**THE COURT OF APPEAL**
**CIVIL**

**Neutral Citation Number [2020] IECA 83**
**Court of Appeal Record No 2018/83**

**Faherty J.**
**Haughton J.**
**Collins J.**

**BETWEEN**

**JIM REDMOND AND MARY REDMOND**
**APPELLANTS/APPLICANTS**

**AND**

**COMMISSIONER FOR ENVIRONMENTAL INFORMATION**
**RESPONDENT**

**AND**

**COILLTE TEORANTA**
**NOTICE PARTY**

**JUDGMENT of Mr Justice Maurice Collins delivered on 3 April 2020**

**PRELIMINARY**

1. The right of access to information on the environment is recognised as a matter of international law (the United Nations Convention on Access to Information, Public Participation and Decision-Making and Access to Justice in Environmental Matters – hereafter the "*Aarhus Convention*"), EU law (Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 – hereafter the "*AIE Directive*") and Irish law (the European Communities (Access to Information on the Environment) Regulations 2007 (as amended)[1] – hereafter the "*AIE Regulations*"). According to the AIE Directive (recital (1):

> "*Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment*."

2. In broad terms, these instruments provide for access to "*environmental information*" in terms initially defined in Article 2 of the Aarhus Convention and subsequently adopted in Article 2 of the AIE Directive and Article 3 of the AIE Regulations. It will be necessary to look more closely at this definition later in this judgment. At this stage, however, it may

[1] S.I. 133 of 2007 as amended by S.I. 662 of 2011, S.I. 615 of 2014 and S.I. 309 of 2018.

simply be noted that the principal issue in this appeal is whether certain information sought by the first appellant (hereafter "*Mr Redmond*")[2] relating to the sale by Coillte of its leasehold interest in 402.92 hectares of land at Kilcooley Abbey Estate, Thurles, County Tipperary (hereafter "*the Coillte Lands*") is "*environmental information*". Whatever the current position may be, the evidence before the Court establishes that at the time of the sale those lands largely comprised forestry and woodland (including old woodland) but also included monuments/archaeological features, including, it appears, a boundary wall around Kilcooley House that is a protected structure under the Planning Acts.

3. A further issue arises concerning the manner in which the Commissioner for Environmental Information ("*the Commissioner*") dealt with one aspect of Mr Redmond's request (referred to in this judgment as "*category 8*").

**ACCESS TO INFORMATION ON THE ENVIRONMENT**

4. Access to information on the environment was first provided for at EU level by Council Directive 90/313/EC of 7 June 1990. In 1998 the European Community signed the Aarhus Convention and the need to amend the EU legal regime to make it consistent with the Convention resulted in the adoption of the AIE Directive in 2003. Member States were required to take appropriate steps to give effect to the Directive by February 2005. The AIE Regulations give effect to the AIE Directive in this jurisdiction and it follows that the Regulations are to be construed by reference to it: *National Asset Management Agency v Commissioner for Environmental Information* [2015] IESC 51; [2015] 4 IR 626.

5. Separately, Ireland has ratified the Aarhus Convention in its own right and various measures have been adopted to give effect to the provisions of the Convention relating to public participation and access to justice in the environmental field. As this Court observed in *Minch v Commissioner for Environmental Information* [2017] IECA 223, the extent to which those provisions of the Convention that have not been incorporated into EU law are part of domestic Irish law is governed by Article 29.6 of the Constitution and the terms of any implementing legislation. We are not concerned with any such issue in this appeal. The only issue before the Commissioner, and the only issue before the High Court and this Court in these judicial review proceedings, concerns access to environmental information under the AIE Regulations. Wider issues of public participation in the sale of the Coillte lands are not before us.

6. The core provision of the AIE Regulations is Article 7(1) which provides that:

> "*A public authority shall, notwithstanding any other statutory provision and subject only to these Regulations, make available to the applicant any environmental information, the subject of the request, held by, or for, the public authority*."

7. The issue of what is a "*public authority*" for the purposes of the AIE Regulations is one of some complexity, as is evident from the Supreme Court's decision in *National Asset Management Agency v Commissioner for Environmental Information* and the decision of

[2] The Commissioner concluded that Mary Redmond did not have standing to bring an appeal because Mr Redmond was the sole party to the AIE Regulations request for information. The High Court Judge considered that conclusion to be correct: Judgment at para 22. The issue was not debated before this Court on appeal and it is not necessary to express any view on it

CJEU in Case C-279/12 *Fish Legal & Emily Shirley v Information Commissioner* [2014] 2 CMLR 36 which is discussed by O' Donnell J in his judgment in *National Asset Management Agency v Commissioner for Environmental Information*. Here, however, there is no dispute that Coillte is such an authority for the purposes of the AIE Regulations.

8. The term "environmental information" is defined in Article 3(1) of the AIE Regulations as follows:

> "'*environmental information' means any information in written, visual, aural, electronic or any other material form on*
>
> *(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms and the interaction among these elements,*
>
> *(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment,*
>
> *(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements,*
>
> *(d) reports on the implementation of environmental legislation,*
>
> *(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c), and*
>
> *(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are, or may be, affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c);*

9. This definition is materially identical to that in the AIE Directive which in turn derives from (but is not identical to) the definition contained in the Aarhus Convention. It is, self-evidently, broad in scope. In Case C-316/01 *Glawischnig*, the CJEU, speaking of Article 2(a) of Directive 90/313/EEC – which contained a similar, though somewhat narrower, definition – stated:

> *"24 The Community legislature's intention was to make the concept of information relating to the environment defined in Article 2(a) of Directive 90/313 a broad one, and it avoided giving that concept a definition which could have had the effect of*

*excluding from the scope of that directive any of the activities engaged in by the public authorities (see Mecklenburg, paragraphs 19 and 20).”*

Nevertheless, the Court immediately added the following by way of qualification:

*“25 Directive 90/313 is not intended, however, to give a general and unlimited right of access to all information held by public authorities which has a connection, however minimal, with one of the environmental factors mentioned in Article 2(a). To be covered by the right of access it establishes, such information must fall within one or more of the three categories set out in that provision.”*

10. The principal battleground in these proceedings, as far as the "*environmental information*" issue is concerned, is paragraph (c) of the definition and, in particular, its reference to "*measures (including administrative measures) …and activities affecting or likely to affect the elements and factors referred to in (a) and (b)* .."[3] This is the "*second category*" of environmental information in the classification of the CJEU in *Glawischnig*[4]. For ease of reference, I shall refer to paragraph (c) of the definition of "*environmental information*" in Article 3(1) of the AIE Regulations simply as "*paragraph (c)*" and I shall refer to a measure **or** activity coming within the scope of paragraph (c) – i.e. *one affecting or likely to affect the elements and factors referred to in (a) and (b)* – as a "*paragraph (c) measure*". Mr Redmond argues that the sale of the Coillte lands was a paragraph (c) measure because the sale was "*likely to affect*" the state of the environment on and adjacent to those lands. The Commissioner held against that contention. Whether the sale was such a paragraph (c) measure is the primary issue in this appeal. Before this Court, Mr Brian Foley BL for the Commissioner largely accepted that if (contrary to the Commissioner's position) the sale is properly to be characterised as a paragraph (c) measure, the information in dispute is indeed "*environmental information*." I will come back to this issue below in the context of discussing the decision of the Court of Appeal of England and Wales in *Department of Business, Energy and Industrial Strategy v Information Commission & Henney* [2017] EWCA Civ 844.

11. The Commissioner accepts that, as a matter of principle, the sale of an interest in land by a public authority is capable of constituting a "*measure*" within paragraph (c).[5] According to the Commissioner, where land is sold by a public authority for the purpose of development and/or where it is known that the purchaser intends to develop the lands in sale, such a sale may properly be characterised as a "*measure*", thus triggering to a right to access information on that sale under the AIE Regulations. Therefore, if the purchaser here had announced that it had acquired the Coillte Lands with the intention of developing a rural holiday resort on them, or if there otherwise was sufficient evidence of such an intention, it appears that the sale would, on the Commissioner's analysis, constitute a paragraph (c) measure. However, the Commissioner says that there was no or no sufficient evidence before him that the sale of the Coillte Lands was likely to have any

[3] While paragraph (c) also refers to measures or activities designed to *protect* those elements, this part of the definition was not relied on before the Court
[4] Para 16
[5] See, for example, para 56 of the Commissioner's Submissions to the High Court and paras 30-33 of its Submissions to this Court

relevant environmental impact because there was no or no sufficient evidence to the effect that the Coillte Lands were, as a matter of fact, likely to be developed.

12. I pause here to observe that much of the discussion before this Court, and before the Commissioner and the High Court previously, was framed in terms of the *development* of the Coillte Lands. However, it is clear from the definition of "*environmental information*" in Article 3(1) that it is not confined to circumstances where there is, or is likely to be, "*development"*. "*Development"* is not, in fact, referred to in any part of the definition. The litmus test in paragraph (c) is whether a measure or activity is "*affecting or likely to affect*" the elements and factors referred to in paragraphs (a) and (b). An intervention that does not constitute or is not likely to lead to "*development*" - in the sense in which that term is generally understood in the context of planning and environmental law - may nonetheless constitute a measure or activity "*affecting or likely to affect the environment*". There may be changes in the user of land that do not constitute "*development*" – or at least "*development*" requiring any form of development consent – that nonetheless affect or may affect the environment. Inaction or omission may affect the environment as much as positive "*development*", as may changes of practice in relation to land management and animal husbandry that do not require any form of permission. Therefore, while the focus on "*development*" is understandable, it is important to appreciate that the inquiry mandated by paragraph (c) is a broader one.

13. Coillte did not appear or participate in the appeal before this Court. The Court was informed that it had been represented before the High Court but had not made submissions to that court. No affidavit was sworn on its behalf. While it was a matter for Coillte to determine the extent of its participation in these proceedings, its participation would have been helpful to the Court and its absence is unfortunate. In Coillte's absence, its position must be gleaned from its exchanges with Mr Redmond and then subsequently with the Commissioner and his investigators, insofar as these exchanges are disclosed in the papers before the Court.

**THE REQUEST FOR INFORMATION AND COILLTE'S RESPONSE TO IT**

14. The request for information was made on 22 May 2014. It referenced the AIE Regulations and the "*recent sale*" of the Coillte lands and sought the following "*information/documentation*":

> *"1. On what date was the land lease for forestry at Kilcooley Abbey estate, purchased by the new owner.*
>
> *2. How many acres were purchased from Coillte and what other assets were included in the sale.*
>
> *3. Who purchased the Coillte lands/forestry at Kilcooley Abbey Estate.*
>
> *4. What price was the paid [sic] to Coillte for the leasehold of the forestry land or other leases at Kilcooley Abbey Estate.*

5. *What other parties and legal representatives were involved in transferring the lease to the new owner.*

6. *Provide details on who valued the leased lands/forestry and how the valuation was compiled.*

7. *What was the valuation of the leased lands/forestry?*

8. *I also request any information or correspondence you have on the proposed development of lands/forestry at Kilcooley Abbey Estate."*[6]

15. On 11 June 2014 the Head of Corporate Communications at Coillte responded to the request. He informed Mr Redmond that Coillte had disposed of 402.92 hectares, that contracts had issued in March 2011 and that the transaction had completed in December 2013. As regards the other questions, it was stated that Coillte would "*not be disclosing this information on the basis that it is commercially sensitive, under Section 9 of the [AIE Regulations]."* However, the response went on to refer to the request for correspondence on the proposed development of the lands (i.e. category 8 above, though that category referred to *information* as well as *correspondence*), indicating that Coillte was unsure what correspondence was being referred to and asking Mr Redmond to be more specific as to what he was seeking.

16. The information provided in this response effectively addressed category 1 of the request and part, at least, of category 2. As regards the remaining categories, Article 9 of the AIE Regulations provides for the refusal of access to "*environmental information*" where its disclosure would adversely affect *(inter alia)* "*commercial … confidentiality, where such confidentiality is provided for in national or Community law to protect a legitimate economic interest.*" By invoking Article 9, Coillte's response appears to imply that the remaining information sought by Mr Redmond was, in its view, "*environmental information*."

17. As regards Mr Redmond's request for correspondence (category 8), Article 7(8) of the AIE Regulations provides that, where a request is made by an applicant "*in too general a manner*" the public authority "*shall, as soon as possible and at the latest within one month of the request, invite the applicant to make a more specific request and offer assistance to the applicant in the preparation of such request*." Though Coillte's response did not specifically refer to Article 7(8), it was presumably on that basis that it invited Mr Redmond to be more specific in his request. In any event, on 23 June 2014 Mr Redmond wrote to Coillte indicating disappointment with its response and stating that he would be appealing what he referred to as a "*denial of access*." He then addressed the request to be more specific in respect of category 8, as follows:

> *"Regarding my last point, in Coillte's disposal of its freehold interest in the lands at Kilcooley Abbey it was aware of the proposed development of the land, what I am seeking is for you to provide information or correspondence that you have on the*

[6] I have numbered the specific requests for ease of reference. The original request used bullet points rather than numbers

*proposed development of the land, forestry etc and also information you have on access and the rights of way to and throughout the land that was formally leased by Coillte. Did you consider the impact of the disposal of the leased land would have on the environment and rights of way and can you provide me with information/report on how it was assessed and the finding of that assessment. Would you also provide information on who requested the issuing of Contracts in 2011 and who Coillte issued the Contracts too (sic)."*

I shall refer to this request as "the reformulated category 8 request".

18. Article 11 of the AIE Regulations provides that where a request is refused the applicant may request the public authority to review the decision, in whole or in part, a process known as "*internal review*." On 2 July 2014 Mr Redmond requested an internal review. In his request, he challenged Coillte's entitlement to rely on Article 9 and set out in full what he referred to as his "*original request*". As of the date of his request for an internal review, Mr Redmond had not received any response to his letter of 23 June 2014 which set out his reformulated category 8 request and his request for internal review made no reference to it.

19. On 16 July 2014 Coillte's Head of Legal and Government Services wrote to Mr Redmond communicating her decision following internal review. She agreed with the decision to withhold the information sought by Mr Redmond but not on the grounds which had been given. The email went on to refer to the various categories of "*environmental information*" as defined in the AIE Regulations and stated that the information sought did not fall into any of those categories. It concluded as follows:

*"Accordingly as the information sought is not environmental information as defined in the statutory instrument it does not fall to be disclosed under the legislation.*

*Notwithstanding the above, further to point 2, I am happy to advise that we sold a leasehold interest in land and trees. I can also advise in relation to point 8 of your request that we have no information on or involvement in the proposed development at Kilcooley Abbey Estate."*

The letter did not elaborate on the nature of the "*proposed development at Kilcooley Abbey Estate*" referred to.

**APPEAL TO THE COMMISSIONER**

20. Article 12(3)(a) of the AIE Regulations provides that where a decision of a public authority has been affirmed, in whole or in part, under Article 11 (as was the case here), the applicant may appeal to the Commissioner against "*the decision of the public authority concerned.*"

21. In the context of the subsidiary issue (concerning category 8), there was some dispute as to the nature and scope of this appeal. Patrick Leonard SC (for Mr Redmond) argued that the appeal was not confined to the public authority's decision on an Article 11 internal review but could encompass the authority's initial decision also. Mr Foley (for the

Commissioner) submitted that the appeal was confined to the review decision. It appears to me that Mr Foley is correct. A public authority's initial decision may be to refuse access to information which is subsequently disclosed on review. It would appear to make no sense if, in such circumstances, the initial refusal could nonetheless be the subject of an appeal to the Commissioner. Equally – as was in fact the case here – the decision on review may be given on a quite different basis to the initial decision and, in such circumstances, it appears to me that the issue on appeal must necessarily be directed to whether the review decision is sustainable on the basis on which it was made (and not by reference to the basis advanced for the initial decision). However, in circumstances where in my view this argument does not avail Mr Redmond in any event (because Coillte did not actually make a formal decision on the reformulated category 8 request either initially or on internal review), it does not appear necessary to express a definitive view on this issue.

22. In any event, Mr Redmond appealed by letter of 6 August 2014 (which was also signed by Mrs Redmond). That letter set out the categories of information at issue. It included the reformulated category 8 request (which had not been the subject of any decision by Coillte, whether on internal review or otherwise). The letter stated the Redmonds' belief that the sale of the Coillte Lands had a direct impact on the environment including wildlife and herds of deer. The letter suggested that public rights of access/use would be lost on the sale and criticised the sale process and what was said to have been the failure to make any efforts to consult/inform the public.

23. Coillte was invited to make a submission in response to the appeal and was also requested to provide a schedule of relevant records to the Commissioner's Office.[7] Coillte duly made a submission on 3 September 2014 in which, in brief, it sought to stand over the refusal decision but also sought to rely in the alternative on Article 9. The submission also took issue with the suggestion that there had not been consultation with the local community and concluded by referring to the fact that Coillte has Forest Stewardship Council (FSC) certification and stating that the FSC had examined the sale the subject of the request and had been "*satisfied that the transaction complied with our FSC obligations.*"

24. Coillte's submission also engaged with the reformulated category 8 request. It invited Mr Redmond to identify any routes he was concerned about, indicating that these could then be investigated to see whether any rights of access/rights of way existed. As regards Coillte's consideration of the impact of the disposal of the lands, it was stated that "*an Environmental Impact Assessment (EIA) was conducted by Coillte*" and reference was made to the obligations imposed by the Forestry Act 1946 ("the 1946 Act") and to the fact that the purchaser had been "*made aware of, and accepted responsibility for, the afforestation/replanting obligations.*" The obligations being referred to here were, it seems, unsatisfied obligations of Coillte under the 1946 Act arising (it appears) from obligations under felling licences that had been granted to Coillte from time to time.

[7] Letter of 14 August 2014

Finally, the submission stated that Coillte was of the view that the information sought concerning the issuing of contracts was not "*environmental information*".

25. Some considerable time later – in mid-2015 – the investigator then assigned to the file asked Coillte to provide the records relevant to the request (which, it will be recalled, had first been requested by the Office of the Commissioner in August **2014**), records were provided to him and, following his review of them, he formed the view that some information "*relevant to [Mr Redmond's] request*" was contained in the records and that such information constituted "*environmental information*."[8] The investigator advised Mr Redmond that he had identified that information to Coillte and had asked Coillte if it would be willing to provide the information to Mr Redmond. Coillte provided the information to Mr Redmond in August 2015. As it appeared to the investigator at that stage that "*Coillte has provided you with access to the environmental information relevant to your request*" (the investigator was of the view - so he informed Mr Redmond - that the issues regarding price and valuation did not constitute environmental information), he invited Mr Redmond to withdraw his appeal, which Mr Redmond was not willing to do.[9]

26. The information provided to Mr Redmond in August 2015 (which the investigator clearly thought constituted "*environmental information*") consists of 10 pages of extracts from longer documents, all with varying levels of redaction. Before saying anything further about this material, it should be noted that, according to the Commissioner, it related to "*the new questions raised on 23 June 2014*" i.e. the reformulated category 8 request.[10] So it appears that, as of mid-2015, *all* of the parties involved in the appeal – the Commissioner, Coillte and Mr Redmond – were proceeding on the basis that the reformulated category 8 request was within the scope of the appeal. Certainly, there was no suggestion in the communication from the Commissioner's investigator that the additional information that had, at his prompting, been provided by Coillte to Mr Redmond, was considered by him to fall outside the actual scope of the appeal: on the contrary, he had stated that he was of the view that this information was "*environmental information relevant to [Mr Redmond's] request*."

27. Ultimately, however, the Commissioner took the view that these "*new questions*" were not for consideration within the appeal, though his decision records that he was "*pleased to note that, since this appeal was made and before this decision was taken, Coillte voluntarily provided to the appellant with access to environmental information which had not been requested*", including "*information on environmental impact assessment*." That hardly gives a complete picture of his investigator's interactions with Coillte and Mr Redmond as detailed above and fails to address his Office's apparent change of position on the question of whether the reformulated category 8 request was within the appeal or not. Furthermore, it does not appear accurate to state that the material provided by Coillte "*had not been requested*". It had been provided precisely *because* the

[8] Email of 26 August 2015 from Mr McCabe to Mr Redmond (which was admitted by agreement of the parties in the High Court)
[9] Mr Redmond responded to Mr McCabe by letter of 16 September 2015 in which he took issue with his analysis and conclusions, sought unredacted copies of certain of the information that had been provided and argued that the Coillte Land was being sold for purposes other than forestry (relying on a Coillte policy document which referred to Coillte's practice to sell "*a limited amount of non-strategic land for purposes other than forestry")*. According to Mr Redmond, the sale was so large that it was likely to effect (sic) the state of the land, landscape and natural sites. Information re price, valuation etc was justified as being relevant to a cost-benefit analysis of the sale
[10] Affidavit of Elizabeth Dolan sworn on 27 May 2016, para 10h

Commissioner's investigator had formed the view that it came within the reformulated category 8 request that Mr Redmond had made, an assessment with which, it appears, Coillte agreed.

28. The Commissioner's apparent change of position is addressed by Ms Dolan in her affidavit of 27 May 2016 in which she explains "*that the Commissioner attempts insofar as is possible to facilitate through informal means the resolution of issues relating to access to information between applicants and public authorities. In this case, I believe that it is fair to say that the Notice Party provided this information when the Commissioner was exploring a possible resolution of the matter in this way. When the applicant was not satisfied that the matter had been resolved, it required to be formally determined. In this respect, whereas this information was provided, the Commissioner was still required to formally determine if the new requests (arising after the request and, indeed, the refusal) fell within the scope of the Commissioner's jurisdiction.*" [11]

29. The AIE Regulations do not appear to confer any express power on the Commissioner "*to facilitate through informal means the resolution of issues relating to access to information between applicants and public authorities*". That is in contrast to the position obtaining in relation to FOI appeals: section 22(7) of the Freedom of Information Act 2015. However, it was not suggested that such activity is outside the powers of the Commissioner and it obviously makes good practical sense that appeals are amicably resolved where possible. But it ought to be obvious that any scenario where the ultimate decision-maker is involved in seeking to facilitate an informal resolution of an issue that may ultimately have to be decided by that same decision-maker is fraught with potential difficulty: see per O' Donnell J in *NAMA v Commissioner for Environmental Information*, at para 26. Here the process followed by the Commissioner was, in my view, rather less than transparent.

30. If (as Ms Dolan suggests was the case) the additional information provided to Mr Redmond by Coillte was provided as part of an attempt to resolve the appeal being "*facilitated*" by the Commissioner's Office, and if that information was effectively being provided "*without prejudice*" to Coillte's position that the material was outside the proper scope of the appeal (as Ms Dolan also suggests) and by way of some form of compromise offer, one would expect that position to have been communicated to Mr Redmond. [12] Equally, if it was the position of the Commissioner at that time that the reformulated category 8 request was not (or might not be) "*for consideration*" in Mr Redmond's appeal (as he ultimately concluded) one would expect that to have been communicated to Mr Redmond. None of this information was in fact communicated to him and the communication to him from the investigator involved at the time (who was not Ms Dolan) appears to me to be difficult to reconcile with the *ex post facto* characterisation of the Office's position advanced in these proceedings. This aspect of the procedure followed by the Commissioner – and the explanation subsequently offered for it – were, in my opinion, unsatisfactory.

[11] Also at para. 10h.
[12] It will be recalled in this context that in its detailed response to the Mr Redmond's appeal (dated 3 September 2014), Coillte had substantively addressed the expanded category 8 request and did not contend that this category did not properly fall for consideration in the appeal

31. In fairness to the Commissioner, I should point out that it is clear from the material before the Court that the Office of the Commissioner was suffering from significant resourcing issues at the time it was dealing with Mr Redmond's appeal which led to delay and, no doubt, discontinuity in the processing of the appeal.

32. The material provided to Mr Redmond in August 2015 comprised extracts from a number of different documents, all redacted to some extent. These documents appear to me to be relevant to the resolution of this appeal and, accordingly, I set out in an Appendix to this judgment a brief description of each document, highlighting any points of significance about their contents.

33. It will be recalled that these documents were provided to Mr Redmond on the basis that they had been reviewed by the Commissioner's investigation officer who had concluded that they contained "*environmental information relevant to [Mr Redmond's] request*." However, it appears that the documents in the form actually provided to Mr Redmond were not copied to the Commissioner: see para 10h of Ms Dolan's affidavit of 27 May 2016. It is not clear whether the investigator had any role in or knowledge of the redaction of those documents. It is also unclear whether the Office of the Commissioner retained the copy documents that had been provided to the investigator by Coillte in late June 2015 (which were, presumably, a larger set of documents from which the investigator had then identified the documents that he considered should be provided to Mr Redmond). What is clear, however, is that the Commissioner does not appear to have any regard to those documents in deciding Mr Redmond's appeal.

34. The Commissioner's decision issued on 2 November 2015. It first made some observations regarding the standing of Mrs Redmond (concluding that she did not have standing to pursue any appeal) and public participation (pointing out that the Commissioner's remit was limited to reviewing Coillte's internal review decision and did not extend to reviewing the provision of opportunities for public participation, though the decision went on to record that the records provided by Coillte showed that it had placed a newspaper advertisement and conducted public participation in advance of the sale). Then having referred to the relevant statutory provisions and the respective positions of the parties, the decision addressed the issue of whether the information sought was "*environmental information*". The decision then described the effect of section 37 of the 1946 Act (which, it stated, makes it a criminal offence to uproot any tree over 10 years old or cut down any tree of any age without a felling licence granted by the Minister).[13] It followed that, even if the new owner of the forest wished to fell the entire forest, he or she could not lawfully do so simply by virtue of acquiring ownership of the land and trees. That being so, the Commissioner did not consider the change of ownership "*in itself and without more*" to constitute "*a measure or an activity affecting or likely to affect*" the environment. As regards Mr Redmond's reliance on Coillte's stated policy of selling lands for purposes other than forestry, there was nothing in the records to suggest that the land at issue were bought for non-forestry purposes and, even if it had been "*that would*

[13] In passing it may be noted that tree felling is now governed by the provisions of the Forestry Act 2014, which repealed the 1946 Act. The 2014 Act came into operation in May 2017

*not necessarily mean that the new owner intended to alter the management of the woodland.*" In any case, a felling licence would "*in practice*" be required before "*there could be any significant interference with the forest*." While noting the concern that the new owner might not continue Coillte's policy of open public access and might apply for a licence to fall some or all of the trees on the land, such concerns did not mean that information on the land sale, in itself, constituted "*environmental information*" for the purposes of the AIE Regulations.

35. The decision then went on to emphasise the specificity of the requests that had been made and noted that, whereas a public authority was obliged to assist an applicant to narrow an excessive general request, such an authority was under no duty to engage with an applicant with a view to expanding a request. The import of this passage is not entirely clear but it appears to imply that, had a broader request been made by Mr Redmond, it might have resulted in a more positive outcome from his perspective. However, the decision fails to give any indication of the additional information that might have been provided in the event that the request had been framed more broadly.

36. The Commissioner then addressed category 8. It was, he was satisfied, a request for environmental information but he was of the view that it had been justifiably refused on the basis that no information of that kind was held by Coillte. As for the reformulated category 8 request, that could only be considered to the extent that it constituted a clarification of the original category 8 request. Given that the records showed that Coillte held no information on any proposed development "*these new questions are not for consideration within this review.*"

37. The decision concluded by referencing the right of the parties to appeal the decision to the High Court within a period of 2 months after notice of the decision was given.

38. Some 5 weeks later Mr Redmond wrote to the Commissioner querying the correctness of a reference in the decision to the sale of the Coillte Lands having taken place in *March 2011*, in circumstances where Coillte had advised that the sale had occurred on *16 December 2013*. The date of sale – so Mr Redmond explained – had a direct bearing on the issue of public participation (which, it will be recalled, the decision had touched upon, while also stating that the issue was not within the Commissioner's remit). The letter sought to interrogate that part of the decision and asked for details of the newspaper advertisement and public consultation process referred to in the decision.

39. The Commissioner declined to give any of this information, explaining that it was not his practice to elaborate on its decisions or comment on them. While as a general policy that is entirely understandable, I find it difficult to understand why the Commissioner apparently felt unable to acknowledge that the reference in the decision to a sale date of March 2011 was an error on his part and that in fact, whereas that was the date on which the contract for sale was signed, the sale had not completed until December 2013. That was an entirely innocent error which was properly acknowledged in the Commissioner's Statement of Opposition after these proceedings were commenced. There appears to me to be no good reason why that error should not have been acknowledged immediately.

40. That said, the suggestion by Mr and Mrs Redmond that this part of the decision (both in terms of the error as to the date of sale and also more generally as regards what was said on the question of public participation) demonstrated bias on the part of the Commissioner appears to me to have been entirely without foundation and was, in my opinion, rightly rejected by the High Court.[14] The bias argument was not canvassed before this Court, correctly so in my view. While some allowance may be made for the fact that the Redmonds represented themselves before the High Court, litigants – whether represented or not – need to understand that complaints of bias should not be made unless there is a legitimate basis for doing so and, where groundless complaints are made, there may be significant adverse consequences, particularly where (as here) litigants seek what is ultimately a discretionary remedy from the courts. Had the bias complaint been maintained before this Court, a real issue might have arisen as to whether any relief which the Court might otherwise have been willing to grant ought to be refused in exercise of the Court's discretion.

**JUDICIAL REVIEW PROCEEDINGS TO THE HIGH COURT**

41. Although an appeal to the High Court on a point of law is provided for by Article 13 of the AIE Regulations, no such appeal was brought here. Instead the Redmonds applied for leave to seek judicial review of the decision (in the form of an order of *certiorari*), with leave being granted by the High Court (Barrett J) on 19 January 2016.

42. Before the High Court, the Commissioner objected to this form of procedure, arguing that an appeal under Article 13 was the prescribed mechanism for challenging a decision of the Commissioner under the AIE Regulations and that, in effect, such an appeal should be regarded as an exclusive remedy. The Commissioner also contended that the proceedings were out of time. These objections were resolved by the Judge in favour of the Applicants for the reasons set out at paragraphs 40–43 of her judgment. The Commissioner did not appeal against the Judge's conclusions and it is not necessary to refer further to this aspect of the judgment. It is also unnecessary to refer further to that part of the judgment that addressed the bias and lack of fair procedures complaints of the Applicants given that these were not pursued in this appeal.

43. The Judge referred to the decisions of the High Court and of this Court in *Minch v Commissioner for Environmental Information* [2016] IEHC 91; [2017] IECA 223. The judgment of Hogan J (in this Court) had explained that the AIE Regulations had to be interpreted teleologically, so as to achieve the purpose of the AIE Directive. That judgment also made it clear, by reference to the CJEU's decision in *Glaswischnig*, that there were limits to the obligations of Member States and that, while the AIE Directive was to be given a broad interpretation, it did not give a general and unlimited right of access to all information which had a connection, however minimal, with any of the environmental factors referred to in the Directive. *Minch* did not (so the Judge found) disapprove of the use of "*remoteness*" as a test in applying the AIE Regulations; rather it had applied such a test but had concluded that the Commissioner had been wrong to

[14] At paras 46 & 47 of the Judge's judgment

conclude that the National Broadband Plan was not "*environmental information*" on the basis that its potential to have effects on the environment was too remote. [15]

44. As to the specifics of the request here, the Judge stated that, even adopting a teleological approach to the AIE Regulations, she could not see how the information in categories 3–7 could fall within any of the categories of "*environmental information*" as defined in Article 3(1). The only category that might apply was paragraph (c). However, the sale of the Coillte lands might not even fall within the definition of a "*measure*" but, even assuming that it did constitute such a "*measure"*, it did not seem to the Judge "*that the particular information sought in categories 3 – 7 can be described as 'affecting or likely to affect' the elements and factors referred to at article 3(1)(a) and (b)*." Information as to price and valuation, in particular, appeared to fall completely outside the concept of "*environmental information*". Information as to the identity of the purchaser might be in a different category but, even where it appeared that a sale of lands was likely to result in development, it would be information regarding the proposed development, rather than the identity of the purchaser as such, that would fall to be disclosed. Here, Coillte had indicated that it did not have any information to what the purchaser's intentions were and, in those circumstances, the identity of the purchaser did not fall within the definition of "*environmental information*" in the AIE Regulations. [16]

45. The Judge went on to refer to the decisions from the UK that had been relied upon by the Applicants and agreed with the Commissioner that in the majority of those decisions concerned with the sale or transfer of land, there was evidence before the decision maker from which it could be inferred that there would or would likely be a change in land use.[17] In any event, the Judge noted, those decisions were not binding in this jurisdiction. The key point of relevance here, in the Judge's view, was that there had been no evidence before the Commissioner as to the nature of any proposed development of the land and, in particular, no evidence that the purchaser proposed to seek tree-felling licences or as to the purchaser's intentions generally. While the Applicants had laid emphasis on Coillte's stated policy of selling lands for purposes other than forestry, the Judge did not think that an inference could automatically be made from the existence of that policy to a conclusion that every sale of forestry land by Coillte required information about the price and the purchaser to be disclosed because it would necessarily affect, or be likely to affect, the elements and factors referred to in Article 3(1), paragraphs (a) and (b).

46. The Judge also dealt with category 8 (expressing the view that the Commissioner's approach could not be faulted) and the complaints made about the redacted documents (agreeing that they fell outside the scope of the appeal to the Commissioner but observing that the issues re redaction could be pursued in the future). Accordingly, the application failed.

[15] At para 52
[16] At para 53
[17] At para 54

**APPEAL**

47. Mr Redmond appeals against that decision on the grounds set out in his notice of appeal filed 7 March 2018. Solicitors and counsel were acting for Mr Redmond by that time. The fundamental point made in the notice of appeal – and in the written and oral submissions of Mr Redmond – is that the High Court Judge erred in concluding that information sought in categories 3-7 of the request did not constitute "*environmental information*" within the meaning of the AIE Directive and Regulations. In that context, reliance was placed on the documents that had been provided to Mr Redmond and on the fact – disclosed by those documents – that Coillte had conducted an environmental impact appraisal of the land sale and had concluded "*that there would be a high likelihood of environmental impact*." The Commissioner objects to reliance being placed on this material by Mr Redmond, on the basis that it was not relied on before him or before the High Court. I will consider that objection in due course.

48. More generally, it is said that the Commissioner should have considered the likely impact of the sale on the environment, including the fact that a very large piece of publicly owned forestry managed in accordance with Coillte's statutory obligations was being sold to a private party that did not have the same statutory obligations or public interest motives as Coillte. It is also said that the Judge was wrong insofar as she affirmed the finding of the Commissioner that a change of ownership in itself did not constitute a "*measure*" given that further permits would be required before the purchaser could fell any trees. The notice of appeal also challenges the Judge's findings in relation to the revised category 8 request.

**DISCUSSION**

*Categories 3-7*

49. The first - and fundamental - issue in this appeal is whether the Commissioner was entitled to conclude that the information sought in categories 3-7 was not "*environmental information*" within the meaning of the AIE Regulations. That conclusion was in turn derived from, and dependent on, his conclusion that the sale of the Lands did not constitute a paragraph (c) "*measure*".

50. This is an application for judicial review rather than an appeal, though in any event the Commissioner contends that, even if this were an appeal under Regulation 13(1) of the AIE Regulations, the jurisdiction of the courts would not in any event be materially broader, relying on the decision of the High Court (Noonan J) in *McKillen v Information Commissioner* [2016] IEHC 27. However, the principal issues in these proceedings, and on this appeal, essentially revolve around the Commissioner's interpretation of the AIE Regulations. That being so, it is perhaps unsurprising that questions of the standard of review and/or the issue of what "*deference*" is to be shown to the judgment of the Commissioner did not really feature in the submissions. [18]

[18] See also the discussion (in the context of a Regulation 13 appeal rather than judicial review proceedings) in the judgment of Hogan in *Minch*, at paras 11-13

51. Before turning to the substantive issues on this appeal, it is necessary to say something more about the role of the Commissioner and the nature of proceedings before the Commissioner under the AIE Regulations. In my opinion, it is clear that such proceedings are inquisitorial rather than adversarial in character. There is no hearing. The extent of the inquiry is determined by the Commissioner, not by the "*parties*". As is demonstrated here, the Commissioner's office investigates each appeal and engages separately with requester and public authority. The Commissioner decides what is disclosed to each party. In addition, the Commission has broad powers to require the production of information by the public authority, to require the attendance of the public authority before it and to enter any premises occupied by a public authority and require to be furnished with any environmental information available on those premises: Regulation 12(6) of the AIE Regulations.

52. It was common case before this Court that, on the facts here, the issue of the information sought at categories 3–7 was "*environmental information*" turns on whether the sale of the Coillte Lands was a paragraph (c) measure.

53. As I have already noted, the Commissioner accepts that, in principle, a sale of land by a public authority *may* amount to a measure affecting or likely to affect the environment. That would be the case, the Commissioner says, where there was evidence available at the time of sale that indicated that the lands in sale were to be developed in a manner likely to affect the environment. According to the Commissioner, that explains most if not all of the various decisions of the UK Information Commissioner relied on by Mr Redmond. It also explains the view taken by the Commissioner to the effect that the information sought in category 8 was, in principle, capable of constituting environmental information.

54. Here, the Commissioner argues, there was simply no evidence before him which could have justified the conclusion that the sale of the Coillte Lands was a measure affecting or likely to affect the environment.

55. The AIE Directive and Regulations do not define "*measure*" (or "*activity*"). Article 2.1(c)/Regulation 3(1)(c) do, however, provide guidance to the extent that it makes it clear that administrative measures are included and, secondly, by identifying by way of illustrative example *( ".. such as…"), "policies, legislation, plans, programmes, environmental agreements"*. That these are illustrative examples only, rather than an exhaustive statement of relevant "*measures*", is clear from the text and is also suggested by C-321/96 *Mecklenberg* where the CJEU held that the (narrower) definition in Directive 90/313 encompassed a submission made by a competent authority in connection with a proposed road scheme on the basis that it was "*an act capable of adversely affecting or protecting the state of one of the sectors of the environment covered by the directive." (para 21)*

56. The High Court Judge here seems to have had doubts whether the sale of the Coillte Lands was capable of constituting a "*measure*" at all: see para 53 of her judgment. However, as I have already indicated, the list in Article 2.1(c)/paragraph (c) is illustrative rather than exhaustive. In any event, the Commissioner accepts (and accepted before the

High Court) that the sale of land could, in principle, constitute a "*measure*", though also submitting that the sale of the Coillte Lands here did not constitute a paragraph (c) measure because of the absence of any sufficient evidence of environmental impact. In any event, I can see no basis on which the disposal of land could properly be said, *a priori*, to fall outside the scope of Article 2.1(c)/paragraph (c) as not being a "*measure*". If – as seems clear from the terms of paragraph (c) – a policy adopted by a public authority in relation to the sale of its property assets is capable of being such a "*measure*", the actual sale of a specific property must equally be capable of being such a "*measure*", subject always to a showing of the necessary environmental effect, actual or "*likely*".

57. The essential question, therefore, is not whether the sale of the Coillte Lands was or was capable of being a "*measure*" but rather whether it was a "*measure affecting or likely to affect*" the environment. If it was, then "*any information ..on*" the sale is *prima facie* required to be provided under the Regulations. That is how this part of this part of the definition of "*environmental information*" operates. In my opinion, it is not correct to look at the information sought to see whether, **in itself**, it is information that can be described as "*affecting or likely to affect*" the elements and factors set out in Article 3(1), paragraphs (a) and/or (b). It is the "*measure*", not the information "*on*" that measure, that is subject to that threshold test.

58. In this context, I agree with the view of Beatson LJ in *Department for Business, Energy and Industrial Strategy v Information Commissioner* [2017] EWCA (Civ) 844 that the definition in Article 2.1(c) (Regulation 2(1)(c) of the UK Regulations) "*does not mean that the information itself must be intrinsically environmental*" (at para 45).

59. Again, this was not in controversy before this Court. However, it does appear that the High Court Judge may have taken the view that it was a requirement that the information sought by Mr Redmond be shown, in itself, to be information "*affecting or likely to affect*" the environment: see paragraph 53 of the judgment. To the extent that she did, she was, in my respectful opinion, in error. Equally, insofar as the Commissioner adopted the same approach in his decision (as to which see the final paragraph of his discussion of question 1), he was also mistaken in my view.

60. Although immediately concerned with paragraph (e) of the definition of "*environmental information*" in Article 3(1), *Minch* provides an illustration of how a document that "*in itself …. could obviously have no implications for the environment since it was concerned with financial modelling*" was nonetheless "*environmental information*" for the purposes of the AIE Regulations.

61. *Minch* also provides guidance as to how the reference in paragraph (c) to measures "*likely to affect*" the environment should be understood and applied. It does not involve any prediction based on probability; rather, according to Hogan J, the question is whether the measure is "*capable*" of affecting the environment: para 40. On that basis, the Court concluded that the National Broadband Plan (NBP) was a measure "*likely to affect the environment*" because it discussed a variety of options for the national delivery of

broadband which would have significant environmental impacts and which could not be dismissed as remote or incidental: para 49. The likelihood of the NDP and/or particular options within the NBP actually being implemented was not the touchstone for the purposes of paragraph (c). A similar approach had been taken by the High Court in *Minch*, where Baker J considered that the approach adopted by the Commissioner had been too narrow and had failed to identify the range of information "*that might affect the elements of the environment i.e. where the consequential effect is not direct or not yet apparent*": para 58 (emphasis added).

62. *Department for Business, Energy and Industrial Strategy v Information Commissioner* suggests that "likely" in Article 2.1(c) denotes "*something more substantial than a remote possibility but did not impose the relatively high standard of a balance of probabilities*": para 31. That was the approach adopted by the Upper Tribunal Judge and no challenge to that approach appears to have been advanced before the Court of Appeal where it was common case that the UK Government's Smart Meter Programme was clearly a measure "*affecting or likely to affect*" the environment: para 38.

63. Drawing together these statements, it appears to me that, for the purposes of paragraph (c), a measure or activity is "*likely to affect*" the environment if there is a real and substantial possibility that it will affect the environment, whether directly or indirectly. Something more than a *remote or theoretical possibility* is required (because that would sweep too widely and could result in the "*general and unlimited right of access*" that *Glawischnig* indicates the AIE Directive was not intended to provide) but it is not necessary to establish the *probability* of a relevant environmental impact (because that would, in my opinion, sweep too narrowly and risk undermining the fundamental objectives of the AIE Directive).

64. Did the material before the Commissioner show a *real and substantial possibility* that the sale of the Coillte Lands would affect the environment? The Commissioner did not pose that question in those terms. He instead appears to have focussed on a different question, namely whether a change in ownership of the Coillte Lands would, in itself, affect the application of the legal regime that controls the felling of trees in the State. Having recited the information his investigator had obtained from the Forestry Service about the control of tree felling, the decision states that it "*follows that even if the new owner of the forest wished to fell the entire forest, he or she could not lawfully do so simply by virtue of acquiring ownership of the lands and trees."* That conclusion appears to have provided the main basis for the Commissioner's ultimate finding that the information relating to the sale was not "*environmental information*".

65. While this analysis may be correct as far as it goes – the new owner of the Coillte Lands is, presumably, bound by the same rules controlling the felling of trees as was Coillte and is not exempt from those rules by virtue of the change of ownership of the Lands - it does not appear to me to adequately address the actual question of whether the sale of the Coillte Lands was "*likely to affect*" the environment. In the ordinary way, the sale of land will not, in itself, result in any alteration of the development regime applicable to

that land. As a matter of general principle, development on the land will require development consent – in the broadest sense of that term – to the same extent after such sale as before. Thus, if the analysis in the decision is correct, it would seem to follow that the sale of land would never constitute a "*measure*" for the purpose of paragraph (c).

66. That, however, is *not* the position adopted by the Commissioner in these proceedings. As I have already noted, the Commissioner accepts (in my view, correctly) that the sale of land can, in principle, constitute such a measure and that it will do so where, for instance, there is evidence that the purchaser intends to develop the land (by, for instance, building houses on what was previously a playing field). That is so even where such development by the purchaser would require development consent in precisely the same way as it would if undertaken by the public authority vendor. The fact that a purchaser cannot undertake development of land without first obtaining development consent does not, therefore, lead to the conclusion that the sale is not a paragraph (c) measure. The Commissioner's approach to category 8 implicitly accepted that this was the case and Mr Foley expressly accepted that this was the position in his submissions to this Court.

67. In his submissions, Mr Foley very fairly accepted that the fact that a "*measure*" may involve development requiring specific development consent(s) does not mean that it is *ipso facto* excluded from the scope of paragraph (c). *Minch* provides a concrete illustration. The NBP was, in the opinion of both the High Court and of this Court on appeal, a "*measure .. likely to affect*" the environment within the meaning of paragraph (c). That was so notwithstanding the fact that (as was expressly acknowledged in the NBP itself) the broadband infrastructure would require various development consents such as road opening permits and planning permissions.

68. It follows, in my view, that the fact that the purchaser of the Coillte Lands would not have an unconstrained entitlement to fell trees - any more than Coillte itself had - did not warrant the decisive weight evidently accorded to it in the Commissioner's decision and the fact that "*a felling licence would, in practice, be required before there could be any significant interference with the forest*" does not, in my opinion, justify the Commissioner's conclusion on the principal issue.

69. It is also important to recall that, as I have sought to explain, it appears to me to be an error to conflate environmental effect and development. While development (in the sense in which that term is generally used in planning and environmental law) will generally affect the environment, a measure may affect the environment absent any such development.

70. The sale here was of a very substantial area of land - over 400 hectares in area - principally forestry and woodland (including old woodland) and also including monuments/archaeological features. In broad terms, the land was/is very clearly of some environmental significance and sensitivity, as is manifest from Coillte's own assessment, as recorded in the material summarised in the Appendix.

71. It is also relevant in this context that Coillte, the vendor, is a public authority established by statute – the Forestry Act 1988 – which is subject to the "*general duty*" *(inter alia)* "*to have due regard to the environmental and amenity consequences of its operations.*"

72. Apart from, and in addition to, that specific statutory duty, Coillte clearly has a depth of experience and expertise in the management of forests and woodlands that few (if any) private owners could match. Given the scale of its operations, it is likely to have significant financial and other resources available to it and may therefore be in a position to take a longer-term perspective in terms of the management and exploitation of its assets.

73. That the transfer of such a significant area of forestry and woodland out of the ownership of a public authority subject to such a statutory duty, and with the expertise and resources of Coillte, into the ownership and control of a private owner who is not so subject, and whose approach to the management and exploitation of the assets being acquired may be quite different to that of Coillte, might give rise to concern as to the potential impact on the environment is unsurprising.

74. The fact that Coillte appears to have a policy of selling land for "*purposes other than forestry*" would likely heighten such concern because it might lead an observer to infer that the sale would or might result in large-scale tree felling and/or otherwise result in the development of the Lands. This policy was, in my opinion, an important factor. Significant reliance was placed on it by the Redmonds in their submissions to the Commissioner.[19] Absent any evidence or explanation to the contrary – and there appears to have been none [20] – it suggests that Coillte itself understood and/or intended that the Lands would or might be used for purposes other than forestry. *Prima facie*, a change in user from forestry to non-forestry purpose would appear to give rise to a real and substantial possibility of environmental effect.

75. The Commissioner's decision does refer to Mr Redmond's reliance on that policy. It makes three separate points about it. The first is that there was "*nothing in the records to suggest that the land at issue in this case was bought for non-forestry purposes.*" However, given that Coillte's stated position was that it had no knowledge of the purchaser's intentions, one way or the other, it seems to me that this point is of little or no weight. Secondly, the decision states that even if the Lands were bought for "*non-forestry purposes*", that would not necessarily mean that the new owner intended to alter the management of the woodland. That, with respect to the Commissioner, is very difficult to understand. If the Lands were indeed bought for non-forestry purposes, then it seems probable if not inevitable that they would managed differently to the way that they had been managed by Coillte for forestry purposes, with (it might be thought to follow) an inevitable impact on the local environment. Thirdly, the decision states that "*in any case, a felling licence would, in practice, be required before there could be any significant interference with the forest*". For the reasons already explained, it does not appear to me

[19] Letter of 16 September 2015, at paragraphs 7-9, as well as paragraph 16
[20] The only Coillte submission to the Commissioner that is before the Court is that dated 3 September 2014 and it is not clear from the papers whether Coillte were given an opportunity to respond to the Redmonds' letter of 16 September 2015

that the fact that "***significant*** *interference with the forest*" (my emphasis) could not occur in the absence of a felling licence has any relevance – and certainly not any decisive relevance – to the actual issue before the Commissioner, which was whether the sale of the Coillte Lands was likely to affect the environment, in the sense of there being a real and substantial possibility of such an effect.

76. The Judge also referred in her judgments to Coillte's policy, stating that she did not think that "*the inference can automatically be made from the existence of that policy to a conclusion that every sale of forestry land by Coillte requires information about the price and the purchaser to be disclosed*." That may indeed be so but the Coillte policy was not the only material before the Commissioner and the issue as presented to the Commissioner was not whether, in isolation, it could or should have led him to conclude that the sale was a paragraph (c) "*measure*" (that being the critical issue rather than the disclosure of information about the price or the purchaser) but whether the material before him, considered as a whole, properly led to such a conclusion. In any event, for the reasons already explained, it appears to me that the Coillte policy was significant and ought perhaps to have been given greater weight by the High Court Judge.

77. In effectively deciding the appeal (so far as it related to categories 3-7) on the basis of the absence of any direct evidence of the purchaser's intentions for the use and/or development of the Coillte Lands (or, more correctly, the absence of any evidence of knowledge on the part of Coillte of the purchaser's intentions for the use and/or development of the Lands) the Commissioner took an approach that, in my opinion, was unduly restrictive. The absence of such evidence was no doubt a material factor but it did not necessarily follow that the appeal ought to fail. To require such evidence in every case would mean that a purchaser might frustrate the effective operation of the AIE Regulations by refusing to reveal its development plans to public authority vendors and/or that public authority vendors might seek to avoid the application of the Regulations by deliberately choosing to remain in ignorance of the intended use of lands being sold by them. I do not, I emphasise, mean to suggest that such was the case here. The point is a general one. In my view, it would be inappropriate to adopt an evidential approach that might incentivise and/or reward such conduct.

78. There is a further aspect of the Commissioner's decision that in my opinion gives rise to significant difficulty. The Commissioner appears to have had available to him the Coillte material referred to above and summarised in the Appendix. It was certainly available to, and was reviewed by, his investigator. The material established (inter alia) that Coillte had undertaken an environmental impact appraisal of the sale and appeared to indicate that, in certain areas, that appraisal had identified that the sale had the potential to result in high environmental impacts. The fact that Coillte had carried out what was referred to as an "*Environmental Impact Assessment*" had also been referred to in Coillte's submission to the Commissioner of 3 September 2014 and in the Commissioner's decision itself.

79. It does not appear that the Commissioner ever inquired why such an exercise had been undertaken by Coillte, ever sought to understand the implications of the results or gave any consideration to this material in his decision. I confess that I find that position difficult to understand. The central question before the Commissioner was whether the sale of the Coillte Lands was a measure "*likely to affect*" the environment. The vendor, Coillte, had undertaken a formal environmental impact appraisal of that sale and yet – so far as the material before the Court discloses – the Commissioner failed to interrogate that process or the output of it. It is also unclear – though this is perhaps a smaller point – whether the Commissioner reviewed the material redacted from the documents furnished by Coillte.

80. The position of the Commissioner that this material related to the reformulated category 8 request which he concluded was not within the scope of the appeal has already been noted. Nevertheless, the material was clearly relevant to the key issue of whether the sale of the Coillte Lands was a measure "*likely to affect*" the environment which issue required to be addressed by the Commissioner in determining whether Mr Redmond had an entitlement to categories 3-7. The conclusion reached by the Commissioner in relation to the reformulated category 8 request did not absolve him from considering the material in that context.

81. Equally, there is no indication in the evidence that the Commissioner sought to understand the internal procedures which Coillte had to follow in order to have the sale approved or its interactions with the Forestry Stewardship Council in relation to the sale to see whether these might be informative as to whether the sale of the Coillte Lands was a paragraph (c) measure.

82. I have already referred to the fact that the Commissioner objects that this material was not relied on before him or before the High Court. Indeed, the Commissioner observes, Mr Redmond had in fact argued that the documents related to an earlier transaction. That being so, it is argued by the Commissioner that no point can properly be made by Mr Redmond at this stage by reference to that material and that the Commissioner cannot properly be criticised for failing to have regard to it, reference being made to a number of decisions which have held that, as a general principle, appeals on a point of law cannot be advanced on the basis of points which could have been but were not advanced before the decision-maker: see, for instance, *Governors of the Hospital for the Relief of Poor Lying in Women v Information Commission* [2011] IESC 26, [2013] 1 IR 1.

83. This is not, of course, an appeal on a point of law and, in any event, no new point of law is being made by Mr Redmond in this context. He contends, as he has always contended, that the information he seeks is "*environmental information*" and that it is such because the sale of the Coillte Lands was a "*measure*" within the meaning of paragraph (c).[21]

[21] In his written submissions, Mr Redmond did seek to rely on paragraph (a) also. The Commissioner objected to such reliance and no argument based on paragraph (a) was pursued before this Court. There would have been very significant obstacles to any attempt to rely on paragraph (a) at this stage of the proceedings, as is evident from *National Asset Management Agency v Commissioner for Environmental Information*, at paragraph 48, referring to *Vavasour v Northside Centre for the Unemployed Ltd* [1995] 1 IR 450

84. It appears that, when provided with the Coillte material in August 2015, the Redmonds mistakenly thought that it related to a different transaction and communicated that mistaken view to the Commissioner. [22] The significant (and unexplained) redactions to the documents may have contributed to their error. The Redmonds sought unredacted copies of certain of the documents at the time but that request appears never to have been responded to.[23] However, the Commissioner's own investigator clearly had been aware that, in fact, the documents were indeed referable to the sale of leasehold interest by Coillte and if there was any doubt on the part of the Commissioner, the position could have been clarified with Coillte.

85. It is also evident from the Commissioner's decision that he understood the correct position i.e. that the material provided by Coillte related to the sale the subject of Mr Redmond's information request.

86. Being aware of the material, it appears to me to be clear beyond argument that the Commissioner ought to have had regard to it in addressing the issues on appeal. I have already referred to the fact that the functions of the Commissioner are inquisitorial rather than adversarial. That being so, the Commissioner did not require any invitation from Mr Redmond in order to consider the material. His investigator had reviewed the material and clearly considered that it constituted "*environmental information*". It should have been considered by the Commissioner in the context of categories 3-7 and in my opinion, the Commissioner failed to properly discharge his functions by failing to consider it.

87. While I readily understood and accept the cogent policy reasons that underpin decisions such as *Governors of the Hospital for the Relief of Poor Lying in Women v Information Commissioner*, it appears to me that, in the circumstances here, it would be wrong to shut Mr Redmond out from relying on the Coillte material before this Court. Mr Redmond was entitled to expect that the Commissioner would consider all relevant material in his possession in determining his appeal. He clearly misread the material when it was provided to him and therefore appears not to have understood its significance. He had no legal representation at that time or when he brought these proceedings or when they were heard in the High Court.

88. The argument that Mr Redmond advances before this Court is not, in my view, outside the parameters of the Statement of Grounds. It does not involve any new relief being sought. The material provided by Coillte is specifically referenced in the Statement of Grounds (albeit by reference to the category 8 issue) and it is clear from the Statement as a whole that Mr Redmond was challenging the Commissioner's determination that the sale of the Coillte Lands was not a paragraph (c) measure.

89. While it certainly appears that the argument was not advanced in the High Court (and, therefore – understandably – was not addressed by the High Court Judge in her judgment), that does not provide an absolute barrier to it being entertained by this Court on appeal: see *Lough Swillly Shellfish Growers Co-operative Society Ltd v Bradley & Ivers*

[22] Letter of 16 September 2015, at paragraph 3
[23] *Ibid*, paragraphs 3 & 4

[2013] IESC 16, [2013] 1 IR 227, at paragraph 28. Here, no new evidential material is being relied on by Mr Redmond – all of the Coillte material was before the Commissioner and before the High Court and the argument that Mr Redmond seeks to make by reference to that material is directed to the essential contention advanced before the Commissioner to the effect that the information sought by Mr Redmond was "*environmental information*" on the basis that the sale of the Coillte Lands was a paragraph (c) measure and the argument made before the High Court to the effect that the Commissioner's conclusion to the contrary was erroneous.

90. In these circumstances, and having regard also to this Court's obligation to give effect to EU law (an obligation that, of course binds the Commissioner also) and to vindicate the rights of citizens under Union law (the ultimate source of Mr Redmond's rights under the AIE Regulations being the AIE Directive), it would in my opinion be wrong to exclude the argument based on the Coillte material from the Court's consideration

91. In all the circumstances, I am of the view that the Commissioner's conclusion that categories 3–7 do not constitute "*environmental information*" is flawed and must be set aside. As I have sought to explain, it appears to me that the Commissioner asked himself the wrong question, did not have sufficient regard to the evidence available to him (and failed to have any regard to a significant portion of that evidence) and failed to carry out an appropriate investigation, including (if required) exercising the significant powers available to him under the AIE Regulations.

92. For the avoidance of any doubt, even if the Commissioner's failure to consider the Coillte material were to be excluded from consideration, I would nonetheless have concluded that his decision ought to be quashed.

*Category 8/Reformulated Category 8*

93. The Commissioner did not adjudicate on the reformulated category 8 request for the reasons set out in his decision. While I have been critical of the manner in which this issue was dealt with by the Commissioner, I do not think there is any basis for impugning the substance of the Commissioner's decision. In circumstances where the reformulated category 8 request (which was significantly broader in scope than the original category 8 request) had not been the subject of any decision by Coillte, the Commissioner was certainly entitled to take the view that it was not properly within the scope of the appeal, though that position should have been communicated earlier to Mr Redmond. In any event, even if I had reached a contrary conclusion, it would not be open to the Court to stand in the shoes of Coillte or the Commissioner and to decide on the reformulated category 8 request now.

94. Given that the Commissioner did not adjudicate on the reformulated category 8 request, it was not necessary or appropriate for him to reach any view on the redactions to the Coillte material. That issue remains to be addressed, in the first instance by Coillte and then by the Commissioner in the event of an appeal to him.

**CONCLUSIONS AND DISPOSITION**

95. Subject to hearing the parties, it follows from the conclusions above that Mr Redmond's appeal in respect of categories 3-7 should be remitted to the Commissioner for reconsideration.

96. It may be, however, that in all the circumstances, including the lapse of time since the existing request was made, as well as the fact that the reformulated category 8 request remains to be decided by Coillte in any event, that Mr Redmond and his advisers will take the view that it would be better to direct an entirely new request for information to Coillte.

97. In the event that the matter is remitted, it will be for the Commissioner to determine whether the sale of the Coillte Lands was a measure "*likely to affect*" the environment in the sense indicated in this judgment. In that context, the Commissioner should have regard to the existing evidence as well as any additional relevant evidence that may be furnished to him, whether by Mr Redmond or by Coillte, including any further evidence provided to him as a result of any further inquiries he considers it appropriate to make in light of this judgment. Mr Redmond and Coillte should also be given an opportunity to make further submissions to the Commissioner in light of this judgment.

98. It will be a matter for the Commissioner to assess that evidence and come to an appropriate conclusion. As ought to be clear from the discussion above, it is not the case that all sales of land by public authorities are paragraph (c) measures. In his submissions, Mr Foley suggested that a finding against the Commissioner would constitute such sales as a *de facto* additional category of "*environmental information*". That is not the case. This judgment simply seeks to clarify how the existing category of "*environmental information*" in paragraph (c) is to be understood and applied to the sale of the Coillte Lands (not any other sale by Coillte or any sale of lands by any other public authority). That is, as was submitted on the Commissioner's behalf in the course of these proceedings, a matter of degree and what the Commissioner is required to determine is how to characterise the specific sale at issue in these proceedings.

99. In the event that the Commissioner were to conclude that the sale of the Coillte Lands did constitute a "*measure*" within paragraph (c) of Article 3(1)) of the AIE Regulation – and I emphasise again that the decision is his – a further issue may then arise as to whether the information sought in categories (3) to (7) is information "on" that measure. The decision of the Court of Appeal of England and Wales in *Department for Business, Energy and Industrial Strategy v Information Commissioner* indicates that there may be some scope for debate on that issue, with Beatson LJ suggesting that regulation 2(1)(c) should be "*read down*" by reference to the purpose of the Aarhus Convention and the AIE Directive to provide for access to environmental information so as to enable members of the public to be better informed and better able to contribute to environmental decision-making. Information not relevant or useful to that purpose, he suggests, may not be required to be provided.

100. In his written submissions to this Court, Mr Redmond referred to this aspect of *Department for Business, Energy and Industrial Strategy v Information Commissioner* and also referred to a subsequent (UK) Upper Tribunal decision in *Department for Transport v Information Commissioner and Cieslik* [2018] UKUT 127 (AAC) in which it is considered. According to Mr Redmond, while the information sought did not need to be environmental in character, it had to have more than a "*minimal connection*" with the relevant "*measure*". Unsurprisingly, Mr Redmond argues that all of the categories sought by him satisfy that requirement.

101. Given the absence of any real discussion of this issue on the appeal and having regard to the fact that Coillte did not participate in the appeal, I do not think that it would be appropriate to hold the Commissioner to any apparent concession that, in the event that he were to conclude that the sale of the Coillte Lands constituted a paragraph (c) measure, the information sought in categories 3–7 would necessarily be "*environmental information*". The decision in *Department for Business, Energy and Industrial Strategy v Information Commissioner* suggests that that may not the correct position and, in the circumstances, it would not be appropriate to foreclose further consideration of that issue before the Commissioner. I express no view on the submissions made by Mr Redmond given that they were not the subject of debate before us.

102. Furthermore, the application (if any) of any grounds for refusing access to environmental information under the AIE Regulations, and in particular Article 9, is a matter that the Commissioner may need to consider, depending on his conclusions on the issue of whether categories 3–7 constitute "*environmental information*".

103. As regards reformulated category 8, Coillte should now proceed to make a decision on that category. Presumptively, that decision will involve access being given at least to access the documents summarised in the Appendix (on the basis that Coillte appear to have accepted previously that these documents came within that category and were "*environmental information*"). Any redactions made to the documents produced on foot of that request should be explained sufficiently to allow Mr Redmond to make an informed decision whether to seek an internal review and/or to pursue a further appeal to the Commissioner. It seems sensible that any such appeal would be dealt with at the same time as the remitted appeal in relation to categories 3–7 (assuming that the appeal is remitted) but I would leave that to the Commissioner to determine.

104. In the event of a new request being made by Mr Redmond, that request should be considered by Coillte and (in the event of an appeal to him) by the Commissioner in accordance with this judgment.

105. The parties will have an opportunity of considering this judgment and of making submissions (which, in the current circumstances, may have to be in writing) on all consequential issues.

Faherty J

1. I agree with the judgment of Collins J.

Haughton J

1. I also agree with the judgment of Collins J

**APPENDIX**

**THE ADDITIONAL DOCUMENTS PROVIDED BY COILLTE**

- An extract from the contract of sale in respect of the Coillte Lands. The Documents Schedule lists "*Copy Felling Licence with outstanding afforestation/replanting obligation affecting the Subject Property*" and the Special Conditions includes a condition whereby the purchaser acknowledges that it is on notice that there are "*unsatisfied afforestation/re-planting obligations under the Forestry Act 1946 (as amended) in respect of a portion*" of the property in sale, recites its agreement to "*accept total responsibility for compliance*" with those obligations and agrees to indemnity Coillte against any proceedings etc arising from its failure to comply with those obligations. A number of special conditions in the extract are redacted.

- A document headed *Coillte Forest Finance*, *Planning and Measurement* which sets out information detailing the make-up of the forestry, including the species and age-class distribution. One of the tables on this page is redacted in its entirety.

- A 2 page document which sets out various items of information relating to the sale of the Coillte Lands. The details of the proposed purchaser are redacted. Under the heading "*Direct Impact Assessment (From Review of Coillte FIS)*", various impact types are listed and there are yes/no boxes to indicate (so I infer) whether that particular impact is anticipated, with space for further details where it is. The document appears to indicate an anticipated impact in respect of "*Biodiversity Designation*" and "*Old Woodland Sites*" by reference to specified "compartments" (presumably sub-units of the Lands) and in respect of "*Monuments/Archaeological features*". Reference is made to an ecology management plan in place since 2004 and also to an EIA, section 6 of which appears to deal with monuments/archaeological features. On the next page, the "*new owner of the Kilcooly estate*" is identified and reference is made to the fact that an EIA had been completed. There is then a section where the recommendations of various officers (whose names are redacted) is recorded, that step preceding "*submission to PSOC*". The document does not explain what PSOC is but in the course of the appeal we were told that it refers to a body within Coillte called the Property Sign-Off Committee that, it seems, has the final say on proposed property disposals. This part of the documents also contains comments (some of which are redacted), one of which states that the "*intention of the purchaser is to maintain the tree cover and manage the woodland as a woodland into [the] future in compliance with the Forestry Act.*"

- 2 maps of the Land

- A document headed "*Appendix 1: On Site Checklist for Environmental Impact Appraisal Form*" It is not evident from this document what it is an appendix to. By reference to 7 categories, it identifies potential environmental impacts/factors. Although the document appears to have been signed and dated (the signatures and dates are redacted, however) it is otherwise blank.

- A document headed "*Appendix 2: Environmental Impact Appraisal Form*". By reference to the same 7 categories, this identifies the nature of the impact, "*scores*" that impact in

terms of high (H), medium (M) or low (L) and identifies relevant mitigation in relation to the impact concerned. Some of the impacts identified (in respect of People, Biodiversity and Archaeology/Cultural Heritage) are given a H score. By way of example, the mitigation column for Biodiversity refers to the existence of a management plan and the proposed replacement of a specific biodiversity area and states that the purchaser had been provided with a map and details of the Coillte designations of biodiversity and areas of old woodland and archaeological features and also notes that as those areas were all woodland, all felling and restocking would have to be compliant with the Forestry Act 1946. The mitigation for Archaeology/Cultural Heritage again refers to the fact that the purchaser had been made aware of the locations of the archaeological and cultural features.

- The final document is a 1 page document that appears to have been prepared by Coillte's Environment Officer which sets out the results of a desk-top review of the designations applicable to the Lands which, in addition to the Biodiversity and Old Woodland designations previously referred, include a number of aquatic zones connecting to the River Nore and certain cultural features.