[2020] IEHC 190

THE HIGH COURT

[No. 2019/47 M.C.A.]

IN THE MATTER OF AN APPEAL PURSUANT TO ARTICLE 13 OF THE EUROPEAN COMMUNITIES (ACCESS TO INFORMATION ON THE ENVIRONMENT) REGULATIONS, 2007-2018

BETWEEN

ELECTRICITY SUPPLY BOARD

APPELLANT

AND

COMMISSIONER FOR ENVIRONMENTAL INFORMATION

RESPONDENT

AND

LAR MCKENNA

NOTICE PARTY

JUDGMENT of Ms. Justice O'Regan delivered on the 3rd day of April, 2020

1. The within matter comes before the Court on foot of a notice of motion of the 11th February, 2019, pursuant to O. 84 of the Rules of the Superior Courts and Article 13 of the Regulations mentioned in the title hereof (the Regulations). Article 13 aforesaid provides for an appeal on a point of law to the High Court from the decision of the respondent and in the instant matter the relevant decision is dated 13th December, 2018.

2. By a request of the 18th October, 2017, the within notice party requested of the applicant three categories of documents including the transcript of a hearing which took place on the 19th and 20th June, 2017, before Paul Good, property arbitrator, wherein there was an assessment of the compensation due and owing to relevant land owners under s. 53(3) of the Electricity Supply Act, 1927, as amended (the 1927 Act). The relevant assessment of compensation was carried out pursuant to the provisions of the Acquisition of Land (Assessment of Compensation) Act, 1919 (the 1919 Act). The transcript runs to 488 pages and was prepared by Gwen Malone Stenography Services (GMSS) for the appellant.

3. The notice party's request was dealt with in the first instance by Colm Smyth on behalf of the appellant, and by a decision of the 17th November, 2017, the request was refused. Following an internal review, by decision of the 11th January, 2018, Marie Sinnott on behalf of the appellant upheld the refusal on the basis that, although the transcript may contain some environmental information, same was captured by the exclusions within the Regulations. By appeal of the 20th January, 2018, the notice party appealed to the respondent under Article 12(3) of the Regulations.

4. The Regulations were brought into force in this jurisdiction to give effect to Directive 2003/4/EC of the 28th January, 2003, on Public Access to Environmental Information (the Directive).

5. Generally, by virtue of the Regulations and the Directive, public access to environmental information is to be construed broadly and should be considered the norm, with the exceptions applying to circumstances where those exceptions are construed narrowly. Recital 1 of the Directive makes reference to "access" and "dissemination" of information.

6. Although the notice of motion comprises several grounds of appeal, in effect, there are three grounds, the first of which is subdivided into two categories, all of which are summarised as follows:

   (1) Reference is made in the body of the decision of the respondent to acquisition of lands and the Compulsory Purchase Order (CPO) process. The appellant suggests that this is an incorrect description of the process undertaken by the respondent;

   (2) The notice party's submissions were not furnished to the appellant in advance of the decision of the respondent, which submissions made reference to UK jurisprudence, which it is said the respondent relied on. Furthermore, the appellant was not notified that Article 7 of the Regulations would be deployed in the manner provided for in the decision. Finally, under this heading, it is suggested that reference to a possible inspection as being a solution to the opposing positions of the parties was only vaguely mentioned in an email of June, 2018 to the appellant, and the appellant suggests that this was insufficient advance notice of engagement with the possibility of inspection in the circumstances;

   (3) The finding of the respondent that the transcript contained environmental information is irrational and not supported by reasons or otherwise within the decision; and,

   (4) Finally, it is suggested that the findings from pp. 12-14 of the decision are irrational in that there was a clear finding at p. 12 of the decision to the effect that the transcript was covered by copyright, that notwithstanding the public interest in disclosure, nevertheless, on a weighing exercise, the protection of the copyright outweighed the public interest element. Following such findings, the respondent then went on to direct access by means of making the transcript available for *in situ* viewing by the notice party. In the cover letter accompanying the decision it was indicated that the appellant was not obliged to make a copy of the transcript, and the notice party was not permitted to transcribe it.

7. In the respondent's points of objection of the 13th June, 2019, the respondent raises a robust defence to each and all of the grounds of appeal.

8. Insofar as the relevant applicable jurisprudence is concerned, the parties agree on the jurisprudence and indeed the applicable principles, however, disagree on the application thereof.

9. The only category surviving in respect of the three categories sought by the notice party in the initial request of the 18th October, 2007, relates to the disclosure of the transcript aforesaid.

10. Insofar as the Court's jurisdiction in respect of the within appeal is concerned, the parties agree that this is an appeal on a point of law. Following a decision of McKechnie J. in *Deely v. Information Commissioner* [2001] IEHC 91, the remit of the court is confined to

setting aside findings of primary fact only if there is no evidence to support such findings, setting aside inferences from such findings of primary fact only if no reasonable decision-making body could draw the same inference, provided however, if such inferences are based on the interpretation of documents, these inferences can be reversed if incorrect, and conclusions reached based on an erroneous view of the law can be set aside.

11. The above principles have since been considered by the Supreme Court in *Sheedy v. Information Commissioner* [2005] IESC 35, and in *Fitzgibbon v. Law Society* [2014] IESC 48 and applied therein. In *Sheedy* aforesaid, it was indicated that once there was some evidence before the respondent, then under the principles of *O'Keeffe v. An Bord Pleanála* [1993] 1 IR 39, the decision of the respondent should not be interfered with – considerable deference will be afforded to an expert decision maker such as the Commissioner (see for example *F.P. v. The Information Commissioner* [2019] IECA 19).

12. Given that the within Regulations are based on an EU Directive as aforesaid, following the decision in *NAMA v. Commissioner for Environmental Information* [2015] IESC 51, a judgment of O'Donnell J. in the Supreme Court, an interpretation of the Regulation solely through the prism of national law would not be correct and the court's approach to interpretation of such legislation so far as possible should involve a teleological approach.

13. In *Minch v. Commissioner for Environmental Information* [2017] IECA 223, Hogan J. observed that the real question before the Court was whether the Commissioner correctly interpreted the relevant legal provisions and, if so, whether the inferences drawn by him were ones which might reasonably have been drawn with questions of statutory interpretation purely on questions of law being judicially determined by reference to the underlying objectives of the Directive.

Characterisation of the hearing before the property arbitrator

14. The appellant complains that at p. 4 of the impugned decision, the respondent describes the nature of the hearing by reference to land being compulsorily acquired by the appellant for the purposes of developing electricity transmission infrastructure. Reference is also made to a CPO process as being integral to the development of such infrastructure. Critically from the appellant's point of view, the respondent stated:

> *"I also accept that the acquisition of land by ESB through the CPO process is…"*

15. The appellant argues that the ESB was not acquiring the land but rather placing a burden by way of an easement thereon, and the hearing was for the purposes of assessing compensation to be paid to the land owner in respect of such wayleave, rather than it involving a CPO process.

16. The respondent references *ESB v. Gormley* [1985] IR 129, where it was held by the Supreme Court that in order for s. 53 of the 1927 Act to be constitutional, same required an obligation to pay adequate compensation, which obligation implied the right to have the amount assessed by an independent arbiter or tribunal rather than by way of an *ex*

gratia payment determined by the appellant. Finlay C.J. did find that the acquisition by the appellant under s. 53 involved a power to impose a burdensome right over land.

17. I am satisfied that reference to the hearing before Mr. Good was not sufficiently central or fundamental to the decision-making process of the respondent to enable the asserted errors to vitiate the decision in the circumstances.

18. Given that there is a clear compulsory component in the acquisition of the wayleave by the appellant with the relevant infrastructure already *in situ* by the time the compensation arbitration hearing took place, the appellant's complaint is, in my view, over technical and not necessarily valid (because of the components of compulsory acquisition and payment).

19. In the circumstances, I am not satisfied that such a ground could give rise either individually or in combination with any other ground to an order condemning the respondent's decision.

Submissions, Article 7 and inspection

20. The appellant argues that fair procedures were breached in not furnishing the submissions, in not indicating that Article 7 might be deployed, and in not making more reference to the possibility of a consideration of an inspection facility under Article 7 of the Directive.

21. The respondent counters that, in fact, such submissions were not sought and the procedures were informal in nature and, therefore, a duty to exchange submissions would be inconsistent with the flexibility afforded to the respondent where there is no express requirement to exchange the submissions. The respondent's procedural manual details the policy that, in general, submissions will not be exchanged, with such exchange happening only in exceptional cases with the consent of the relevant parties.

22. The appellant relies on *National Maternity Hospital v. Information Commissioner* [2007] IEHC 113, being a judgment of Quirke J. in the High Court, as to a possible breach of fair procedure by reason of a failure to circulate submissions. Notwithstanding that, the Court indicated that it knew of no principle where a right to respond to submissions in a statutory process arose. It is argued by the appellant that the context of those comments arose where the relevant submissions of a third party not made available were in fact supportive of the position of the hospital and no prejudice could be deemed to be suffered.

23. The appellant also relies on *J & E Davy v. Financial Services Ombudsman* [2008] IEHC 256, where Charleton J. noted that a procedure cannot be fair if the party against whom a complaint is made is not enabled to make a response. In fact, Charleton J. indicated that where the submissions involved argument no need to exchange arose, but rather, it is where factual material which might influence the adjudication process is included, a complaint can validly be made.

24. In *Grange v. The Information Commissioner* [2018] IEHC 108, this Court set out at para. 28 thereof, the matters taken into account in determining that the non-furnishing of the submissions complained of prior to the relevant decision did not breach any constitutional right of the appellant or breach fair procedure. Those matters apply equally here, namely:

    (a) The fact that submissions cannot be classified as evidence.

    (b) The adjudicative process as a whole (see the judgement of Haughton J, in *Martin v. Date Protection Commissioner* [2016] IEHC 479 at para 75 *et seq*. where he distinguishes various different statutory adjudicative processes).

    (c) The discretion afforded to the Commissioner in or about the procedures to be adopted.

    (d) The decision of Quirke J. aforesaid.

    (e) The respondent's policy document and prior advice on the point afforded to the appellant.

25. In all of the circumstances therefore, it does appear to me that failure to furnish the notice party's submissions prior to the decision of the respondent did not amount to a breach of fair procedure.

26. Article 7(3) of the Regulations provides that where access is requested in a particular manner, access may be given in another form, *inter alia*, if this is reasonable.

27. In an email of the 1st June, 2018, from the respondent to the appellant, in advance of making a decision, various queries were raised of the appellant. At p. 2 thereof, under the heading "Adverse Effects", a paragraph is included to the following effect:

> *"I would be obliged if ESB would clarify, if in the event the Commissioner was to decide to direct the release of the transcript or parts of it, or to direct that the appellant be allowed to inspect the transcript, how the potential harm or loss would not be prevented by the enforcement of the stenography company's intellectual property rights."*

28. The respondent suggests that this is sufficient to satisfy fair procedures, notwithstanding that the concept of in situ inspection was not raised again by the Commissioner of the appellant. The appellant complains that this comprised a minimal and oblique reference to inspection and the concept of *in situ* inspection was not sufficiently advised to the appellant in advance of the decision.

29. In my view, there is not a minimal quantum of words to be used in order to sufficiently alert a party in order to afford advance notice of a consideration which might be made in the circumstances. Although the detailed letter of the 1st June, 2018, ran to some five pages and it is true that the above reference was the only reference to the possibility of inspection, nevertheless, I am satisfied that it was not necessary for the Commissioner to

repeat or otherwise deploy a larger wordcount on the invitation to make submissions on inspection for the purposes of compliance with fair procedure.

30. I am not satisfied in the circumstances, therefore, that the appellant has discharged the onus of proof in respect of a breach of fair procedure relative to the considerations subsequently given by the respondent to a potential inspection of the transcript subject to matters hereinafter detailed with regard to the appellant's irrationality point.

Did the transcript comprise environmental information within Article 3(1)(a) of the Regulation?

31. As previously mentioned, disclosure of information will be the general rule with any refusal to be interpreted in a restrictive manner (see Recital 16 of the Directive). It is further accepted that the three pillars of the Aarhus Convention, which in turn gave rise to the Directive, was to afford access to information to the public for any number of purposes and not just to participate, although the second pillar is public participation in decision making and the third is access to justice.

32. Article 3(1) of the Regulation provides that:

> *"environmental information" means any information in written… or any other material form on-*
>
> *(a) the state of the elements of the environment…*
>
> *(b) factors, such as substances… and other releases into the environment, affecting or likely to affect the elements of the environment,*
>
> *(c) measures… such as policies… 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…, and*
>
> *(f) the state of human health and safety… affected by the state of the elements…"*

33. In *Case C-316/01 Glawischnig v. Bundesminister für soziale Sicherheit und Generationen*, the CJEU was dealing with the precursor of the instant Directive. The Court was satisfied that a broad interpretation of access to environmental information was to be afforded, although it was not intended 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. To be covered by the right of access, the Court determined that such information must fall within one or more of the categories set out in that provision (see para. 25 of the judgment).

34. In *Case C-297/12 Fish Legal v. Information Commissioner*, the CJEU held that the right of access guaranteed by the Directive applies only to the extent that the requested information satisfies the requirements for public access, which means that the information must be "environmental information" within the meaning of Article 2(1) of the Directive.

35. It is common case that Article 2(1) of the Directive is mirrored by Article 3 of the Regulation.

36. In the matter of *The Department for Business, Energy and Industrial Strategy v. The Information Commissioner & anor* [2017] EWCA Civ 844, a decision of the UK Court of Appeal of the 29th June, 2017, the Court was dealing with an appeal of the Upper Tribunal on a request for information under UK legislation similar to the Regulation herein.

37. At para. 6 of the judgment, it was indicated that, in very general terms, the issue was when and whether information on a measure which does not in itself affect the state of the elements of the environment or factors, can be information "on" another measure which does so affect. It was agreed that the programme as a whole was likely to affect the relevant elements and factors but the appellant argued that one component thereof did not qualify as it did not include relevant environmental information.

38. The tribunal's decision was upheld and the Court found that the relevant component was "on" the programme as a whole because it was integral to the success of the programme as a whole.

39. The tribunal has been satisfied that the disputed component must play a sufficiently important role in the overall project and in the environmental aspects of that project to be sufficiently connected (see para. 26 of the Court of Appeal judgment). Furthermore, the tribunal was satisfied that the fact that the disputed component was not inherently about the environment, did not suffice to preclude it from being taken into account in the overall project.

40. The tribunal recognised that some types of information are not relevant to a project and clearly will not amount to environmental information within the meaning of the Regulation. The tribunal found that the disputed component did not contain information of some incidental aspect of the overall project that could easily be hived off, rather, was integral to its success.

41. The Court of Appeal at para. 37 indicated that information is "on" a measure if it is about, relates to or concerns the measure in question. At para. 40, the Court noted that the tribunal accepted that some types of information that are relevant to a project which itself has some environmental impact do not amount to environmental information within the Regulation and that the information in the disputed component was "integral" and "critical" to, and a "key element" to the success of, the overall programme.

42. The Court accepted at para. 43 that in identifying measures that are "on", requires consideration of the wider context and it is not strictly limited to the precise issue with which the information is concerned. The Court identified that it may be relevant to consider "*the purpose for which the information was produced, how important the information is to that purpose, how it is to be used, and whether access to it would enable the public to be informed about, or to participate in, decision making in a better way"*.

43. At para. 45, it was indicated that a literal reading of the Regulation would mean any information about a relevant measure would be environmental information, even if the information itself could not be characterised as having, even potentially, an environmental impact as defined. The information itself need not be intrinsically environmental and the task is to find the line between information which qualifies, and that which does not qualify by reason of being too remote.

44. The Court at para. 47 stated that reference has to be had to the general principle that the Regulations, the Directive and the Aarhus Convention are to be construed purposefully, *"Determining on which side of the line information falls will be fact and context-specific."* General guidance was to the effect that information will not be information "on" the project for the purposes of, inter alia, Article 3 of the Regulations because it is not consistent with or does not advance the purpose of, *inter alia*, the subsections of Article 3.

45. Both parties in their respective submissions indicated that the facts of each case will dictate as to whether information qualifies or does not. This acknowledges the UK Court's indication at para. 47 that in answering the question, the matter will have to be reviewed on a fact and context specific basis.

46. In the impugned decision of the 13th December, 2018, at p. 2, the respondent indicates that he has completed his review under Article 12(5) of the Regulation, having regard to the submissions of the parties, the guidance document, the Directive, the Aarhus Convention and its implementation guide, the jurisprudence of the court, the 1927 Act and the Copyright and Related Rights Act, 2000. At p. 3, it is indicated that:

> *"Therefore, if there is no environmental information contained in the transcript, then it would not be necessary or appropriate for me to consider whether any of the exceptions to disclosure in Articles 8 and 9 of the AIE Regulation applies."*

47. The above statement follows an indication that the respondent's powers apply only in respect of environmental information.

48. The respondent then goes on to set out the provisions of Article 3(1) of the Regulation and, thereafter, the submissions of the notice party. At p. 4 of the decision, it is stated:

> *"I accept that the development of the electricity infrastructure is a measure and activity affecting or likely to affect the elements and factors of the environment under Article 3(1)(c). I also accept that the acquisition of land by ESB through the*

CPO process is a measure affecting or likely to affect the elements and factors of the environment under Article 3(1)(c). Both these measures and activities are likely to affect the elements and factors of the environment such as landscape, energy and emissions."

49. The decision then goes on to deal with the obligation to pay compensation and the *Gormley* decision aforesaid. The paragraph concludes with:

> *"Accordingly, I accept that the property arbitrator's jurisdiction and hearing are integral to the CPO process and the development of the electricity infrastructure. Therefore, I am satisfied that the transcript of the property arbitrator's hearing is information on a measure and activity within the meaning of Article 3(1)(c) of the AIE Regulations."*

50. Having regard to all of the foregoing, I am satisfied that:

(1) Although it is common case between the parties that the Commissioner had a copy of the transcript available to him, he does not suggest at pp. 2 and 3 thereof that in completing his review, he has had regard to the content of the transcript.

(2) The respondent set forth the correct test having regard to the CJEU decisions aforesaid and the UK Court of Appeal decision in respect of the requirement to review the transcript.

(3) Page 4 of the decision in accepting that the acquisition of land through the compensation process is a measure affecting or likely to affect the elements and factors, in my view, the Commissioner was being context specific and not facts specific. The subsequent reference to the *Gormley* decision was also context rather than fact specific.

(4) At no time during the course of the effective discussion in the decision, prior to coming to the conclusion that the transcript is information on a measure and activity to be captured by Article 3(1)(c), is the transcript or any detail within the transcript referenced.

(5) I am satisfied that, having regard to the jurisprudence identified, it is not possible for the Commissioner to come to a valid decision that because the payment of compensation is integral in terms of constitutional requirements, that that in and of itself makes the information contained in the transcript a measure and/or activity within the meaning of Article 3(1)(c), without either, in accordance with the CJEU decisions aforesaid, specifying how the information is environmental on the content of the transcript, or how same is integral to the development of electricity infrastructure.

(6) The respondent did not conduct any case specific review of the transcript notwithstanding that at p. 3 of his decision, he identified the necessity for such.

(7) In the circumstances, I am satisfied that the manner in which the respondent reached his conclusion, that the transcript was a measure or activity, within Article 3(1)(c) of the Regulation, was not lawful.

Are the findings at pp. 12-14 of the decision irrational?

51. At p. 10 of the decision, the Commissioner found that the transcript is an original literary work for the purposes of s. 17(2) of the 2000 Act and comprised the intellectual property of GMSS. Thereafter, the respondent posed the question as to whether disclosure of the transcript would adversely affect the intellectual property rights provided for in Article 9(1)(d) of the Regulation. The respondent lays particular emphasis to the following content in p. 11 to explain the finding at p. 13:

> *"I am satisfied that disclosure under the AIE Regulations would adversely affect the intellectual property rights… as it would involve copying the transcript and making it available to the public without the copyholder's consent."*

52. Insofar as the foregoing is concerned, the respondent suggests that by using the word "disclosure", reference is being made to furnishing the notice party with a copy of the transcript without the consent of GMSS. At p. 12, he stated that the "*release of the transcript would adversely affect its intellectual property rights*." Thereafter the respondent makes the clear finding: *"Accordingly, I am satisfied that Article 9(1)(d) of the AIE Regulations applies to the transcript."*

53. The respondent then went on to consider the public interest as provided for in Article 10(3) to ascertain whether, notwithstanding the finding of the application of the exception in Article 9(1)(d), nevertheless disclosure may be in the public interest.

54. At p. 13, the respondent indicates that he found above that the release of the transcript would breach, *inter alia*, copyright and would adversely affect the intellectual property rights. In fact, what he had found above was that Article 9(1)(d) applied.

55. The matter is further confused by the Commissioner indicting that a decision to grant access would require that ESB provide the appellant with a copy. Thereafter, the Commissioner finds that the interest in maintaining the exception in Article 9(1)(d) outweighs the public interest in disclosing the information sought. In this context, the respondent argues that the word "disclosing" indicates copying the transcript to the notice party.

56. The respondent then goes on to consider whether or not Article 7(3)(a)(ii) (which, as aforesaid, details that disclosure might be by an alternate mode), and then comes to the conclusion that the public interest "*in disclosure would be satisfied to a large extent by ESB allowing the appellant to inspect the transcript in situ at its office*."

57. The cover letter under which the decision is furnished on the 13th December, 2018, identifies that arrangements for the granting of access by means of inspection involve giving the notice party a reasonable opportunity to inspect the information including sufficient time to read the information. This inspection does not mean an opportunity to

transcribe the records but he may make notes as he is inspecting the information. It states that the appellant does not have to provide a copy of the information.

58. In submissions, it is argued on behalf of the respondent that although not expressly stated, it is implied that there will be no phone copying during the currency of inspection. It is also suggested that there might have been other ways of deciding what precisely was granted by the Commissioner's decision rather than making an application to the court.

59. Based on the foregoing, I am satisfied that:

(1) The Commissioner has used the words disclose, release and access as being interchangeable words on p. 13 of his decision.

(2) The Commissioner did in fact make a clear finding that Article 9(1)(d) of the Regulation applied. Thereafter, the decision went on to provide that the interest in maintaining the exception in Article 9(1)(d) outweighed the public interest in disclosing the information sought. According to the respondent's argument, one reads disclosing in the context of the finding under Article 10(3) as meaning by furnishing a copy. At p. 14, in the paragraph commencing "on balance", the word disclosure is again used, but here apparently meaning without a copy being furnished, that is, a meaning in accordance with the dictionary meaning being "make known".

60. Given the fact that disclose, release and access appear to be interchangeable words, and disclose has a meaning on the one hand of providing a copy but on the other not providing a copy, it would be hard to conclude that the decision is clear. In fact, in argument, it was conceded that the decision may not be entirely clear and it was urged that a fairer reading would be to read the word "access" and "disclosing" as being reference to providing a copy at page 13. This status is not assisted by the fact that the cover letter does not clarify that phone copying will not be permitted, although it is suggested on behalf of the respondent that this is implicit in the letter. Further, as aforesaid (para 58 above) the respondent did in submissions acknowledge that clarification as to what precisely was granted by the decision might have been clarified other than by way of application to the court.

61. It does appear on balance that the decisions reached in pp. 12-14 inclusive are confusing and contradictory. This in my view amounts to a use of terminology which plainly and unambiguously flies in the face of fundamental reason and common sense (Griffin J., *State (Keegan) v. Stardust Victims Compensation Tribunal* [1986] IR 642). Finally, it is not clear which of the two meanings is ascribed to each of the words as they appear in the Directive and/or Regulations.

Conclusion

62. In the circumstances, I am satisfied that the manner in which the respondent determined that the transcript comprised environmental information under Article 3(1)(c) of the Regulations was unlawful and, separately, decisions made at paras. 12-14 are irrational.