THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 27 J.R.]

BETWEEN

JIM REDMOND AND MARY REDMOND

APPLICANTS

AND

COMMISSIONER FOR ENVIRONMENTAL INFORMATION

RESPONDENT

AND

COILLTE TEORANTA

NOTICE PARTIES

JUDGMENT of Ms. Justice Ní Raifeartaigh delivered on the 14th day of December, 2017.

Nature of the Case

1. This is an application by way of judicial review for an order of *certiorari* of a decision made by the first respondent (hereinafter "the Commissioner") on the 2nd November, 2015, upholding a decision of the second respondent (hereinafter "Coillte") in respect of information relating to a property sale by Coillte. The sale in question concerned lands and forestry at Kilcooley Abbey Estate, Thurles, Co. Tipperary. The kernel of the case concerns the meaning of the term "environmental information" within the meaning of the EC (Access to Information on the Environment) Regulations, 2007.

The AIE Regulations: S.I. No. 133/2007 - European Communities (Access to Information on the Environment) Regulations 2007

2. The EC (Access to Information on the Environment) Regulations, 2007 (hereinafter "the Regulations") transpose the obligations to provide for access to environmental information as required by Directives 90/313/EEC and, subsequently, 2003/4/EC (the latter Directive having replaced the former).

3. The Directives were implemented following the signing by the European Community of the UN/ECE Convention on Access to Information, Public Participation and Decision-Making and Access to Justice in Environmental Matters, known as "the Aarhus Convention" (1998).

4. Article 3(1) of the AIE Regulations provides for the following definition of "environmental information":-

> "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
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> (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)."

Relevant Facts/Chronology

5. It is necessary to distinguish between a number of different stages in the chronology; the initial request for information by the applicants to Coillte, the internal review within Coillte, and the appeal to the Commissioner.

The request for information made to Coillte

6. By letter dated the 22nd May, 2014, the first applicant wrote to Coillte requesting information/documentation in relation to the "recent sale of the Coillte lands/forestry at Kilcooley Abbey Estate, Thurles, Co. Tipperary", under the Access to Information on the Environment Regulations 2007. He specified the information and documents sought in eight bullet points as follows:

> • "On what date was the land lease for forestry at Kilcooley Abbey Estate purchased from Coillte by the new owner?
>
> • How many acres were purchased from Coillte and what other assets were included in the sale?

- Who purchased the Coillte land/ forestry at Kilcooley Abbey Estate?
- What price was paid to Coillte for the leasehold of the forestry lands or other leases at Kilcooley Abbey Estate?
- What other parties and other legal representatives were involved in transferring the lease to the new owner?
- Provide details on who valued the leased lands/forestry and how the valuation was compiled.
- What was the valuation of the leased lands/forestry?
- I also request any information or correspondence you have on the proposed development of lands/forestry on Kilcooley Abbey Estate."

7. By email dated 11th June, 2014, Mr. Tom Byrne of Coillte replied as follows.

> "Coillte disposed of its leasehold interest in 402.92 hectares at Kilcooley. Contracts were issued in March 2011 and the transaction completed on 20th December 2013 and in relation to your other questions regarding who purchased the land, price paid and other details about valuation process we will not be disclosing this information on the basis it is commercially sensitive, under s. 9 of the Access to Environmental Information Legislation. I am not sure what correspondence you are referring to when you asked about correspondence on proposed development of the lands at Kilcooley. Can you be more specific as to what you are asking here?"

8. Thus, some information in relation to items 1 and 2 was provided; the information on items 3-7 was refused on the basis of commercial sensitivity; and further information was sought about the request at item 8.

9. By letter dated the 23rd June, 2014, Mr. Redmond expressed his disappointment with the decision and indicated that he would be appealing. He added, in relation to the last point and 8th bullet point, as follows:

> "Regarding my last point, in Coillte's disposal of its freehold interest in the lands at Kilcooley Abbey Estate it was aware of the proposed development of the lands, what I am seeking is for you to provide information of correspondence that you have on the proposed development of the land, forestry etc. and also information you have on access and the rights of ways to and throughout the land that was formally (sic) leased by Coillte. Did you consider the impact of the disposal of the leased land would have on the environment and the 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 the contracts in 2011 and who Coillte issued the contracts to?"

his may be referred to as the "expanded" or "enlarged" item 8 request.

The request for review of the decision

10. By letter dated the 2nd July, sent by email on the 4th July, 2014 and re-sent on the 10th July, 2014, the first applicant wrote to Coillte requesting a review of the decision. The internal review is a procedure contemplated by the Regulations.

11. By email dated the 16th July, 2014 from Ms. Maura McCarthy, with the heading "Coillte Internal Review", Ms. McCarthy referred to Mr. Redmond's "appeal" regarding a request for information under the Access to Environmental Information legislation. She said that having reviewed the matter, she agreed with the withholding of information sought by him but not on the original ground identified. In her view, the information sought was not "environmental information" as defined in Statutory Instrument 133/2007 and therefore did not fall to be disclosed under the legislation. The email went on to say:

> "Notwithstanding the above, further to point 2 of your request, I am happy to advise that we sold a leasehold interest in lands 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 appeal to the Commissioner

12. By letter dated the 6th August, 2014, both applicants wrote to the Commissioner for Environmental Information indicating that they wished to appeal the decision of Coillte. The appeal was stated to be in relation to six points, numbers 3-7 being the same as the original questions submitted to Coillte, and number 8 being the expanded version of point 8 that had been sent in following a request for clarification from Coillte. The letter referred to Kilcooley Abbey Estate as part of an important historical site with a listed building status. The applicants stated their belief that the sale of the land lease which included lands and trees had a direct impact on the environment including wildlife and herds of deer. They said that under the lease there was an implied presumption or easement created which gave access to the general public to use the lands as a public right of way for recreational purposes, which was used for many years. Their understanding was that once the lease was extinguished by Coillte, all persons were prevented from availing of this right. They complained that Coillte had made no efforts to consult or inform the general public of the disposal of the land lease. They also mentioned that the sale of the land lease was not offered to the general public and was transferred to the new owner at a price that was "considerably below market value" and that "it has been reported in the press that the new owner has made a profit of over 8 million euro within months of Coillte's sale of the land lease". The applicants said that how Coillte values its lands/forest in terms of the environment, recreational and social, and monetary terms "does relate to the AIE Regulations" and therefore they were requesting information in relation to the points above.

13. By letter dated the 14th August, 2014 the office of the Commissioner wrote to Coillte indicating that it had accepted the appeal and was seeking records in order to determine the issues. It also invited submissions from Coillte in respect of the decision which was the subject of the appeal.

14. By letter dated 23rd September, 2014, Ms. Maura McCarthy, acting head of legal and governance services at Coillte set out the submission to the Commissioner on behalf of Coillte. This explained the reasoning in relation to each of the itemised bullet points and also referred to the deliberation of the Commission in the case of *Garvin Sheridan v Central Bank of Ireland* CEI/11/0001. In the penultimate paragraph, she said that Coillte has in place a number of process and protocol requirements relating to property sales all of which were complied with in this instance. She said that, prior to the sale, Coillte had engaged in a consultation process with the local community which included a leaflet drop and one- to -one meetings with certain parties. Issues surrounding the lease and possible sale were also addressed at an open forum meeting as part of the Forest Management Plan conducted by local management.

Furthermore, an advertisement was published in a local newspaper. The final paragraph of the submission referred to Forest Stewardship Council (FSC) certification. She said that on foot of a representation from a member of the public, the auditors had examined the transaction the subject of this information request and were satisfied that the transaction complied with their FSC obligations.

15. Meanwhile, by email dated the 26th August, 2015, Mr. Bernard McCabe of the Commissioner's office communicated with Mr. Redmond with the subject heading "Your AIE appeal case - an update". In the course of this email he said as follows:

> ... I formed the view that details such as who purchased the lands, for how much, who the parties were, who valued the land and how, and the value figure itself do not constitute environmental information in the meanings of the Regulations. This is not a ruling, you understand just my opinion and a OCEI investigator. I noted that some information relevant to your request was contained in Coillte's records and I formed the view that this information constituted environmental information. I identified those elements of information to Coillte and in mid July 2015 asked if Coillte would be willing to provide you with access to same… Coillte later confirmed to me that they provided to you, on 19th August 2015, with access to the information which I had identified. The situation now, as it appears to me, is that Coillte has provided you with access to the environmental information relevant to your request, albeit well past the date when Coillte ought to have done so. May I ask that you accept that this the position? If you do, are you agreeable to withdrawing your appeal (in which case your fee would be refunded) … I expect to be submitting my report soon to a senior investigator: if she agrees with my assessment, she could either recommend to the Commissioner, that he exercise his discretion under Article 15 of the Regulations to deem to the appeal to be withdrawn (in which case your fee may be refunded) or proceed to make a formal decision finding that Coillte provided the information relevant to your request outside of the time permitted for same, of course, she might take a different view of the case to mine, as might the Commissioner. My role is to assess the case, attempt to reach a settlement, and submit a report. I realise that you are likely to be disappointed in my assessment that much of the information which you sought is not environmental information in the meaning of the Regulations. I wish to assure you I formed this opinion only after very careful consideration in the light of previous decisions, official guidance and court judgments".

16. The court has seen a bundle of documents which were, apparently, the documents furnished to the applicants as referred to in the above email. There were redactions, some constituting partial redactions of documents, and others constituting total redaction of documents. It may be noted that the role of the investigator at this point was to try to seek an informal resolution of the dispute.

17. By letter dated the 16th September, 2015, the applicants wrote to Mr. McCabe referring to the above email and disagreeing with his opinion that the information sought was not environmental information within the meaning of the Regulations. They prefaced their submissions in relation to the issue of whether the information was environmental information with certain comments relating to the documents they had received from Coillte in August 2015. They said that the documents furnished, in their view, did not relate to Coillte sale of the land at Kilcooley Abbey Estate and sale of the timber harvesting on the 16th December, 2013, but rather appeared to have been compiled for the sale of the land to the previous owner of the freehold title, Mr. McCann. They made this assumption based on information contained in some of the documents and certain redacted dates. They took issue with certain redactions within the documents also. There then followed a wide-ranging set of submissions concerning the policy of Coillte in relation to sales generally and in relation to this particular sale. There was reference to the absence of any public participation in the sale of the land and forestry of Kilcooley Abbey Estate.

The impugned decision of the Commissioner dated the 2nd November, 2015

18. The attempt at informal resolution having failed, the matter proceeded to a formal determination by the Commissioner. In a written decision dated the 2nd November, 2015, the Commissioner rejected the applicants' appeal. This is the decision impugned in the present judicial review proceedings. It was a nine-page document which may be summarised as follows.

19. The first page of the document contains a 'decision summary', namely that the Commissioner found that Coillte was justified in refusing access to information which was not environmental information, and to environmental information which was not held by or for Coillte. The Commissioner affirmed Coillte's decision while partially varying the grounds justifying refusal.

20. On the next page, the document set out a narrative of events. In this regard, the first sentence recites that in March 2011, Coillte sold its leasehold interest in 402.92 hectares of land at Kilcooley Abbey to a private buyer. This date is incorrect and it is accepted by the respondent that this was the date of the contract for sale, not the sale itself. This is a matter upon which the applicants place considerable significance. The document continues by setting out the applicants' request for information on the 8 points originally submitted and sets out the history of the request within Coillte. It then says that the Commissioner has taken account of a number of matters in conducting the review, including the submissions made by the appellant and by Coillte as well as the Minister's guidance on the implementation of the Regulations, the Directive upon which the Regulations where based, the Aarhus Convention and the Aarhus Guide (the Aarhus Convention; an implementation guide, 2nd Ed., June 2014).

21. The decision sets out the scope of the review under article 12 of the Regulations as being the review of Coillte's internal review decision and refers to the power of the Commissioner to affirm, vary or annul this decision, and says that his review is concerned with whether Coillte's decision was justified

22. The decision then discussed what it described as two preliminary issues, namely standing and public participation. As regards standing, it noted that the appeal was brought by both Mr. and Mrs. Redmond, although the records did not show that Mrs. Redmond had submitted a request to Coillte or a subsequent request for internal review. It was noted that article 12 of the Regulations allows a person who is not the applicant to make an appeal to the Commissioner only where that person would be incriminated by the disclosure of the environmental information concerned, and since this was not the case, he found that Mrs. Redmond did not have standing to appeal to his office. The applicants made complaint about this finding on the basis of its unfairness, but, given the wording of the Regulations, the conclusion of the Commissioner in this regard must be correct.

23. As regards public participation, the document says as follows: -

> "In his submissions the appellant asserted that there had been no opportunity for public participation in the land sale. The provision of opportunities for public participation in environmental decision-making is an important part of the Aarhus Convention. However, in conducting this review my remit is confined to reviewing Coillte's internal review decision. I have no remit to investigate or rule on the provision of opportunities for public participation in decision-making. However, since the assertion that there was no opportunity for public participation will appear in the text of this decision, I feel obliged to say that the records provided to me by Coillte show that it placed a newspaper advertisement and conducted public

consultation in advance of the sale, I have nothing further to say about public participation."

he applicants place reliance upon this passage also, as will be seen.

24. The Commissioner then went on to deal with the substance of the appeal. He noted the argument on behalf of Mr. Redmond that the information requested was environmental information because the sale of such a large forest was likely to affect the state of the land, landscape and natural sites, biological diversity and its components, and the interaction between these elements, especially because of Coillte's policy of selling land for purposes other than forestry. He recorded that his investigator had obtained information about the control of tree-felling in Ireland and that it was clear that under the legal regime concerning tree-felling, even if the new owner of the forest wished to fell the entire forest, he could not lawfully do so simply by acquiring ownership of the land and trees. In those circumstances, he concluded that the change of forest-ownership *in itself and without more* did not constitute a measure or activity affecting or likely to affect the elements and factors in article 3(1)(a) or (b), or a measure or activity designed to protect those elements. He said that information on the sale of land in this case, in itself, including the sale of afforested land, is not environmental information.

25. He went to hold that item 8 of the request, however, should properly be considered a request for environmental information within the meaning of the Regulations, as any information held by Coillte on proposals for development by the new owner could constitute environmental information if it was information on a measure or activity affecting or likely to affect the elements or factors referred to in article 3(1)(a) and (b). However, he went to hold that the refusal was justified on the grounds that no such information was held by Coillte. He referred to Mr. Redmond's assertion that Coillte was aware of the proposed development of the land, and also to Coillte's denial that it held any information on any proposed development of the land. He noted that Coillte had provided his office with details of the steps it took to search for relevant information; including a search of files, including electronic files, and direct requests for information from relevant staff, including the Head of Land solutions and the solicitor who dealt with the sale. He was satisfied that Coillte took reasonable steps to search for information relating to item 8 and he accepted its written assurance that it was not withholding any such information.

26. The decision concluded with the information that a party to the appeal or any other person affected may appeal to the High Court on a point of law from the decision not later than two months after notice of the decision is given.

Events after the determination of the Commissioner

27. By email dated the 9th December, 2015 Mr. Redmond expressed disappointment in respect of a number of matters, including the length of time it had taken to conclude the appeal, the degree of investigation that had been carried out, the decision itself, and the decision not to give standing to Mrs. Redmond. It was indicated that the applicants were considering their options in relation to an appeal to the High Court, but that they first wished to clarify a number of points made in the letter. They referred to the date of March 2011, which the Commissioner had cited as being the date of Coillte's selling its leasehold interest to a private buyer. They said that Coillte had advised them that they sold the leasehold interest on the 16th of December, 2013. They asked if they could confirm which date was correct. They said that the exact date "has a direct bearing on your decision regarding public participation". They mentioned various reasons why they were of the view that neither date could be correct. They also said that they believed that the records Coillte had provided to the Commissioner regarding the newspaper advertisement and alleged public consultation were from March 2011, in which case this could not be interpreted as being related to the sale in December 2013 and therefore could not constitute public participation in that process. They also submitted that the information provided by Coillte which had redactions had been the subject of a request by them to Mr. McCabe that the documents be furnished without redactions, and that the Commissioner had not made any comment on this request; they asked if he could provide a decision on this particular request.

28. By letter dated the 11th December, 2015, the Office of the Commissioner replied, acknowledging the email, and stated: -

> "The Commissioner has considered your submissions. He considers that his findings and the basis for his decision are fully set out in the decision of 2 November 2015. The Commissioner has no power to re-open consideration of this appeal. Given the right of appeal on a point of law to the High Court, this office does not propose to elaborate upon the decision or to comment on the issues now raised. This approach is in accordance with our practice on all such appeals."

Commencement of judicial review proceedings

29. The present judicial review proceedings were commenced by ex parte application on the 19th January, 2016, on which date Barrett J. granted leave to bring the application by way of judicial review and extended time for making the application, the two-month deadline for the statutory appeal having elapsed. As previously noted, the relief sought is *certiorari* of the decision made by the Commissioner on the 2nd of November, 2015.

30. The grounds upon which relief was sought may be summarised as followed; breach of natural justice (bias and the right to a fair hearing); exercising power for the wrong purpose and fettering discretion by adopting an overly rigid policy or set of guidance and in reliance on guidance set down by predecessor; inadequate consultation; taking incorrect factors into account; acting contrary to European law and Directives; irrationality; and the Human Rights Act 1998 Article 13 (sic). The last piece of legislation is in fact an English statute and has no application whatsoever in Ireland. The Irish equivalent is, of course, the European Convention on Human Rights Act, 2003 and is very different in the mechanisms by which it transposes the European Convention on Human Rights into Irish law.

31. By order dated the 14th of March, 2016, Barrett J. granted liberty to the plaintiff to amend the summons by adding Coillte Teoranta as a notice party to the proceedings.

32. The Commissioner delivered a statement of opposition dated the 27th May, 2016. A number of preliminary matters were raised, including: -

> (1) That the prescribed mechanism for challenging a decision of the Commissioner is to bring an appeal on a point of law in accordance with the European Communities (Access to Information on the Environment) Regulations 2007-2014;
>
> (2) That such an appeal must be brought within a period of two months from the date of the decision and that the present proceedings had been brought outside that period; it was submitted that the prescribed mode of challenge to the Commissioners decision could not be circumvented by seeking to litigate what was in effect a statutory appeal under the guise of judicial review proceedings which were out of time;

(3) That insofar as the High Court on an *ex parte* application appears to have extended time to bring the proceedings, this part of the order of the High Court should be set aside and/or the Commissioner ought to be entitled to argue *inter partes* that these proceedings are out of time, and that there was no good and sufficient reason why the proceedings where not brought within two months of the date of the decision.

33. The statement of opposition goes on to respond to each of the other claims. There is a denial of the existence of the concept of an "Aarhus Convention claim". It is pleaded that the Commissioner in his decision erroneously referred to the sale as being in March 2011 when the actual sale was, it is pleaded, the 16th of December, 2013. It is pleaded that the March 2011 date was the date contracts were drawn up and that this did not have any bearing on the procedures afforded to the applicants nor was it an error of fact which entitled them to any relief as it had no bearing on the substantive determination by the Commissioner. It is also generally pleaded that there was no denial of natural justice in the procedures adopted by the Commissioner. It is further pleaded that the Commissioner correctly determined that the second named applicant did not have standing to maintain the application before the Commissioner. Bias was also denied in the statement of opposition. It was pleaded that the Commissioner properly determined that Items 3-7 did not constitute environmental information within the meaning of the Regulations. It is pleaded that in reaching his determination, the Commissioner made various findings of primary fact which were made within his jurisdiction and that there was evidence before the Commissioner upon which such findings could lawfully be made. On the basis of those findings of primary fact, the Commissioner reached the determination that the items did not constitute environmental information, and the conclusion of law was properly made. It is pleaded that it was valid to conclude that the information sought under certain of the headings was not environmental information on the basis that a change in ownership of the land and interests at issue did not of itself render such environmental information within the meaning of the Regulations. It was pleaded that the concept of "effect" within the Regulations necessarily requires a consideration of the connection between any given matter, such as the transfer of ownership or interest, and environmental effect within the meaning of the Regulations. The Commissioner denies that the approach was unlawful and pleads that even if there are different approaches in other jurisdictions, this does not affect the legality of the Commissioner's conclusion in the present case. It is pleaded that the redaction of the documents furnished in August 2015 was not the subject of determination in the Commissioner's decision because it had been determined that the new questions (the enlargement of point 8) were not within the scope of the appeal.

The Submissions of the Parties

34. Written submissions were delivered on behalf of the applicants and the Commissioner. At the oral hearing, the case for the applicants was presented by Mrs Redmond. The Commissioner was represented by a legal team.

35. The submissions on behalf of the applicants contain much detail concerning the historical and ecological value of the Kilcooley Abbey Estate, together with various pieces of information gleaned from sources such as newspaper reports, a Dáil Éireann written answer, a sale brochure, documents obtained under Freedom of Information requests, the Land Registry, and other sources in the public domain. Many issues are canvassed in the submissions, including an audit carried out by the Forest Stewardship Council (FSC) in 2014 and alleged non-compliance with the Code of Best Practice for the Governance of State Bodies, before moving on to the issues set out in the statement of grounds. It is clear from both the written and oral submissions that a major part of the applicants' complaint is that there was an absence of transparency and public accountability in relation to the sale in question. The applicants have, in the circumstances, sought to piece together information about the identity of the purchaser, the details of the sale and the purchase price, and dates of various events relating to the sale, from various pieces of information in the public domain. However, the Commissioner has a limited jurisdiction under the Regulations and this is a judicial review arising out of a specific decision of the Commissioner, and accordingly this Court is limited in the scope of what it may consider in the present proceedings. In particular, in reviewing the decision of any decision-making body, the Court is confined to reviewing that decision on the basis of the evidence which was before the decision-maker at the time of his or her decision.

36. Concerning the matters in issue in these proceedings, the applicants relied upon the matters pleaded in the statement of grounds as described above. Considerable emphasis was laid upon the error of fact in the Commissioner's decision of the 2nd November, 2015, namely that it referenced the sale as having taken place in March 2011, when in fact this was the date of the contracts for sale. The applicants contend that this error raised a serious issue of bias on the part of the Commissioner and that it prevented them from having a fair hearing. On these, as on all issues, the applicants relied almost exclusively upon English cases and informed the Court that this was because they were based in London. In these days of internet researches, it is difficult to understand how no attempt was made to engage with the Irish authorities relating to judicial review proceedings. I cannot imagine that an English court would be overly impressed by a litigant who relied exclusively on Irish authorities, if the position were reversed. I should say, however, that apart from this particular aspect of their presentation, it is clear that the applicants had gone to considerable efforts to prepare documents for the court in accordance with the normal procedures and in the preparation of the written and oral submissions.

37. In any event, it is clear from the submissions that the date error was, in the view of the applicants, fundamental because it was linked to the question of adequate public participation in the process leading up to the sale. The applicants also contended that the Commissioner's discussion of public participation in his decision notice of the 2nd November 2015 was incorrect insofar as it was premised on the wrong date of sale. The applicants repeatedly, in their written and oral submissions, relied upon the Aarhus Convention and claimed that it granted them rights which could be relied upon directly in the Irish courts.

38. As regards the test applied by the Commissioner in reaching his decision as to whether the information sought was "environmental information", the applicants relied upon the High Court decision in *Minch v. Commissioner for Environmental Information* [2016] IEHC 91 for the proposition that the application of a "remoteness" test was not appropriate. It was argued that the Commissioner's use of the *Glawischnig v Bundesminister fur soziak Sicherheit und Generationen* (Case C-316/01) [2003] E.C.R. I-6009 constituted a fettering of his discretion and the adoption of overly rigid policy or guidance. The applicants also sought to rely on a number of decisions of the Information Commissioner's Office in England and Scotland to illustrate the "correct" approach and to suggest that the approach of the Irish Commissioner was erroneous. Finally, the applicants submitted that the Commissioner erred in failing to rule on the redacted documents furnished by Coillte to the applicants.

39. The Commissioner submitted that the applicants had sought to circumvent the time limit provided by for in the form of proceeding that should properly have been employed by the applicants, namely an appeal on a point of law as provided for by article 13 of the Regulations. It was submitted that the error of fact as to the date of the sale of the land made by the Commissioner in his decision of the 2nd November, 2015 was not material to the decision on whether the information sought constituted "environmental information". It was submitted that the applicants had sought to rely on information and evidence that was not before the Commissioner, and that they were seeking to go far beyond the scope of what the Commissioner had jurisdiction to deal with. It was argued that the Commissioner had applied the correct analytic framework to the question of whether the information constituted "environmental information" and had reached the correct conclusion, particularly having regard to the decision of the Court of Appeal in the *Minch* case. It was submitted that the applicants' complaint regarding the redacted documents was simply not before the Commissioner for determination, having regard to the precise history of the requests, the internal review and the appeal.

The Form of the Appeal and the Time Limit issue
40. The Regulations make specific provision for an appeal to the High Court on a point of law and O.84C of the Rules of the Superior Courts deals with the procedure in the event of such an appeal. Article 13 of the Regulations provides for a specific time limit of 2 months for the statutory appeal. It was noted earlier that the Commissioner's decision of the 2nd November, 2015 drew attention to the existence of such an appeal and the statutory time limit. The present proceedings were brought by way of judicial review and were brought outside the two-month time limit. The impugned decision of the Commissioner was dated the 2nd November, 2015, although it may have been that this decision was not notified to the applicants until the 10th November, 2015. Leave was obtained by the applicants on the 19th January, 2016, which was more than two months from the date of such notification. It was, however, only one week out of time if one takes the clock as starting from the date of notification.

41. It was submitted on behalf of the Commissioner that the proceedings had not been brought in the proper form and that the applicants were seeking to circumvent the time limit for the statutory appeal by bringing judicial review proceedings. An extension of time had been granted by Barrett J. on the ex parte application of the applicants at the leave stage, but it was submitted, and I accept, that such an order made *ex parte* may be reviewed by the court when the party not previously on notice has had an opportunity to make submissions. It was submitted that the appropriate time limit should have been two months and that the applicants needed to satisfy the court that there was good reason for an extension of time.

42. In *EMI Records(Ireland) Ltd v. Data Protection Commissioner* [2013] 2 IR 669, the Supreme Court referred to the default position as being that a party should pursue an appeal provided for by statute rather than initiate judicial review proceedings. The court referred with approval to the comments of Hogan J. in *Koczan v. Financial Services Ombudsman* [2010] IEHC 407. In that case, Hogan J. accepted that there exist certain exceptional categories of cases where the legal argument may appropriately fall to be dealt with by judicial review. He instanced cases such as where the decision-making body suffered from a total lack of subject matter jurisdiction, or where the complaint related to the integrity or basic fairness of the decision-making process, or cases where the constitutionality of legislation might be in issue and could not be raised in the appeal provided for. It is strongly arguable that the present case did not fall within an exceptional category of case as identified by Hogan J. and that therefore the statutory appeal should have been availed of. There was no want of subject-matter jurisdiction, no issue as to the constitutionality of legislation, and the central point was one relating to an alleged error of law (the meaning of "environmental information"). The applicants did, however, allege bias and lack of fair procedures, and I would be prepared to give them the benefit of any doubt with regard to the matter of the form of proceedings, particularly in circumstances where they had no legal representation, and hold that a judicial review proceeding was one of the available methods by which they could litigate the issues of concern to them in circumstance where these included complaints of bias and fair procedures. If that is correct, it seems to me that the three-month time limit applies and that it is not necessary to consider the situation as if the 2-month time limit applied or whether the applicant was entitled to apply for and/or had good reason for obtaining an extension of that time.

43. If, however, I am incorrect about the conclusion that the 3-month time limit applies, I would be inclined to accept their arguments that there was good reason to warrant the granting of an extension of time beyond the 2-month limit. The justifications offered (in the pleadings) were that the Commissioner took 15 months to reach his decision; that they did not receive his decision until 10th November 2015 nor his reply to their further request until 17th December 2015; that they are litigants in person who needed to take time to draft documents in response to his reply of 17th December; and that their application was refused on 12th January, 2016 because they were advised by account a court clerk that information on the courts' website was incorrect as a result of which they had to have an oath witnessed by a Commissioner for Oaths or practising solicitor, and that they had to travel in person from London to lodge the application. They also pointed out that they fell only a short period of time outside the 2-month time limit. I agree with the submission of the Commissioner that a party cannot unilaterally stop the clock from running by seeking further clarifications from the decision-maker. However, given the totality of the circumstances, including that they were lay litigants, that Christmas intervened, and that they were outside the time limit by only one week, I would be inclined to allow the extension of time.

The date error in the Commissioner's decision
44. There is no doubt that the Commissioner's decision erroneously referred to the date of March 2011 as being the date for the sale, when it appears that it was the date upon which the contract for the sale of the leasehold was entered into (although even that latter fact is now doubted by the applicants). In judicial proceedings, an error of fact may ground the relief sought, but it will not necessarily do so in every case. Everything depends on the particular error made and the context in which it arises. I have no doubt that this particular error of fact was not significant in terms of the particular issue that fell for decision before the Commissioner. The applicants are convinced of the significance of the error because it is a central part of their contentions that there should have been adequate public participation and that the adequacy of the public participation prior to the sale can only assessed if one is taking the correct date of sale as one's starting point. If public participation were a matter for decision by the Commissioner, the date error would of course have been very significant; but the issue of public participation was not before the Commissioner. His decision related solely to whether the information sought amounted to "environmental information". A factual error in the narrative relating to the sale date therefore could not have a material bearing upon the qualitative assessment of whether the categories of information sought amounted to "environmental information".

45. The applicant sought to rely on the fact that the Commissioner's decision chose to refer to the issue of public participation as a preliminary issue, and that he thereby introduced the issue himself. The Commissioner cannot arrogate to himself decision-making functions which are not conferred by the Regulations simply by referring to a matter in a decision; and therefore, by referring to the issue of public participation, whether accurately or inaccurately in terms of his description in this regard, does not alter the fact that the decision itself was not, and could not validly, be concerned with the issue of public participation, given the limited scope of the Commissioner's jurisdiction under the relevant legal provisions. His comment about public participation was more in the nature of an *obiter dicta*, albeit on a matter in respect of the Commissioner had no jurisdiction to opine. Even if it were *ultra vires*, it would not render the remainder of his decision invalid. Nor do I think it would be appropriate to grant any relief 'quashing' that aspect of the decision, as requested by the applicants. Its status is merely an opinion of the decision-maker on a matter on which he had no jurisdiction to give a decision and has no legal effect in any event.

46. Further, I am not persuaded that the date error indicated a bias on the part of the Commissioner or that it could reasonably be perceived as such, within the meaning of objective bias as described in the leading Irish cases, such as *Bula Ltd v. Tara Mines (No. 6)* [2000] 4 IR 412, *Spin Communications v. Independent Radio and Television Commission*, [2000] IEHC 128, and *Orange Communications v. Director for Telecommunications Regulation* [2000] 4 IR 159. Given the matter falling for decision before the Commissioner, I am of the view that no reasonable person in possession of the facts could reach the conclusion that this simple date error indicated bias on the part of the decision-maker, within the meaning of the test as set out in those authorities.

47. I express no opinion whatsoever on whether, objectively speaking, the Commissioner was correct or not in what he said about the issue of public advertisement and public participation. This matter is simply not before the court. That is not to say for one moment that such matters are not important; on the contrary, issues of public participation relating to matters of environmental concern are

extremely important, but they are simply not within the scope of these judicial review proceedings. These proceedings are solely concerned with the decision of the Commissioner within the scope of his duty under the Regulations, which in turn was confined to reviewing the decision of a public body relating to the disclosure of environmental information. The date error, in my view, has no relevance to that precise and particular issue.

The meaning of "environmental information" within the Regulations
The Minch decision

48. The question of how the Commissioner should approach the issue of whether a matter constitutes environmental information was discussed in *Minch v. Commissioner for Environmental Information* [2016] IEHC 91. This concerned the issue of whether the National Broadband Plan was a "measure" within article 3(1)(c) of the Regulations, such that another report (a costs benefit analysis described as the 'Broadband Report') was disclosable on the basis was an economic analysis within the meaning of article 3(1)(e). The Commissioner had concluded that the NBP was merely a high-level strategy document and that the link between the plan and the environment was too remote. At para 58 of the High Court judgment, Baker J said that she did not consider that the question of remoteness was a correct approach, and at para. 63, She held that the Commissioner had imposed an overly narrow test of remoteness and did not pay sufficient regard to the teleological approach required.

49. On appeal, the Court of Appeal, [2017] IECA 223, upheld the conclusion of the High Court. In the course of his judgment on behalf of the court, Hogan J. discussed the relationship between the Directives, the Regulations and the Aarhus Convention at paras 7 and 8:

> "…. Both the 2003 Directive and, by extension, the 2007 Regulations, seek to give effect in law to one of the underlying objectives of the Aarhus Convention, namely, ensuring that members of the public can have access to all relevant information concerning the environment in a timely fashion.
>
> Given that effect has been given to this aspect of the Aarhus Convention by the Union legislator via the 2003 Directive, the 2007 Regulations constitute an EU legal obligation which this Court must uphold. Of course, very different considerations apply in respect of those features of the Aarhus Convention which have not been incorporated into EU law and the extent to which those obligations have been made part of domestic law independently is governed principally by reference to Article 29.6 of the Constitution and the legislation (if any) enacted by the Oireachtas for this purpose; see, e.g. *McCoy v. Shillelagh Quarries Ltd* [2015] IECA 28 and *Conway v. Ireland* [2017] IESC 13".

The latter point is sufficient to dispose of an argument made on behalf of the applicants that the public participation aspects of the Aarhus Convention can be directly relied upon as forming part of domestic Irish law. Although the applicants repeatedly referred to their "Aarhus Convention claim", the legal reality is that a claim grounded on an international convention cannot be litigated in these judicial review proceedings except insofar as aspects of the Convention have become part of Irish law, as is the case regarding access to environmental information, a right conferred by the Regulations in order to comply with the EC Directive, which in turn was influenced by the Convention. No such right was conferred by the Regulations in respect of public participation nor had the Commissioner any role in adjudicating on this matter under the Regulations.

50. Hogan J. went on to say that the proper approach to the interpretation of the 2007 Regulations was not in doubt and that, having regard to the comments of O'Donnell J in *NAMA v. Commissioners for Environmental Information* [2015] IESC 51, and of the CJEU in *Fish Legal v. Information Commissioner* (Case C-279/12) [2014], the courts were required to interpret legislation implementing a Directive teleologically, in order to achieve the purpose of the Directive. He noted the recitals to both the 2004 Directive and Aarhus Convention which stressed the importance of the obligation to provide access to environmental information because of the link between the access to such information and participatory decision-making on environmental issues. He noted that there were, however, limits to the extent of a Member Statute's obligations, and referred to *Glawischnig v. Bundesminister fur Sicherheit and Generationen* (Case C-316/01) [2003] E.C.R. I-6009, in which the Court said (in relation to a precursor Directive) that while the Directive was to be given a broad meaning, it did not 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", and that the information must fall within one of the relevant categories.

51. He went on to discuss the Broadband Report and article 3(1)(c) and (3) of the Regulations, and said, at para 46, that the antecedent question was raised as to whether the NBP was "likely to affect" the environment. He disagreed with the Commissioner's view that the link between the NBP and the environment was too remote. He said that, viewed objectively, it would be hard to deny that many of the actions proposed in the plan were likely to affect the environment. He gave the example of a discussion in the plan of fibre infrastructure and the necessity for road openings in this regard; and the 2000 installations and structures that might be required. The plan envisaged further measures with regard to the planning process and the development of telecommunications infrastructure. He was of the view that none of those proposed actions could be dismissed as remote or incidental. Therefore, the NBP constituted a plan for the purpose of article 3(1)(c) and the Commissioner's conclusions to the contrary were in error because the inferences he drew from the plan were not legally sustainable.

52. Thus, it appears that the judgment does not disapprove of the use of "remoteness" as an appropriate test, but rather applies that test and concludes that the Commissioner's application of the test was erroneous because the potential for effects on the environment were not too remote from the plan.

Application to the present case

53. It was argued on behalf of the respondent that, having regard to the Court of Appeal judgment in *Minch*, the Commissioner therefore applied the correct analytic approach to the issue of the information sought in relation to the sale of the Kilcooley land and forest, and further, correctly held that there was no evidence before him that the mere transfer of the lease would extinguish the pre-existing obligations in terms of the protection of woodland areas. I agree with the respondents in this regard. Even adopting a teleological approach to the Regulations in light of the purpose of the Directive, I cannot see how the information sought at items 3-7 of the request for information could fall within any of the categories of "environmental information" as defined by article 3(1) of the Regulations. These requests were, it will be recalled, requests as to the identity of the purchaser (item 3); the price paid (item 4); the identity of other parties or legal representatives who were involved in the transfer of the lease (item 5); the identity of the valuer and information on how the valuation was compiled (item 6); and the valuation of the lands/forestry (item 7). The only conceivable part of the definition under the Regulations of "environmental information" that falls to be considered in this regard is article 3(1)(c), namely "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 (emphasis added). In the present case, what was in issue was information on the sale

of the leasehold of land, which may not even fall within the definition of a "measure", not being a policy, legislation, plan, programme, environmental agreement or activity for that purpose; but, even assuming that it did constitute a measure for that purpose, it does not seem to me 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). The price and valuation of the land, in particular, seem to me to fall completely outside the concept of "environmental information". I can understand, to a degree, where the applicants might be coming from with regard to the identity of the purchaser. Suppose, for example, that a public authority sold a piece of a national wildlife park to a property developer who had informed the public authority baldly that he wished to build a hotel on the land. It would seem that any information held by the public authority about the proposed hotel development would fall to be disclosed. However, in those circumstances, it seems to me, that, strictly speaking, the environmental information that falls to be disclosed is not such much the identity of the purchaser but any information that was given by the purchaser about the proposed development. In the present case, the evidence before the Commissioner did not include, and he was informed that Coillte simply did not have, any information as to what the purchaser's intentions were and it seems to me that the mere identity of the purchaser did not fall within the meaning of environmental information for the purpose of the Regulations.

54. Further, I agree with the respondents that in the majority of the decisions from the UK and Scotland relied upon by the applicant which concerned 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. For example, in the Trinity Housing Association case, there was a stated intention to demolish a dwelling and build a new one; while in Kent County Council case there was a plan to re-develop the lands into a Tesco supermarket. In any event, those decisions are not binding in this jurisdiction, although the reasoning in them can be adopted if it is considered that sheds useful light on how the Directive should be interpreted and provided it is not inconsistent with legal precedent within this jurisdiction.

55. The key point of relevance in the present case in my view is that, in reviewing a decision of the Commissioner, this Court must evaluate that decision on the basis of the evidence which was before the Commissioner at the time of the decision. In the present case, there was no evidence before the Commissioner at the time of his decision as to the nature of any proposed development in relation to the land or forestry sold. In particular, there is no evidence before the Court, for example, that there was any evidence before the Commissioner at the time of his decision that the purchaser proposed to seek tree-felling licences or as to the purchaser's intentions as to the land generally. The applicants laid emphasis on Coillte's stated policy of selling land for purposes other than forestry, but I do 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 because it will necessarily affect, or be likely to affect, the elements and factors referred to at article 3(1)(a) and (b) of the Regulations.

56. Information about any proposed development of the land by the purchaser is different, however. In the present case, the Commissioner in fact held that the request for such information, at item 8, *did* constitute a request for environmental information and my view is that he was correct in this conclusion. It is clear that the Commissioner was drawing a careful distinction between that particular request and the previous items requested (price, valuation and identity of purchaser). He went on uphold, on the basis of the information before him, the finding that Coillte did not in fact hold any information falling within this category. The applicants clearly are sceptical of the view that Coillte had and has no such information, but the Court cannot fault the manner in which the Commissioner engaged in his task of seeking out information from Coillte in this regard. It is the Commissioner's decision which is in issue in the present proceedings.

The redacted documents

57. The applicants' complaint in respect of the redacted documents was that the Commissioner did not make any determination at all in relation to the request to remove the redactions. It will be recalled that the decision of the Commissioner is limited to a review of the Coillte internal review and that this review in turn was limited to item 8 as originally formulated by the applicant, not the 'enlarged' version of item 8. This is because the applicant himself requested an internal review in respect of his original item 8 request (along with items 3-7) and did not await the decision on his enlarged item 8 request. The redacted documents were furnished to him by Coillte after the internal review had been completed and his appeal had commenced, and as a result of a recommendation by the Commissioner's investigator that they be disclosed as part of an attempt to resolve the dispute informally. However, once this attempt at informal resolution proved unsuccessful, the appeal proceeded along formal lines. The redacted documents were not considered to fall within the appeal, which was circumscribed by the scope of the internal review under appeal. The redacted documents therefore did not fall within the internal review decision which was the subject of the Commissioner's decision on appeal, and he did not err in failing to rule on the redaction issue. However, because they did not fall within the appeal, it seems that issues relating to the redacted documents can still be pursued by the applicants in the future because the matter has not yet been ruled upon by the Commissioner.

Conclusion

58. The applicants appear to have a very genuine concern about the lands and forestry at Kilcooley. They have made great efforts to raise issues with Coillte, and the Commissioner, and before this Court. Unfortunately for them, in my view, the kernel of their complaint relates as much as to the issue of public participation prior to the sale of Coillte forestry as to the issue of access to environmental information. The Regulations are relatively narrow in their remit, as is the Commissioner's jurisdiction to rule on an appeal. The Court's jurisdiction is accordingly circumscribed. I have reached the conclusion that, despite the valiant efforts of the applicants to bring together the information in the public domain to create a case that the Commissioner was wrong, the Commissioner was legally correct in reaching the conclusion on the evidence before him that the information sought at items 3-7 of the request did not constitute environmental information within the meaning of the Regulations. Further, the information sought at item 8 would fall within the meaning of environmental information and would require to be disclosed if Coillte held such information. His conclusion that Coillte did not in fact possess such information about any proposed development was based upon the fruits of reasonable inquiries made by his office and I cannot see any basis for this Court to quash this conclusion. Further, I find that the complaints about fair procedures and bias are not made out.

59. Accordingly, I refuse the reliefs sought.