

THE HIGH COURT

2019 No. 1982 P

BETWEEN

MICHAEL BURKE

PLAINTIFF

– AND –

EIRCOM LIMITED (TRADING AS EIR)

DEFENDANT

JUDGMENT of Mr Justice Max Barrett delivered on 7th May 2020

1. On 8 March 2019, Mr Burke, a litigant in person, commenced the within proceedings against Eir for (i) defamation and (ii) failure to comply with a Freedom of Information (“FOI”) request. The alleged defamation is particularised as follows in the statement of claim: *“Eir defamed me in an email address to ComReg dated 6 March 2015, by intimating that I had called in ‘to make a payment’ when no such payment was due. Eir continues to maintain notations on my file stating that disconnection of services was due to non-payment.”*. By notice of motion of 5 November 2019, Eir seeks, *inter alia*, *“an Order pursuant to O.19, r.28 RSC dismissing the Plaintiff’s claim and/or the Plaintiff’s claim in defamation, against the Defendant on the grounds that it is out of time and statute barred, discloses no reasonable cause of action and/or is frivolous or vexatious and/or is bound to fail.”*. The background to the within proceedings is set out hereafter.
2. It is admitted that Eir disconnected Mr Burke’s services for a short period on or about 5 March 2015. It is further admitted that this should not have occurred. Mr Burke spoke to a servant or agent of Eir on the date of the disconnection, Eir apologised for same, re-connected Mr Burke and applied a goodwill credit to his account. Eir also wrote by letter to Mr Burke on 31 March 2015 regarding a complaint made by Mr Burke to the Commission for Communications Regulation as to how he had been treated, again apologising for what had occurred.
3. Mr Burke was apparently prepared to let matters rest at this time and move on with life. However, in January 2016, he had a further ‘run in’ with Eir regarding a price increase concerning, and charges to, his account. In his dealings with Eir at this time, Mr Burke apparently came to suspect that there were adverse annotations on his customer file regarding why he had been disconnected in March 2015, when Eir had accepted that it was in the wrong as regards same. Sometime around May 2016, Mr Burke asked that the annotations on his account be amended to reflect the truth of what had occurred in March 2015, viz. that the disconnection of service was due to an error on Eir’s part and not due to an arrears and overdue payment on his part. On 16 May 2016, Mr Burke received a letter from Eir stating, *inter alia*, that *“I would like to advise that as per your request I have amended the notes on your account to specify that the disconnection of service was due to an error on our side and was not due to a delayed payment by yourself”*. It is perhaps not immediately clear from the foregoing that this involved supplementing the existing annotations on Mr Burke’s account, not excising any of the previous annotations.

4. Mr Burke also submitted a data access request to Eir in May 2016. Not having received a timely reply to this request, he again contacted Eir in August 2016 and September 2017. Thereafter, having still received no reply to his data access request, Mr Burke made complaint to the Data Protection Commissioner. Soon afterwards, he received, in March 2017, a reply to his request of May 2016. In December 2018, Mr Burke was the beneficiary of a decision by the Data Protection Commissioner who held, unsurprisingly, that Eir had breached the 40-day statutory turnaround time (in s.4 of the Data Protection Acts) for responding to Mr Burke's data access request.
5. The documentation received with the data access request did not fully tally with the documentation that Mr Burke already had to hand – he knew he had received correspondence that did not feature in the documentation received with the data access request – so Mr Burke queried this with Eir. Getting no meaningful reply, he engaged the assistance of a solicitor. Eir initially denied receiving correspondence from this solicitor. However, it has since admitted that it did receive this correspondence and this solicitor's intervention appears, on Mr Burke's account, to have elicited a reply from Eir of 22 May 2019, that included "*copious additional documents and correspondence...[which] should have been included with the response, to my access request, made by Eir on 29th March 2017*".
6. This additional documentation appears to Mr Burke to explain a further adverse experience that he claims to have suffered in July 2017, and which he describes as follows in his reply to Eir's defence:

"On 7th July 2017 I called with a friend, to Currys PC World based in the Airside Estate in Swords to purchase a new mobile phone. The sales assistant informed me that I was entitled to a 'free upgrade' and attempted to complete the transaction. He was barred from completing the transaction as there was a prohibiting notice on file. I immediately went to the Eir store in the Pavilions Shopping Centre where I was again informed that I qualified for a free upgrade. The application was again rejected. Over the following days I was obliged to phone Eir...on a number of occasions, each time being told that there was a reject code 20 – 'legacy account' on file. I also called into the Eir store on four occasions, without success. Eventually, the phone was replaced on 12th July, 2017....[After referring to certain of the details supplied on 29 March 2017 and which refers to on-file annotations that reference 'legacy account' and 'mailbox' issues, Mr Burke moves on to observe that] I believe that the 'legacy account' and 'mailbox' issues mentioned may relate to notations referring to disconnection for non-payment [i.e. the event of March 2015 for which he bears no responsibility].
7. The events of July 2017 do not appear in the statement of claim in the within proceedings (issued in March 2019) because Mr Burke, on his account, appears not to have appreciated that he may have been defamed in July 2017 until he belatedly received the FOI documentation supplied to him in May 2019, by which time the within proceedings

had commenced. Nonetheless, Eir issued a letter of 4 November 2019 to Mr Burke treating with the issues raised, stating, inter alia, as follows:

- "4. *We again reiterate that we have corrected the inaccurate information on our systems [albeit by including a supplementary annotation, not by excising a previous annotation]...With regard to having your information erased, this cannot be done in circumstances where you are still an eir customer...If you wish to have your data erased and/or anonymised as is permitted under GDPR, please note you would first need to move provides and no longer receive services from eir. Should you wish to do that we can then move on to erase and/or anonymise your data so that it is no longer visible on the system and/or attributable to you. We are happy to assist you with this should you decide that this is the course of action that you wish to take. There will be no early cease charges for such a move to another operator and it will achieve the aim you appear to seek; namely that your personal or identifying data is erased and/or anonymised save as required by law.*
5. *Please note that we were in the process of moving from Outlook to Gsuite at the time of drafting our Defence and it appears the initial migration of some data from one system to the other may have failed, without our knowledge. As such, we mistakenly stated at that time that we had not received a letter from your solicitor...which was incorrect. It is now admitted that same was received and that we provided data under a Data Access Request to your solicitor in 2019. We will formally apply to amend our Defence accordingly. As regards what was provided to...[your solicitor] in 2019 and what was provided to you in 2017; given the passage of time the data provided to [your solicitor]...would be more extensive as it would have included data for an additional 2 year period.*
6. *It is entirely incorrect to state that the 'legacy account' and 'mailbox issues' experienced when you tried to upgrade had anything to do with any alleged non-payment in the past. This was a regrettable systems issue with no relation to any alleged non-payment. We note that this issue was resolved and, by your own admission, the phone was replaced 5 days after your initial request. It is admitted that Curry's have limited access to customer data in order to process sales and provide upgrades. It is suggested that you were aware that this was the case given by your attendance at Curry's PC World...on 7 July 2017 to request an upgrade. Please note that Curry's only have access to limited data to allow them [to] action sales and upgrades and do not have access to all customer data."*
8. There are two sides to every story, both sides have been outlined in the foregoing paragraphs, this is not a judgment following on a substantive hearing of the dispute between the parties, and the court has and offers no view on whether Eir has exposed itself to any liability towards Mr Burke in its above-recounted dealings with him. It was necessary to recount the facts in a little detail solely to explain the background to the application now made by Eir and the court's adjudication on same.

9. As mentioned, by notice of motion of 5 November 2019, Eir seeks, *inter alia*, "an Order pursuant to O.19, r.28 RSC dismissing the Plaintiff's claim and/or the Plaintiff's claim in defamation, against the Defendant on the grounds that it is out of time and statute barred, discloses no reasonable cause of action and/or is frivolous or vexatious and/or is bound to fail.". Order 19, Rule 28 of the Rules of the Superior Courts ("RSC") provides that "The Court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just."
10. The statement of claim, as presently worded, indicates Mr Burke's claim to be for damages "as compensation for the defamatory statement made in Eir's mail to ComRef on 6 March 2015 on 6 March 2015 and for failing to comply with a request for release of information under the Data Protection Acts 1988 & 2003". Eir correctly makes the point that an action for defamation alleged to have occurred in 2015 falls hopelessly outside the one + (potential and maximum additional) one-year period for bringing such a claim under s.11 of the Statute of Limitations 1957, as amended by s.38(1)(a) of the Defamation Act 2009. This portion of Mr Burke's claim, having been brought out of time, falls to, and will, be struck out. How Mr Burke might proceed in respect of the alleged defamation in July 2017 is a matter for him separately to decide and is not a matter for adjudication by this Court at this time.
11. Eir contends that Mr Burke's claim against it for breach of its obligations under the Data Protection Acts should likewise be struck out on the basis that "[T]he Plaintiff has already litigated this issue by making a complaint to the Data Protection Commissioner...[which] was subject a determination in December 2018". The court respectfully does not accept Eir's submissions in this regard for the following reasons:
 - (i) the determination of the Data Protection Commissioner can only relate to the complaint that was before her. However, it is clear from Mr Burke's submissions that he means to make complaint in respect of both (a) what went before the Data Protection Commissioner and (b) the treatment of his data access request subsequent to that complaint and up to the date on which the within proceedings were commenced.
 - (ii) as regards the just-mentioned point (i)(a), yes, Mr Burke's complaint to the Data Protection Commissioner has been the subject of a determination favourable to him by the Data Protection Commissioner on 21 December 2018; however, as the Data Protection Commissioner expressly makes clear in that determination, she has no role to play in whether a liability presents under s.7 of the Data Protection Acts and, in truth, what Mr Burke is seeking to claim, armed with the said favourable determination, is that such a liability presents. Mr Burke may be right in this claim, he may be wrong in this claim but the court does not see that he is out of time in making this claim (any breach of statutory duty presenting – negligence is not

alleged – would have occurred after the expiry of 40 days from the date when the data access request was submitted in May 2016 and the within proceedings were commenced in March 2019), nor has his being out of time in this regard even been contended; what has been contended, in effect, is that Mr Burke has exhausted the reliefs available to him in the data protection context, but, with respect, he has not.

- (iii) what has been contended is that having received a favourable determination from the Data Protection Commissioner, Mr Burke has "*litigated*" this matter to an end. Three points might be made in this regard: (i) the process in which Mr Burke has engaged before the Data Protection Commissioner is not adversarial litigation; it is a non-judicial, inquisitorial process contemplated by s.10 of the Data Protection Acts, that sits apart from a suit for breach of statutory duty; (ii) the determination of the Data Protection Commissioner is properly being viewed/used by Mr Burke as a strength to be relied upon in the case he now wishes to bring; (iii) the determination of the Data Protection Commissioner following her inquisitorial consideration of matters does not yield some form of *res judicata* as regards the bringing of an associated claim for breach of statutory duty; although there can no longer be an appeal against the determination of the Data Protection Commissioner to the Circuit Court, there has been no final decision concerning breach of statutory duty which cannot be appealed from; this is because there has never been a decision at all on the issue of breach of statutory duty.
- (iv) as mentioned at (i), the determination of the Data Protection Commissioner in any event can only relate to the complaint that was before her, so it cannot relate to what happened after that complaint. Mr Burke's grievance on the data protection front, it is clear from the pleadings, extends to occurrences that post-date his complaint to the Data Protection Commissioner and pre-date his commencement of the within proceedings.

12. For the reasons identified above, the court declines to strike out Mr Burke's claim insofar as it relates to the Data Protection Acts.