THE HIGH COURT
COMMERCIAL

[2016 No. 4809 P.]

BETWEEN

THE DATA PROTECTION COMMISSIONER

PLAINTIFF

AND

FACEBOOK IRELAND LIMITED AND MAXIMILLIAN SCHREMS

DEFENDANTS

JUDGMENT of Ms. Justice Costello delivered on the 20th day of February, 2017

1. On the 19th of July, 2016, McGovern J. joined four parties to the proceedings as a*mici curiae.* On the 25th of July, 2016, he directed that the issue as to whether the a*mici curiae* will be entitled to rely on affidavits they deliver is to be decided by the court. This is my ruling on the application by three of the four a*mici curiae* for leave to deliver three affidavits.

2. It is clear from the order and judgment of McGovern J. that he envisaged that the amici could assist the trial court whether or not they were permitted to file affidavits. It is also clear that he was of the view that the court had discretion whether or not to permit the amici to file affidavits. At paras. 15 and 16 of his judgment admitting four a*mici curiae* but refusing the application of six applicants delivered on the 19th of July, 2016, [2016] IEHC 414 he stated:

> *"These proceedings do involve issues of public law. But they are not, in any real sense, a lis inter partes. One of the reliefs sought by the plaintiff is a*

reference to the CJEU. It is accepted by all the applicants that, if a reference is made, they cannot be heard before the CJEU unless they were involved in some way before the court of first instance. (See: Article 96 of the Rules of Procedure of the Court of Justice of the European Union.)

16. Because there is no factual dispute or lis inter partes in these proceedings, the applicants argue that the usual rule, excluding the involvement of an amicus curiae at the first instance hearing, does not apply. Furthermore, when the issues raised in the proceedings are almost certain to involve a reference to the CJEU, it is essential that any party who has a right to be heard as an amicus curiae should be heard in the proceedings before the High Court. It seems to me that this is a reasonable view."

3. It seems clear therefore that he permitted the four a*mici curiae* to be joined in order that they not be excluded from a hearing before the Court of Justice of the European Union if the High Court makes a reference, as requested by the plaintiff. Secondly, he accepted the arguments advanced by the applicants that there was no factual dispute or *lis inter partes* in the proceedings such as would lead to the exclusion of an a*micus curiae at* the first instance hearing.

4. There was nothing in his judgment to suggest that in order to fulfil their role of assisting the High Court in its determinations that the a*mici curiae* needed to adduce evidence. In relation to the BSA (the Business Software Alliance), he stated that they should be in a position to offer views which might not otherwise be available to the court. In relation to Digital Europe, he held it would be in a position to assist the court by bringing to bear its expertise in a way which might not otherwise be available to the court. In relation to EPIC (Electronic Privacy Information Centre), he said it would be in a position to offer a counterbalancing perspective from the US

government on the position in the US and could bring an expertise which might not otherwise be available to the court. The language he used clearly reflected the language used in the prior authorities including *Fitzpatrick v. FK* [2007] 2 I.R. 406.

5. He declined to join the other six applicants as a*mici curiae* on the grounds that they could not offer any particular assistance to the court which will not be furnished by the parties to the proceedings, or bring a new perspective beyond that of the parties and the *amici* he admitted. In refusing to admit Mr. Kevin Cahill as an a*micus curiae*, McGovern J. stated that as a general rule an a*micus curiae* is not permitted to give evidence.

6. He concluded his judgment by putting the matter back for further directions to discuss *inter alia* the nature of the assistance to be given by the a*mici curiae* and in particular whether or not such a party wishes to give evidence on US law *"… as opposed to the US regime surrounding data transfer…"* and whether evidence of law should be given by way of affidavit or in submissions.

7. It is thus clear that he accepted, as do I, that there is no absolute rule that an a*micus curiae* can never give evidence but as a general rule an *amicus curiae* is not permitted to give evidence. This reflects the decision of the Supreme Court in *H.I. v. Minister for Justice Equality and Law Reform* [2003] 3 I.R. 197 in which Keane C.J. accepted that an a*mici curiae* was not normally entitled to adduce any evidence. The Chief Justice made this observation in the context of holding that the jurisdiction to join an a*micus curiae* is to be exercised "*sparingly*".

8. In *Fitzpatrick v. F.K.* Clarke J. in the High Court considered the question of joining an applicant as an a*micus curiae.* He held that an important factor to be taken into account was whether the party might reasonably be said to be in a position to bring to bear expertise in respect of an area which might not otherwise be available to

the court. But he also accepted that an a*micus curiae will* more readily be joined at the stage of a final court. He emphasised the importance of the involvement of the *amicus* in the legal debate. In para. 31 of the report he stated:

> *"It is obvious, therefore, that an amicus should not be permitted to involve itself in the specific facts of an individual case. It is only after those facts have been determined that the extent to which issues of general importance may remain for decision will be clear. That is far more likely to be the case at the appellate rather than at the trial level…..While I am not persuaded that there is an absolute bar to parties being joined as amicus curiae at trial level, I believe that the circumstances in which it would be appropriate so to do should, ordinarily, be confined to cases where there is no significant likelihood that the facts of an individual case are likely to be controversial or to have a significant effect on determining what issues of general importance required to be determined."*

9. Clarke J. does not envisage a*mici curiae* having any role in adducing evidence at the trial. It would be very much the exception for a court to permit an a*micus curiae* adduce evidence at a trial.

10. It is absolutely clear that an a*micus curiae* cannot contest the undisputed facts in the case (see *EMI Records (Ireland) Ltd and Ors v UPC Communications (Ireland) Ltd* [2013] IEHC 204 para. 69).

11. The role of an a*mici curiae* is to assist the court. Therefore, the question the court must ask is: Will the evidence sought to be adduced assist the court in its determination?

12. In this case the plaintiff seeks declarations in relation to the standard contractual clauses (SCCs) insofar as they apply to data transfers from EEA to the

United States and a preliminary reference to the CJEU for ruling on the validity of the SCCs insofar as they apply to data transfers from EEA to the United States. Mr. Schrems' complaint to the Data Protection Commissioner relates to data transfers by Facebook Ireland Ltd to Facebook Inc. in the United States. It follows that the issues for determination by this court relate to transfers of data to the United States; not to any other third country outside the EEA.

13. Mr. Higgins on behalf of Digital Europe has sworn an affidavit which is concerned with transfers of data to third countries, including the United States, pursuant to SCCs. The only third country with which this case is concerned is the United States. Facebook Ireland Ltd has adduced evidence in relation to transfers to the United States. I believe that Digital Rights may still fulfil its brief as an a*micus curiae* based on the evidence which has been adduced by the parties. It is not necessary for the court to depart from the normal rule and admit into evidence an affidavit largely concerned with matters outside the parameters of the case. I therefore refuse to permit Digital Europe to file the affidavit of Mr. Higgins.

14. Counsel for the BSA submitted that the touchstone is whether the evidence will assist the court. I agree. However, the fact that the evidence is new material and not contested by any party is not sufficient. The normal rule is that parties to the proceedings adduce the evidence and in this case the plaintiff and the first named defendant oppose the introduction of the proposed additional evidence and the second named defendant is neutral. The test the court should apply is not whether there is no reason not to permit the affidavit to be adduced; but, in light of the evidence to be adduced by the parties, this additional evidence would assist the court.

15. The BSA says that it is not trying to get involved in the facts in the dispute though it clearly wishes to fill what it says is a deficit in the court's factual

framework. However, the issue is not whether there are omissions from the evidence available to the court but whether the additional evidence would assist the court in reaching its determination on the issues before it for decision. The role of the *amicus curiae* is to help the court in its task. Having read the written submissions filed on behalf of the BSA, I am of the opinion that it will be able to fulfil its brief as an a*micus curiae* without the need to adduce evidence which will not be adduced by the parties to the proceedings. I see no reason to depart from the normal rule that an a*micus curiae* does not adduce evidence and therefore I refuse the application of BSA to deliver the affidavit of Professor Boué.

16. Professor Butler on behalf of EPIC filed an affidavit which deals with US law and practice. Counsel for EPIC explained that this was done in order to introduce materials into evidence in relation to US law at a time when the affidavits adduced by the parties on US law had not yet been filed. To that extent his affidavit has been overtaken by events. The court has and will have evidence from five experts who will give evidence on behalf of the parties in relation to the areas of US law which they identify as relevant. Extensive materials have been adduced in evidence and the experts will be cross examined. With due respect to Professor Butler's expertise, his affidavit of US law and practice is not, in the circumstances necessary for the court.

17. I note that at para. 17 of his affidavit grounding the application for the admission of EPIC as an a*micus curiae* he confirmed that the intervention would be limited to written or oral submissions on relevant questions of law. It was not suggested before McGovern J. that he would need to give evidence. I understand why, as a matter of timing, he swore his affidavit but it has been overtaken by events and it is not necessary that EPIC file the affidavit in order that it may assist the court as an a*micus curiae*. Indeed he implied that this was not necessary in his affidavit

grounding the application to be admitted as an *amicus curiae*. I likewise refuse to admit his affidavit.