High Court of Ireland Decisions

Judgment

Title:	Savage -v- Data Protection Commissioner & anor
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[2018] IECH 122

THE HIGH COURT

DUBLIN CIRCUIT COUNTY OF DUBLIN

[2016/224CA/239CA]

BETWEEN

MARK SAVAGE

RESPONDENT/ APPELLANT

AND

DATA PROTECTION COMMISSIONER

FIRST APPELLANT/RESPONDENT

AND

GOOGLE IRELAND LIMITED

SECOND APPELLANT/NOTICE PARTY

JUDGMENT of Mr. Justice White delivered on 9th of February, 2018

1. This is an appeal on points of law only from an order of the Circuit Court of 25th October

2016, pursuant to the Data Protection Acts 1998 and 2003.

2. The Circuit Court allowed the appeal of Mark Savage (in this judgment the Respondent) from a ruling of the Respondent the Data Protection Commissioner of 26th March, 2015 (in this judgment referred to as the First Appellant). The Notice Party Google Ireland Ltd has also appealed. (In this judgment referred to as the Second Appellant)

3. The First Appellant appealed by Notice of Appeal of 3rd November, 2016 on the following grounds,

> (i) The Court erred in law in directing the Commissioner to issue an enforcement notice. The Circuit Court has no jurisdiction on an appeal to direct that an enforcement notice be issued by the Commissioner.
>
> (ii) The Court erred in law in directing the Commissioner to issue an enforcement notice to a party that was not a party to the proceedings; namely Google Inc. The Circuit Court has no jurisdiction on an appeal to direct that an enforcement notice be issued by the Commissioner to a person who is not a party to the Circuit Court Appeal, namely Google Inc.
>
> (iii) The court erred in law in its application of the test outlined in *Orange Communications Limited v. Director of Telecommunications Regulations & Anor (No 2)* [2004] 4 I.R. 159 to the Commissioner's decision.
>
> (iv) The court erred in law in its interpretation an application of the decision of the Court of Justice of the European Union delivered on 13th May, 2014, in *Google Spain v. AEPD & Mario Costeja Gonzalez* (Case C-131/12) (the Google Spain Decision).
>
> (v) The court erred in law in holding that the Commissioner made a serous error in her application of the Google Spain decision.
>
> (vi) The court erred in law in finding that the content of the URL title was factual in nature and not an expression of opinion.
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> (vii) The court erred in law in holding that the content of the URL is to be presumed to be a statement of fact in the absence of quotation marks or some other indication expressly identifying it as opinion.
>
> (viii) The court erred in law in evaluating whether the content of the URL title was factual in nature or an expression of opinion without having regard to the contents of the webpages to which the URL directs internet users.
>
> (ix) The court erred in law in circumstances where there was no factual basis for a finding that the content of the URL was inaccurate, excessive or out of date.
>
> (x) The court erred in law in finding that the content of the URL title was inaccurate.
>
> (xi) The court erred in law in its determination that the accurate transposition of a statement of opinion from a posting or thread to a URL title or heading had the effect of elevating such statement of opinion to the status of accurate data.

(xii) The court erred in law in its balancing of the competing interests in play as required by the Google Spain decision. In particular, the court erred in failing to give due or any weight to the necessity to protect freedom of expression.

(xiii) The court erred in law in failing to give due weight or any weight to

- The context in which that information was published (i.e. as part of an online exchange of views in which Mr. Savage himself had participated in an active way, posting three separate entries); and

- more especially, the fact that the expressions of opinion posted to the relevant webpages (including the specific content of the URL title) were clearly prompted by, and connected with, material that had been put into the public domain by Mr. Savage as an integral part of the platform he was presenting to voters in the course of the elections for Fingal County Council.

4. The Second Appellant appealed by Notice of Appeal of 1st November 2016 on the following grounds,

(i) The learned Circuit Court Judge erred in law in determining the appeal of the Data Protection Commissioner's decision made by Mr. Savage (the "Respondent") on the basis that the URL title bore the appearance of a verified fact.

(ii) The learned Circuit Court Judge erred in law in determining that the test of whether data are opinion rather than fact is dependent on whether the data have the appearance of verified fact.

(iii) The learned Circuit Court Judge erred in law in determining that the URL title was a matter of fact rather than an expression of opinion.

(iv) The learned Circuit Court Judge erred in law in determining that the accurate transposition of a statement of opinion from the underlying webpage to the URL title elevated such opinion to the status of apparently accurate data.

(v) The learned Circuit Court Judge erred in law in determining that the URL title was inaccurate data.

(vi) The learned Circuit Court Judge erred in law in determining the fact/opinion status of the URL title in isolation, and the accuracy thereof, without reference to the content of the underlying webpage linked to by that URL.

(vii) The learned Circuit Court Judge erred in law in determining that an expression of opinion was required to be highlighted by the use of quotation marks or parentheses.

(viii) The learned Circuit Court Judge erred in law in her application of the Orange/Nowak test to the Data Protection Commissioner's Decision.

(ix) The learned Circuit Court Judge erred in law in not carrying out an appropriate balancing of interests as required by the Court of Justice of the

European Union in the Costeja case.

The Relevant Legislative Provisions

5. The relevant act is the Data Protection Act 1988, s. 10 deals with the enforcement of data protection and states:-

"(1)

(a) The Commissioner may investigate, or cause to be investigated, whether any of the provisions of this Act have been, are being or are likely to be contravened by a data controller or a data processor in relation to an individual either where the individual complains to him of a contravention of any of those provisions or he is otherwise of opinion that there may be such a contravention.

(b) Where a complaint is made to the Commissioner under paragraph (a) of this subsection, the Commissioner shall—

(i) investigate the complaint or cause it to be investigated, unless he is of opinion that it is frivolous or vexatious, and

(ii) as soon as may be, notify the individual concerned in writing of his decision in relation to the complaint and that the individual may, if aggrieved by his decision, appeal against it to the Court under section 26 of this Act within 21 days from the receipt by him of the notification.

(2) If the Commissioner is of opinion that a person, being a data controller or a data processor, has contravened or is contravening a provision of this Act (other than a provision the contravention of which is an offence), the Commissioner may, by notice in writing (referred to in this Act as an enforcement notice) served on the person, require him to take such steps as are specified in the notice within such time as may be so specified to comply with the provision concerned.

(3) Without prejudice to the generality of subsection (2) of this section, if the Commissioner is of opinion that a data controller has contravened section 2 (1) of this Act, the relevant enforcement notice may require him—

(a) to rectify or erase any of the data concerned, or

(b) to supplement the data with such statement relating to the matters dealt with by them as the Commissioner may approve of; and as respects data that are inaccurate or not kept up to date, if he supplements them as aforesaid, he shall be deemed not to be in contravention of paragraph (b) of the said section 2(1).

(4) An enforcement notice shall—

(a) specify any provision of this Act that, in the opinion of the Commissioner, has been or is being contravened and the reasons for his having formed that opinion, and

(b) subject to subsection (6) of this section, state that the person concerned may appeal to the Court under section 26 of this Act against the requirement specified in the notice within 21 days from the service of the notice on him.

(5) Subject to subsection (6) of this section, the time specified in an enforcement notice for compliance with a requirement specified therein shall not be expressed to expire before the end of the period of 21 days specified in subsection (4)(b) of this section and, if an appeal is brought against the requirement, the requirement need not be complied with and subsection (9) of this section shall not apply in relation thereto, pending the determination or withdrawal of the appeal.

(6) If the Commissioner—

(a) by reason of special circumstances, is of opinion that a requirement specified in an enforcement notice should be complied with urgently, and

(b) includes a statement to that effect in the notice,

subsections (4)(b) and (5) of this section shall not apply in relation to the notice, but the notice shall contain a statement of the effect of the provisions of section 26 (other than subsection (3)) of this Act and shall not require compliance with the requirement before the end of the period of 7 days beginning on the date on which the notice is served.

(7) On compliance by a data controller with a requirement under subsection (3) of this section, he shall, as soon as may be and in any event not more than 40 days after such compliance, notify—

(a) the data subject concerned, and

(b) if such compliance materially modifies the data concerned, any person to whom the data were disclosed during the period beginning 12 months before the date of the service of the enforcement notice concerned and ending immediately before such compliance, of the rectification, erasure or statement concerned.

(8) The Commissioner may cancel an enforcement notice and, if he does so, shall notify in writing the person on whom it was served accordingly.

(9) A person who, without reasonable excuse, fails or refuses to comply with a requirement specified in an enforcement notice shall be guilty of an offence.

6. Section 26 of the Act allows for an appeal to the Circuit Court from a decision of the Data Protection Commissioner and an onward appeal from the Circuit Court to the High Court on a point of law. It states:- Appeals to Circuit Court:-

"(1) An appeal may be made to and heard and determined by the Court against—

(a) a requirement specified in an enforcement notice or an information notice,

(b) a prohibition specified in a prohibition notice,

(c) a refusal by the Commissioner under section 17 of this Act, notified by him under this section and

(d) a decision of the Commissioner in relation to a complaint under section 10(1)(a) of this Act,

and such an appeal shall be brought within 21 days from the service on the person concerned of the relevant notice or, as the case may be, the receipt by such person of the notification of the relevant refusal or decision.

(2) The jurisdiction conferred on the Court by this Act shall be exercised by the judge for the time being assigned to the circuit where the appellant ordinarily resides or carries on any profession, business or occupation or, at the option of the appellant, by a judge of the Court for the time being assigned to the Dublin circuit.

(3)

(a) Subject to paragraph (b) of this subsection, a decision of the Court under this section shall be final.

(b) An appeal may brought to the High Court on a point of law against such a decision; and references in this Act to the determination of an appeal shall be construed as including references to the determination of any such appeal to the High Court and of any appeal from the decision of that Court.

(4) Where—

(a) a person appeals to the Court pursuant to paragraph (a), (b) or (c) of subsection (1) of this section,

(b) the appeal is brought within the period specified in the notice or notification mentioned in paragraph (c) of his subsection, and

(c) the Commissioner has included a statement in the relevant notice or notification to the effect that by reason of special circumstances he is of opinion that the requirement or prohibition specified in the notice should be complied with, or the refusal specified in the notification should take effect, urgently, then, notwithstanding any provision of this Act, if the Court, on application to it in that behalf, so determines, non-compliance by the person with a requirement or prohibition specified in the notice, or, as the case may be, a contravention by him of section 19 of this Act, during the period ending with the determination or withdrawal of the appeal or during such other period as may be determined as aforesaid shall not constitute an offence.

Section 1(2) states:- For the purposes of this Act, data are inaccurate if they are incorrect or misleading as to any matter of fact.

Section 2 of the Act defines the responsibility of a data controller in relation to the processing, keeping, use and disclosure of personal data and it states:-

> "Protection of Privacy of Individuals with regard to Personal Data
>
> Collection, processing, keeping, use and disclosure of personal data
>
> (1) A data controller shall, as respects personal data kept by him, comply with the following provisions:
>
> (a) the data or, as the case may be, the information constituting the data shall have been obtained, and the data shall be processed, fairly,
>
> (b) the data shall be accurate and, where necessary, kept up to date,
>
> (c) the data—
>
> (i) shall be kept only for one or more specified and lawful purposes,
>
> (ii) shall not be used or disclosed in any manner incompatible with that purpose or those purposes,
>
> (iii) shall be adequate, relevant and not excessive in relation to that purpose or those purposes, and
>
> (iv) shall not be kept for longer than is necessary for that purpose or those purposes,
>
> (d) appropriate security measures shall be taken against unauthorised access to, or alteration, disclosure or destruction of, the data and against their accidental loss or destruction.
>
> (2) A data processor shall, as respects personal data processed by him, comply with paragraph (d) of subsection (1) of this section.
>
> (3) Paragraph (a) of the said subsection (1) does not apply to information intended for inclusion in data, or to data, kept for a purpose mentioned in section 5(1)(a) of this Act, in any case in which the application of that paragraph to the data would be likely to prejudice any of the matters mentioned in the said section 5(1)(a).
>
> (4) Paragraph (b) of the said subsection (1) does not apply to back-up data.
>
> (5)
>
> (a) Paragraph (c)(iv) of the said subsection (1) does not apply to personal data kept for historical, statistical or research purposes, and
>
> (b) the data or, as the case may be, the information constituting such

data shall not be regarded for the purposes of paragraph (a) of the said subsection as having been obtained unfairly by reason only that its use for any such purpose was not disclosed when it was obtained,

if the data are not used in such a way that damage or distress is, or is likely to be, caused to any data subject.

(6)

(a) The Minister may, for the purpose of providing additional safeguards in relation to personal data as to racial origin, political opinions, religious or other beliefs, physical or mental health, sexual life or criminal convictions, by regulations amend subsection (1) of this section.

(b) Regulations under this section may make different provision in relation to data of different descriptions.

(c) References in this Act to subsection (1) of this section or to a provision of that subsection shall be construed in accordance with any amendment under this section.

(d) Regulations under this section shall be made only after consultation with any other Minister of the Government who, having regard to his functions, ought, in the opinion of the Minister, to be consulted.

(e) Where it is proposed to make regulations under this section, a draft of the regulations shall be laid before each House of the Oireachtas and the regulations shall not be made until a resolution approving of the draft shall have been passed by each such House.

(7) Where—

(a) personal data are kept for the purpose of direct marketing, and

(b) the data subject concerned requests the data controller in writing to cease using the data for that purpose, the data controller shall, as soon as may be and in any event not more than 40 days after the request has been given or sent to him—

(i) if the data are kept only for the purpose aforesaid, erase the data,

(ii) if the data are kept for that purpose and other purposes, cease using the data for that purpose, and

(iii) notify the data subject in writing accordingly and, where appropriate, inform him of those other purposes.

Recent Developments in the Law

7. A decision of the European Court of Justice has enshrined "the right to be forgotten" into

data protection law. In essence, this development in jurisprudence places a responsibility on search engines who collate and order material on the internet rather than edit it to delete evidence of a search under certain circumstances. The relevant case is *Google Spain SL & Anor v. Agencie Espanola de Proteccion de Datos (AEPD) & Anor* Case C-131/12. I will return to extracts from this judgment.

Background

8. The background to this appeal is the complaint of the Respondent in respect of a search result against his name from a search on the Google website. He contested the local government elections in May 2014 as a candidate in the Swords Ward for Fingal County Council. He had printed and distributed an election leaflet for the election and a small portion of the leaflet stated:-

> "Mark Savage – is an Advocate of FAMILY VALUES and allowing Parents and Children to enjoy the amenity of Donabate beach without witnessing the lewd behaviour of Gay Perverts cavorting in flagrante on the beach in broad daylight as was reported in the media last summer and condemned as DISGUSTING… Mr. Savage is seen here on a fact finding mission to the location and illustrates the kind of detritus left behind by the Gay Perverts. This Hedonistic Integral part of gay "Culture" known as "Cruisin" cannot be allowed to conflate with the Integrity of the Institute of Marriage. In the referendum for MARRIAGE INTEGRITY, it is the fallacy of fools to believe otherwise. This extract was accompanied by a photograph of Mr. Savage wearing a t-shirt on the beach with some material in his hand. The logo on the t-shirt stated 'STOP AIDS NOW'."

9. This provoked a discussion on a website called Reddit.com. It is a discussion website which posts comments on any issue. A contributor to this website called Soupynorman uploaded the election leaflet of the Respondent and attached a heading to it, "North County Dublin's Homophobic Candidate. " The next post had the first sentence "me thinks Mark doth protest too much".

10. The subsequent posts on the site were generally of a coarse nature, some aiming to be good humoured, but certainly the posting of the Respondent's election leaflet provoked quite a number of controversial responses. He participated in this discussion forum at a later date posting three lengthy contributions. In the first, he objected to being labelled as homophobic. He stated in his post:-

> "The attempt to demonise me as a homophobe or closet homosexual is a wearingly predictable tactic of the hysterical homosexual brigade. I think a new adjective needs to be created to give undistorted meaning. In the context of homosexuals they have pushed to have the meaning of the word Phobia to imply Hate, but what phobia really means is Fear. I am neither hateful of homosexuals or afraid of them. What I am is Disgusted by them. Their attempts to erode Marriage Integrity to shore up their deep seated doubts about their disordered lifestyle. I don't think it is unlawful to be Homo-disgusted and it is a more accurate reflection of how I feel. I object to being called a homophobe, no objection to being called 'homodisgusted'. Hate is distinct from disgust…I have the same compassion for homosexuals as I do for heroin addicts and prostitutes who all belong to the same category of being barred for life from ever donating blood by virtue of their destructive lifestyles."

The Respondent made a complaint by email to Google on 31st August, 2014 which stated:-

> "I wish to make a complaint about information Google hold on me. When you type in the Google search bar – mark savage swords or mark savage swords dublin, the search results include in reference to me 'northside's homophobic candidate'. This is from the reddit.com site and details a defamatory statement by a poster. The context of this was regarding my candidacy to be elected a

Councillor to Fingal county council in the recent local elections. The poster objected to an issue I was highlighting in my election leaflet. The issue that I was raising public awareness about was out of concern for public decency and public health risks. It was about gay perverts on Donabate beach walking around without clothes and having sex in broad daylight in front of parents with children present on the beach at the time. I object to being labelled a Homophobe just for relaying facts to the public. The facts are they were gay, they were perverts - public nudity and having gay sex in public is illegal under the sexual offences act. This occurring in daylight in front of children makes it even more offensive. I was highlighting the scandal of this and also the health risk of this behaviour contributing to people becoming infected with HIV through having gay sex with strangers on a beach. I was also equating this behaviour as a reason not to support "gay marriage." My belief and opinion is that supporting gay marriage would legitimise the gay lifestyle a part of which is having sex with strangers in public places such as parks and beaches. To label me a Homophobe because of this is completely inaccurate and defamatory. I include here links to media reports about what I am referring to and also attach a photo of the section in my leaflet that the Reddit.com poster was reacting to."

11. Google responded to the complaint on 21st October, 2014, stating:-

"We note that the data subject, Mark Savage ran for public office as Councillor to Fingal County Council in 2014 elections. The URL http://www.reddit.com/r/ireland/comments/26a486/marksavage north county dublin homophobic/ contains a discussion and criticism of alleged homophobic remarks that Mr. Savage has made.

The criteria used by the CJEU in the Costeja case are based on the wording of Article 7(f) of the Directive, which requires that the legitimate interest pursued by the controller or a third party or parties to whom the data disclosed are overridden by the interest for fundamental rights and freedoms of the data subject which require protection under Article 1.

When a person chooses to willingly run for public office and become an elected representative, the legitimate interest in providing access to information and of the public in being able to search for information which is directly relevant to that candidate's political, economic and cultural stances, as well as any kind of past behaviour or act that may be of relevance to potential voters and constituents' ability to make informed decisions about political candidates vastly outweighs the data subject's right to privacy. In this case, Mr. Savage willingly chose to run for public office and inject himself into the public sphere. Even though he failed to win office, he may run again in the next election, and this information still retains a strong public interest value in identifying the political and cultural positions of past candidates for this office, particularly given its recent date of publication."

12. The Second Appellant in its submissions explained the search result on the Google site. The search result stated as follows:-

"Mark Savage – North county Dublins homophobic candidate. : ireland

http://www.reddit.com/r/ireland/mark_savage_north_county_dublins_homophobic

May 23rd 2014 – Mark Savage North county Dublin's homophobic candidate. Me thinks Mark doth protest too much. I believe he's running in Swords."

13. The submissions state:-

"Every search result has three elements.

(a) The URL title which means Uniform Resource Location. The first blue line of any Search result is the title of the third party webpage Here the URL title is - Mark Savage- North county Dublin's homophobic candidate. The URL title is itself a hypertext link to the reddit.com discussion thread. When an internet user clicks on the URL title, the user is automatically taken to the webpage contained at the Reddit URL. As is apparent from the review of that webpage, the URL title comes from the website itself. It is derived from the discussion thread title. (Mark Savage North County Dublin's homophobic candidate) originally posted by a reddit.com user 'Soupynorman'. It is important to recognise that Google Inc did not author or modify the content of the URL title – it was merely transposed from the webpage."

(b) "The URL link – the second part of the Search result is then in green which is the web address of the webpage. Here the URL link is http://www.reddit.com/r/ireland/comments/26a486/marksavagenorthcountydublinshomophobic/. This is the URL for a reddit.com discussion thread that contains comments about the Respondent's candidacy in the May 2014 elections as detailed in the next paragraph. Reddit.com is a third party website unconnected to Google. It is a popular discussion platform on which internet users debate and exchange views on topical issues. The Reddit URL itself contains the words 'Mark Savage North county Dublin's homophobic candidate'.

(c) "The Snippet Text – Finally below the URL link is grey descriptive text (or a snippet) that helps show how the page relates to the internet user's query. This is completely automated and takes into account both the content of the webpage as well as references to it that appear on the web. Here, the snippet text is 'May 23rd 2014 - Mark Savage North county Dublin's homophobic candidate. Me thinks Mark doth protest too much…I believe he's running in Swords. As is apparent from the review of the Reddit URL webpage the snippet text is comprised of pieces of text that are derived from that webpage which are then reproduced as a snippet in the search result namely:-

(i) the date the discussion thread was posted – 23rd May, 2014;

(ii) the title of the discussion thread (which is the same as the URL title); and

(iii) texts from two comments that were posted by reddit.com users to the discussion thread.

An internet user must click on the URL title in order to be brought to the Reddit URL discussion thread."

Decision of the First Appellant

14. In her ruling of 26th March, 2015, the Data Protection Commissioner stated:-

"In November 2014, the Article 29 Data Protection Working Party which was set up under the Directive 95/46/EC devised a list of common criteria for the handling of complaints by European Data Protection Authorities in the wake of the Judgment of the Court of Justice of the European Union in the case of *Google Spain v. AEPD & Maria Costeja* and these were carefully considered in respect of your complaint and the response to your complaint received from Google. These criteria are available at the following link: http://ec.europa.eu/justice/data-protection/article/29/documentation/opinion-

recommendation/files/2014/wp225en.pdf."

15. The following criteria were considered to be particularly pertinent in relation to your request for de- indexing of the following URL: http://www.reddit.com/r/ireland/comments/26a486/mark_savage_north_county_dublins homophobic:-

> • *Does the data subject play a role in public life? Is the data subject a public figure?* As per the response received from Google, you ran for public office as Councillor to Fingal County Council in the 2014 local elections.
>
> • *Is the data accurate?* Section 2(1)(b) of the Data Protection Acts 1988 & 2003 requires that data shall be accurate. In general 'accurate' means accurate as to a matter of fact and this link remains accurate in that it represents the opinion expressed of you by a user of the relevant forum. As to the quality or otherwise of that opinion that is not a matter for this Office.
>
> • *Is the data relevant and not excessive?* Section 2(1)(c)(iii) of the Data Protection Act 1988 &2003 requires that data shall be adequate, relevant and not excessive. You stated in an email to this Office dated 6th March, 2015, that the discussion content of this URL is relevant to the public interest as you ran for public office.
>
> • *Is it clear that the data reflect an individual's personal opinion or does it appear to be a verified fact?* It is clear that the original poster is expressing his/her opinion.
>
> • *In what context was the information published? Was the content voluntarily made public by the data subject?* The URL is to a particular discussion topic on an on-line discussion forum. The discussion topic relates to the poster's opinion of you based on material disseminated by you to the public during your election campaign in 2014. It must also be noted that you took part in the on-line discussion and posted three separate entries.
>
> I do not consider that the processing of your personal data by Google in the context of the URL http://www.reddit.com/r/ireland/comments/26a486/mar_savage_north_countydublins homophobic/ being indexed in the results for searches conducted on your name is unwarranted by reason of prejudice to your fundamental rights and freedoms or your legitimate interests.
>
> Decision.
>
> This letter should be read as the outcome of the investigation by the Data Protection Commissioner of your complaint against Google Ireland Limited. Following the investigation of your complaint against Google Ireland regarding the refusal to remove the URL. I am unable to conclude that a contravention of the Data Protection Acts 1988 and 2003 took place in this instance."

16. The Respondent appealed this ruling pursuant to s. 26 of the Data Protection Acts 1988 and 2003, to the Circuit Court.

Judgment of the Circuit Court

17. The learned Circuit Court Judge in a written judgment of 11th October, 2016, allowed the Respondents appeal. The relevant extracts of the judgment are as follows:-

"19. The Appellant accepts that the content of the discussion thread under the URL title constitutes freedom of expression and is in the public interest. However, his point as it has been explained to me and as I understand it, is that he denies the stance he took can accurately define him as a homophobe and that the URL asserts this as a fact without any qualification or parenthesis and as a result constitutes inaccurate data appearing as he argues it does as a verified fact.

30. There was no engagement with the central point made by the Appellant that if it was an opinion it should be obvious or made obvious that this was so, as it was presented, it appeared to be a verified fact. He argues that the absence of quotation marks gives it the appearance of a verified fact.

31. If one looks at the criteria laid out by the Working Party for consideration when a DPC is adjudicating on application to de-list data held by a Data Controller on a Data Subject, the fact that a Data Subject might be a public figure, mitigates against de-listing information which might be relevant to that role and the public might have an interest in being aware of this. However, another relevant consideration is whether the data is accurate? It says

'DPAs will be more likely to consider that delisting of a search result is appropriate where there is inaccuracy as to a matter of fact and where this presents an inadequate or misleading impression of an individual.'

33. Mr. Savage contends that title of the URL in issue is a statement of fact, or has the appearance thereof, which is untrue and inaccurate, and set out in his correspondence and affidavit, why this was so. In his submissions he states that he believes he will be disadvantaged or prejudiced by this inaccurate factual assertion being allowed to stand, without qualification or disclaimer in terms of his employment prospects, or other future plans. It is accepted by Mr. Savage that the contents of the discussion thread or forum beneath the URL clearly involves the exchange of views and constitutes the expression of opinions and is not objected to by him.

34. Where there is a dispute about the accuracy of information and that dispute is ongoing, it appears that the DPC may choose not to intervene until the process is complete. In this matter, the Court has been told that the Appellant has issued a number of defamation writs and it is argued that the Appellant has sought to use the Data Protection legislation to support his defamation actions.

35. It is accepted by all parties that while DPA's are generally not empowered and not qualified to deal with information that is likely to constitute slander or libel, the DPA's remain competent to assess whether data protection law has been complied with or not and this, the DPC has sought to do in this instance. This Court considers this application in the context of this Appeal under the Data Protection Acts and expresses no view regarding any defamation proceedings which may be in being."

18. Under the heading "Decision", the court went on to state:-

"44. As such the case law would suggest that this court ought only to interfere with a decision of the DPC where it finds:Â¬

(a) An error of law or

(b) If there is a serious error or a series of errors made by the DPC in

coming to her decision.

45. In reality, this Appeal turns on the consideration of a narrow premise. The DPC in her decision at paragraphs (b) and (d) arrives at a conclusion that the data in question is accurate because:

> *(b) In general' accurate' means accurate as to a matter of fact and this link remains accurate in that it represents the opinion expressed of you by a user of the relevant forum. As to the quality or otherwise of that opinion, that is not a matter for this office.*

And further at para (d) she states:

> *(d) Is it clear that the data reflect an individual's personal opinion or does it appear to be verified fact? - It is clear that the original poster is expressing his/her opinion.*

46. Upon consideration of the above issues, this Court arrives at a conclusion which is to the contrary. This Court takes the view that if one were to simply consider the URL title, and apply the reasoning of the DPC, it is not accurate by virtue of the fact that it is simply not clear, that it is the original poster expressing his or her opinion but rather bears the appearance of a verified fact.

47. It may well be the case that upon further or full consideration of the entire thread, to include the contribution of not alone the original poster but the Applicant also, it would become clear that the original poster is expressing his or her opinion.

48. However, upon the Search Engine returning, on foot of a search for the Applicant, the URL heading "Mark Savage North County Dublin's Homophobic Candidate," without the parenthesis, the position is far from clear that it is the expression of a poster's opinion as found at (b) and (d) above.

49. It is on this narrow basis and this basis alone that I must conclude that the DPC fell into error such as justifies, warrants or indeed mandates the Court's interference.

50. The reasoning or logic as communicated by the DPC leaves open the possibility of elevating a statement of opinion from the body of any such discussion forum to the status of accurate data, by merely accurately transposing the data from the body of the posting or thread to a URL heading, in the absence of any indication that it is actually requoting such a view.

51. If the expression of an opinion is to constitute accurate data in circumstances such as this, one would have expected at a minimum, that it would be carried within quotation marks or parenthesis. This simple step ought properly to have been taken and would have eleviated the present difficulties. In the absence of such an amendment, in its present format I do not believe it constitutes accurate data or communicates that it is "clearly the expression of the opinion of the original poster.

52. In coming to the decision I have, I have had regard to the dicta of O'Donnell J., in *Nowak v DPC* 28/04/2016 and believe that even as a non

expert Court, after scrutiny of the DPC's decision, and consideration of the oral and written submissions, the case and legislation, this Court can detect sufficient errors which justify the decision as set out above. By reason of these, the Court takes the view that the Appellant's fundamental rights and legitimate interests have been prejudiced.

53. I accept that the actual procedures followed by the DPC were appropriate. I accept that the DPC assessed the criteria of the Art 29 Working Group and the reasoning of the Court of Justice in the "*Google Spain*" decision before coming to her decision. However as set out I disagree with the findings she made for the reasons set out.

54. Given the acknowledged ubiquitous nature of the internet and the accessing of it for all types of information, irrespective of whether the Data Subject is a public figure or not, I am of the view that the balance of rights which I have to consider, in the circumstances of this case, falls in favour of the Appellant, notwithstanding the fact that he was a public figure, for the reasons outlined. I am not convinced by the submission that *"any individual user of the internet seeking out facts in relation to any topic is unlikely to consult an online discussion forum such as Reddit as a source of verified facts"* given the manner in which a search engine operates.

55. Therefore I will uphold the Appeal and on the application of Counsel for the Respondent, adjourn the matter to the 25th October, 2016, for mention, to consider the appropriate Order to be made."

The Law

19. The ambit of an appeal pursuant to s. 26 of the Data Protection Acts 1998 and 2003, to the Circuit Court from a ruling of the Data Protection Commissioner was clarified by the Supreme Court judgment of *Peter Nowak v. Data Protection Commissioner*, a judgment delivered by O'Donnell J. on 28th April, 2016. [2016] IESC 18 O'Donnell J. at para. 30 stated:-

> "In my view, in addition to considering the terms of the statute, it is useful to ask why the Oireachtas might have created a right of appeal to a court rather than to a further expert appellate body as occurs, for example, when planning appeals are brought to An Bord PleanÃ¡la, or indeed as occurred in the telecommunications field when, briefly, an expert appeal panel was established. First, it may, no doubt, be that the Oireachtas wished, by designating the court as the appropriate appellate body, to provide a guarantee of independence. It is, of course, possible to establish a body which is, by statute, independent, but by providing for appeal to the court, the legislation invokes, and to some extent, benefits from the constitutional guarantee of independence of the judiciary, and moreover the long history of independence in decision making. Thus, provision for appeal to a court can be seen as an assurance that extraneous considerations, whether national or local, or industry requirements or expectations, or perhaps public controversy, will not affect the decision. In so much as any appeal raises a point of law, then it is natural to expect that a court would determine such issues. Furthermore, however, courts, while perhaps having no expertise in the underlying area, do have considerable experience both in decision making and in review of decision making and reasoning processes. On the other hand, even the greatest admirer of courts might think it unlikely that individual courts could, in the course of a single case, develop the type of technical expertise acquired by, and available to, specialist bodies in a complex area, and in any event, might reasonably doubt that adversarial litigation is the most

effective or cost efficient way of educating a judge on technical issues to the point where he or she could, with confidence, substitute his or her decision on a technical issue for that of the original decision maker. This functional analysis perhaps supports the test identified in *Orange*: a court can be expected to detect errors of law, and may identify serious errors in reasoning or approach. It can be said that if an error is sufficiently clear and serious to be detectable by a non-expert court after scrutiny, then that is justification for overturning the decision, even though the court may lack more specific expertise. In my view, the *Orange* standard is the appropriate standard to apply here. As it happens, I do not believe this issue has much, if any, impact on the substance of Mr Nowak's appeal, since the issue he raises is essentially an issue of law: it involves the application of a legal test to facts which are not significantly in dispute. However, since the matter is of general importance, I would hold that the Circuit Court is not required to allow a full appeal on the merits, or the narrower appeal permitted in Dunne. Instead, the Court should apply the Orange test as outlined above. I would, however, emphasise that the argument here proceeded on the basis that the only options were a Dunne type appeal, or the more limited form of review contemplated in *Orange*. No argument was addressed to the formulation of the test in *Orange*, which may yet arise in an appropriate case."

20. The case referred to is *Orange Communications Limited v. Director of Telecommunications Regulations* [2004] 4 I.R. 159, when in relation to curial deference, Keane C.J. referred with approval to a passage from the decision of the Canadian Supreme Court in *Canada (Director of Investigation and Research) v. Southan Inc* [1997] ISCR at 748, and also to the decision of Kearns J. in M&J Gleeson v. Competition Authority [1999] ILRM 401, in which he was considering the nature of an appeal under the Competition Act 1991, s. 9 and in which the same passage was cited with approval. Keane C.J. stated,

> "Accordingly, while I would approach the case on that basis, it is also clear that the High Court in hearing the appeal must bear in mind that the Oireachtas has entrusted to the first defendant a decision of a nature which requires the deployment of knowledge and expertise available to her, her staff and consultants retained by her, but not available to the court. As it was put by the Canadian Supreme Court in Canada (Director of Investigation and Research) v. Southam Inc. [1997] 1 S.C.R. 748:-
>
> > '… (an) appeal from a decision of an expert tribunal is not exactly like an appeal from a decision of a trial court. Presumably if parliament entrusts a certain matter to a tribunal and not (initially at least) to the courts, it is because the tribunal enjoys some advantage the judges do not. For that reason alone, review of the decision of a tribunal should often be of a standard more deferential than correctness … I conclude that the … standard should be whether the decision of the tribunal is unreasonable. This is to be distinguished from the most deferential standard of review, which requires courts to consider whether a tribunal's decision is patently unreasonable. An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it …'"

21. To the same effect is the decision of Kearns J. in *M. & J. Gleeson v. Competition Authority* [1999] 1 I.L.R.M. 401, where he was considering the nature of an appeal under s. 9 of the Competition Act, 1991 and said at p. 410:-

> "It seems to me clear that the concept of curial deference of necessity takes the court to this further position, namely that the greater the level of expertise and specialised knowledge which a particular tribunal has, the greater the reluctance there should be on the part of the court to substitute its own view for that of the authority. That again is the weighting which was indicated by the court in Canada (Director of Investigation and Research) v. Southam Inc.

[1997] 1 S.C.R. 748.

That means in practical terms that the applicants in order to succeed must establish a significant erroneous inference which was critical to the grant of the licence and which went to the root of that decision rather than an erroneous inference which relates to some detail, even if that detail is relevant."

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

23. In the High Court judgment in *Ulster Bank Investment Funds Limited v. Financial Service Ombudsman*, judgment of the High Court of 1st November, 2006, the then President, Finnegan P. stated in respect of an appeal pursuant to the Central Bank Acts known as the statutory appeal:-

"To succeed on this appeal the Plaintiff must establish as a matter of probability that, taking the adjudicative process as a whole, the decision reached was vitiated by a serious and significant error or a series of such errors. In applying the test the Court will have regard to the degree of expertise and specialist knowledge of the Defendant. The deferential standard is that applied by Keane C.J. in *Orange v The Director of Telecommunications Regulation & Anor* and not that in *The State (Keegan) v Stardust Compensation Tribunal*."

The Judgment in Google Spain SL v. Agencia Espanola de Proteccion de Datos Case C131/12

24. This is an important and determinative judgment and relevant to the issues which this Court has to decide. There are a number of important extracts from the judgment which are relevant and are set out hereunder:-

"81 In the light of the potential seriousness of that interference, it is clear that it cannot be justified by merely the economic interest which the operator of such an engine has in that processing. However, inasmuch as the removal of links from the list of results could, depending on the information at issue, have effects upon the legitimate interest of internet users potentially interested in having access to that information, in situations such as that at issue in the main proceedings a fair balance should be sought in particular between that interest and the data subject's fundamental rights under Articles 7 and 8 of the Charter. Whilst it is true that the data subject's rights protected by those articles also override, as a general rule, that interest of internet users, that balance may however depend, in specific cases, on the nature of the information in question and its sensitivity for the data subject's private life and on the interest of the public in having that information, an interest which may vary, in particular, according to the role played by the data subject in public life."

"92. As regards Article 12(b) of Directive 95/46, the application of which is subject to the condition that the processing of personal data be incompatible with the directive, it should be recalled that, as has been noted in paragraph

72 of the present judgment, such incompatibility may result not only from the fact that such data are inaccurate but, in particular, also from the fact that they are inadequate, irrelevant or excessive in relation to the purposes of the processing, that they are not kept up to date, or that they are kept for longer than is necessary unless they are required to be kept for historical, statistical or scientific purposes."

"93 It follows from those requirements, laid down in Article 6(1)(c) to (e) of Directive 95/46, that even initially lawful processing of accurate data may, in the course of time, become incompatible with the directive where those data are no longer necessary in the light of the purposes for which they were collected or processed. That is so in particular where they appear to be inadequate, irrelevant or no longer relevant, or excessive in relation to those purposes and in the light of the time that has elapsed.

97. As the data subject may, in the light of his fundamental rights under Articles 7 and 8 of the Charter, request that the information in question no longer be made available to the general public by its inclusion in such a list of results, it should be held, as follows in particular from paragraph 81 of the present judgment, that those rights override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in finding that information upon a search relating to the data subject's name. However, that would not be the case if it appeared, for particular reasons, such as the role played by the data subject in public life, that the interference with his fundamental rights is justified by the preponderant interest of the general public in having, on account of inclusion in the list of results, access to the information in question."

"98. As regards a situation such as that at issue in the main proceedings, which concerns the display, in the list of results that the internet user obtains by making a search by means of Google Search on the basis of the data subject's name, of links to pages of the on-line archives of a daily newspaper that contain announcements mentioning the data subject's name and relating to a real-estate auction connected with attachment proceedings for the recovery of social security debts, it should be held that, having regard to the sensitivity for the data subject's private life of the information contained in those announcements and to the fact that its initial publication had taken place 16 years earlier, the data subject establishes a right that that information should no longer be linked to his name by means of such a list. Accordingly, since in the case in point there do not appear to be particular reasons substantiating a preponderant interest of the public in having, in the context of such a search, access to that information, a matter which is, however, for the referring court to establish, the data subject may, by virtue of Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46, require those links to be removed from the list of results."

"Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 are to be interpreted as meaning that, in order to comply with the rights laid down in those provisions and in so far as the conditions laid down by those provisions are in fact satisfied, the operator of a search engine is obliged to remove from the list of results displayed following a search made on the basis of a person's name links to web pages, published by third parties and containing information relating to that person, also in a case where that name or information is not erased beforehand or simultaneously from those web pages, and even, as the case may be, when its publication in itself on

those pages is lawful."

25. The Appellants also rely on *Cornec v. Morrice* [2012] 1 I.R. 804 where Hogan J. stated at para. 65 and 66 as follows:-

> "65. I now turn to the position of Mr. Garde. While Mr. Garde is not a journalist in the strict sense of the term, it is clear that his activities involve the chronicling of the activities of religious cults. Part of the problem here is that the traditional distinction between journalists and laypeople has broken down in recent decades, not least with the rise of social media. It is probably not necessary here to discuss questions such as whether the casual participant on an internet discussion site could invoke *Goodwin v. United Kingdom* (App No. 17488/90 (1996) 22 EHRR 123 style privileges, although the issue may not be altogether far removed from the facts of this case.
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> 66. Yet Mr. Garde's activities fall squarely within the "education of public opinion" envisaged by Article 40.6.1. A person who blogs on an internet site can just as readily constitute an "organ of public opinion" as those which were more familiar in 1937 and which are mentioned (but only as examples) in Article 40.6.1, namely, the radio, the press and the cinema. Since Mr. Garde's activities fall squarely within the education of public opinion, there is a high constitutional value in ensuring that his right to voice these views in relation to the actions of religious cults is protected. It does not require much imagination to accept that critical information in relation to the actions of those bodies would dry up if Mr. Garde could be compelled to reveal this information, whether in the course of litigation or otherwise. It is obvious from the very text of Article 40.6.1 that the right to educate (and influence) public opinion is at the very heart of the rightful liberty of expression. That rightful liberty would be compromised – perhaps even completely jeopardised – if disclosure of sources and discussions with sources could readily be compelled through litigation."

26. The court was also referred to an English decision of *Quinton v. Peirce & Cooper*, judgment of the High Court of Justice, Queen's Bench Division, [2001] EWHC 912, when Eady J. dealing with an allegation of malicious publication was also dealing with an alternative claim of infringements of the principles set out in the schedule to the English Data Protection Act 1998 which is similar to the Irish legislation and at paras. 87 and 88 stated:-

> "87. "I must now turn to the Data Protection Act. I am by no means persuaded that it is necessary or proportionate to interpret the scope of this statute so as to afford a set of parallel remedies when damaging information has been published about someone, but which is neither defamatory nor malicious. Nothing was cited to support such a far ranging proposition, whether from debate in the legislature or from subsequent judicial dicta.
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> 88. Still less am I persuaded that it is necessary or proportionate so to interpret it as to give a power to the court to order someone to publish a correction or apology when the person concerned does not believe he has published anything untrue. Such a scheme could surely only work in respect of factual statements which could be demonstrated uncontroversially and objectively to be false. It cannot be intended to compel publication of an account of a factual scenario which is capable of being understood in different ways if, on one interpretation, it might not be accurate."

27. In distilling the submissions of both Appellants, they submit that the errors of the Circuit Court Judge were as follows:-

> (i) In applying the *Google Spain* judgment she had a duty to consider the underlying text of the Reddit discussion forum and should not have dealt with

the search heading wording in isolation.

(ii) The learned Circuit Court Judge made a fundamental error in identifying opinion as an appearance of fact.

(iii) That the learned Circuit Court Judge did not apply any balancing test as envisaged in the *Google Spain* judgment weighing up the various factors that should have been considered.

(iv) That the learned Circuit Court Judge did not apply properly the test in *Orange Communications*.

(v) That the learned Circuit Court Judge exceeded jurisdiction on an application of *Google Spain* by insisting on the editing of the search engine results when the only remedy available was to delist it and could not give appropriate consideration to the consequences of seeking to have a search engine operator edit underlying articles to which the search engine referred to.

The Respondent's Submissions

28. The Respondent before the statutory appeal commenced on 18th May, 2017, deposed an affidavit on 17th May, 2017, with a number of exhibits. In the course of the hearing he deposed another affidavit on 22nd May, 2017, after two days of hearing on 18th and 19th May and before the final hearing date on 23rd May, 2017. The court accepted the affidavits and exhibits without prejudice to issues in the affidavits to which the Appellants objected to. As the Respondent is a lay litigant, the court will insofar as it can deal with the issues raised in those affidavits. However, the court has to decide the issue on the basis of the circumstances arising at the date of the initial complaint on 31st August, 2014 and the application of the legal principles which apply have to be considered in that context.

29. Because of subsequent decisions by the Second Appellant or its parent company in respect of other matters, the Respondent has submitted that the Second Appellant has particular bias against him because of his religious beliefs which is denied.

30. This Court is dealing with the decision of the First Appellant and is confined to consideration of the legal principles upon which the learned Circuit Court Judge decided the appeal subject to s. 26 of the Act. The Respondent also in his affidavit of 17th May, 2017, purports to appeal aspects of the decision of the learned Circuit Court. That is not permissible as if he wished to appeal any aspect of the matter, he had a responsibility to file and serve a notice of appeal from the order of the Circuit Court within the statutory period.

31. The court accepts that the Respondent may well have posted responses on the Reddit.com site at a much later date than the original discussion thread which occurred around May 2014. However, the extract from his first post which the court has quoted illustrates the difficulty which confronted the learned Circuit Court Judge in determining whether the matter was fact or had the appearance of fact or was the expression of an opinion. This difficulty is readily apparent from the Respondents attempt to explain the difference between homophobic and homo-disgusted. The Respondent refers to alleged bias on the part of the Second Appellant in respect of facilitating a request by another public representative to delist a listed search and also an allegation of particular bias because of the Respondents religious belief. Those matters are irrelevant to the task facing this Court which is to determine if the learned Circuit Court Judge applied the legal principles properly in relation to data protection law.

32. The Respondent also seeks to draw a distinction as to his status pointing out that he was not an elected politician and ran a limited campaign in his local ward for election to Fingal County Council and did not expect to get elected and ultimately only received 125 first

preference votes. He also makes an allegation that the search against his name some times brings out different results and thus alleges that the Second Appellant has modified the data. This court does not consider these issues relevant to its determination.

33. S.I. No. 68/2003, European Communities Directive 2000/31/EC, Regulations 2003 are not relevant to this statutory appeal.

34. The Respondent has made a relevant submission on the Australian Federal Court decision of *Hockey v. Fairfax Media Publications PPY Limited* [2015] FCA 652 which decided that tweets could be considered in isolation and were held to be defamatory.

Decision

35. The learned Circuit Court Judge in applying the jurisprudence of *Google Spain* had a duty to consider the underlying article the subject of the search. The Circuit Court did refer to this matter by indicating that if that Reddit.com discussion was considered, it would become clear that the original post by Soupynorman was an expression of opinion. The learned Circuit Court Judge was incorrect in law to consider the URL heading in isolation.

36. If the court had considered the underlying discussion thread it could not have come to the conclusion that it was inaccurate data and factually incorrect, or an appearance of fact.

37. The learned Circuit Court Judge did not identify any serious breach by the First Appellant of any legal principle. The court's only criticism is at para. 30 where it was alleged that the First Appellant did not engage with the central point made by the Respondent that if it was an opinion it should be obvious and that it appeared as a verified fact. The court concluded on a narrow basis that the First Appellant fell into error as if one were to simply consider the URL title and apply her reasoning, the title was not accurate by virtue of the fact that it was simply not clear that it is the original poster expressing his or her opinion but rather bears the appearance of a verified fact. However, the court acknowledged that the actual procedures followed by the First Appellant were appropriate and that she assessed the criteria in Art 29 of the Working Group and the reasoning of the Court of Justice in *Google Spain* before coming to her decision but that the court disagreed with the findings for the reasons set out. The learned Circuit Court Judge did not carry out any balancing tests as envisaged in the *Google Spain* judgment but acknowledged that the First Appellant had carried out this procedure correctly.

38. The learned Circuit Court Judge did not properly apply the test as mandated in the *Orange Communications* and *Ulster Bank* decisions as she did not identify any serious error either in law or in fact as to how the First Appellant approached her decision making, and did not give that decision appropriate curial deference.

39. The Second Appellant or its parent company does not carry out any editing function in respect of its activities. It is an automated process where individual items of information on the internet are collated automatically and facilitate the user searching particular topics or names. To mandate a search engine company to place parenthesis around a URL heading would oblige it to engage in an editing process which is certainly not envisaged in the *Google Spain* decision. The responsibility placed on the Data Controller by that judgment is to delist the search once appropriate criteria are considered. It would not have been a simple step to have placed the URL heading within quotation marks or parenthesis.

40. This court is not dealing with the law of defamation but Data Protection law. It is not appropriate for this Court to make any comment in that regard. The jurisprudence in *Hockey v. Fairfax* does not reflect the law of defamation as it presently stands in Irish jurisprudence but that may well change in due course when the Superior Courts consider Tweets or for that matter the results of searches in the context of the law of defamation.

41. The court vacates the order of the Circuit Court and reinstates the original determination of the First Appellant.