

THE HIGH COURT

2003 No., 73 MCA

IN THE MATTER OF THE FREEDOM OF INFORMATION ACTS, 1997
AND 2003, AND ON THE APPLICATION OF:

C.W. SHIPPING COMPANY LIMITED
SHANNON EXPLOSIVES LIMITED
AND
WHELANS LIMESTONE QUARRIES LIMITED

APPLICANTS

Judgment of Mr. Justice Murphy, dated 13th January, 2004.

This is an application in respect of a preliminary point of law raised by the Information Commissioner (the Commissioner) who was served with the papers but not included as a respondent that the appellants should have named her as a respondent to the appeal. The substantive matter under appeal is the decision of the Commissioner made the 15th September, 2003, pursuant to s. 8 of the Freedom of Information Act, 1997, to grant a requester access to a report in the records of the Department of Communications, Marine and Natural Resources (the Department), notwithstanding, in the appellants' submission, that the information contained in the report is commercially sensitive within the meaning of s. 27 of the Act.

The procedure relating to such appeal is contained in Statutory Instrument 325 of 1998, the Rules of the Superior Courts (No. 3) (Freedom of Information Act, 1997), 1998 as amended. The following rules are relevant:

Rule 3: The Notice of Motion shall be served within (8) weeks after the notice of the decision concerned is given to the person bringing the appeal. The Notice of Motion

shall be served upon the Commissioner and upon any other person affected by the decision the subject matter of the appeal. Service shall be by ordinary prepaid post.

Rule 4: The Notice of Motion shall be entitled "in the matter of the Freedom of Information Act, 1997" and on the application of the appellant.

The appellant says that if the legislature intended any person to be named as a respondent it would have said so. In particular the Statutory Instrument does not provide for the Commissioner to be a respondent but that it be served on the Commissioner.

Detailed submissions were given in relation to the above in that the Commissioner had no *locus standi*, and was *functus officio*. The Commissioner's decision is complete and cannot be the subject of further consideration. The appellant says that both the requester and the Department have a right to appear and fully argue their case. The appellant has served the Commissioner and the Department and has complied strictly with the provisions of Order 130, Rules 3 and 4 referred to above. The appellants also say that the High Court should be ~~jealous~~ ^{and cost} to ensure that access to the courts is not made cumbersome and costly. The appellants should not be faced with the burden of taking on a needless adversary in the form of the Information Commissioner. In this regard the appellants referred to Council Directive 90/313/EEC of the 7th June, 1990. Article 4 of that Directive provides as follows:-

"A person who considers that his request for information has been unreasonably refused or ignored, or has been inadequately answered by a public authority, may seek a judicial or administrative review of the decision in accordance with the relevant national legal system."

Article 5 provides that "Member States may make a charge for supplying the information, but such charge may not exceed a reasonable cost.

The report from the Commission to the Council and the European Parliament on the experience gained in the application of that Directive, dated the 29th June, 2000, referred to "several complaints raised the high costs and long delays associated with the review procedures".

The Commissioner, notwithstanding its not being made a respondent to the proceedings, entered a conditional appearance. It said it ought to have been named as respondent as the appellants are appealing its decision of the 15th September, 2003 which affirmed the decision of the Department of the 7th January, 2003, to release a report on the use of the foreshore at Cahercon Pier, Kildysart, Co. Clare, to a requester.

No other party is named as respondent, notwithstanding that the appellants adopted the position that the Department or the requester may have been proper respondents to the appeal.

In the pleadings the appellants are challenging the decision of the Commissioner on an *ex parte* basis. They are not proposing that any other body stand in the shoes of the Commissioner to defend the decision.

The scheme of the Act provides for an appeal against the decision of the Commissioner on a point of law under s. 42(1). It is implicit that the Commissioner be a respondent as has been done in all of the 20 cases heretofore.

Moreover, there is a distinction between the adversarial system of justice operating in the court arising from a *lis inter partes* and administrative decisions taken under the Freedom of Information Act by the Freedom of Information Officer, the

Appeals Officer and the Commissioner herself. Each of these proceeds *de novo* and not by way of review.

In *Flood v. Lawlor*, Supreme Court, 12th December, 2001, Keane C.J. referred to the Tribunal of Inquiry as having two features. First, they are essentially inquisitorial rather than adversarial in their nature and hence not all of the features associated with a *lis inter partes* are present.

Moreover, the Commissioner is established by statute and is independent in the performance of his or her function (s. 33(2)).

When determining an appeal under s. 42, McKechnie J. in *Deely v. Information Commissioner* [2001] 3 I.R. 439, stated that:

- "i. The Court cannot set aside findings of primary fact unless there was no evidence to support such findings;*
- ii. It ought not to set aside inferences drawn from such facts unless such inferences were ones which no reasonable decision making body could draw;*
- iii. It could, however, reverse such inferences if the same were based on an interpretation of documents and should do so if such inferences were incorrect; and*
- iv. If the conclusion reached by such bodies showed that they had taken an erroneous view of the law, that would be a ground for setting aside the resulting decision.*

The respondent submits that this necessitates the presence of the Commissioner as a respondent in the proceedings.

It was submitted that the appellants have not complied with the provisions of Order 130. Rule 3 supports the conclusion that the Commissioner was envisaged as being named as a respondent, where it states that the Notice of Motion is to be "served upon the Commissioner and upon any other person affected by the decision the subject matter of the appeal".

There is no attempt by the Commissioner to influence the decision of the High Court but to defend the decision in the face of a challenge.

No other body or person is in a position to defend the Commissioner's decision.

Decision of the Court:

While the preamble of the Freedom of Information Act is not itself legislation it does encapsulate the objective of the legislation, that is "to enable members of the public to obtain access, to the greatest extent possible consistent with the public interest and the right to privacy, to information in the possession of public bodies . . . and, accordingly, to provide for a right of access to records held by such bodies, for necessary exceptions to that right and for assistance to persons to enable them to exercise it, to provide for the independent review both of decisions of such bodies relating to that right and of the operation of the Act generally."

In addition, the Act enables the establishment of the Office of Information Commissioner and a definition of its functions. Sections 33 to 40 refer to the functions of the Commissioner.

Under s. 34 the Commissioner may, on the application to him or her in that behalf, in writing or in such other form as may be determined, review a decision to which the section applies and following the review, to review or vary the decision, or

annul the decision and, if appropriate, make such decision in relation to the matters concerned as he or she considers proper.

The appeal to the High Court is provided for in s. 42 whereby a party to a review under s. 34 or any person affected by the decision of the Commissioner following such a review, may appeal to the High Court on a point of law from the decision.

The Commissioner may refer any question of law arising in a review under s. 34 to the High Court for determination (s. 42(5)).

A decision of the High Court following an appeal such as referred to above shall, where appropriate, specify the period within which effect should be given to the decision which shall be final and conclusive (sub-s. 7) and (8) of s. 42.

Order 130 provides rules in relation to an appeal to the court pursuant to s. 42(1), s. 42(2) or s. 42(3) and should be brought by way of originating Notice of Motion. The Notice of Motion should be served upon the Commissioner and upon any other person affected by the decision the subject matter of the appeal and should be grounded upon an affidavit of the applicant, such appeal should be heard and determined upon affidavit unless the court otherwise directs.

Order 130 also deals with the procedure in relation to a case stated under s. 42(5) which is not relevant to the instant application. The application in this case comes under s. 42(1).

It seems clear that a Notice of Motion is not merely the giving of information that an applicant intends to move the court. It allows the party served to appear and argue before the court if they so choose. The appellants say that they have done that by service on the Commissioner and on the Department. It is not an *ex parte* nor a

moot, but a matter of contention, a *lis inter partes*. If there were no contention then the court would not require to be moved to make a decision.

Order 15 deals with parties and envisages plaintiffs and defendants in contentious litigation.

While the court need not examine the grounds for appeal in this preliminary application and, indeed, such grounds were not open to the court, it is clear from a perusal of the grounding affidavit of Mr. Whelan, filed the 6th November, 2003 in the substantive matter that all of the six grounds referred to the Information Commissioner erring in law in refusing, in failing and in holding certain matters. These included refusing to make known to the appellants the identity of the person requesting the release of the report and the motive of that person; failing to consider that information given to the writer of the report by the appellants could be used by the person requesting same to damage the appellants; failing to have regard to the fact that commercially sensitive information was given by the writer of the report by the appellants; failing to have regard to the public interest in having specific information itself made public and erring in holding that information about use of a public amenity could not constitute information whose disclosure could prejudice the conduct or outcome of contractual or other negotiations or persons to whom the information relates.

It is clear that to answer these grounds of appeal the Commissioner is entitled to be a party to the proceedings and is a necessary party.

The issue of costs is not a factor which the court considers relevant in respect to an appellant. The Directive, at Articles 4 and 5 and the Report of 29th June, 2000 relate to a requester and emphasise the objective of the legislation to supply information.

Accordingly, the applicants' claim is refused.

I will hear counsel on the necessity of any consequential orders.

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G.1.

THE HIGH COURT

No 73 of 2003 MCA

Tuesday the 13th day of January 2004

BEFORE MR JUSTICE MURPHY

BETWEEN

**C.W. SHIPPING COMPANY LIMITED, SHANNON EXPLOSIVES
LIMITED AND WHELANS LIMESTONE QUARRIES LIMITED
APPELLANTS**

Upon Motion of Counsel for the Appellants pursuant to Notice of Motion dated the 6th day of November 2003 by way of Appeal to this Honourable Court pursuant to section 42 (1) of the Freedom of Information Act 1997 on points of law from the decision of the Information Commissioner affirming the decision of the Department of Communications Marine and Natural Resources to release a report on the use of the foreshore at Cahercon Pier Kildysart County Clare which decision of the Information Commissioner was communicated to the Appellants by the Information Commission in a letter dated 15th September 2003

This Matter having been listed before the Court on 12th January 2004 in the presence of Counsel for the Appellant and Solicitor for the Information Commissioner

Upon application of Solicitor for the Information Commissioner to determine a preliminary point of law as to whether the Appellants should have named the Information Commissioner as a Respondent to the Appeal same being heard on 12th January 2004

Whereupon and on reading the said Notice of Motion herein dated the 6th November 2003 and on reading the written submissions on behalf of the respective parties and the Affidavit of Patrick Whelan and on hearing the said

G.1.

THE HIGH COURT

The Court reserved Judgment to this day and the same
having been called for Judgment this day

The Court doth find that the Information Commissioner is entitled to
be a party to the proceedings and is a necessary party

IT IS ORDERED that the Appellant do pay to the Information
Commissioner the costs of this preliminary issue when taxed and ascertained

IT IS ORDERED that execution on foot of the said Orders be stayed
for a period of twenty one days from the date of perfection of this Order and in the
event of the Appellant serving Notice of Appeal within that period and duly
entering same that execution be further stayed until the final determination of such
appeal

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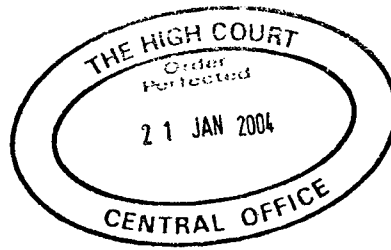
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The 13th day of January 2004

C W SHIPPING COMPANY LIMITED
SHANNON EXPLOSIVES LIMITED
AND

WHELANS LIMESTONE QUARRIES
LIMITED

APPELLANTS



SHANNON EXPLOSIVES