APPROVED **[2021] IEHC 233**

THE HIGH COURT
JUDICIAL REVIEW

2018 No. 942 J.R.

IN THE MATTER OF THE EUROPEAN COMMUNITIES (ACCESS TO INFORMATION ON THE ENVIRONMENT) REGULATIONS 2007 – 2018

AND IN THE MATTER OF DIRECTIVE 2003/4/EC ON PUBLIC ACCESS TO ENVIRONMENTAL INFORMATION

BETWEEN

RIGHT TO KNOW CLG

APPLICANT

AND

AN TAOISEACH

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 23 April 2021

INTRODUCTION

1. These judicial review proceedings give rise to significant questions of law in respect of the limits of cabinet confidentiality. The principal question for determination concerns the circumstances, if any, in which the constitutional imperative that discussions at meetings of the Government remain confidential must yield to the requirements of a European Directive which confers a right of access to information on the environment. The answer to this question turns, in large part, on how discussions at meetings of the Government are to be characterised for the purposes of the European Directive. Where

convenient, I will refer to this principal question as the "***characterisation issue***". The parties are in disagreement as to whether the correct characterisation is as "internal communications" of a public authority, or, alternatively, as the "proceedings" of a public authority.

2. The route to the resolution of this principal question is, potentially at least, blocked by a number of procedural obstacles. Specifically, the following two objections have been raised on behalf of the respondent, An Taoiseach. First, it is said that the applicant should have exhausted its statutory right of appeal to the Commissioner for Environmental Information before having recourse to the High Court. Secondly, it is said that the question of the correct characterisation of meetings of the Government, for the purposes of the relevant European Directive, has already been conclusively determined by the High Court in two judgments, one of which involved the applicant itself. The issue is said, therefore, to be the subject of persuasive precedent. It is also said that the applicant is precluded by the doctrine of *res judicata* from reagitating the issue in these proceedings.

3. The applicant contends that these procedural objections are not well founded, and has invited this court to make a reference to the Court of Justice of the European Union ("***Court of Justice***") for a preliminary ruling on the interpretation of the relevant provisions of the European Directive.

STRUCTURE OF THIS JUDGMENT

4. It may be helpful to the reader to flag now that the discussion of the objection that the applicant should have exhausted its statutory right of appeal is to be found towards the end of this judgment (at paragraph 65 *et seq*.). Whereas it had been necessary for me to decide this objection as a threshold issue, it should, hopefully, assist the reader in a better

understanding of the issue to leave the discussion of same over until after the detail of the case has been explained.

PROCEDURAL HISTORY

5. In circumstances where this judgment is confined to specific aspects of the applicant's judicial review proceedings, it is not necessary to set out the procedural history in full. The following summary is sufficient for the purposes of this judgment.

6. These proceedings have their genesis in a request for access to information on the environment made on behalf of the applicant on 8 March 2016. The information which was requested is as follows: all documents which show cabinet discussions on Ireland's greenhouse gas emissions from 2002 to 2016. This request had been refused, by an initial decision dated 5 May 2016; and, following an internal review, the refusal had been affirmed by a subsequent decision dated 10 June 2016.

7. The applicant instituted judicial review proceedings seeking to challenge the decision of 10 June 2016 ("***the first judicial review proceedings***"). The applicant had been partially successful in the first judicial review proceedings. In a reserved judgment dated 1 June 2018, the High Court (Faherty J.) set aside the decision of 10 June 2016 and remitted the request for access to the respondent for reconsideration. A fresh decision was duly made on 16 August 2018 ("***the decision on remittal***"). The decision on remittal was to the effect that access would be granted in respect of one record; partial access would be granted in respect of seventeen records; and access would be withheld in respect of the remaining thirteen records.

8. Relevantly, part of the stated reasons for the decision on remittal included reference to cabinet discussions comprising the "internal communications" of a public authority, and more generally, to the principle of cabinet confidentiality under domestic constitutional

law. The decision on remittal cites, seemingly in support of this position, passages from the judgment of the Supreme Court in *Attorney General v. Hamilton* [1993] 2 I.R. 250.

9. The applicant seeks to challenge the decision on remittal in these judicial review proceedings ("***the second judicial review proceedings***"). The proceedings came on for hearing before me over three days commencing on 17 November 2020. During the course of the hearing, it was agreed that the issues arising in respect of cabinet confidentiality (including the procedural objections raised on behalf of the respondent) should be dealt with first, with the court delivering an initial judgment on these issues and on the question of a reference for a preliminary ruling to the Court of Justice. The determination of the alternative grounds of challenge raised by the applicant, which centre largely on whether the balancing exercise required under the European Directive and the implementing domestic regulations had been properly carried out, is to be deferred pending the resolution of this first set of issues.

10. The question of whether the applicant is precluded, by the doctrine of *res judicata*, from reagitating the "characterisation" issue came into sharp focus during the hearing. At the conclusion of the hearing on 19 November 2020, the parties were given leave to file supplemental written legal submissions on *res judicata*. Four sets of submissions were ultimately exchanged between the parties, on 6 January; 22 January; 18 February and 23 February 2021, respectively. The submissions also addressed the very recent judgment of the Court of Justice in Case C-619/19, *Land Baden-Württemberg*, which had been delivered subsequent to the conclusion of the hearing before me.

11. The parties confirmed, at a directions hearing on 29 January 2021, that they did not require the oral hearing to be reopened but were, instead, content to rest on their written legal submissions.

RELEVANT LEGISLATION

12. It may be of assistance to the reader in understanding the procedural arguments relied upon by the parties to pause here, and to provide a brief overview of the relevant legislation. The request for access to the relevant records had been made pursuant to the EC (Access to Information on the Environment) Regulations 2007 to 2018 ("***the domestic implementing regulations***"). These regulations transpose the provisions of the Directive on Public Access to Environmental Information (Directive 2003/4/EC) ("***the Environmental Information Directive***").

13. The Environmental Information Directive attaches a special status to information relating to *emissions* into the environment. The grounds upon which access to such information can be refused are narrower than those in respect of other types of information on the environment. This result is achieved by providing that certain exceptions to disclosure, which are otherwise available under the Environmental Information Directive, do not apply in the case of information relating to emissions into the environment. The applicant, in its written legal submissions, has used the shorthand "***the emissions override***" to describe these provisions. It is submitted, in effect, that the Directive recognises that there is an overriding public interest in the disclosure of information relating to emissions into the environment which precludes reliance on certain exceptions.

14. One of the principal areas of disagreement between the parties is as to whether records of meetings of the Government come within a category which is subject to this so-called emissions override. The applicant's case is that the records fall within the following class of exception under Article 4(2)(a) of the Environmental Information Directive.

> "Member States may provide for a request for environmental information to be refused if disclosure of the information would adversely affect:

> (a) the confidentiality of the proceedings of public authorities, where such confidentiality is provided for by law;
>
> […]
>
> The grounds for refusal mentioned in paragraphs 1 and 2 shall be interpreted in a restrictive way, taking into account for the particular case the public interest served by disclosure. In every particular case, the public interest served by disclosure shall be weighed against the interest served by the refusal. Member States may not, by virtue of paragraph 2(a), (d), (f), (g) and (h), provide for a request to be refused where the request relates to information on emissions into the environment."

15. As appears, the exception in respect of the confidential "proceedings" of a public authority is not available where the request relates to information on emissions into the environment. Put otherwise, this class of exception is subject to what the applicant describes as the "emissions override". Were the applicant to be correct in its characterisation of meetings of the Government as the confidential "proceedings" of a public authority, then disclosure would be mandatory insofar as the information relates to emissions into the environment, and the Government could not rely on the principle of cabinet confidentiality to refuse access to such information.

16. The respondent disputes this characterisation. On the respondent's case, records of meetings of the Government fall within Article 4(1)(e) of the Environmental Information Directive as follows.

> "Member States may provide for a request for environmental information to be refused if:
>
> […]
>
> (e) the request concerns internal communications, taking into account the public interest served by disclosure."

17. This class of exception is not subject to what the applicant describes as the "emissions override".

18. There has been some limited discussion of these two classes of exception by the Court of Justice. I will return to consider this case law presently (at paragraph 58 *et seq.* below). For the purposes of the procedural objections raised by the respondent, however, it is the domestic case law on cabinet confidentiality which is of more immediate relevance. I discuss this case law under the next heading.

19. Before turning to that task, it is necessary first to explain how cabinet confidentiality is treated under the domestic implementing regulations. Article 8(b) of the EC (Access to Information on the Environment) Regulations 2007 provides that a public authority "shall not" make available environmental information where disclosure of the information, to the extent that it would involve the disclosure of discussions at one or more meetings of the Government, is prohibited by Article 28 of the Constitution of Ireland.

20. As discussed under the next heading, the High Court has since confirmed that—notwithstanding the apparently mandatory terms of article 8(b)—there is an obligation, even in the case of records of discussions at meetings of the Government, to weigh the public interest served by disclosure against the interest served by refusal before a decision to refuse access can be made.

CASE LAW ON CABINET CONFIDENTIALITY

21. The characterisation of discussions at meetings of the Government, for the purposes of the Environmental Information Directive, has been addressed in detail in *An Taoiseach v. Commissioner for Environmental Information* [2010] IEHC 241; [2013] 2 I.R. 510 ("***Cabinet Confidentiality No. 1***"). (For an insightful analysis of this judgment, see A. Ryall, *Access to Environmental Information in Ireland: Implementation Challenges* Journal of Environmental Law, Volume 23, Issue 1, March 2011, pages 45–71).

22. The High Court (Ó Néill J.) held that meetings of the Government are properly characterised as entailing "internal communications" of a public authority. The alternative analysis, namely that the meetings represent the confidential "proceedings" of a public authority, was rejected in robust terms. See paragraphs 83 and 84 of the reported judgment as follows.

> "Meetings of the Government are but one aspect of its constitutional role and its many and varied functions as described briefly in the Constitution and set out in great detail in a vast array of legislation. To describe meetings of the Government as 'the proceedings' of the Government as the public authority in question seems to me somewhat artificial and strained. Applying the natural and ordinary meaning of these terms as used in art. 4(2)(a) in the Directive, would in my opinion result in a conclusion that art. 4(2)(a) did not, and was not intended to, apply to meetings of the Government such as and in so far as these are provided for in our Constitution and laws.
>
> On the other hand, meetings of the Government are the occasions when, as provided for in Article 28.4.2° of the Constitution, the members of the Government come together to act as a collective authority, collectively responsible for all departments of State. Meetings of the Government are the constitutionally mandated means or system of communication between its members for the purpose of discharging their collective responsibility. These meetings and their records are required by the Constitution to be private and confidential unless otherwise directed by the High Court under Article 28.3 of the Constitution. Whereas many aspects of the functions of the Government are essentially public and external in nature, meetings of the Government are quintessentially private and internal to the overall functions of the Government. Thus, in my judgment, this constitutionally mandated form of communication between members of the Government can only be regarded as the internal communications of a public authority. Any other conclusion would lead to absurd results, as pointed out by counsel for the appellant, in that communications between members of the Government in any other context apart from formal meetings of the Government would have to be regarded as internal communications and protected from disclosure but the same communications at a Government meeting would, as 'the proceedings of a public authority', attract disclosure. Manifestly such a state of affairs, apart from its obvious absurdity, would seriously undermine the discharge of collective responsibility by the Government, as required by Article 28.4.2° of the Constitution. In this regard, I should further add that I am quite satisfied that the distinction sought to be drawn between communications between the members of a public authority and between officials of that authority or between officials of the authority and the members of the authority

> is devoid of any rational merit and has no discernible basis either in the express provisions or, by way of necessary implication, in the Directive or the Regulations of 2007."

23. This approach has since been endorsed in the more recent judgment of the High Court (Faherty J.) in *Right to Know clg v. An Taoiseach* [2018] IEHC 372; [2019] 3 I.R. 22 ("***Cabinet Confidentiality No. 2***"). This judgment was delivered in respect of the first judicial review proceedings taken by the applicant.

24. Faherty J. stated, at paragraph 65 of her judgment, that whether one approached the issue from a teleological approach or otherwise, the rationale of Ó Néill J. on this issue could not be faulted as either irrational or unreasonable. Faherty J. did, however, differ on the related question of whether the domestic implementing regulations require that the public interest in disclosure be taken into account in determining whether records of meetings of the Government are to be disclosed. The court held that the constitutional protection afforded to cabinet confidentiality, as reflected under article 8(b) of the domestic implementing regulations, cannot be "solely dispositive of" a request for access to environmental information. Rather, before the refusal of access to records of a meeting of the Government can be justified, the requisite weighing exercise must be embarked upon, i.e. the public interest served by disclosure must be weighed against the interest served by the refusal (as required under Article 4 of the Environmental Information Directive). The court emphasised that this must not be a formulaic exercise. Any decision on a request for environmental information must reflect the fact that the process of engagement with the request (whatever the ultimate outcome) was conducted in accordance with the letter and spirit of the Environmental Information Directive. (See paragraph 84 of the reported judgment).

25. This result was achieved in *Cabinet Confidentiality No. 2* by the court applying a purposive interpretation to the domestic implementing regulations. The exception from

disclosure allowed in respect of discussions at meetings of the Government must now be read as implicitly subject to the requirements of article 10(3), (4) and (5) of the regulations. Put otherwise, notwithstanding the apparently mandatory terms of article 8(b), that provision is to be understood as entailing an obligation that each request be considered on an individual basis; that the public interest served by disclosure be weighed against the interest served by refusal; and that the possibility of providing partial information be considered. This interpretation of the domestic implementing regulations is intended to ensure that same align with the requirements of the Environmental Information Directive.

26. The decision in *Cabinet Confidentiality (No. 2)* is a very significant judgment. It confirms that the constitutional imperative that discussions at meetings of the Government are confidential must yield to the requirements of the Environmental Information Directive. Rather than baldly assert cabinet confidentiality, the Government must now justify any refusal to disclose information on the environment by reference to the balancing test prescribed under the Directive.

IMPLICATIONS OF THE CASE LAW FOR THE PRESENT PROCEEDINGS

27. The respondent contends that the judgments in *Cabinet Confidentiality No. 1 and No. 2* are dispositive of the question of how records of meetings of the Government are to be characterised for the purposes of the Environmental Information Directive. It is said that the records are to be regarded as comprising the "internal communications" of a public authority, and, as such, are not subject to mandatory disclosure even if they contain information relating to emissions into the environment. Instead, disclosure is subject to the balancing test prescribed under the Directive. The respondent further contends that

it is not open to the applicant to seek to reagitate this "characterisation" issue in the present proceedings.

28. This contention is advanced by reference to two related arguments as follows. The first argument invokes the principle of precedent as applicable to courts of co-ordinate jurisdiction, i.e. the principle that a judge of first instance ought usually to follow the decision of another judge of the same court unless there are "substantial reasons" for believing that the initial judgment was wrong.

29. The second argument invokes the principle of *res judicata*. It is said that not only is the question of the correct characterisation of meetings of the Government well settled, it has actually been decided in proceedings, i.e. the applicant's first judicial review proceedings, which involved the self-same parties as in the present case. The question having been decided against the applicant itself in *Cabinet Confidentiality (No. 2)*, it is said that the applicant is estopped from relitigating the issue in these proceedings. This second argument came into sharper focus at the hearing in November 2020, and the parties exchanged four sets of very helpful written legal submissions thereafter in January and February 2021.

30. The two lines of argument relied upon by the respondent share some similarities. Both take as their starting point the existence of an earlier judgment which has determined a question of law which the applicant seeks to agitate in the present proceedings. It should be explained, however, that the implications of the two arguments are very different. The first argument, i.e. the argument based on precedent, acknowledges that this court would be entitled to depart from the earlier case law on cabinet confidentiality if satisfied that there are "substantial reasons" for believing that the initial judgments were incorrectly decided. Conversely, the logic of the second argument, i.e. the argument based on *res judicata*, is that the finding in *Cabinet Confidentiality (No. 2)* is binding on the applicant

in personam irrespective of whether the finding is right or wrong. The values which the doctrine of *res judicata* seeks to protect are subtly different from those of the doctrine of precedent. In particular, the doctrine of *res judicata* is directed to the conduct of the parties and the need to avoid questions, which have already been determined conclusively in earlier proceedings, from being relitigated between the same parties or their privies. If a party is aggrieved by a judicial determination, then the remedy is to appeal that determination rather than attempt to reagitate the same question in a second set of proceedings. If a party allows an earlier judicial determination against them to go unappealed, then they will ordinarily be bound *in personam* by that determination on that issue, even though it may be incorrect in law. Put shortly, the principle of *res judicata* places a premium on the finality of litigation.

31. I turn next to consider the two arguments in more detail. I propose to take the arguments in reverse order, by commencing with the argument based on *res judicata*.

(1). RES JUDICATA / ISSUE ESTOPPEL

32. The term *res judicata* is often used as an umbrella term, embracing a number of related principles all of which seek to advance the public interest in the finality of litigation. The strictest form of *res judicata* is cause of action estoppel, whereby a party is precluded from pursuing a particular cause of action in consequence of a final judgment in earlier proceedings. The next form of *res judicata* is issue estoppel, whereby a party will, generally, be precluded from relitigating an issue of fact or law which has previously been determined against them in earlier proceedings. The determination of that issue must have been necessary to the outcome of the earlier proceedings, i.e. the finding on the issue must have been fundamental rather than merely collateral or incidental.

33. Put otherwise, notwithstanding that the judgment in earlier proceedings may not have entailed a final determination on the legal right asserted in subsequent proceedings, it may nevertheless have determined an *issue* which is common to both sets of proceedings. Provided that the determination of this issue had been an essential part of the rationale for the earlier judgment, then the finding on the issue will, generally, be binding in the subsequent proceedings.

34. There is a third species of *res judicata*, whereby a party will, generally, be precluded from litigating an issue in a second set of proceedings if that party should have—but failed—to raise the issue in an earlier set of proceedings. This principle is described as the rule in *Henderson v. Henderson*, but recent case law confirms that it too is grounded in the principle of *res judicata* (*Arklow Holidays Ltd v. An Bord Pleanála* [2011] IESC 29; [2012] 2 I.R. 99 (at paragraphs 46 and 57)).

35. It should be explained that the application of both issue estoppel and the rule in *Henderson v. Henderson* are subject to exceptions. These species of *res judicata* represent aspects of the court's inherent jurisdiction to prevent an abuse of process (*McCauley v. McDermot* [1997] 2 I.L.R.M. 486 and *Arklow Holidays Ltd v. An Bord Pleanála* (cited above)). The court has a discretion, in special circumstances, to allow a party to pursue an issue in subsequent proceedings notwithstanding that the issue had been decided against the party in earlier proceedings or that the party had failed to raise the issue in those earlier proceedings. In exercising this discretion, the court must seek to balance (i) the constitutional right of access to the courts against (ii) the public interest and the common good in ensuring that there is finality to litigation and that an individual is not subject to repeated or duplicative litigation in respect of issues which have previously been determined.

36. The form of *res judicata* asserted against the applicant in the present proceedings is issue estoppel. The respondent, very properly, does not allege cause of action estoppel. There has been no final judicial determination in respect of the applicant's entitlement to access the relevant records under the domestic regulations implementing the Environmental Information Directive. The judgment in *Cabinet Confidentiality (No. 2)* did not represent a final judicial determination on that controversy. Rather, the question of access to the relevant records had been remitted, pursuant to Order 84 of the Rules of the Superior Courts, to the original decision-maker for reconsideration.

37. The contention of the respondent is narrower. It is said that the judgment in *Cabinet Confidentiality (No. 2)* has determined an identified issue of law against the applicant. More specifically, the judgment held that, for the purposes of the Environmental Information Directive, meetings of the Government are properly characterised as entailing "internal communications" of a public authority. The significance of this determination being, of course, that the requirement for mandatory disclosure of records relating to information on emissions into the environment did not apply.

38. The determination of this issue of law fulfils the traditional criteria for an issue estoppel as per *McCauley v. McDermot* [1997] 2 I.L.R.M. 486. First, the legal issue is precisely the same as that which the applicant seeks to agitate in the present proceedings. Secondly, the determination had been final: no appeal was taken against the High Court judgment in *Cabinet Confidentiality (No. 2)*. Thirdly, the legal issue arises in proceedings between the same parties as before. (As it happens, it even concerns access to the same records).

39. The requirement that the determination of the issue be fundamental, rather than collateral, to the outcome of the earlier proceedings is also met. The question of the correct characterisation of records of meetings of the Government had been one of the principal

issues in dispute in *Cabinet Confidentiality (No. 2)*, and the determination on this issue had been fundamental to the outcome of the proceedings. Had the High Court reached a *different* finding on the issue, and ruled that the records related to the confidential "proceedings" of a public authority within the meaning of Article 4(2)(a) of the Environmental Information Directive, then disclosure of the records would have been mandatory if and insofar as the request related to information on emissions into the environment. Had the High Court reached this finding, then the only basis on which disclosure could have been resisted would be for the Government to advance its inchoate argument that *discussions* are not subject to the so-called "emissions override" because the only type of information which can constitute "information on emissions into the environment" is *factual information* relating to such emissions.

40. In the event, the High Court actually determined the issue against the applicant, holding that the records represented the "internal communications" of a public authority, and, as such, would not be subject to mandatory disclosure even if they constituted "information on emissions into the environment". This finding dictated the outcome of the proceedings in *Cabinet Confidentiality (No. 2)*, and, in particular, determined the basis on which the access request was to be remitted to the decision-maker for reconsideration. The decision-maker was being directed to reconsider the request by weighing the public interest served by disclosure against the interest served by the refusal (as required under Article 4 of the Environmental Information Directive).

41. In circumstances where the issue has already been determined against it in *Cabinet Confidentiality (No. 2)*, the applicant would not normally be entitled to reagitate the question of the proper characterisation of records of meetings of the Government. The principle that a party is estopped from pursuing an issue previously determined against it is not, however, absolute. The court retains a discretion to allow an issue to be reagitated

where it is in the interests of justice to do so. In exercising this discretion, the court must seek to strike an appropriate balance between the competing rights of the parties, and, more generally, between the constitutional right of access to the courts and the public interest in the finality of litigation. The court should consider whether the allowing of an exception to the general rule, i.e. that a party should be bound by the earlier determination of an issue, would undermine the values which the principle of issue estoppel seeks to protect. Relevantly, these include the prejudice caused to the opposing party in being subject to a second set of proceedings raising the same issue; and the wider implications for the administration of justice and judicial economy of duplicative litigation.

42. For the reasons which follow, I am satisfied that the correct balance is achieved by allowing the applicant to advance its argument on the "characterisation" issue, subject to the caveat that it may be necessary to address the matter by way of an appropriate costs order at the conclusion of the proceedings.

43. The strict application of the principle of issue estoppel to the circumstances of this case has the potential to result in an infringement of EU law remaining unremedied. The gravamen of the applicant's complaint is that the judgment in *Cabinet Confidentiality (No. 2)* mischaracterises meetings of the Government for the purposes of the Environmental Information Directive, with the consequence that the requirement for the mandatory disclosure of records relating to information on emissions into the environment is, incorrectly, disapplied. If this complaint is well founded, but the applicant is not allowed to pursue it in the present proceedings, then a misinterpretation of the Environmental Information Directive by a national court will go uncorrected.

44. Of course, such an outcome is not necessarily incompatible with EU law. The case law of the Court of Justice has consistently emphasised the importance of ensuring that judicial decisions, which have become definitive after all rights of appeal have been

exhausted or after the expiry of the time-limits provided for in that connection, can no longer be called into question. EU law does not necessarily require a national court to disapply domestic rules of procedure conferring finality on a decision, even if to do so would enable it to remedy an infringement of EU law. This is subject to the principles of equivalence and effectiveness. The rationale for this approach is to ensure both stability of the law and legal relations and the sound administration of justice. (See, generally, Case C-234/04, *Kapferer*, EU:C:2006:178).

45. The distinguishing feature of the present case is that, even following the delivery of the judgment in *Cabinet Confidentiality (No. 2)*, a significant dispute remained to be resolved between the parties. There continued to be a live controversy as to the applicant's entitlement, if any, to access the relevant records. The applicant had advanced a number of *alternative* arguments for saying that the respondent's first decision to refuse access had been incorrect as a matter of law. These arguments had, in most part, been accepted by the High Court in *Cabinet Confidentiality (No. 2)*. The matter had, accordingly, been remitted to the respondent in accordance with the provisions of Order 84 of the Rules of the Superior Courts. It is the decision on remittal that is impugned in the present proceedings.

46. Given that one of the principal objectives underlying the case law of the Court of Justice is to ensure the "stability of legal relations", the justification for the application of the doctrine of *res judicata* is considerably weakened in the circumstances of the present case. The question of access to the relevant records had not been settled by the judgment in *Cabinet Confidentiality (No. 2)*. The legal position remained uncertain and unstable. The present case may be contrasted with one where say, for example, the validity of an administrative decision had been upheld in earlier judicial review proceedings, and the parties were entitled to assume that the issue had been resolved and to act on that basis.

47. More generally, it may be doubtful whether the form of *res judicata* discussed in the case law of the Court of Justice extends to include issue estoppel (as opposed to cause of action estoppel). I will return to this point at paragraph 52 below.

48. The domestic case law on issue estoppel indicates that one of the factors to be considered in deciding whether the preclusion arises is the conduct of the party said to be estopped. In the present case, the conduct of the applicant cannot reasonably be said to involve an abuse of process. The applicant had found itself in a quandary following the delivery of the judgment in *Cabinet Confidentiality (No. 2)*. Whereas it had, obviously, been unsuccessful on the "characterisation" issue, it did succeed on its alternative arguments. The decision impugned in the proceedings had been set aside and the matter remitted to the respondent for reconsideration. Against this background, there is some force in the submission made by the applicant to the effect that it would have been in an invidious position had it sought to appeal the judgment in *Cabinet Confidentiality (No. 2)*. The applicant suggests that any such appeal would likely have been met with a response that it was premature to appeal pending the determination on remittal. It is further submitted that as issue estoppel is meant to *discourage* pointless repetitive litigation, it would be surprising if it were applied in a way that effectively encouraged defensive litigation by a party in anticipation of future proceedings that might never be needed. (See §2.11 of applicant's written legal submissions of 22 January 2021).

49. One of the justifications for the strict application of issue estoppel is that it would be an abuse of process for a party—who had a clear-cut route of appeal available, but failed to exercise their right of appeal—to reagitate the issue in a second set of proceedings before the court of first instance. That abuse of process justification does not apply to the applicant for the reasons outlined above.

50. Separately, some weight should be attached to the fact that, irrespective of whether the applicant is estopped from pursuing the "characterisation" issue, there are a number of alternative arguments which would have to be resolved in these proceedings in any event. The prejudice suffered by the respondent in having, in addition, to defend an argument based on the correct characterisation of the records is slight. This is not a case where, for example, the application of the principle of issue estoppel would relieve a party from having to contest litigation.

51. Having regard to the considerations outlined in all of the preceding paragraphs, I am satisfied that it would be disproportionate to preclude the applicant from pursuing the "characterisation" issue in these proceedings. The public interest in allowing the applicant to ventilate what are undoubtedly significant issues of EU law and domestic constitutional law outweighs the countervailing public interest in the finality of litigation. In the special circumstances of this case, the values sought to be protected by the principle of *res judicata* can instead be vindicated by the making of an appropriate costs order at the conclusion of the proceedings. If, for example, the respondent is able to demonstrate that the effect of the "characterisation" issue being agitated in two sets of proceedings has resulted in unnecessary duplication of costs, then this can be addressed by an appropriate costs order. This measured approach is sufficient to ensure that any prejudice suffered by the respondent is mitigated. More generally, the prospect of an adverse costs order being made against them in similar cases will serve to deter other litigants from pursuing duplicative proceedings.

52. In reaching my decision on issue estoppel, I have proceeded on the assumption that a court has discretion, in special circumstances, to rule that a party is not precluded from reagitating an issue of law which has previously been decided against it. The existence of such a discretion appears to be recognised in the case law cited at paragraph 35 above.

It is also consistent with the following statement from *A.A. v. Medical Council* [2003] IESC 70; [2003] 4 I.R. 302 (at page 317 of the reported judgment).

> "Rules or principles so described cannot, in their nature, be applied in an automatic or unconsidered fashion. Indeed, it appears to me that sympathetic consideration must be given to the position of a plaintiff or applicant who on the face of it is exercising his right of access to the courts for the determination of his civil rights or liabilities."

53. I note, however, that the respondent has cited the judgments in *Moffitt v. Agricultural Credit Corporation* [2007] IEHC 245 and *Mount Kennett Investment Company v. O'Meara* [2011] 3 I.R. 547 as authority for the proposition that there is no discretion in the context of *res judicata*. If and insofar as it might be suggested that the existence of such a discretion only arises in respect of the rule in *Henderson v. Henderson*, and not in respect of issue estoppel, a question would then arise as to whether domestic procedural law breaches the principle of effectiveness. As flagged earlier, it may be doubtful whether the form of *res judicata* discussed in the case law of the Court of Justice extends to include issue estoppel (as opposed to cause of action estoppel). This is because the justification for allowing an infringement of EU law to go uncorrected by reference to the principle of legal certainty is far less compelling where there has been no final determination of the rights of the parties. Given this doubt, and given that I propose to make a reference to the Court of Justice in any event in respect of the Environmental Information Directive, I propose to include a question on the applicability of *res judicata*. I will discuss the precise form of this question with counsel.

(2). PRECEDENT AND COURTS OF COORDINATE JURISDICTION

54. The modern statement of the application of the principle of precedent to courts of co-ordinate jurisdiction is to be found in the judgment of Clarke J. (then sitting in the High Court) in *In re Worldport Ireland Ltd*. [2005] IEHC 189 (at pages 7 and 8).

> "[…] It is well established that, as a matter of judicial comity, a judge of first instance ought usually follow the decision of another judge of the same court unless there are substantial reasons for believing that the initial judgment was wrong. *Huddersfield Police Authority v Watson* [1947] K.B. 842 at 848, *Re Howard's Will Trusts, Leven & Bradley* [1961] Ch. 507 at 523. Amongst the circumstances where it may be appropriate for a court to come to a different view would be where it was clear that the initial decision was not based upon a review of significant relevant authority, where there is a clear error in the judgment, or where the judgment sought to be revisited was delivered a sufficiently lengthy period in the past so that the jurisprudence of the court in the relevant area might be said to have advanced in the intervening period. In the absence of such additional circumstances it seems to me that the virtue of consistency requires that a judge of this court should not seek to second guess a recent determination of the court which was clearly arrived at after a thorough review of all of the relevant authorities and which was […] based on forming a judgment between evenly balanced argument. If each time such a point were to arise again a judge were free to form his or her own view without proper regard to the fact that the point had already been determined, the level of uncertainty that would be introduced would be disproportionate to any perceived advantage in the matter being reconsidered. […]."

55. This approach has most recently been reaffirmed by the Supreme Court in *A. v. Minister for Justice and Equality* [2020] IESC 70. The Supreme Court emphasised the requirement for certainty in the law. Different decisions on the same issue by different members of the same court can only give rise to a situation where judges and practitioners alike would be unable to say with clarity what the state of the law is in any given area. The Supreme Court emphasised that where one judge of the High Court feels it is necessary to depart from a decision of a colleague of that court, it is incumbent on that judge to explain the reasons for doing so. This is not just a matter of comity, but is a matter of importance in order to ensure that the law does not descend into uncertainty.

56. I turn now to apply these principles to the circumstances of the present case. Rather than follow the judgments in *Cabinet Confidentiality (No. 1)* and *(No. 2)*, I have decided, instead, to make a reference to the Court of Justice for a preliminary ruling. I do this because those two earlier judgments had been reached without the court having an

opportunity to consider the views of the Court of Justice on the interpretation of the Environmental Information Directive. The judgment in *Cabinet Confidentiality (No. 1)* had been delivered in June 2010, at a time when the interpretation of the relevant provisions of the Environmental Information Directive, namely Article 4(1)(e) and 4(2)(a), had not yet been considered. The case law had evolved by the time *Cabinet Confidentiality (No. 2)* came to be decided in June 2018, but, unfortunately, two significant Advocate General's Opinions had not been brought to the attention of the court. Counsel for the applicant has very frankly acknowledged that his side had been unaware at the time of the potential relevance of the two Opinions. Moreover, the case law has evolved further since June 2018, with the Court of Justice delivering a significant judgment on the Environmental Information Directive as recently as January 2021. (The opinions and judgment are discussed in detail at paragraph 58 *et seq*. below).

57. I have had an opportunity, which neither of my judicial brethren had, to consider the recent jurisprudence of the Court of Justice on the Environmental Information Directive. Whereas the legal position is still not clear-cut, I have a very real concern that the judgments in *Cabinet Confidentiality (No. 1)* and *(No. 2)* were not correctly decided. In particular, it seems to me that the dividing line between the "internal communications" of a public authority and its subsequent confidential deliberative "proceedings" may not have been properly observed in the two judgments. These terms must be given an autonomous and uniform interpretation throughout the European Union, and their interpretation is a matter of EU law, rather than domestic law. I elaborate upon these points under the next heading below.

NECESSITY FOR A REFERENCE TO COURT OF JUSTICE

58. There are strong grounds for saying that the meetings of the Government represent precisely the type of confidential deliberative proceedings envisaged by Article 4(2)(a) of the Environmental Information Directive. The Government is mandated under Article 28.4.2° of the Constitution of Ireland to "meet and act as a collective authority". The purpose of these meetings, as identified by the Supreme Court in *Attorney General v. Hamilton* [1993] 2 I.R. 250, is to allow for full, free and frank discussion between members of the Government prior to the making of decisions. (See page 266 of the reported judgment as follows).

> "These obligations involve some obvious, necessary, consequential duties. The first of those relevant to the issues arising in this appeal is the necessity for full, free and frank discussion between members of the Government prior to the making of decisions, something which would appear to be an inevitable adjunct to the obligation to meet collectively and to act collectively. The obligation to act collectively must, of necessity, involve the making of a single decision on any issue, whether it is arrived at unanimously or by a majority. The obligation to accept collective responsibility for decisions and, presumably, for acts of government as well, involves, as a necessity, the non-disclosure of different or dissenting views held by members of the Government prior to the making of decisions."

59. Such discussions are more properly characterised as involving deliberations rather than internal communications, and, as such, are logically within the scope of the exception for the "proceedings" of a public authority. This interpretation is supported by the two Opinions relied upon by counsel for the applicant. The first is that in Case C-204/09, *Flachglas Torgau*. Advocate General Sharpston describes the concept of the "proceedings" of a public authority as being confined to expressions of view and discussions of policy options in the context of *decision-taking procedures* within each such authority. The Advocate General also drew attention to the fact that in a number of the authentic versions of the Directive, a word cognate to "deliberations" is used.

> "I note here that the wording of the Directive (and of the Convention) may give rise to some hesitation when different language versions are compared. On the one hand, the authentic French of the Convention speaks of '*délibérations*', the expression also used in the Directive, where it is mirrored by, for example, the German '*Beratungen*' and the even more specific '*deliberazioni interne*' in Italian. Those versions seem more supportive of the Commission's view. On the other hand, the equally authentic English version of the Convention speaks of 'proceedings', again the expression found in the Directive, where it is mirrored, for example, in Spanish and Portuguese by '*procedim(i)entos*' and in Dutch by '*handelingen*' – all terms which might be read as having a broader meaning and thus as more supportive of the German Government's interpretation."

60. There is no elaborate analysis of this issue in the judgment of the Court of Justice itself, but it is stated, at paragraph 63 thereof, that the concept of "proceedings" of public authorities refers to the final stages of the *decision-making process* of public authorities.

61. The second Opinion cited is that of Advocate General Szpunar in Case C-60/15 P, *Saint-Gobain Glass Deutschland*. The Advocate General considered that the concept of "proceedings" must be understood as covering only the deliberation stage of decision-making procedures.

62. Counsel for the applicant suggests that the distinction between what he describes as a "thinking space" and the formal deliberative process might represent the dividing line between "internal communications" and "proceedings" (in the sense of deliberations). Meetings of the Government are said to fall within the latter category.

63. Having carefully considered all of this case law, I have concluded that the interpretation of the two terms is not obvious. In particular, the dividing line between "internal communications" and confidential "proceedings" is unclear. In the absence of guidance from the Court of Justice on the interpretation of the Environmental Information Directive, I am unable to determine conclusively which category records of meetings of the Government fall into. The judgment in Case C-619/19, *Land Baden-Württemberg* is of only limited assistance to me in this regard. It is difficult to know how the notion of

information which *circulates* within a public authority and which, on the date of the request for access, has not left that authority's internal sphere, is to be applied to meetings of the Government.

64. In summary, I am satisfied that there is a strong argument that meetings of the Government come closer to the type of deliberative process captured by the term "proceedings", as interpreted by the two Advocates General in the two Opinions cited on behalf of the applicant. Given the high constitutional status which meetings of the Government have, they do not sit comfortably within the "internal communincations" pigeonhole. I cannot, however, reach a final decision on this issue without the benefit of a preliminary ruling from the Court of Justice.

EXHAUSTION OF RIGHT OF APPEAL TO COMMISSIONER

65. As flagged earlier, the discussion of the objection that the applicant failed to exercise its statutory right of appeal has been deliberately deferred to this point in the judgment. This is because it is necessary for the reader to have a full appreciation of the legal issues arising in the proceedings, in order to properly understand the findings of the court on this objection.

66. The Supreme Court has recently reaffirmed in *Petecel v. Minister for Social Protection* [2020] IESC 25 that the existence of a right of administrative appeal is not an automatic bar to the right to seek judicial review, but is a matter to be taken into consideration in the exercise of the discretion of the High Court judge. One of the factors to be considered is whether, for jurisdictional reasons, the statutory appeal process cannot provide the remedy sought.

67. For the reasons which follow, I have concluded that, in the very special circumstances of the present case, it would not be a proper exercise of the court's discretion to refuse to

entertain an application for judicial review by dint of the fact that the applicant failed to exhaust its statutory right of appeal to the Commissioner for Environmental Information ("***the Commissioner***").

68. First, the applicant's access request gives rise to significant—and difficult—issues of EU law and domestic constitutional law. These include, obviously, questions as to the correct interpretation of the Environmental Information Directive, and, in particular, the interaction between the exceptions for "internal communications" and "proceedings" of a public authority, respectively. Crucially, however, questions also arise in respect of domestic constitutional law. These relate to the interaction between the protection afforded to cabinet confidentiality under the Constitution of Ireland and the domestic regulations on access to information on the environment. Whereas the Commissioner would, presumably, have jurisdiction to make a reference to the Court of Justice in respect of the EU law issues, the Commissioner does not have the competence to determine the issues of domestic constitutional law. This is especially so where the Commissioner would be invited not to follow the two earlier High Court judgments on cabinet confidentiality.

69. It seems inevitable, therefore, that any decision by the Commissioner would almost certainly be appealed to the High Court. There is no obvious benefit, then, in forcing the applicant in this case down the route of a statutory appeal given that, even had an appeal been made to the Commissioner, the matter would ultimately have come before the High Court in any event. The rationale underlying much of the case law in respect of the exhaustion of rights is that the statutory appeal mechanism will provide an adequate alternative remedy and may obviate the necessity of recourse to the High Court. These considerations do not apply with any force on the facts of the present case.

70. Secondly, in assessing the reasonableness of the conduct of the applicant in instituting judicial review proceedings, in preference to a statutory appeal to the Commissioner, it is necessary to consider the legal landscape as it lay at the time these proceedings were instituted. These proceedings were instituted by way of an *ex parte* application for leave on 12 November 2018. As of that date, the case law indicated that, as a matter of domestic law, an administrative decision-maker such as the Commissioner did not have jurisdiction to disapply provisions of domestic law which conflicted with the requirements of an EU Directive. This principle had been applied in the specific context of the Commissioner for Environmental Information by the High Court in *Cabinet Confidentiality (No. 1)*.

71. As of the date the present proceedings were instituted, therefore, it would have been doubtful whether the Commissioner had jurisdiction to determine any conflict between domestic and EU law. Indeed, there may even have been a question mark as to whether the Commissioner would have had jurisdiction to make a reference to the Court of Justice for a preliminary ruling. It was not unreasonable, therefore, for the applicant to bring the matter directly before the High Court.

72. The legal position has since changed as a result of the judgment of a Grand Chamber of the Court of Justice in Case C-378/17, *Minister for Justice v. Workplace Relations Commission*. This judgment was delivered on 4 December 2018. It would not, in my view, be a proper exercise of the court's discretion to refuse to entertain the judicial review proceedings by reference to this change in circumstances. To do so would be to assess the applicant's choice to go by way of judicial review with the benefit of hindsight. This would be unfair.

73. Thirdly, it is also relevant to the exercise of the court's discretion to note that the question of alternative remedies had been expressly addressed by the High Court (Fullam J.) in

the context of the first judicial review proceedings taken by the applicant. The leave application had been moved *ex parte* on 7 September 2016, and judgment reserved. A detailed written judgment was subsequently delivered on 7 October 2016. I have been furnished with an unapproved version of this judgment. (The respondent sought to make something of the fact that the judgment has not been formally approved, but I am satisfied that nothing turns on this. The judgment was delivered on an *ex parte* application and it would be unusual for such a judgment to be formally approved or posted to the Courts Service website).

74. The High Court held (at paragraphs 43 and 44 of the judgment) that an application by way of judicial review was the appropriate remedy. Fullam J. observed that in circumstances where the Commissioner would be bound to apply the decision of the High Court in *Cabinet Confidentiality (No. 1)*, the exercise of the statutory right of appeal to the Commissioner would merely delay the substantive challenge.

75. Having regard to the fact that the High Court had previously granted leave to apply for judicial review on the basis that it was the appropriate remedy, it was reasonable for the applicant to have pursued the same course in challenging the remitted decision, i.e. to institute judicial review proceedings in preference to a statutory appeal.

76. Finally, it would, in the special circumstances of this case, be contrary to the right of access to a court under Article 6 of the Environmental Information Directive to rely on the technical objection that judicial review proceedings are inappropriate. Whereas the imposition of a requirement to exhaust a statutory right of appeal is not precluded by Article 6, any such requirement must be predictable and certain. Here, the applicant was entitled to rely on the judgment of 7 October 2016 as indicating that judicial review could be pursued.

CONCLUSION AND NEXT LISTING

77. There is a strong argument that meetings of the Government should be characterised, for the purposes of the Environmental Information Directive, as entailing the type of deliberative process captured by the term "proceedings" under Article 4(2)(e). The significance of this being that certain exceptions from the obligation to disclose information would not then apply to records of the meetings of the Government. It would be mandatory to disclose records relating to information on emissions into the environment.

78. This interpretation of the Environmental Information Directive is consistent with the approach adopted by the two Advocates General in the two Opinions cited on behalf of the applicant. (See paragraphs 58 to 63 above). I cannot, however, reach a final decision on this issue without the benefit of a preliminary ruling from the Court of Justice.

79. Accordingly, I propose to make a reference to the Court of Justice pursuant to Article 267 of the Treaty on the Functioning of the European Union ("***TFEU***") for a preliminary ruling on the interpretation of the relevant provisions of Article 4 of the Environmental Information Directive. I will discuss with counsel the precise form of questions to be referred.

80. I also propose to refer a question as to the application, if any, of the principle of *res judicata* in the form of issue estoppel to the interpretation of the Environmental Information Directive. In circumstances where I have concluded that a reference is necessary in any event, in order to allow me to determine the proceedings before me, the inclusion of this additional question will not entail any extra delay.

81. It will be necessary, in the reference, to apprise the Court of Justice of the nature of the records at issue and the nature of the discussions recorded therein. It may be, for example, that there is a difference in status between records of meetings of the full cabinet

and those of cabinet subcommittees. Counsel for the respondent has previously confirmed that his side has no objection, in principle, to my having sight of the relevant records. It occurs to me that it may now be necessary for me to consider the documents. Alternatively, it may be possible for the parties to agree a description of the nature of the records at issue and the nature of the discussions recorded therein.

82. I propose to list the case before me, on a date convenient to the parties, for submissions on the precise form of reference. The case will initially be listed before me, for mention only, on Friday 7 May 2021 to fix a hearing date.

Appearances

Noel Travers, SC and David Browne for the applicant instructed by FP Logue Solicitors
Brian Kennedy, SC and Aoife Carroll for the respondent instructed by the Chief State Solicitor

Approved Garrett Simons