[2020] IEHC 392

THE HIGH COURT

RECORD NO: 2018/119 MCA

IN THE MATTER OF THE EUROPEAN COMMUNITIES (ACCESS TO INFORMATION ON THE ENVIRONMENT) REGULATIONS 2007-2014
AND IN THE MATTER OF AN APPEAL, PURSUANT TO ARTICLE 13 OF THOSE REGULATIONS

BETWEEN

RIGHT TO KNOW CLG

APPELLANT

AND

COMMISSIONER FOR ENVIRONMENTAL INFORMATION

RESPONDENT

AND

MINISTER FOR TRANSPORT, TOURISM AND SPORT

NOTICE PARTY

JUDGMENT of Ms. Justice Niamh Hyland delivered on 31 July 2020

Introduction

1. In these proceedings Right to Know CLG ("the appellant") seeks to appeal and set aside the decision of the Commissioner for Environmental Information ("the respondent") of 13 February 2018 which affirmed the earlier decision of the Minister for Transport, Tourism and Sport ("the notice party") to refuse access to certain information sought by it under the European Communities (Access to Information on the Environment) Regulations 2007 to 2018 ("the AIE Regulations"). By decision of 13 February 2018 (the "Decision"), the respondent determined that the information sought by the appellant (a submission from IBEC to the respondent and two associated documents) held by the notice party was not environmental information within the meaning of Article 3(1) of the AIE Regulations.

2. The AIE Regulations provide for the right to request access to environmental information, such right arising originally under Directive 90/313/EEC and now under Directive 2003/4/EC ("the 2003 Directive"). This appeal proceeds under Article 13 of the AIE Regulations which states:

> *"A party to an appeal under article 12 or any other person affected by the decision of the Commissioner may appeal to the High Court on a point of law from the decision".*

3. Environmental information is defined at regulation 3(1)(c) of the AIE Regulations as "*any information in written, visual, aural, electronic or any other material form on …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".*

4. There are two broad issues in this case. First, a question arises as to whether the proceedings are moot as the appellant has since been provided with the documentation it originally sought by both the notice party and by a third party. Second, if they are not

moot, then it is necessary to decide whether the information sought is environmental information within the meaning of Article 3(1)(c) of the AIE Regulations.

Reliefs Sought

5. The appellant in its Notice of Motion of 10 April 2018 seeks an Order setting aside the respondent's Decision upholding the decision to refuse access, a Declaration that IBEC's submission is environmental information, an Order compelling the respondent to provide the appellant with reasons for refusal, an Order remitting the matter back to the respondent for consideration of exemptions to the right of access to environmental information (if necessary), a Declaration that the respondent order the notice party to release the IBEC submission (if necessary) as well as ancillary orders. Significantly, at the hearing of the action, counsel for the appellant accepted that the remittal order was no longer necessary given that the documents had now been provided.

Background and Chronology

6. By way of background, on 15 March 2017 the appellant made a request to the notice party seeking access to a submission made by the business and employer lobbying group IBEC under the AIE Regulations. In its request for information, the appellant referred to a specific entry on the Register of Lobbying maintained by the Standards in Public Office Commission and sought "the submission and minutes of the meeting" referred to in that entry. This request was refused by the notice party on 13 April 2017. The reasons given for this refusal were that the records held by the notice party were not "environmental information" within the meaning of the AIE Regulations, and that there were no minutes of a meeting between IBEC and the notice party. The appellant sought an internal review of this decision on 13 April 2017. No decision was made by the notice party within the statutory timeframe, resulting in a deemed refusal. The appellant appealed this refusal to the respondent on 22 May 2017. In its Decision of 13 February 2018, the respondent concluded that the information sought was not environmental information within the meaning of the Regulations.

7. By Notice of Motion of 10 April 2018, the appellant lodged an appeal to this Court against the Decision.

8. The documents, having been obtained in the circumstances set out below, are exhibits in this appeal and consist of three documents in total. The first, and most significant, is a single page submission made by IBEC comprising a bullet points entitled "Business priorities for ministerial handover brief", described by the respondent as "akin to an agenda". The second is a cover letter accompanying the one-page submission from Danny McCoy CEO of IBEC to Graham Doyle, Secretary General of the Department of Transport, Tourism and Sport dated 2 March 2016 (incorrectly describing the Department as the Department of Environment, Community and Local Government). These two documents are referred to as "the submission". The third document is a subsequent letter of 9 March 2016 that corrects the description of the Department ("the letter") and seeks to arrange a meeting between the respondent and IBEC.

9. On 24 April 2018, following correspondence, the appellant received the first of those documents from a journalist entitled "Business priorities for Ministerial handover brief".

10. On 1 May 2018, the respondent contacted the appellant and indicated that in the interests of avoiding the incurring of legal time and costs, it had suggested to the notice party that it might consider releasing the records on what is described as a without prejudice basis. The notice party, having consulted with IBEC, provided the records to the appellant outside the scope of the AIE Regulations by letter of 15 May 2018. That exchange of correspondence is described in greater detail below.

11. Although it now has possession of the entirety of the documents covered by its request for access, the appellant wishes to maintain its appeal and indicates it will only withdraw the appeal if the decision of the respondent is set aside. The respondent stands over its Decision.

The Decision

12. By its Decision, the respondent identified that the issue to be resolved was the connection of the requested information to the measures referenced in the requested information. Those measures included matters such as investment in transport infrastructure, upgrades to the Atlantic corridor, decarbonising transport, alternative fuel infrastructure, public transport, access to Dublin airport including Metro North. It concluded that the letter did not have a sufficient connection with the measures, and therefore was not satisfied that the letter was information on a measure or activity and was therefore not environmental information within the definition of regulation 3(1)(c). In respect of the submission, the respondent found in general that it was not the case that such information could not be capable of being environmental information; but in this case the submission did not contain or provide any substantive information on the measures referenced within.

Arguments of the Appellant

13. In respect of mootness, the appellant disputes that the issues raised in these proceedings are moot, arguing there remains a live controversy between the parties as the respondent stands over its decision. *Citing Murphy v. Roche* [1987] I.R 106 and *Goold v. Collins* [2004] IEHC 38, the appellant accepts the principle to the effect that proceedings are moot when there is no longer any legal dispute between the parties and that the existence of a live controversy is required to be present to avoid parties seeking advisory opinions on abstract, hypothetical or academic questions of the law by requiring the existence of a live controversy to be present in order for the issue to be justiciable. It identifies the six-part test formulated by McKechnie J. in *Lofinmakin v. Minister for Justice* [2013] 4 I.R. 274 at paragraph 82 for identifying whether a case is moot (later applied in *Godsil v. Ireland* [2015] 4 I.R. 535).

14. The appellant contended in oral submissions that the appeal is not moot as the principle issue between the parties remains in dispute i.e. the characterisation of the documents as not containing environmental information, since this issue has not been conceded by the respondent. The appellant is concerned that this decision will be relied upon by the

respondent in future appeals under Article 12 of the AIE Regulations and that, unless quashed, the Decision has precedential significance. Accordingly, the requirement of exceptional circumstances identified in the case law is met.

15. The appellant also submits that this appeal raises issues of a more general application having implications for requests pursuant to the AIE Regulations concerning information relating to lobbying on environmental matters. The appellant argues for a general public interest in the nature and objective of lobbying activities and for determining the scope of what might constitute a lobbying activity within the context of the AIE Regulations and/or the Directive.

16. Having regard to the fact that AIE Regulations implement the 2003 Directive, the appellant places heavy reliance upon the case law of the General Court and the CJEU in access to documents cases where the documents have been received in whole or part prior to the hearing.

17. Turning to the substantive issues in the case, the appellant argues that the records sought constitute environmental information within the meaning of Article 3 of the AIE, relying upon Hogan J. in *Minch v. Commissioner for Environmental Information* [2017] IECA 223 where he noted that the recitals to the Directive and the Aarhus Convention stressed the importance of the obligation to provide access to environmental information because of the link between access to such information and participation by the public in decision-making on environmental issues. When looking at the definition of "environmental information" the appellant submits that the wording of Article 3 of the AIE Regulations makes it clear that to be environmental information, the information sought must be information "on" the enumerated categories, including that set out at regulation 3(1)(c) the subject of this dispute.

18. The appellant submits that the overall intent of the Directive is that there should be broad access to environmental information, subject only to narrowly construed exemptions and exceptions. It points to the case of Case C-316/01 *Glawischnig* [2003] ECR I-05995 wherein the ECJ held that the European Community legislature's intention was to make the concept of "*information relating to the environment*" as defined in Article 2(1) of the 1990 Directive, a broad one, and to avoid giving the concept a narrow definition. It accepts that neither the 1990 Directive nor its successor the 2004 Directive give a general and unlimited right of access to all information held by public authorities having a connection, however minimal, with an environmental factor, noting that in *Minch*, Hogan J. referred to *Glawischnig* observing 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*".

19. The appellant argues the information sought in this case is not so remote as to be regarded as falling outside the scope of the AIE Regulations. The appellant in its oral submissions argued that the reliance by the respondent on the "bigger picture" test in its Decision is misplaced, citing *Department for Business, Energy and Industrial Strategy v.*

the Information Commissioner and Alex Henney [2017] EWCA Civ 844 (approved by the Court of Appeal *in Redmond v. Commissioner for Environmental Information*, Court of Appeal, 3 April 2020 (Collins J.)). The appellant submits that in *Henney* the UK Court of Appeal did not endorse the "bigger picture" test and found that the lower tribunal erred in finding that the "bigger picture" approach was permissible and/or appropriate in identifying the relevant "measure". The approach taken by the tribunal went beyond the broad approach to construction that is required of the UK Regulations and the Directive. The appellant also submits that the Court of Appeal was concerned that the use of the bigger picture test could lead to an approach that assess whether information is "on" a measure by reference to whether it "relates to" or has a "connection to" one of the environmental factors mentioned.

20. The appellant also criticised the statement in the Decision that the submission did not contain or provide any substantive information on the measures referenced, the reference to the submission not being integral to the measures referenced within and the reference to the submission being incidental to the measures.

21. Separately, the appellant argues that the information sought falls under regulation 3(1)(c) as the records were submitted by IBEC in the course of its lobbying activities, and lobbying is itself a measure and/or activity affecting or likely to affect the elements and factors identified in article 3(1)(a) and (b) of the AIE Regulations.

Arguments of the Respondent

22. While the respondent fully stands over its decision, it submits that this appeal and these proceedings are moot, as there is no live and concrete dispute between the parties such as that described in *Goold v. Collins*. There is also no controversy affecting or potentially affecting the rights of the parties in this case anymore, as described *in O'Brien v. Personal Injuries Assessment Board* (no. 2) [2007] 1 I.R. 328, as the appellant now possesses the records sought.

23. The respondent also submits that while the appellant has tried to re-characterise factual issues as legal issues, there is nothing in this case that would operate to affect other parties in other cases. The respondent submits that the general orientation of the courts is against hearing a moot case.

24. In oral submissions, the respondent pointed out that the appellant had conceded that the matter, if the appellant were successful, should not be remitted back to the respondent and therefore what was being engaged was an entirely artificial exercise. It also argued that the courts should only decide cases that it is necessary to decide, for reasons of judicial economy. The judicial process is not about making sure that every single decision made is absolutely correct, but rather adjudicating on decisions with a live factual controversy.

25. In respect of the appellant's argument that the Decision will have a bearing on future cases in terms of precedent or as a legal test, the respondent characterises that argument as entirely hypothetical, as each decision of the respondent is arrived at entirely on its

facts. The respondent points to the lack of evidence before the court to support the argument that the court should decide a moot point because it might have an effect on future decisions.

26. The respondent argues there is nothing in this case which would bring it into the realm of the types of cases which "survive" mootness and that there is no comparable issue here to that in Case C-57/16*, ClientEarth v. Commission* ECLI:EU:C:2018:660. In that case there was a transcendent legal issue regarding the application, nature and consequence of the presumption that the Commission had contended for and the General Court accepted. There is no comparable issue in this case. It is not a "test case" type situation nor would it impact many other parties in many other cases.

27. In respect of the substantive issues, the respondent submits it is not clear why the appellant submits that the records sought are environmental, relying upon *Glawischnig* to show that a minimal connection or link is insufficient in the face of a test requiring a measure or activity affecting or likely affecting the elements and factors identified.

28. The respondent accepts that the AIE Regulations and the Directive are intended to support a broad right of access but notes that they are not open ended and do not provide an indefinite right of access to documents. There is a clear need to associate the measure at issue with an environmental effect, and as everything can have an environmental effect there must be some clear connection between the measure and the effect. There is a legally required relationship between the matter claimed to be the measure and an environmental effect.

29. The respondent disputes the appellant's points made against the bigger picture test and the use of certain adjectives such as "substantive" and "integral" in its decision. It submits that the decision in *Henney* does not preclude the use of the bigger picture test, and that it may be used to determine the question of whether records are information "on" a measure. It also submits that the adjectives used in its Decision have been used in previous jurisprudence by the courts.

30. In addressing the lobbying issue, the respondent points to the *Minch* case and argues that the National Broadband Report was a plan, or something in the nature of a plan; but that lobbying *per se* has no such character. The respondent does not submit that lobbying cannot be a measure or activity. No general point of law in the sense urged by the appellant has been determined. Indeed, in oral submissions the respondent stressed that the Decision makes it clear that information in respect of matters such as arranging meetings and identifying matters for discussion at the meeting is capable of being environmental information within the meaning of the Regulations.

Arguments of the Notice Party

31. The notice party also argues the appeal is moot as the appellant has been given the information sought by the notice party itself and a third party, and there is therefore no substantive dispute between the parties. It points to the long-established principle that

superior courts ought not to engage in a consideration of proceedings which are moot unless there are exceptional circumstances that warrant such a determination.

32. The notice party argues that these proceedings can have no practical impact on the parties and that consideration of the substantive issue (i.e. whether the records sought constitute environmental information) could only be hypothetical or advisory. It submits that as the appeal is *prima facie* moot, the onus is on the appellant to establish that this appeal falls into one of the restricted categories of moot cases. In oral submissions the notice party argued that the exceptional circumstances (where an issue will have systemic impacts in a particular area or where a particular case has been identified as a test case) do not arise in this case, as the respondent's decision was made on the facts of the case. To say that this might apply to future decisions is highly speculative and artificial and presumes the same decision would be reached again on a different fact pattern.

33. Turning to the substantive issues, the notice party submits that in order to fall within the definition of environmental information, the information must be information "on" a measure of the type identified in Article 3(1)(c), which clearly implies that the information must have a connection to the particular measure. The mere fact the information originates from lobbying undertaken by a particular body does not mean that the information is automatically environmental information. An examination of the information must be undertaken to identify whether it falls within the definition.

34. With regard to lobbying, the notice party submits that it cannot be said that lobbying *per se* is a measure within the meaning of Article 3(1)(c), as it itself has no environmental impacts and to be relevant it must be rooted in a particular measure which will have environmental impacts.

Mootness under Irish law

35. As identified above, all the documents the subject of the request were provided to the appellant by the notice party by letter of 15 May 2018 and the one-page submission itself was provided by an unidentified journalist on 24 April 2018.

36. In those circumstances, both the respondent and the notice party have raised a sustained objection to the case proceeding on the basis that the documents having been received, the case is now moot as there is no live controversy between the parties.

37. The Irish case law on mootness has been well rehearsed in many judgments*. Lofinmackin and O'Brien* appear to be the most relevant Irish cases in the context of these proceedings and I consider both below. However, less commonly, there is also significant reliance by the appellant on case law of the General Court and the CJEU as to when a party may maintain proceedings where the dispute between the parties has come to an end. It is therefore necessary to consider the requirements of EU law in this respect, as well as the interaction between Irish and EU law on the question of mootness.

38. The decision of the Chief Justice, Denham C.J. in *Lofinmakin* makes clear that the following *dicta* of the Supreme Court in the Canadian case *Borowski v. Canada (Attorney*

General) [1989] 1 SCR 342 represents the law in this jurisdiction as to when a case will be treated as being moot - "*an appeal is moot when a decision will not have the effect of resolving some controversy affecting or potentially affecting the rights of the parties*". Or as identified as McKechnie J. in the same case, "*there must exist some issue(s), embedded within a factual or evidential framework, the determination of which is/are necessary so as to resolve the conflict or dispute which necessitated the proceedings in the first instance (paragraph 59)" and later, "when the action has lost its utility by reference to the issues and the parties, the case is classified as moot".* Explaining the reasons for this approach, he observes that (a) the mootness rule is firmly based on the deep rooted policy of not giving advisory opinions, or opinions which are purely abstract or hypothetical, in a system that is fully adversarial; (b) judicial economy or efficiency/effectiveness requires that the courts scrutinise and calculate how best they can fulfil their functions and where necessity of resolution is not required, the courts will correctly be most reluctant to get involved; and (c) the discharge of the judicial function is best performed where the reference point is focussed on resolving defined issues in a concrete legal setting, with a consequent reduced danger of overstepping the reach of the judicial role as envisaged in Article 34 of the Constitution (paragraph 61).

39. Of course, even where an issue is moot, the courts have always maintained a discretion to hear and determine the point. McKechnie J. in *Lofinmakin* observes that where overriding interests of justice require a decision on the moot, same should be given (paragraph 67). In the same judgment, Denham C.J. refers to exceptionality as a test for the exercise of that discretion. During the hearing of this matter, all parties agreed that a moot should only be heard in exceptional circumstances. It is clear from the case law that an issue of exceptional public importance alone does not warrant the hearing of an appeal (*Lofinmakin*, as followed by Finlay Geoghegan J. in *Kovacs v. Governor of Mountjoy Women's Prison* [2016] IECA 108 (paragraph 13)).

40. Given the provision of the entirety of the documents sought by the notice party by letter of 15 May, as well the provision by a journalist of the submission by IBEC of 24 April 2018, the legality of the Decision to refuse access to the documents sought is *prima facie* moot. I am reinforced in this conclusion by the fact that the appellant no longer seeks the relief at paragraph 4 of the Notice of Motion, i.e. that the matter be remitted back to the respondent to consider exemptions to the right of access environmental information or paragraph 5, an Order that the respondent order the notice party to release the IBEC submissions to the appellant.

41. However, the appellant argues that the requirement of exceptional circumstances is met, in substance because the Decision remains in being, and because it, as an NGO dedicated to obtaining access to documents, is likely to be bound by the legal principles articulated in the Decision should it make a similar request in the future.

Circumstances in which the documents were received

42. Before dealing with these arguments, I should address the circumstances in which the documents were received. First, it is important to emphasise that the documents were not provided by the respondent and indeed could not have been without the consent of the

notice party. Rather they were provided by the notice party, albeit following a suggestion by the respondent to the notice party that it might adopt this course. This is not therefore a case where there might be a concern that the respondent was (in U.S. legal parlance) "evading review" i.e. disclosing documents to avoid the possibility of review of its decision to refuse. Further, there was an added disclosure by a third party.

43. Second, very considerable emphasis has been placed by the appellant on the "*without prejudice*" nature of the disclosure and the maintenance of the Decision refusing access by the respondent. In its letter of 1 May 2018 to the solicitors for the appellant, the solicitors for the respondent indicated they had contacted the notice party to ascertain whether it would release the information to avoid further resources being expended on the issue, including court time and legal costs but stated that this was strictly without prejudice to the respondent's position that the Decision was correct in law. The appellant was invited to withdraw the proceedings on the basis that they were moot. By reply of 15 May 2018, the solicitors for the appellant replied stating that lobbying on environmental matters is a measure or activity that affects or is likely to affect the environment, that any information on that lobbying is environmental information and that there is a published decision of the respondent indicating this is not the case. The letter went on to contend that there was a real public interest in overturning the Decision and that their client, as an information rights NGO, had an interest in the proceedings beyond accessing the information since the Decision, if unchallenged, would set a precedent for a narrow interpretation of what is environmental information. The letter identified terms upon which the appellant would be willing to withdraw its appeal including that the respondent would accept its decision was legally incorrect and would make a new decision containing certain acceptances.

44. On 15 May 2018 the notice party wrote to the appellant enclosing the documents the subject of the request and indicating that having consulted with IBEC, it had no objection to providing the appellant with a copy of the documents strictly without prejudice to its view that the records did not constitute environmental information within the meaning of the AIE Regulations. The notice party stated it did not accept that the documents sought were environmental information within the meaning of the AIE Regulations or that there was any obligation under the AIE Regulations to release those documents.

45. The respondent was notified of the receipt of the documents by the appellant's solicitors by letter of 18 May 2018 and by response of 24 May 2018 the respondent's solicitors replied noting they would not agree to the terms proposed by the appellant to withdraw the appeal and repeated its contention that the proceedings were moot.

46. That exchange makes it clear that although the documents were provided on what is described as a "without prejudice" basis, there was no element of agreement between the parties and the respondent was standing over its Decision. The use of the phrase "without prejudice" in this case therefore constituted not any kind of agreement between the parties but rather a flag to indicate that despite the provision of documents, the respondent was standing over its decision.

47. The factual position is therefore that there is no longer a live issue between the parties as the documents the subject of the dispute have now been provided but that there is an extant decision of the respondent which, if the respondent succeeds on the question of mootness, will remain in being.

Extant Decision of the Respondent

48. In this case, the appellant relies heavily on the without prejudice nature of the disclosure as a reason why the case should be treated as exceptional. But as noted above, the "without prejudice" provision has no significance other than as a flag to indicate the respondent's intention to maintain its Decision. Of more significance are the appellant's arguments on the continued existence of the Decision, whereby it asserts that the discretion of the court to hear a moot case should be exercised where not to do so would leave intact a decision that might in future have precedential value. It was suggested by the appellant that this is an unusual occurrence and not one identifiable in the Irish case law opened.

49. There is a variety of circumstances in which matters become moot, some of which are identified by McKechnie J. in *Lofinmakin*. They include situations where there was a resolution of the underlying dispute by agreement or other circumstance, as in *Irwin v. Deasy*, or where the attainment of what was sought was achieved by means other than those in dispute (*PV (A Minor v. the Courts Service* [2009] 4 I.R. 264). It is certainly true that in certain cases, the event causing the case to become moot has the effect of removing the impugned decision. Thus, in *Lofinmakin* the deportation order at issue had been revoked (although there is no suggestion that the decision of Cooke J. in the High Court refusing leave had been revoked). In *Goold*, the Protection Order of the District Court the subject of the challenge was discharged.

50. But in *Copymoore v. Commissioners of Public Works* [2013] IEHC 230, the decision of Hogan J. in the High Court that had quashed the Ministerial Circular the subject of those proceedings remained in being and the Court of Appeal nonetheless declined to hear the appeal. This was so despite the respondent arguing that the decision of the High Court had far reaching implications beyond the parties. As noted by O'Regan J. in *Naisiunta Leictreach Conraitheoir Éireann v. Labour Court* [2018] IEHC 405, in *Copymoore* it was argued:

> *"that the effect of the judgment of the High Court was not spent, and that the case involves matters of principle that go beyond the circular and would have ramifications for the State's operation of framework agreements in the future. Accordingly, even if the matter was moot, the discretion of the court should be exercised to hear the appeal. Notwithstanding the arguments aforesaid, and based upon the jurisprudence, the Court of Appeal concluded that by the withdrawal of the relevant circular, the issues between the parties were at an end and the appeal was therefore moot".*

Copymoore is therefore an authoritative statement of principle to the effect that even where a decision of a lower court remains in being, in circumstances where the losing

party considers the judgment raises issues of principle that have a continuing impact, this will not constitute exceptional circumstances. No other case law has been opened to me suggesting that the continued existence of a decision of a lower court that a party suggests is wrongly decided is, in and of itself, enough to establish exceptional circumstances. Moreover, as the respondent points out, if that was the law, then appeals against a written decision of a lower court would almost always require to be heard even where the underlying factual dispute had resolved. I therefore find that the appellant cannot succeed in establishing exceptionality on that basis.

Identification of binding legal test by respondent

51. The appellant goes on to make a separate argument to the effect that the Decision inaccurately identifies the legal test to be applied when considering whether information comes within the definition of environmental information and that it, as an NGO with an interest in transparency, will undoubtedly make further requests to the respondent and the Decision will be relied upon by the respondent when adjudicating upon those requests. In that way, it argues that the requirement of exceptionality is met. It relies heavily on case law of the CJEU in this respect, arguing that this case law specifically permits cases that would otherwise be moot to be determined in such circumstances.

52. I did not understand an argument to be made that the Decision of the respondent *per se* raised a point of law of exceptional public importance. Rather the importance of the Decision was in the fact that the legal approach identified therein might be used against the appellant in future decisions of the respondent. In support of this argument, the appellant identified that, in the Decision, the respondent referred to one of its previous decisions, CEI/15/0007 Foxe, ("Foxe") in the following terms:

> *"In CEI/15/0007, I stated that a bigger picture approach to whether information is information on a measure or activity and that an assessment of what is integral to a measure or activity under article 3(1)(c) is a useful test to use when considering the scope of the definition of environment information".*

53. The appellant noted that on the following page of the Decision, when considering the connection of the information requested to the measures referenced in the context of the submission made by IBEC, the respondent considered whether the submission falls within the bigger picture and whether the submission is integral to the measures referenced within. In support of its argument that the concept of "integral to the measures" is a legal test that it will face in the future, the appellant also referred to the decision of O'Regan J. in ESB v. *Commissioner for Environmental Information* [2020] IEHC 190, where she was considering the legality of a decision of the respondent in which he applied the "integral" test in deciding whether to grant information under Article 3(1)(c) of the AIE Regulations. In summary, the appellant argues that the identification in the Decision of (a) the bigger picture test and (b) the question of whether something is integral to the measures, justifies a finding of exceptionality sufficient to warrant the case being heard.

54. The respondent's approach to this argument was as follows. First, he argued strongly that the Decision was made on the basis of the facts alone and did not establish any legal

principles that would be used in future cases. He observed the Decision was not binding. He said the two instances identified by the appellant where the same test or tests had been used both pre-dated the Decision in the instant case. He argued that it could not be assumed that he would adopt a similar approach in the future, where each case is decided upon its own facts. He made reference to the decision of the Court of Appeal in *Redmond* and said there were many factors that might affect the approach he would take to decisions in the future including new case law. He noted that, unlike cases such as *Irwin v. Deasy*, where the Revenue had been identified as part of the evidence in the case the existence of 20 cases whose outcome was dependent on the outcome of the issue before the appeal court, no evidence had been put before the court of any prejudice that had been or would be suffered by the appellant, such as other cases decided in a similar way subsequent to the impugned Decision, or any evidence of an immutable approach of the respondent to the applicable legal test.

Discussion

55. There was only one Irish case opened to me that identified as an exceptional circumstance the fact that an applicant may be faced in future with an approach similar to that at issue in the case alleged to be moot. This is the case of *O'Brien v. PIAB* No. 2 [2007] 1 I.R. 328, being an appeal by PIAB against an Order of the High Court, the High Court having found that PIAB had acted unlawfully in the exercise of their statutory powers by refusing to deal with the applicant's duly appointed solicitor in connection with his claim for damages for personal injuries.

56. Judgment was given in favour of the applicant. The applicant subsequently received an authorisation from the respondent to institute court proceedings, and therefore there was no longer an obligation for the applicant to deal with the respondent. The applicant argued that the proceedings were moot as the applicant's claim now fell outside the PIAB system. The Court found that the respondent had a wider interest than the applicant, since the conclusion of the High Court affected how PIAB exercised its statutory functions, not in respect of the applicant but in respect of thousands of other applications made to it. It is fair to say the majority of the judgment is taken up with that line of reasoning. However, the Supreme Court also identified a second basis upon which the case should be heard, being that the approach of PIAB might impact upon the applicant again should he be unfortunate enough to have a second accident and issue new personal injury proceedings. Murray C.J. observed as follows:

> *"On these grounds alone I would dismiss the application but I do think another aspect of the consequence of the Order of the High Court is that it defines obligations which the respondent owes under statute to the applicant not only as regard his past claim but as regards any future claim which he might have for personal injuries. Counsel for the applicant expressed the view that this was a rather extreme possibility but nonetheless acknowledged, as he was inevitably bound to do, that if a situation arose in the future where the applicant had a claim for personal injuries he would rely on the declaration of the High Court as regards s. 7 of the Act as one which required the respondent to deal with any solicitor*

appointed to act for him. I do not think it is necessary to consider simply the level of probability in the applicant being unfortunate enough to have some accident in the future whether at work or on our roads which might lead him to bring a claim for personal injuries. It seems to me sufficient to state that one cannot preclude that as a real possibility, and is not one that is so remote as to be purely hypothetical. … The foregoing scenario underscores the fact that in seeking and obtaining the declaration as to the correct interpretation of s. 7 in these proceedings the applicant obtained a ruling determining how the respondent should exercise public statutory powers vis-à-vis him which is binding as between the parties not only as regards the circumstances of the particular case but as regards any future event."

57. Unlike the present situation, there was no uncertainty as to the approach of PIAB if he was required to engage with PIAB again. The only uncertainty was whether he would be so required.

58. O'Brien was discussed in the case of *Salaja v. Minister for Justice, Equality and Law Reform* [2011] IEHC 51, which concerned an application for a visa. The Minister asserted the case was moot as the information on which the application was based had been superseded by the information contained in subsequent applications. Hogan J. referred to *O'Brien*, noting that there the Supreme Court were prepared to look to the future and not merely the past in determining the question of mootness. In the *Salaja* case, Hogan J. noted that Mr. Salaja had every interest in seeking a judicial determination as to the validity of the original ministerial decision and he would obtain a real and not simply theoretical benefit were he to succeed in such a challenge as the Minister would be obliged to reconsider the original application and perhaps re-assess the outcome of the other applications. *Salaja* is not in my view an example of a case where the potential future impact of an extant decision is held to be sufficient to establish exceptional circumstances: rather in *Salaja*, the ruling of the Court on the validity of the ministerial decision would, if successful, require the Minister to address his original application and therefore he would derive an immediate benefit from the judgment.

59. Returning to *O'Brien*, there the existence of the judgment meant that it was indisputable that PIAB would exercise its statutory powers towards all litigants, potentially including the applicant, in an identified way in future. That may be contrasted with the instant position. To come within the *O'Brien* situation, the appellant would have to show that it will almost inevitably be faced with a fixed legal approach that has been identified in the Decision on the next occasion it seeks access to environmental information and the same issues in respect of regulation 3(1)(c) arise again. I do not believe it has established that for the following reasons.

60. First, the Decision itself does not in my view lay down an immutable set of principles that will govern any decision on what constitutes information on measures or activities. Rather it identifies what is described as a "useful" test i.e. looking at the bigger picture and the question of what is "integral" to a measure. The very wording of the Decision imports a

flexibility of approach, with the reference to "useful" preventing any conclusion that this is an exhaustive or prescriptive approach. So, for example, if the appellant wished to argue that the bigger picture or integral approach were an incorrect way of considering the question of information on measures/activities, it is difficult to read into the Decision any restriction or prohibition on such an approach. The Decision does not seek to establish a binding approach to the question of what constitutes measures or activities affecting or likely to affect the environment.

61. Second, there is no evidence suggesting that the respondent will inevitably approach any future case on the basis that he did in this Decision. The only evidence before the court in that respect is in fact quite contrary to that. There is uncontested evidence from the respondent that the Decision is fact dependent. In the Affidavit sworn by Ms. Dolan on behalf of the respondent on 13 July 2018, she avers that the Decision is "*decided on a specific set of facts with regard to specific records*" (paragraph 9). That approach is repeated in the Points of Opposition where it is pleaded, inter alia, at paragraph 1 as follows:

> *"The matter before the Commissioner and the Commissioner's determination concerned a specific set of records and was determined on specific facts. On appraisal of the actual records and facts in this particular case the Commissioner held that they did not constitute environmental information within the meaning of the European Communities (Access to Information on the Environment) Regulations".*

In oral submissions it was again forcefully submitted that the Decision does not have precedential value or is binding.

62. In those circumstances, there is no basis upon which I could assume, as the appellant asks, that the Decision establish a fixed approach that would necessarily bind the respondent in future cases. The respondent has made clear that in fact the opposite is the position. In those circumstances, this does not appear to be analogous to *O'Brien*, where the applicant knew that if was subject to the PIAB regime again, he would be faced with the same fixed approach based on identified legal principles.

63. Accordingly, no exceptional circumstances have been established on the basis contended for by the appellant in this regard.

Lobbying as an activity

64. Separately, and expressed very much as a secondary argument, the appellant argues that the question as to whether lobbying on the environment may constitute an activity or measure for the purpose of regulation 3(1)(c) is a question of significant importance and that there is a public interest in this question being resolved. As noted above, by letter of 15 May 2018, the solicitors for the appellant stated that there is a published decision of the respondent that indicates that information on lobbying on environmental matters is not environmental information within the meaning of the AIE Regulations.

65. However, as accepted by counsel for the appellant, the Decision did not exclude lobbying as an activity or measure for the purpose of the Regulations. In fact, the plea that the respondent had erred in failing to conclude that lobbying was an activity at paragraph (l) of the Notice of Motion was withdrawn. Nonetheless, the plea at paragraph (c) was maintained which asserted that the letter was information on an activity likely to affect the environment i.e. the activity of lobbying.

66. When one looks at the Decision, it cannot be said that the Decision has made any negative pronouncement on lobbying as a measure or activity under regulation 3(1)(c). In fact, the Decision tentatively suggested that lobbying type activities could in principle be capable of being environmental information. The Decision recites that the IBEC submission outlines IBEC's priorities, that it can be described as being akin to an agenda for a subsequent meeting in that it lists the matters IBEC wants to address and that it is better described as a communication to arrange a meeting and the proposed matters for discussion at that meeting. The respondent concludes by noting "*That is not to say that such information is not capable of being environmental information within the meaning of the AIE Regulations".*

67. Indeed, it is not surprising that the Decision did not address at all the question of whether lobbying could be an activity or measure for the purposes of the Regulations, given that in the appellant's internal request for review of the original decision of the notice party of 13 April 2017, it argued only that the request related to environmental information since it related to investment in transport infrastructure, upgrades to the Atlantic corridor, decarbonising transport, alternative fuel infrastructure, public transport, access to Dublin airport including Metro North. Similarly, in its submissions to the respondent on 10 November 2017, it submitted simply that the lobbying concerned transport and related measures, being something that affects the environment. On neither occasion did the appellant ever express the view that lobbying itself was a measures or activity. This approach goes some way towards explaining why at no time does the Decision consider whether lobbying on environmental issues could be environmental information.

68. The respondent made the point that if the question of whether lobbying on the environment can constitute a measure or activity was to be decided by the court, it would be decided in a complete factual vacuum since the matter was never addressed at all by the respondent. That is certainly true. In any case, the appellant has advanced no exceptional circumstances identifying why an otherwise moot matter should be decided on this basis. The Decision does not decide the lobbying point, and certainly places no barrier to the argument being made in a different case; no material relevant to the point was before the respondent; if a decision was made on the point it would not in my view have raised issues of exceptional public importance (which alone is insufficient in any case); and no material interest of the appellant was raised in this regard. For all those reasons, there is no reason to depart from the normal rule on mootness in respect of the arguments on lobbying constituting an activity or measure.

Mootness under EU law

69. As well as contending that, under Irish law, the legality of the refusal of the documents should be adjudicated upon, the appellant contended that a separate and distinct obligation to hear the case arose under principles of EU law. It did not say that Irish mootness rules are necessarily in breach of EU law; but it argued that if I found that under Irish law principles, the matter was moot and no exceptional circumstances existed, EU law still required that the matter should be heard. In support of that submission, it relied upon various case law of the General Court and the CJEU.

Case Law

70. I will start by considering in some detail the decision of the Grand Chamber of the CJEU in *ClientEarth* given the reliance placed by the appellant on it. ClientEarth is a non-profit organisation whose purpose is the protection of the environment. It submitted requests for documents to the European Commission pursuant to Regulation No. 1049/2001 on public access to Parliament, Council and Commission documents. The aim of that Regulation is to define the conditions under which access to documents is granted, with the aim of making documents accessible to the widest extent, while establishing exceptions to the right of access. One of those exceptions provides that access will be refused if the disclosure of the document would seriously undermine the institution's decision-making process unless there is an overriding public interest in disclosure (Article 4). The documents sought were (a) a draft impact assessment report relating to access to justice in environmental matters at Member State level in the field of EU environmental policy and an opinion of the Impact Assessment Board regarding the draft and (b) an impact assessment report regarding a proposed binding instrument setting a strategic framework for risk based inspection and surveillance in relation to EU environmental legislation and an opinion of the Impact Assessment Board regarding the report. The Commission refused the request, explaining that impact assessments were intended to help it in preparing its legislative proposals and that the content of those assessments were used to support the policy choices made in such proposals. Disclosure would undermine its decision-making process and affect its ability to reach a compromise. ClientEarth appealed this decision to the General Court, who upheld the Commission decision. ClientEarth appealed to the CJEU.

71. By the time the CJEU came to rule, certain of the documents had been published on the internet and others had been provided to ClientEarth. No documents remained outstanding. The Commission argued there was therefore no need to adjudicate on the appeal. ClientEarth disagreed, arguing that it retained an interest to prevent the unlawfulness recurring in the future and that the Commission had not formally withdrawn the decisions. The CJEU noted that the applicable test under the case law of the CJEU was that "*the purpose of the action must, like the interest in bringing proceedings, continue until the final decision, failing which there will be no need to adjudicate, which presupposes that the action or, as the case may be, the appeal will be liable, if successful, to procure an advantage for the party bringing it*". Applying that test, the CJEU agreed that in *ClientEarth* there was a need to adjudicate on the appeal for the following reasons. First, the decisions at issue had not been withdrawn by the Commission so the dispute had retained its purpose. Second, ClientEarth had been disadvantaged by the refusal

since it had sought access to make its views known in the Commission's decision-making process and had not been able to do that without the documents. Third, an applicant may retain an interest in seeking annulment of a contested act to avoid the risk that the unlawfulness alleged will be repeated. The continuation of that interest presupposes that the unlawfulness is liable to recur in the future, irrespective of the circumstances of the case in question.

72. The Court noted that normally, where an EU institution refuses to grant a request for access to documents, it must explain how access to the document could undermine the interest protected by that exception. However, the Court acknowledged it was open to the institution to base its decisions on general presumptions applying to certain categories of documents as considerations of a generally similar kind are likely to apply to requests for disclosures relating to documents of the same nature (paragraph 51). Here, the presumption meant that the EU institution concerned could treat the disclosure of certain categories of documents as undermining the protected interest – in this case, undermining the decision-making process of the institution - without being required to examine specifically and individually each of the documents concerned (paragraph 52). The CJEU noted that this presumption was likely to be implemented again in response to requests for access to documents drawn up in the context of preparing an ongoing impact assessment, a likelihood that was not disputed by the institution (paragraph 53). The CJEU noted that ClientEarth was particularly vulnerable to implementations of that presumption in the future, given that one of its tasks was to promote increased transparency and lawfulness in relation to the EU legislative process. It was therefore likely that, in future, ClientEarth would request similar documents, and the Commission would refuse, based on the presumption. It concluded that from ClientEarth's perspective, the question of the lawfulness of the general presumption at issue was relevant in view of future requests for access to such documents. Accordingly, it had retained an interest in bringing proceedings as "*recognition of such an interest is in the interests of the sound administration of justice, having regard to the risk of recurrence of the alleged unlawfulness and in view of the particular circumstances referred to above*" (paragraph 56).

73. This decision had been preceded some years previously by a decision of the General Court in similar terms, Case T-29/08 *LPN v. Commission* [2011] ECR II-06021. On that occasion, a different exception under Regulation 1049/2001 was invoked by the Commission, which entitled institutions to refuse access where disclosure would undermine the purpose of inspections, investigations and audits. The applicant, LPN, was a Portuguese environmental NGO. It made a complaint about a dam construction project on the Sabor river where it maintained that the dam was damaging two rivers of Community importance. The Commission initiated an infringement procedure against Portugal and contacted Portugal to establish the extent to which the dam project was liable to infringe the Wild Birds Directive. LPN sought access to the documents exchanged between the Commission and Portugal. The request was rejected on the basis that it would affect the conduct of the infringement procedure as the Commission and the Member State should cooperate in a climate of trust to be able to open negotiations and

arrive at an amicable settlement of the dispute and it therefore came under the exception applying to the protection of investigations etc.

74. The Commission subsequently decided to take no further action on the complaints and in those circumstances granted access to some but not all of the documents on the basis that the exception had ceased to be applicable since the investigation was at an end. It continued to refuse other documents but on grounds other than that relating to the protection of investigations. It argued that LPN had no interest in the original decision being annulled since an annulment would procure no advantage to LPN.

75. The Court held that insofar as LPN was granted access to documents, the action had become devoid of purpose and there was no need to adjudicate (paragraph 57). In respect of documents not granted, the Court noted that the Commission had not withdrawn its original decision so that the decision continued to produce binding legal effects. Further, it noted that the interest in maintaining proceedings could only exist if the alleged unlawfulness is liable to recur in the future independently of the circumstances of the case giving rise to the action brought by the applicant. In this case, the Commission had adopted a position of principle re access to documents contained in the file of a current infringement procedure in the field of environmental law. Given the position of LPN as an active environmental NGO, the Court held there was: "*a sufficiently real risk, independent of the circumstances of this case that, in the future, in similar situations, that is to say when LPN applies to the Commission for access to documents relating to environmental information related to a current infringement process, LPN will find itself exposed to the same alleged unlawfulness*". In those circumstances, there was a need to adjudicate in respect of documents not yet or only partially disclosed to LPN. Interestingly, in contradistinction to *ClientEarth*, the Court was able to decide the applicant had no interest in obtaining a decision in respect of that aspect of the case where the documents had been provided: it was only where they had not been provided, but the basis upon which they were not provided had become redundant, the Court decided the applicant still had an interest in proceeding with the case.

Discussion

76. This line of case law merits careful consideration given the factual similarities between it and the current case. The first issue is whether it sets a different standard or higher standard from that articulated by Irish law. If the answer to that is no, then the potentially involved question as to the relationship between the EU and Irish approach in this area does not require to be answered. But if it sets a lower standard, and one which the appellant can meet in the circumstances of this case, then the relationship between the standard set by the CJEU and the Irish standard discussed above requires to be considered.

77. In that context, I observe that of course what may be described as the EU rules on the continued interest in bringing proceedings identified in the case law above are specifically applicable in the context of direct actions brought before the EU courts challenging decisions of the EU institutions. Those rules do not apply directly in the Member States since procedural rules and remedies are matters to be determined by each Member State

in accordance with their own legal system (unless specifically addressed in a particular area of EU law, such as public procurement, which includes a directive specifically on remedies) subject to the twin principles of equivalence and effectiveness. These principles posit a "floor", whereby national procedures and remedies will be considered to breach EU law and will be set aside where they impose different rules for the vindication of EU law rights from those applicable for domestic rights (the principle of "equivalence") or where the national rules make it impossible for a person seeking to exercise their EU law rights to do so in practise (the principle of "effectiveness").

78. I am not persuaded that the mere fact that a national procedural rule, such as the one at issue in this case i.e. mootness, operates to preclude an applicant from arguing a case involving the application of principles derived from an EU Directive, can *ipso facto* mean that the rule in question breaches the principle of effectiveness. This is the somewhat simplistic approach adopted by the appellant in this case. Many procedural rules, such as those concerning standing or time limits or *res judicata*, have the potential effect of operating to bar a litigant. That does not inevitably mean they breach the principle of effectiveness. The case law of the Court of Justice indicates that what must be asked is whether the national procedural provision makes it impossible or excessively difficult to apply EU law. In answering this question, it is necessary to take into account the objective of the procedural rule and the values which it protects, such as, for example, the principle of legal certainty or the proper conduct of the procedure.

79. However, this issue was not argued in any detail at the oral hearing, is not addressed at all in the written submissions and it would be undesirable in those circumstances to adjudicate on the compatibility of Irish mootness rules with EU law unless it was absolutely necessary. Therefore, I have decided to consider the issue on the assumption that the EU standard is the applicable one to see whether, on that basis, the appellant would be entitled to proceed with its case. I conclude that even applying the EU standard, the appellant would not be entitled to proceed on the basis that the outcome of this case would not procure an advantage for it for the following reasons.

80. ClientEarth were permitted to continue the litigation despite receiving the documents sought precisely because they would procure an advantage by a ruling of the CJEU. The advantage was that, in circumstances where the Court accepted that (a) where impact assessment documents were sought the Commission would rely on the presumption that same would undermine the institution's decision making process (without individually examining the underlying documents) and (b) it was likely that ClientEarth would again request impact assessment type documents, then it continued to maintain an interest in the question of whether such an approach was lawful since it would impact on future requests.

81. The appellant seeks to argue that a similar approach applies here since the respondent has laid down a universally applicable principle of law that would inevitably be applied again and, given it is an NGO concerned with access to information, it would likely come up against the application of the principle in future.

82. However, I am not persuaded by this argument having regard to the Decision the subject of these proceedings. First, as noted above, the respondent has explicitly averred the Decision is based upon the facts of the case and does not lay down any generally applicable principle of law. This is a significant point of distinction since it is difficult for the appellant to contend that it will inevitably be faced with a point of principle contained within the Decision when the decision maker itself makes it clear that the Decision does not contain any such principle that he would consider binding upon him in the future.

83. Second, viewed objectively, I do not consider that the Decision establishes an immutable generally applicable principle or approach that will inevitably be applied in future decisions. It is helpful to go back to the sentence in the Decision that the appellant lays such weight upon i.e. "*I stated that a bigger picture approach to whether information is information on a measure or activity and that an assessment of what is integral to a measure or activity under article 3(1)(c) is a useful test to use when considering the scope of the definition of environment information*".

84. That seems to me an identification by the respondent of the approach he was intending to take in this particular case in considering whether the information was "on" a measure or activity affecting or capable of affecting the environment. He does not say it is the only test or approach, or that it must be applied in each case. There is no evidence that the respondent's approach in this particular case constitutes an immutable approach that the respondent will inevitably apply again, particularly when he himself is saying that this is not the effect of the Decision.

85. The appellant points to two other occasions where a similar approach was taken by the respondent, as evidence that this approach will inevitably be taken again by the respondent – his previous decision in the *Foxe* case and the judgment of O'Regan J. in *ESB v. Commissioner for Environmental Information*. However, the invocation of the concept of integral on two other occasions and the reference to the "big picture" on one other occasion does not appear to be sufficient to permit me to conclude that the approach in the Decision is a fixed approach that will be repeated. This is particularly so where there is uncontradicted evidence (identified above) from the respondent that the Decision has no precedential status and is not binding.

86. This contrasts with the situation in *ClientEarth*, where ClientEarth knew with a high level of certainty that if a similar situation arose again, they would be refused the documents. No such certainty of outcome exists here.

87. The second question considered by the CJEU was whether ClientEarth would be likely to be faced with the presumption again, as opposed to any other party. The appellant urges me to find that, in future, it is likely to be seeking again to persuade the respondent that information sought is information "on" a measure or activity capable of affecting the environment. That does not seem improbable given the nature of the activities of the appellant. However, because the appellant has fallen at the first hurdle i.e. it has failed to show that the approach adopted by the respondent is very likely to be implemented in future cases, my conclusion in that respect does not alter the position.

88. The appellant also sought to argue that the mere fact that the decision of the respondent had not been revoked was sufficient to give it standing and relied on the EU case law identified above in that regard. However, in my view, the decisions of the General Court and CJEU do not support that approach. First, in the *LPN* case, the Court focused on the maintenance of the Commission decision in respect of the documents that were still being refused. Here all documents have been released. But more substantively, the EU cases make it clear in my view that the very strong possibility of a refusal based on the same grounds in subsequent cases brought by the applicant in each case was the critical factor leading to the decision that the applicants would obtain an advantage by the continuation of the case. Thus, the mere maintenance of the decision was in and of itself insufficient to allow the case to be heard.

89. Accordingly, even if the EU standard is different (and I am not necessarily persuaded of that), applying that standard to the appellant does not lead to the conclusion that deciding these proceedings would lead to an advantage to the appellant and therefore the EU standard for continuing proceedings is not met.

Costs

90. Finally, insofar as it was suggested that the appellant would derive a cost benefit from maintaining the proceedings, the Irish authorities cited above make it clear that a case that would otherwise be moot will not be heard simply to procure an advantage in costs to one party.

Conclusion

91. Given that the appellant has now received the documents the subject of its access application, both from the notice party and (in the case of the IBEC submission) from a third party, it no longer retains an interest in the determination of these proceedings and the case is moot. Nor are the tests for hearing a moot met; no exceptional circumstances have been identified by the appellant. The fact that the appellant has an apprehension that it may face the application of a legal test that it says is wrong in future applications to the respondent is insufficient (even applying the test established by the CJEU) where the respondent characterises its decision as one that is exclusively fact based and lays down no legal principles and where there is no certainty that the appellant will face a similar approach by the respondent in justifying a refusal of documents in the future.