has suffered any adverse consequence or damage as a

result of the acts or omissions that he has asserted. As noted above, the furthest the plaintiff goes is to assert that he was concerned about the overall situation and apprehended that he may suffer some damage in the future if it transpired that he was associated with electrical installations in respect of which his QCN was used in the certification process. However, even in that regard and bearing in mind that the court is concerned with events that occurred between June 2018 and October 2018, the plaintiff did not identify any particular situation where that eventuality was likely.

57. I am not satisfied that at this point in the proceedings the court can make a conclusive finding that the duties of care asserted by the plaintiff simply cannot arise. However, the court is satisfied that the statement of claim fails to disclose an essential ingredient in any claim for negligence: damages. Hence, even if the trial court eventually was persuaded that the defendant owed the plaintiff the asserted duties of care or any of them and found that the duties had been breached, no recognisable loss or damage has been claimed. As noted correctly by the defendant, damage is an essential element of any negligence claim, see for instance, *Kelly v Hennessy* [1995] 3 IR 253, *Larkin v. Dublin County Council* [2008] 1 IR 391, *Hegarty v Mercy University Hospital* [2011] IEHC 435, and *Walter v. Crossan Homes* [2014] 1 IR 76. In those premises, the relief at (10) in the prayer for relief will be struck out for failing to disclose a reasonable cause of action and as having no reasonable chance of succeeding.

58. The claim for damages for breach of warranty must also be struck out. The statement of claim contains no pleading that the parties were in any sense in a contractual relationship and no contract or warranty has been pleaded. In those premises, the prayer for relief at (11)

bears no connection to any pleaded facts in the statement of claim and cannot be permitted to go forward.

59. The absence of any claim of a recognisable loss or damage was also emphasised by the CRU in applying to have the claim for relief at (12) in the prayer for relief struck out. The CRU also sought to rely on an argument that the underlying statutory scheme was established for the benefit of public at large and that a claim for breach of statutory duty did not lie at the suit of an individual litigant. I am not satisfied that the court is in a position to reach a conclusive view that a claim for breach of statutory duty cannot be made in this case or more generally in the context of this statutory scheme. Even though I am very sceptical that a case can be made that the 1999 Act, as amended, imposes duties of the type contended for by the plaintiff, I consider that such a determination is better explored within the framework of a full trial.

60. However, I am satisfied that the failure of the plaintiff to claim that he suffered any loss or damage as a result of the asserted breaches of statutory duty is fatal to the claim. The tort of breach of statutory duty is not actionable per se, see *Collins v FBD Insurance plc* [2013] IEHC 137. Here, even if there was a breach of duty, in the absence of any pleading that the plaintiff suffered a recognisable loss or damage, there is no pleaded tort. Accordingly, the court will strike out the claim at (12) in the prayer for relief as failing to disclose a reasonable cause of action and as having no reasonable chance of succeeding.

61. The claim for damages for misfeasance in public office – which is a relief sought at (13) in the prayer for relief - was the subject of considerable criticism by the defendant. I agree that this claim should not have been made and the relief should be struck out. The ingredients

of a proper claim for damages for misfeasance in public office and what must be pleaded are clear. In *Kennedy v. Law Society (No. 4)* [2005] 3 IR 228, the Supreme Court was clear that the law contemplated two scenarios: first where the public body specifically intended to injure the plaintiff, and, second, where the public body acted in the knowledge that it had no power to do the act complained of, and that the act probably will cause loss to the plaintiff. Each scenario involves an element of bad faith.

62. In the plaintiff's claim there is simply no pleading capable of supporting a claim for damages for misfeasance in public office. Moreover, like any other tort, for the tort to be actionable it is necessary for the plaintiff to plead loss or damage; see for instance, *Watkins v. Home Office* [2006] UKHL 17. As noted above, there is no claim for any recognisable loss or damage. In those premises, the claim for relief at (13) must be struck out for failing to disclose a reasonable cause of action and / or having no reasonable chance of succeeding.

63. Likewise, the court is satisfied that the claim for damages for breach of legitimate expectation at relief (15) must be struck out. Again, this is a claim for relief that does not flow from the pleaded matters in the body of the statement of claim. As noted by the Supreme Court in *Glencar Exploration v Mayo County Council* [2002] 1 IR 84, there are a number of identified ingredients to a claim for breach of legitimate expectation which must be pleaded. It is quite unclear what precise legitimate expectation is being asserted by the plaintiff. Moreover, the plaintiff did not plead that a particular representation was made by the CRU or that he took any steps in reliance on that representation. In the premises the court is satisfied that this claim is bound to fail.

64. The plaintiff also sought damages for breach of his constitutional rights and for breach of his rights pursuant to section 3(2) of the European Convention on Human Rights Act 2003. The difficulty here, as highlighted by the CRU, is that the plaintiff has not identified in the statement of claim any particular constitutional right or rights under the ECHR that he claims were breached. As the prayer for relief does not flow from or bear any connection to facts or claims set out in the statement of claim, the court is satisfied that this claim must be struck out as having no reasonable prospect of success.

65. That leaves the claims that in a very general sense are connected to data protection issues. This aspect of the judgment addresses the reliefs at (6) through to (9) and (14), which are as follows:

> "*6. An Order directing the Defendant to release to the Plaintiff the report or reports that were carried out by the RECI's inspection team in respect of records of McHugh Electric (Dublin) Limited regarding the use of the Plaintiff's QCN pursuant to his rights under Article 15 of the General Data Protection Regulation 2016 and Section 91 of the Data Protection Act 2018.*
>
> *7. A Declaration that the Plaintiff is entitled to have access to all information and data relating to the use of his QCN known to or held by the Defendant as controller or by RECI as processor or to which the Defendant and/or the RECI have access, pursuant to the Plaintiff's rights under Articles 13, 14 and 15 of the General Data Protection Regulation 2016 and Sections 90 and 91 of the Data Protection Act 2018.*
>
> *8. An Order directing the Defendant to have all personal data relating to the use of the Plaintiff's Qualified Certifier Number by McHugh Electric (Dublin)*

limited or by any other electrical contractor known to the Defendant or the Register of Electrical Contractors in Ireland in relation to electrical installations which had not been inspected and certified by the Plaintiff, erased pursuant to the Plaintiff's rights under Article 17 of the General Data Protection Regulations 2016 and Section 92 of the Data Protection Act 2018.

9. Damages for breach of the Plaintiff's rights under the generality of Article 82 of the General Data Protection Regulation 2016 and Sections 117 and 128 of the Data Protection Act 2018, for material and non-material damage.", and

"*14. Damages pursuant to Article 82 of the General Data Protection Regulation 2016 and Sections 117 and 128 of the Data Protection Act 2018*."

66. As noted above, Part 6 of the Data Protection Act 2018 sets out the scheme for the enforcement of data protection rights. Section 117 of the 2018 Act provides for a "*data protection action*". Such an action is predicated on a claim by a data subject that their rights under a relevant enactment have been infringed as a result of the processing of their personal data in a manner that fails to comply with the relevant enactment. A data protection action is deemed to be an action founded on tort. The reliefs that can be granted in a data protection action can be an injunction, a declaration, or compensation for damage suffered as a result of the infringement of the relevant enactment. For the purposes of a compensation claim, the damages can include "*material and non-material damage*".

67. It follows that, unlike other torts, a data protection claim can proceed even where the loss or damage is not ordinarily recognised in tort law, and even non-material damage can form

the basis of the claim. Nonetheless a valid data protection action does require certain features to be present.

68. The claim is made by or on behalf of a "*data subject"* and arises in the context of the processing of that person's "*personal data*". Both of those terms have the meaning provided for in Article 4 of the GDPR:

> "*'personal data' means any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person*".

69. The claim must arise from some *processing* of the data subject's personal data. In that regard, pursuant to Article 4 of the GDPR:

> "'*processing' means any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction".*

70. Finally, for the purposes of this application, the processing must have been carried out in a manner that fails to comply with a relevant enactment and breaches the subject's rights

under a relevant enactment. In that regard, as noted above, a relevant enactment means (a) the GDPR or (b) a provision of the 2018 Act or a regulation made thereunder that gives further effect to the GDPR.

71. Turning to the specific claims made by the plaintiff, the CRU argument was that the remedies sought either are moot in the sense that the CRU and RECI have responded to all requests to provide the plaintiff with his data and / or that the remedies relate to matters that cannot be located in the relevant enactment, i.e., that the CRU or RECI are not entitled to direct access to or the erasure of the plaintiff's personal data which is held by McHugh.

72. The plaintiff contends that as a matter of fact the CRU or RECI have not disclosed all the personal data that has been requested. This is linked to a contention that it may be possible to identify a use of his QCN – which it is argued is a form of personal data in the sense that the plaintiff is identifiable from the QCN – by McHugh on certain certificates.

73. On balance and by reference to the applicable legal principles and although the court has real concerns about the lack of clarity in the manner in which the plaintiff's claim has been pleaded, the court is not satisfied that the CRU argument regarding these claims overcomes the high threshold that must be reached to strike out the claims. It is not appropriate for the court to answer the pleaded facts with the response in Ms O'Beirne's affidavit that all data has been provided. This seems to require a factual adjudication that is better suited to a full trial, and the court cannot find at this point that this is a matter where there is no reasonable chance of the plaintiff succeeding or that he is bound to fail. If the trial court finds in favour of the plaintiff, it cannot be ruled that there may be an award of compensation for non-material damages,

although all of that will have to be a matter for the trial judge. However, this means that the court cannot conclude that the specific damages claim at (14) in the prayer for relief should be struck out.

74. It is possible to identify one significant difficulty with the claims and which will have to be amended by deletion. The plaintiff refers to and relies on at various points to sections 90 to 92 of the 2018 Act. The sections in question are found in Part 5 of the 2018 Act, which is headed "*Processing of Personal Data for Law Enforcement Purposes*". Part 5 operates a regime that differs from the general regime of the Act, and as stated expressly in section 70(1)(a) of the 2018 Act, it applies to the processing of personal data where the processing is carried out for the purposes of "*(i) the prevention, investigation, detection or prosecution of criminal offences, including the safeguarding against, and the prevention of, threats to public security, or (ii) the execution of criminal penalties*". Clearly this case is not concerned with data processing of the type addressed in Part 5 of the 2018 Act. In those premises the pleadings will have to be amended by the removal from the prayer for relief of any references to sections 90, 91 or 92 of the 2018 Act.

CONCLUSION

75. The result is that the court proposes to strike out the reliefs sought at paragraphs (1), (2), (3), (4), (5), (10), (11), (12), (13), (15), (16) and (17). The plaintiff must also delete the references to sections 90, 91 and 92 of the 2018 Act. That course of action is now clearly permitted by O. 19, r. 28 (1), which provides for the striking out of a claim or "*part of a claim*".

76. A final observation is that while the High Court has jurisdiction to deal with this claim even in its markedly reduced scope, the District and Circuit Courts also have jurisdiction. It seems to the court that there is very little justification for incurring costs in a High Court action when the matter could be more appropriately dealt with at a lower jurisdiction. I will invite the parties to consider whether any agreement can be reached on the question of whether the case should be remitted to a lower court. There is currently no application before the court for an order remitting the case, and this is merely an observation. If there is no agreement, then the court cannot make such an order in the absence of an application brought in the usual manner.

77. The court will require the plaintiff to deliver an amended statement of claim with the relevant portions of the prayer for relief struck through. I am not proposing to require the plaintiff to amend the body of the statement of claim as this would produce a practically unreadable document. However, the defendant will of course be entitled to refer to this judgment to make clear to the trial court and any court dealing with any further pre-trial motions what will be the remaining scope of the case.

78. As this judgment is being delivered electronically, I will express the provisional view that because the CRU has succeeded in obtaining orders striking out significant parts of the plaintiff's claim it can be treated as being the successful party. Because the case will have to continue, I propose making a further order staying the effect of that order for costs until the determination of the proceedings. In the event that the parties wish to agitate for a different form of costs order, I direct that this is confirmed in writing to the other party by close of business on the 21 October 2024 and thereafter the parties will exchange short written

submissions on or before the 5 November 2024. I will list the matter before me to deal with the final form of orders at 10.30am on the 12 November 2024.