

**THE HIGH COURT
JUDICIAL REVIEW**

Record No. 2013 / 765 JR

Between:-

MAXIMILLIAN SCHREMS

Applicant

-and-

DATA PROTECTION COMMISSIONER

Respondent

AFFIDAVIT OF DAMIEN YOUNG

I, **Damien Young**, of [REDACTED] aged 18 years and upwards, **MAKE OATH** and say as follows:-

1. I am a partner in the firm of Philip Lee, solicitors for the Data Protection Commissioner (“the Commissioner”), the Respondent in the within proceedings. I make this affidavit on behalf of the Commissioner and with his authority, from facts within my own knowledge, save where otherwise appears, and where so otherwise appearing I believe the same to be true and accurate.
2. I make this affidavit in connection with an application by the Applicant for a Protective Costs Order and by way of reply to an affidavit grounding that application sworn by the Applicant on 2nd July 2014.
3. In summary terms, the Commissioner objects to the application for an Order in the particular terms sought at paragraph (i) of the Notice of Motion issued herein on 4th July 2014. Without prejudice to his position that the Applicant is not entitled to any Order limiting the Applicant’s ultimate costs exposure in these proceedings, the Commissioner has made a proposal to the Applicant in terms

consistent with paragraph (ii) of the Notice of Motion. That proposal is contained in a letter issued by my firm to the Applicant's solicitors dated 15th July 2014. I beg to refer to a copy of the said letter of 15th July 2014 attached hereto and upon which marked with the letters "DY1" I have signed my name prior to the swearing hereof. As appears therefrom, the material terms of the Commissioner's proposals are as follows:

- (i) If the judicial review proceedings are ultimately decided in favour of the Commissioner, then the Commissioner would be at liberty to pursue an application for costs in the ordinary way.
 - (ii) If costs are awarded in the Commissioner's favour, then, in the context of the execution of any such order, the amount of the costs recoverable by him would be limited to the sum of €55,000, this being an amount raised by or on behalf of the Applicant from third parties for purposes that include the prosecution of the within proceedings.
 - (iii) The Commissioner would not have recourse to assets held by the Applicant in his personal capacity. Rather, the assets to which he would have recourse would be limited to the third party funding raised by or on behalf of the Applicant.
4. The terms of the Commissioner's proposals were expressed to be subject to the Applicant having made full disclosure of his assets in his grounding affidavit so that, if the Commissioner was later to learn that assets had not been disclosed by the Applicant, or if the Applicant's financial position was to change materially from that disclosed, the Commissioner would be at liberty to enforce any costs order made in his favour against the Applicant in the usual way and without limitation.

Background

5. I say and believe that there are a number of factual matters that will be of relevance to the Court's consideration of the Applicant's application if the Commissioner's proposal is rejected and the Applicant presses its application for Orders in the terms set out in the Notice of Motion issued on 4th July 2014. Those factual matters are addressed below.

Timing of the application

6. Firstly, I say and believe that the timing of the within application is of significance. In that regard, I say that the Commissioner is particularly concerned that it is only now, at the point at which a Judgment has already been delivered by this Honourable Court, that the Applicant has adopted the position that, unless he is insulated from the risk of an adverse costs order, he will discontinue the proceedings. I say and believe that the timing of the adoption of this position is entirely unsatisfactory, particularly when the issue of a protective costs order was first raised by the Applicant by letter dated **7 October 2013**. I beg to refer to a copy of the said letter attached hereto and upon which marked with the letters “**DY2**” I have signed my name prior to the swearing hereof. As appears therefrom, that letter (which was issued shortly before the commencement of the within proceedings) explicitly referenced the Applicant’s intention to bring an application to deal with the costs risks to which the litigation would expose him at the point at which his application for leave was being made. In anticipation of his application for leave, therefore, the Applicant invited the Commissioner to agree to enter into discussion around measures to mitigate the Applicant’s costs risks.
7. This Office replied by letter dated **11 October 2013**. Reflecting the Commissioner’s view that he was not obliged to investigate the Applicant’s complaint, that letter made clear the fact that the Commissioner would not consent to any application for a protective costs order. I beg to refer to a copy of the said letter of 11 October 2013 attached hereto and upon which marked with the letters “**DY3**” I have signed my name prior to the swearing hereof.
8. In the full knowledge of the Commissioner’s position on the question of costs, and presumably having obtained advice from his legal advisers on the merits of the case and on the costs risks associated with it, the Applicant commenced the within proceedings on **21st October 2013**. In doing so, the Applicant assumed the full range of costs risks that any party to litigation must bear.
9. Contrary to the position that had been put forward in his letter of 7th October 2013, however, no application for a protective costs order was made at or around the date of the application for leave.

10. I say and believe that, if it was the Applicant's intention to bring an application for a protective costs order, that application should properly have been made before the proceedings were commenced on 21 October 2013, or certainly as soon as leave to bring these judicial review proceedings was granted. In any event, the application should have been made before substantial costs had been incurred on both sides. Instead, the Applicant chose to proceed to trial and only brought the within application at a time when Judgment had already been delivered, and substantial costs had already been incurred by both parties. I say and believe that the Applicant's failure to bring this application at an earlier date is an important fact to be considered by this Honourable Court when considering whether or not an Order should be made in the terms now sought.

Third party funding

11. At paragraph 10 of his grounding affidavit, the Applicant disclosed that the sum of approximately €55,000 has been raised from third parties by an organization established by the Applicant titled "europe v. facebook". The Applicant says he is Chairperson of that organization. From a review of media statements and other material contained on its website, it is clear that the Applicant is also the main driver of the organisation.
12. The Applicant says (at paragraph 10 of his grounding affidavit) that this third party funding has been raised "for legal costs of the 23 pending complaints before the Respondent". I say and believe that, in circumstances where the present proceedings arise out of one of those 23 complaints, it is clearly the case that the funds in question have been raised for purposes directly connected to the within proceedings.
13. It is equally clear from paragraph 12 of his grounding affidavit that the Applicant has already used this funding source to pay for expenses connected with these proceedings. In the same paragraph, however, he says that the funds sought and obtained from third parties are not available to pay legal costs and may only be used to pay travel and other 'out of pocket' expenses. Specifically, the Applicant says that he "... [does] not have any legal right or contract that would allow me to reimburse my legal costs from it. There is no capacity within the NGO to fund this case beyond mere expenses."

14. In support of the proposition that the funding obtained from third parties is intended to defray travel and other 'out of pocket' expenses only, and not legal costs generally, the Applicant says (at paragraph 11 of his affidavit) that "[g]iven the number of complaints pending before the DPC the NGO has so far received donations that cover €2,400 per complaint, which will not even cover 'out of pocket' expenses." On the basis of this averment, I understand the Applicant to say that, if the total amount third party funding available to him is apportioned between his 23 complaints, then the amount of funding available 'per complaint' is just €2,400. From there, the inference appears to be that, because the "per complaint" amount of €2,400 is not sufficient to cover "out of pocket" expenses incurred (or to be incurred) in connection with each complaint, it necessarily follows that the third party funding available to the Applicant cannot be said to have been intended to cover legal costs per se.

15. I say that, quite apart from the fact that this position is not consistent with paragraph 10 of the Applicant's grounding affidavit, it is also the case that this position is not borne out by other statements contained on the Applicant's website. For example, in a section of the website that deals with third party funding (under the heading "What will happen with the money?") the following statement is made to prospective contributors:

"... From it, we pay fees for lawyers, court fees and travelling expenses, which are necessary in immediate connection to the enforcement of the basic right to privacy."

I beg to refer to a copy extract from the Applicant's website attached hereto and upon which marked with the letters "**GON4**" I have signed my name prior to the swearing hereof.

16. I say that, on the face of it, the position as set out by the Applicant on the Applicant's website is materially different to (and inconsistent with) that set out on affidavit, in that the website clearly references the fact that monies raised from third party contributors would be applied to the discharge of legal fees amongst other things. That that is the true position is also borne out by other references elsewhere on the Applicant's website, including the following:

"To appeal the decision by the Irish authority before courts and demand the enforcement of the users' fundamental right to

privacy we will need astronomical amounts of money (estimated at between €100,000 and €300,000).”

As will be apparent, this particular reference (also exhibited at “GON4”) sets the Applicant’s fund-raising target at a level that is manifestly in excess of the “out of pocket” expenses that the Applicant might reasonably expect to incur in connection with his complaints. On this basis, I say that it is very clearly the case that the third party funding sought and obtained by the Applicant was obtained to fund the legal costs associated with these proceedings.

17. Having regard to the foregoing, I say that the Commissioner is concerned that, having sought and obtained third party funding for purposes that include the prosecution of the within legal proceedings, the Applicant has now decided, unilaterally, that he does not wish to put those funds at risk in the context of the present proceedings. This application, therefore, is only partly concerned with a desire on the part of the Applicant to insulate himself (and his personal assets) from risk. I say and believe that, on the facts, it appears that the Applicant’s more pressing concern is to put the third party funds raised by him or on his behalf beyond the reach of any costs order that may be made in favour of the Commissioner, preserving those funds intact to litigate other matters entirely.
18. I say and believe that, on any objective assessment, this is not a reasonable position for the Applicant to adopt, especially when he chose to wait and see the outcome of these proceedings before bringing his protective costs order application. I say that it is also unreasonable for the Applicant to say (as he has said at paragraph 11 of his grounding affidavit) that “all other 22 complaints will might (sic) face the same future, given the violations of Irish and EU law by the Respondent that I assert”. The true position is that the 22 complaints do not allege any breach of Irish and EU law by the Commissioner. Rather, they focus on allegations that, in the operation of certain elements of its social media platform, a third party (Facebook Ireland Limited) is acting otherwise than in compliance with data protection legislation. In circumstances where no decisions have yet been delivered in connection with those complaints, it is unclear how or on what basis the Applicant considers it likely that he will find himself in further litigation with the Commissioner.

Other relevant factors

19. At paragraph 18 of his grounding affidavit, the Applicant expressly notes that his own legal advisors are not acting in a *pro bono* capacity. I say and believe (and am advised) that some significance attaches to this point given that, under the principles set out in relevant case-law, the fact that an applicant's legal advisors may not be acting *pro bono* is a factor properly to be taken into account by the Court when deciding whether a protective costs order should be made in a particular case.
20. While the Applicant's affidavit acknowledges (at paragraph 8) that "the costs in this case could be very significant", it fails to acknowledge that the Commissioner remains at substantial costs risk in connection with these proceedings. I say and believe that the costs risk to which the Commissioner is exposed is an important factor to be considered having regard to the fact that his office is funded through the public exchequer. Like all public bodies, the level of exchequer funding available to the Commissioner's office has been the subject of intense pressure in recent times. It is also relevant to note in this context that very substantial resources (both internal and external) have been expended by the Commissioner in the investigation of the Applicant's overall body of 23 complaints.
21. Finally, I say and believe that it is unhelpful that the Applicant has omitted to procure a report from a costs accountant estimating the quantum of the costs risk to which he considers himself exposed. In the absence of any such report, it is difficult to see how this Honourable Court can assess whether and to what extent the monies raised by the Applicant to date from third parties would be sufficient (or not) to meet the costs risk to which the Applicant may be exposed.

Conclusion and Prayer

22. For all of the reasons set out herein, and in light of the Commissioner's proposals of 15th July 2014, I pray this Honourable Court to refuse the reliefs sought by the Applicant herein.

SWORN by the said **DAMIEN YOUNG**
on this the day of July, 2014 at

in the City/County of
before me a Practising Solicitor and I know
the Deponent.

PRACTISING SOLICITOR

*This affidavit is filed on behalf of the Plaintiff by Philip Lee Solicitors, 7/8 Wilton Terrace, Dublin
2. Filed this day of July, 2014*

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Record No.: 2013/765 JR

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MAXIMILLIAN SCHREMS

Applicant

-and-

**DATA PROTECTION
COMMISSIONER**

Respondent

AFFIDAVIT OF DAMIEN YOUNG

Philip Lee Solicitors
7-8 Wilton Terrace
Dublin 2

**THE HIGH COURT
JUDICIAL REVIEW**

Record No. 2013 / 765 JR

Between:-

MAXIMILLIAN SCHREMS

Applicant

-and-

DATA PROTECTION COMMISSIONER

Respondent

**EXHIBIT “DY1” TO AN AFFIDAVIT OF DAMIEN YOUNG
SWORN ON JULY, 2014**

DAMIEN YOUNG

PRACTISING SOLICITOR

**THE HIGH COURT
JUDICIAL REVIEW**

Record No. 2013 / 765 JR

Between:-

MAXIMILLIAN SCHREMS

Applicant

-and-

DATA PROTECTION COMMISSIONER

Respondent

**EXHIBIT “DY2” TO AN AFFIDAVIT OF DAMIEN YOUNG
SWORN ON JULY, 2014**

DAMIEN YOUNG

PRACTISING SOLICITOR

**THE HIGH COURT
JUDICIAL REVIEW**

Record No. 2013 / 765 JR

Between:-

MAXIMILLIAN SCHREMS

Applicant

-and-

DATA PROTECTION COMMISSIONER

Respondent

**EXHIBIT “DY3” TO AN AFFIDAVIT OF DAMIEN YOUNG
SWORN ON JULY, 2014**

DAMIEN YOUNG

PRACTISING SOLICITOR

**THE HIGH COURT
JUDICIAL REVIEW**

Record No. 2013 / 765 JR

Between:-

MAXIMILLIAN SCHREMS

Applicant

-and-

DATA PROTECTION COMMISSIONER

Respondent

**EXHIBIT “DY4” TO AN AFFIDAVIT OF DAMIEN YOUNG
SWORN ON JULY, 2014**

DAMIEN YOUNG

PRACTISING SOLICITOR