Neutral Citation: [2014] IEHC 375

THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 176 MCA]

IN THE MATTER OF THE FREEDOM OF INFORMATION ACTS 1997 – 2004 AND IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 42(1) OF THE SAID ACTS

BETWEEN

WESTWOOD CLUB

APPELLANT

AND

INFORMATION COMMISSIONER

RESPONDENT

AND

BRAY TOWN COUNCIL

NOTICE PARTY

JUDGMENT of Mr. Justice Cross delivered on the 15th day of July, 2014

1. In these proceedings, Westwood Club ("the Appellant"), is challenging a decision of the Respondent ("the Commissioner") which affirmed the refusal of the Notice Party, Bray Town Council ("the Council"), to grant access to the Appellant to any records held by the Council concerning Bray Swimming Pool and Sports Leisure Centre Limited ("Shoreline").

2. Shoreline was set up by the Notice Party by a resolution dated 17th April, 2007. The company was at that stage in the process of being formed for the purposes of operating a swimming pool. A contract for construction was signed on 12th April, 2007, endorsed by the Cathaoirleach of the Notice Party. The minutes of the Notice Party state that the reason that Shoreline was being set up was to operate leisure facilities:-

> "…so as not to become a drain on Council resources. To be in a position to engage staff without the restrictions on employee numbers that are applicable to local authorities and as it is financially advantageous from a taxation prospective."

3. The minutes went on to state that during the construction of the leisure centre, the number of directors of Shoreline would be limited to facilitate speedy decision making and thereafter it was stated that a board would be formed consisting of directors of nominating bodies and that such "nominating bodies would be approved by the Town Council. It is also envisaged that the board will include a number of members of Bray Town Council". Part of the funding was awarded by the Department of Arts, Sport and Tourism for the project with the balance being funded from the Council and there was a decision of the Notice Party "to guarantee its wholly owned subsidiary". Over €10m was, in fact, provided to Shoreline by way of a loan from the Notice Party. The leisure centre was built on the Notice Party's land and occupied by Shoreline originally without any lease and subsequently a lease was granted to Shoreline by the Notice Party at what I accept to be uneconomic rent.

4. In order to establish the funding relationship between Shoreline and the Notice Party, Mr. Paul Begley, on behalf of the Appellant, requested access to the financial records of Shoreline for 2008 and 2009 by letter dated 21st April, 2011. The request was sent to the secretary of Shoreline at the Notice Party's civic offices. The request sought a detailed breakdown of income and expenditure for 2008 and 2009.

5. This late request was replied to by the Freedom of Information Officer for Wicklow County Council by letter dated 10th May, 2011, who informed the Appellant that as Shoreline was a private company, it was not subject to the provisions of the Freedom of Information Act ("the Act").

6. By letter dated 31st May, 2011, the Appellant advised the FOI Officer that it was amending its request to all records held by the Notice Party in relation to Shoreline. The letter referred to the fact that the Notice Party owned 100% of the share capital of shoreline and that the three directors were all local authority employees.

7. By letter dated 29th June, 2011, the FOI Officer for Wicklow County Council responded to the Appellant stating:-

> "The reason for my refusal is that any records held by Bray Town Council relating to the finances of Bray Swimming Pool, Sports and Leisure Centre (t/a Shoreline) are held by staff members of Bray Town Council who are officers of the company and not held by Bray Town Council *per se*. Accordingly, this information is held by a private company which is not subject to the provisions of the Freedom of Information Acts."

8. The Appellant then exercised its right of appeal by letter of 1st July, 2011, to the County Manager of Wicklow County Council which appeal noted, *inter alia*, that the Appellant failed to see how that Bray Town Council as 100% shareholder and owner held no financial records of the company.

9. In response to this appeal, Ms. Lorraine Gallagher, Acting Director of Services for the Council responded by letter dated 26th July, 2011, which summarised correspondence to the then date and gave reasons for affirmation of the original decision which may be

summarised as:-

> (a) Shoreline it is a private limited company which operates as a commercial company, it is not employed by or delivering services to the Notice Party, it delivers service to its members. A private company is a separate legal entity and therefore not subject to the provisions of the Freedom of Information Act legislation.
>
> (b) Under the FOI Acts a company which carries out services under contract to public bodies, for example, a cleaning company, comes within the ambit of the FOI regime but only to the extent that those records of that company relate to services actually provided to the public body.
>
> (c) The Acts also stipulates that a company which is funded directly or indirectly by a Government Minister comes within the FOI regime. While the construction of the pool was part funded by the Department of Arts, Sports and Tourism it noted "no funds were paid to this company by the Department. Therefore this company is not funded directly or indirectly by a government body and is not subject to the provisions of the Freedom of Information Acts".
>
> (d) Shoreline has entered into a lease agreement with the Notice Party to operate the facility, it acts as a private company and engages in all normal day to day operational issues of such a facility.
>
> (e) The record specifically requested and not held by the Notice Party, the published accounts of Shoreline are publicly available on the company's website. Any records held by officials of the Notice Party relating to the finances of Shoreline are held by them in their capacity as offices of the company and not of the Notice Party; "information is held by a private company and is not subject to the provisions of the Freedom of Information Acts".

10. This refusal was appealed to the office of the Information Commissioner (the Respondent) by the Appellant by letter dated 10th August, 2011. The appeal noted that the directors of Shoreline were obliged to prepare financial statements and to keep proper books of accounts and noted that the company is directly "owned, controlled and funded by Bray Town Council". The appeal noted that public money funded the company and built the facilities, which are on Council land. So the "Council must hold detailed financial information on its subsidiary".

11. The Respondent accepted the appeal for consideration and invited submissions and the Appellant submitted that the information requested was information held by the Notice Party about Shoreline rather than information held by Shoreline itself. The Appellant further noted that the facility operated by Shoreline was built by the Notice Party at a cost of approximately €10.5m and that the completed pool was then transferred to Shoreline. The Appellant noted the 2010 accounts of Shoreline which stated:-

> "There is a loan due to Bray Town Council of €10,777,384…Council will not be seeking repayment of this loan in the foreseeable future."

12. The Appellant further noted that the Notice Party owned 100% of the share capital of Shoreline and that Shoreline was set up by the Notice Party to allow the Council to operate swimming pool and ancillary facility. Furthermore, the fact that three of the directors of Shoreline were employees of the Council and added it was implausible for the Council to research that it did not have records of Shoreline just because Shoreline had legal independence.

13. By letter dated 28th February, 2013, the investigator on behalf of the Respondent advised that it had come to a preliminary view that the request for access would be refused and this letter noted that the companies were separate legal entities to those who owned and managed and that ownership of the company does not entail any legal assumption of control by the Council over the company. The preliminary view set out in detail the basis that the Respondent's investigator, Ms. Lyons, came to a preliminary view and invited the comments to make in response by three weeks time.

14. The reason, the investigator, Ms. Lyons came to her preliminary view were in the main incorporated in the terms of the final decision of the Respondent, the subject of this appeal. It is important to make certain references to the main points of this letter. The investigator on behalf of the Respondent divided the potential records being sought by the applicant to (a) the records of Shoreline; and (b) any records held by the Town Council in its capacity as a shareholder. That division of the appellant's request was a useful one and is followed in this judgment.

15. In relation to the records of Shoreline itself, the investigator held that the Council did not control "the day to day operations of the company" and came to the view that the company was "in business on its own account" and that any records held by the company other than those required, it is required to submit to the Council as per s. 159 of the Companies Act are not under the Town Council's control and it follows that the records could not be deemed to be subject to FOI.

16. In relation to those records held by the Town Council in its capacity as shareholder, the investigator considered whether these records should be refused pursuant to s. 27(1)(b) of the Freedom of Information Act and whether they might contain financial, commercial, scientific or technical or other information "whose disclosure could reasonably be expected to result in a material financial loss or gain to the person to whom the information relates or could prejudice the competitive position of that person in the conduct of his or her profession or business or otherwise in his or her occupation".

17. In this regard, the investigator concluded that the standard of proof to show that the information "could" prejudice the competitive position of the company was "very low".

18. The investigator noted that the Council held records in its capacity as shareholder pursuant to the requirements of s. 159(1) of the Companies Act 1963, and considered that those records, were in principle subject to the FOI Act as they are "held" by the Council. The investigator concluded that there are some differences between the draft unabridged documents sent to the Town Council (which contain a breakdown in Shoreline's profits and losses accounts and tangible and fixed assets for the year 2008 and 2009 as well as the details of employee numbers and costs for 2009) and that Shoreline contended that the release of this information though it dates from 2008 and 2009, could enable competitors to understand how its business was run and accordingly, the investigator accepted this submission from the council and the company and accepted that the reliefs could prejudice the company's competitive position.

19. The investigator then considered the provisions of s. 27(3) which provides that information might be still released if the public interest in its release outweighs the public interest in withholding it and referred to the comments in the Supreme Court in the case of *Governors and Guardians of the Hospital for the Relief of Poor Lying-In Women v. Information Commissioner* (the Rotunda case) and accepted what undoubtedly were the Obiter comments of that court in relation to the consideration of public interest. The

investigator concluded "the release of details at issue will no in way serve the public interest in ensuring the openness and accountability of same". The fact that the company was set up and is owned by the Town Council is she concluded irrelevant in this regard.

20. The investigator then stated that if the Appellant accepted her views the application fee of €150 would be refunded but if they did not accept the view that:-

> "It is open to you to make submissions to the Commission as to why this is the case. Any submission you wish to make will be taken into account by the Commission in arriving at her decision. It is important to note, however, that the onus lies on you as requestor of the records at issue to demonstrate that further records of relevance to your request are controlled by the Town Council or relate to a contract for service. In respect of those records held by the Town Council in its capacity as shareholder of the company, the onus lies on you to demonstrate that they do not contain information that if release could prejudice the company's competitive position, or alternatively that the public interest warrants the reliefs of the company's commercially sensitive information. I would anticipate receipt of those comments by 21st March, 2013."

21. The Appellant did not accept the preliminary view as outlined above and made submissions through its financial controller, Mr. Begley in this matter and in a related similar decision of the Respondent in relation to another swimming pool operated by Kildare County Council. It is fair to say that the submissions of the Appellant in response to the preliminary view did not really engage with the preliminary view of the Respondent.

22. On 29th April, 2013, the Respondent made its decision, the subject matter of this appeal, and found the Council's refusal on the basis that "certain records of relevance to the request as held by the Council contained commercially sensitive information that was not required to be released in the public interest, and on the basis that any further records of relevance to the request as held by the company were not under the Council's control as such as they could be deemed to be held by the Council further to s. 2(5)(a) of the FOI Act".

23. The decision maker firstly dealt with the issue of records held by the Council in its capacity as shareholder and secondly the other records in relation to the question of the Council's control.

24. I will deal with a decision in reverse order to conform with the order of the consideration of the documents in the preliminary decision.

25. Dealing with the issue of the Council's control of the company, the Respondent referred to the preliminary views referred to above and indicated that the company was a separate legal personality and referred to the issue as being the extent to which the alleged controller "takes an active role in that company's day to day operation". The Respondent found that the payment of grant monies in respect of the construction of the pool on council land and the advertisement of the pool on the Council's website do not of themselves prove that the Council controlled the company's day to day operations.

26. Reference was made to the judgment of the High Court in *Minister for Enterprise, Trade and Employment v. Information Commissioner* [2006] 4 I.R. 248 which found that the Department did not control the City Enterprise Boards as the board was "in business on its own account subject to limited and defined reporting requirements that do not include the information requested". However, the Respondent then added:-

> "Thus it seems to me that the relevant former and current local authority staff make (such) decisions in their capacity as officers of the company rather than the local authority officials. Thus I do not accept that the Council can be said to control those board decisions (in which regard I also note that strategic rather than the operational nature thereof). Further, neither does it seem that the Town Manager or Town Council's elected members have any role in approving the board's decisions, other than deciding on matters that are required to be taken at a general meeting."

27. The Respondent then specifically referred to the preliminary decision made by the investigator to the effect that the company was "in business on its own account". The Respondent accepted the arguments that the Council did not control the company or have any role in its day to day operation and that any records held by the company could not be deemed to be held by the Council further to s. 2(5)(a) of the FOI Act.

28. In relation to those records held by the Council in its capacity as a shareholder, the Respondent refused this request on the same basis as the preliminary decision namely that in the first place she found that they contained financial information whose disclosure "could reasonably be expected to result in a material or financial loss or claim to the person to whom the information relates or could prejudice the competitive position of that person in the conduct of his or her profession or business or otherwise in his or her occupation" (this is, in effect, a repetition of the provisions of the FOI Act). Again, the Respondent accepted the view in the preliminary letter that the standard of proof was very low and otherwise accepted the argument set out in this preliminary view letter.

29. The Respondent then considered the issue of public interest as she is required to do so under s. 27(3) of the Act. In relation to the order category of documents, those held directly by the Council and *prima facie* subject to the FOI Act, the relevant issue was the question of the public interest.

30. When dealing with the issue of public interest, reference again was made to the reasoning in the preliminary view letter and the previously referred to comments in the Supreme Court, in the *Rotunda* case (above), that the public interest was described as "a true public interest recognised by means of well known and established policy, adopted by the Oireachtas or by law" which must be distinguished from a private interest for the purpose of section 27(3).

31. The Respondent added:-

> "The FOI Act itself recognises the public interests in ensuring the openness and accountability of public bodies as to how they conduct a business, and in ensuring that people can exercise their rights under the Freedom of Information Act. However, s. 27 of the Act also recognises a public interest in safeguarding an operation's ability to carry on its business without inappropriate interference from competition, which could arise by disclosing its commercially sensitive information to the world at large."

32. The Respondent again adopting the reason in the preliminary view concluded on this point:-

> "Insofar as there is a public interest in the release of commercially sensitive information regarding a limited company that is not subject to the FOI Act, I am satisfied that this has been adequately met by the various requirements of company legislation. On the other hand, in my view, the low standard of proof that is required to be met in order for s. 27(1)(b) to apply, recognises that the public interest in ensuring that the release of material under FOI does not impact inappropriately on commercial interests. On balance, therefore, I accept and find that the public interest weighs in favour of withholding the details in issue."

The Statutory Appeal

33. This is a statutory appeal by the applicant. The relevant statutory provisions in relation to this appeal would seem to be as follows. Section 2(5)(a) of the Act provides that:-

> "(a) a reference to records held by a public body includes a reference to records under the control of the body." (Emphasis added)

34. Section 6(1) provides that:-

> "(1) Subject to the provisions of this Act, every person has a right to and shall, on request therefor, be offered access to any record held by a public body and the right so conferred is referred to in this Act as the right of access.
>
> …
>
> (7) Nothing in this section shall be construed as applying the right of access to an exempt record."

35. Section 7(1) provides a person who wishes to exercise a right of access is required to make a request in writing.

36. Section 27(1)(b) states that a public body may refuse to grant a request under s. 7 if the record contains:-

> "financial, commercial, scientific or technical or other information whose disclosure could reasonably be expected to result in a material financial loss or gain to the person to whom the information relates, or could prejudice the competitive position of that person in the conduct of his or her profession or business or otherwise in his or her occupation." (Emphasis added)

37. Section 27(1)(b) is subject to s. 27(3) which provides:-

> "Subject to section 29, subsection (1) does not apply in relation to a case in which, in the opinion of the head concerned, the public interest would, on balance, be better served by granting than by refusing to grant the request under section 7 concerned."

38. Pursuant to s. 34(1)(a), s. 34(2) and s. 14 of the Act, the Respondent may review a public body's decision to refuse to grant a request.

39. Following the review, the Respondent may affirm or vary the decision or annul the decision or make such other decision as they consider proper.

40. Under s. 42 of the Act, a party to review before the Respondent or any other person affected by the decision may appeal to the High Court on a point of law from that decision.

41. It is accepted by both the Appellant and Respondent that there is a presumption in favour of disclosure and that the default position is one of disclosure. In *Sheedy v. Information Commissioner* [2005] IESC 35, Fennelly J. stated at p. 2 of his decision:

> "The passing of the Freedom of Information Act 1997 constituted a legislative development of major importance. By it, the Oireachtas took a considered and deliberate step which dramatically alters the administrative assumptions and culture of centuries. It replaces the presumption of secrecy with one of openness. It is designed to open up the workings of government and administration to scrutiny. It is not designed simply to satisfy the appetite of the media for stories. It is for the benefit of every citizen. It lets light in to the offices and filing cabinets of our rulers."

42. In a number of cases including the *Sheedy* case above, judges have referred to the long title of the Act being "an act to enable members of the public to obtain access, to the greatest extent possible, consistent with the public interest and the right of privacy, to information in possession of public bodies".

43. The Appellant submits the Respondent had no point did "show any awareness of the presumption in favour of disclosure in its decision".

44. I do not find that that submission is valid. On a number of occasions, the Respondent without specifying or restating the presumption of disclosure in her analysis of the provision of s. 27 in relation to public interest and otherwise. The Respondent did indeed recognise the public interest in ensuring the openness and accountability of public bodies. I do not find the Respondent erred in this regard.

45. Furthermore, it is clear rightly or wrongly the Respondent did analyse the relationship between Shoreline and the Council in relation to the issue of control.

46. The Respondents rely upon the decision of Macken J. in the Rotunda case (above) to the effect that the Act does not create an absolute right for disclosure. I accept that proposition that while there is a presumption in favour of disclosure there is no absolute right to disclosure.

47. The Appellant argued that the burden of proof to justify the non-release of documents always rests on the body which is refusing the request. The Respondent in her submissions does not dispute this. I find that throughout the various deliberations of the Respondent, it is reasonably clear that at no stage, save for one important exception which will be discussed below, was there any issue of the burden of proof shifting to the Appellant.

The Applicable Law
48. Under the decision of *Deely v. Information Commissioner* [2001] 3 I.R. 439, McKechnie J. in the High Court held that in an appeal such as this, the onus of proving that the decision of the Respondent was erroneous in law rests on the Appellant and he outlined the remit of a court in considering an appeal such as this, a point of law as follows:-

> "(a) it cannot set aside findings of primary fact unless there is no evidence to support such findings;
>
> (b) it ought not to set aside inferences drawn from such facts unless such inferences were ones which no reasonable decision making body could draw;
>
> (c) it can however, reverse such inferences, if the same were based on the interpretation of documents and should do so if incorrect; and finally;
>
> (d) if the conclusion reached by such bodies shows that they have taken an erroneous view of the law, then that also is a ground for setting aside the resulting decision: see for example *Mara v. Hummingbird Ltd*. [1982] 2 ILRM 421, *Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare* [1998] 1 I.R. 34 and *Premier Periclase v. Commissioner of Valuation* (Unreported, High Court, Kelly J., 24th June, 1999). However, an Income Tax Appeals Commissioner is quite a different statutory creature than is the Commissioner under the Act of 1997 and his conception likewise. So also is the Chief Appeals Officer in the social welfare case as, of course, is the Valuation Tribunal. These are but examples of bodies, tribunals and statutory *persona* from whom the superior courts have addressed references purely on points of law. There are of course many others. In this case however, it is unnecessary to express any view as to whether or not a court under s. 42 is so circumscribed. This because there is no challenge and never has been to any of the material facts as alleged by the Notice Party, or and obviously of more immediate importance, to the findings made by and upon which the Appeal Commissioner arrived at his decision. Therefore I would prefer to express no concluded view on this point."

49. The principles were endorsed by Fennelly J. in the Supreme Court in the *Sheedy* case above. In *Sheedy*, Kearns J. at pp. 293 and 294, stated in relation to McKechnie J's summary in *Deely*:-

> "This is a helpful résumé with which one would not disagree, but it would be obviously incorrect to apply exclusively judicial review principles to matters of statutory interpretation in the way that might be appropriate to issues of fact. A legal interpretation of a statute is either correct or incorrect and the essence of this case is to determine whether the interpretation given first by the Respondent and later by the High Court (Gilligan J.) to s. 53 of the Education Act 1998 was correct or otherwise."

I accept the law as stated above in *Deely* and as clarified in *Sheedy* as being a proper description of my jurisdiction in this appeal.

The Documents
50. As indicated above, the Respondent approached various documents being sought by the Appellant under two distinct headings, namely:-

> (a) Those documents which Shoreline sent to the Notice Party over and above the documents which a company is ordinarily obliged to supply to the CRO which documents were held to come within the scope of the Appellant's request but the records were refused for release because of the issue of confidentiality.
>
> (b) Secondly documents created by Shoreline were refused because of the lack of control by the Council over Shoreline as found by the Respondent.

1. Documents directly held by the Notice Party

A. The Issue of Confidentiality
51. It is accepted that certain documents are held by the Notice Party directly being certain financial statement which Shoreline sent to the Notice Party.

52. In relation to these documents, the Respondent found against the Appellant under two separate tests in relation to this category and as the Appellant has stated if the Respondent had found in the Appellant's favour in either the test, the records would have been released. The first test is whether the release of the documents "could" prejudice the commercial interest of Shoreline. In this regard, the Appellant complains of the categorisation by the Respondent of the standard of proof as being "very low". I cannot agree with the Appellant that this categorisation of itself would be grounds for appeal. "Very low" may be a term of art about which one could argue but I do not find that the use of this term to be an error of law and indeed in layman terms it fairly describes the nature of what must be proved.

53. The Commissioner, in the case of *Dr. X. v. Midland Health Board*, (decision No. 030759, 30th August, 2004), had previously decided that the phrase "could prejudice" required evidence of potential harm:-

> "…in invoking the phrase 'prejudice' the damage likely to occur as a result of disclosure of the information sought must be specified with a reasonable degree of clarity."

54. Similarly in the Respondent's decision of *Eircom Plc v. Henry and Department of Agriculture and Food* (decision No. 98114, 98132, 98164 and 98183, 13th January, 2000), the Commissioner noted:-

> "The essence of the test in s. 27(1)(b) is not the nature of the information but the nature of the harm which might be occasioned by its release." (Emphasis added)

55. The Appellant contends that no proper exercise in this regard was carried out by the Respondent and that the finding should be set aside on this ground alone. The respondent submits that the above quotations from these decisions misstates what was decided or were taken out of context, but having reviewed the respondents submissions in this regard I do not accept that point.

56. In order to ascertain the nature of the inquiry that was undertaken by the Respondent, it is necessary to examine in a little detail the various emails and correspondence between the Respondent and the Notice Party on this issue.

57. By email dated 21st January, 2013, the Notice Party confirmed that the Council as shareholder was in possession of the accounts of the company and said that they contained commercially sensitive information.

58. This was responded to on the same day by an email from the investigating officer of the Respondent requesting copies of the records to enable a decision to be made whether they required to be released and also needed to know how they differ from the records to put into the public domain filing in the CRO and why the details held by the Council are commercially sensitive.

59. By email dated 18th February, 2013, the Notice Party gave their first answer to the request from the Respondent as follows:-

> "The information that is deemed to be commercially sensitive under s. 27(1)(b) of the Act i.e. the records contained financial, commercial or other information whose disclosure could reasonably be expected to result in a material financial loss or gain to the person to whom the information relates, or could prejudice the competitive position of that person in the conduct of his or her profession or business or otherwise in his or her occupation, as detailed below:-
>
> (i) all information in the profit and loss account – the record contains financial, commercial or other information whose disclosure could reasonably by (sic) expected to prejudice the competitive position of that person in the conduct of his or her profession or business or otherwise in his or her occupation;
>
> (ii) In the notes to the accounts:-
>
> details of the operating loss
>
> information on numbers and renumeration of employees
>
> the breakdown of tangible fixed assets.
>
> The records contain financial, commercial or other information whose disclosure could reasonably be expected to result in a material financial loss or gain to the person to whom the information relates, or could prejudice the competitive position of that person in the conduct of his or her profession or business or otherwise in his or her occupations.
>
> In summary, the Council feels that it would negatively impact on the company to have such details released to a competitor…"

60. What the Notice Party was doing here was merely repeating the terms of the Act and merely stating that they objected to furnishing the information and this email drew and understandable response from the Respondent, *inter alia*:-

> "One very important thing that is missing is the Council's explanation of why the details in the accounts – presumably the details that are in the unabridged accounts that are not in the abridged ones although this is not made explicitly clear – or commercially sensitive.
>
> I am not being pedantic here – you will note my email of 21st Feb I stated that I needed to know why the details in the records held by the Council are commercially sensitive.
>
> I need to know why each of the particular details at issue are deemed by the Council to be commercially sensitive before I can form any opinion on the matter. Please send me the details by close of business today. I don't think this deadline to be unreasonable given that I have said it can in both email and our last telephone conversation on the matter that I needed an explanation of why the details are deemed commercially sensitive in addition to knowing how the abridged and unabridged accounts differ. You might also wish to note that s. 34(1)(ii) of the FOI Act places the onus on the Council to satisfy the Commission that details should be exempt from release. Given the fact that if no argument/explanation is given, it is open to the Commission to direct that the release of the details you'll appreciate that I have actually been trying to protect the Council's interest by giving as many chances possible for the relevant arguments to be made. However, I can't keep doing this indefinitely." (Emphasis added)

61. On the next day, a further email was sent by the investigator on behalf of the Respondent to the Notice Party stating, *inter alia*:-

> "You'll note that my email of 18th asked for the Council explanation as to why the details in the accounts…are commercially sensitive. However, other than pointing me to the precise details that the Council consider to be commercially sensitive, which is useful, no actual explanation was given as to why these details are deemed to be sensitive at this point in time.
>
> Therefore, once again I must ask you to give me an explanation of why the figures for the company's profit and loss, and tangible fixed assets for 2008 and 2009, and details of employee costs and renumeration for 2009 (the 2008 CRO accounts having contained such details by the way), might be of use to a competitor now. For instance, would it enable a competitor to build up a picture of the company's current cost base *etc*. and if so, how, and why might this be of use to competition?
>
> Jackie, I really cannot give another opportunity for the Town Council to makes it case. This office has no idea of what makes this four to five year old details commercially sensitive and it would be inappropriate for us to make an argument on behalf of the Council given the requirements of s. 34. I don't need a complicated answer, as the threshold of proof in s. 27 is quite low, but at the same time I need some kind of argument from the Council." (Emphasis added)

62. The Appellant contends that this correspondence indicates a bias in favour of the Notice Party by the Respondent. That would indeed be a possible reading of the correspondence but I think a fairer reading is that the Respondent in this case, through its investigating officer was trying to cajole the Notice Party into giving the reasonable explanations which the Respondent at that stage required.

63. The last email was answered by email of 27th February, 2013, from the Notice Party, as follows:-

> "Having discussed the commercial sensitivity of certain elements of the accounts with Shoreline's auditor. He is of the

view that:-

(a) releasing details of turnover profit margin and details of overheads contained in the profit and loss account in the unabridged accounts would disclose to a competitor how the business is run.

(b) releasing percent of wages breakdown contained in the notes to the unabridged accounts would disclose to a competitor how the business is run.

And is therefore considered to be commercially sensitive.

I trust this clarifies the situation."

64. On the very next day, the detailed preliminary view referred to above dated 28th February, 2013, which upheld the refusal was furnished.

65. Dealing with the issue of confidentiality the preliminary view, which was then incorporated in the final decision, the subject matter of this appeal, then states:-

> "The company contends that release of the above details, the world at large will, notwithstanding that they date from 2008 and 2009, enable competitors to understand how its business is run. It seems reasonable to me to accept that any insight into the company's finances could be used by its competitors to the company's detriment, particularly when the company would not be privy to corresponding details regarding the operation of its competition. It is my view, therefore, that s. 27(1)(b) applies to the details referred to in the preceding paragraph in that I would accept that the release could prejudice the company's competitive position in the conduct of its business."

66. Counsel for the Appellant makes the point that the detailed preliminary view dated 28th February, 2013, in all probability must have been substantially drafted before the receipt of the explanation which is of a window dressing nature only.

67. I will not decide the matter on that point but I do hold that the explanation as finally given on 27th February, 2013, by the Notice Party does little more than repeat the requirements of s. 27(1)(b) and refers to the nature of the documents held. It does not in any sense engage with the proper question of the investigator on behalf of the Respondent as to why these particular documents, if disclosed, could prejudice the financial position of the Notice Party. In particular, the point properly made by the investigator on behalf of the Respondent as to the antiquity of the documents was not dealt with at all by the email of 27th February from the Notice Party.

68. I believe that the query as to the antiquity of the documents raised a reasonable question to be answered by the Notice Party in the circumstances which the investigator indicated plainly to the Notice Party that without some explanation as to why these documents of some antiquity could be prejudicial to the company's competitive position there would be a failure by the Notice Party to deal with the proper request. The Notice Party entirely failed to engage with the issue of the antiquity of the documents. By merely furnishing to the investigator, Shoreline's auditors view that the release of the documents "could prejudice" the competitive position of the company and by not in any sense answering the proper queries of the investigator, I believe that the investigator should have ruled against the Notice Party.

69. I hold that the acceptance by the Respondent first in its preliminary decision and secondly in the final decision of the approach of the Notice Party is clearly a failure to follow its previous practice as outlined in the decisions of the Respondent referred to above e.g. *Dr. X. v. Midland Health Board*. I do not accept the respondent's submission in this regard.

70. I find that the information as furnished by the Notice Party to the Respondent and ultimately accepted by the Respondent amounts to little more than a restating of the Act and listing of the documents in saying that these documents were commercially sensitive *etc*.

71. In a decision of the Respondent, *X. v. Department of Communications, Marine and Natural Resources* (decision No. 020644, 30th April, 2003), the Respondent held:-

> "It is arguable that the release of pricing information contained in the invoice could result in a material loss to the company by making such information available to its competitors. However, given the information is now historic, being almost five years old, I find that its release could not give an advantage to competitors of such magnitude as 'could reasonably be expected to result in loss to the company or prejudicial position'."

In this case the respondent raised the antiquity issue with the notice party, but proceeded to rule in its favour without having received any real reply.

72. I accept the submission on behalf of the Appellant that the Respondent was under an obligation to consider whether the release of the historic commercial information could result in the detriment as stated.

73. All that is done by the Respondent is to note the contention by Shoreline that detriment will accrue from its release "notwithstanding that they date from 2008 and 2009". This is not a reason and I believe that the Respondent has fallen into an error of law in this regard.

74. It is contended by the Respondent and I accept that a mistake or error of law in the decision will not itself result in that decision being quashed. It is only whether the mistakes are or are not material that such a decision can be made and I will consider that aspect of the matter later in my judgment.

B. Public Interest

75. Having found that the Respondent erred in relation to the release of these documents on the issue of confidentiality, it might not be necessary for me to consider the public interest test, however, I will do so for completeness sake. The Respondent having decided that the issue of confidentiality applies under s. 27(1)(b) then very properly considered the provisions of s. 27(3) on the issue of the public interest.

76. Section 27(3) stipulates:-

> "Subject to section 29 [not relevant in this case], subsection (1) does not apply in relation to a case in which, in the opinion of the head concerned, the public interest would, on balance, be better served by granting than by refusing to grant the request under section 7 concerned."

77. Counsel on behalf of the Appellant criticised the Respondent for relying upon the obiter remarks in the Supreme Court of *Governors and Guardians of the Hospital for the Relief of Poor Lying-In Women v. Information Commissioner* [2011] IESC 1, (the Rotunda case). This case was used as authority for the proposition that a release under s. 27(3) may only be ordered if there is:-

> "a true public interest recognised by means of a well known and established policy, adopted by the Oireachtas, or by law."

78. The fact that the above definition of public interest was contained in obiter remarks in the Rotunda case and was adopted by the Respondent is not, I find, grounds of itself to condemn the Respondent. It is only if such definition of the public interest were wrong that I should condemn it. It is clear that the public interest test as referred to in the Rotunda case refers to the public interest as identified by an established policy adopted by the Oireachtas or by law and accordingly, in my view, it is a reasonable definition of public interest and I accept the arguments of the Respondent in this regard.

79. The Appellant also criticises the reasoning of the Respondent in relation to public interest that the Appellant must demonstrate "that their interest in the records being sought is public before the public interest is engaged by the Act".

80. I accept the arguments of the Respondent that the Respondent did not exclude the possibility that a private interest in making the request could be accompanied by a public interest in disclosure and I do not find as is contended by the Appellant that the Respondent held that a private interest "of itself" disposed of the "public interest test".

81. What the Respondent held in its regard is "[in]sofar as there is a public interest in the release of commercially sensitive information regarding a limited company that is not subject to the FOI Act, I am satisfied that this has been adequately met by the various requirements of company legislation".

82. I fail to find any error in the reasoning of the Respondent in relation to the public interest test.

2. Documents held by Shoreline and whether the Notice Party controlled Shoreline?
83. In her decision, the Respondent made the realistic point that it had no power to conduct "exhaustive investigation" into how a private company, which is being set up in accordance with company law, is operated in practice. I accept that point.

84. The Respondent then concluded:-

> "I accept that the arguments made to date indicate that the Council does not control the company or have any role in its day to day operations. Furthermore, as already noted, company law requires company directors to act in the interest of that company, and to abstain from any matters that represent a conflict of interest. Company law also requires the Council and the company to be treated as two separate identities. Accordingly, I am also satisfied that the Council has no legal entitlement to any records that come into the possession of current or local authority staff as a result of their roles as company directors. It follows that I do not consider the applicant's contentions to be an appropriate basis for me to find that the Council controls or has a legal entitlement to, further records as held by the company that might be relevant to the request."

85. Earlier in its consideration of the issue of control, the Respondent referred to the Appellant's contention:-

> "The applicant contends that the Council controls the company and its records, and that such records are potentially releasable under the FOI Act. As set out in the preliminary views letter, companies have separate legal personalities to those who own and/or manage them. Although the applicant contends otherwise, the company must be legally seen as a separate entity to the Council. Company case law indicates that it is not the majority or 100% ownership of a company that determines if an owner controls the company, but rather the extent to which he or she takes an active role in that companies' day to day operations. Having regard to this point in particular, I would accept that the payment of grant monies in respect of the construction of the pool, the construction of the pool on Council land, or the advertisement of the pool on the Council's website, do not, of themselves, prove that the Council controls the company's day to day operations."

86. The respondent has in her submissions eloquently raised the issue of curial deference and the fact that the court in a statutory appeal no more than a judicial review should lightly interfere with any findings of fact including, the respondent submits, the definitions of what is or is not "control". I fully accept the respondent's submissions. The law allows a wide margin of discretion to decision makers. It is not for the Court to impose its standards of excellence or otherwise upon what decision makers should decide or how they should decide it. Anxious scrutiny, or as it works in practice officious scrutiny, forms no part of our law and represents an attempted blurring of the separation of power by those who advocate it. Whereas the respondent is not an expert with expertise in, for example, planning or engineer, and a distinction is rightly made in that regard by the applicant, the respondent is the person who has been charged at law with the decision making of these matters and has an expertise in so deciding.

87. I accept that a margin of appreciation has to be shown as to what the respondent did or did not consider on the issue of control and, as I have stated earlier in this judgment, the applicable law as to the limits of my jurisdiction is as set out in the *Deely* and *Sheedy* cases above.

88. The issue that the Appellant will have to satisfy me is where the Respondent has erred in law or failed the long established tests in the *O'Keeffe* case.

89. The Respondent relies upon the decision of *The Minister for Enterprise, Trade and Employment v. Information Commissioner* [2006] IEHC 39 (2006 4 I.R. 248), in which the court held that records consisting of internal documentation in relation to a grant application to a City Enterprise Board were not under the control of the Department and in the above case, the court held that the Boards were established as a company limited by guarantee and that the focus of the Minister's powers in relation to the Board was as to their overall financial capacity rather than individual grants and that the company was "in business in its own account subject to limited and defined reporting requirements".

90. The Appellant relies upon the decision of Laffoy J. in *Fyffes Plc v. DCC Plc* [2005] IEHC 477, (2009 2 I.R. 417), in which she

referred to the test and control in the following terms:-

> "As a matter of law, Lotus Green may be regarded as having acted as the agent of DCC in relation to the holding and disposal of the shares in Fyffes, if to do otherwise would lead to an injustice. Whether it should be, depends on whether the inference is factually justified. This is to be determined having regard to all of the facts, including the nature of its interest in the shares, and the relationship between Lotus Green and DCC. The views of the human agents of the companies are not in any way determinative of the question."

91. I do not see any inconsistency between the judgments in *Fyffes* and the *Minister for Enterprise* case.

92. The day to day workings of the company and whether the Notice Party interferes with the day to day operations is of course an important matter. It is not, however, to be taken as definitive. In this case, I am of the view that the Respondent did, in effect, take the day to day workings of the company as definitive. In referring to the fact that the company is a separate legal entity and the obligations of its directors under company law, the Respondent was embarking upon a reasoning process that would mean no separate legal company could be said to be controlled by another company absent perhaps evidence of extreme daily interference.

93. The directors of a "controlled" company will always be obliged to act pursuant to the interest of that company in accordance with company law and accordingly the fact that one company is a separate legal entity from the other cannot be the definitive test of the matter, neither can the level of day to day interference be definitive. "Control" must include the real strategic control of one entity by the other and the financial nexus between them.

94. The Respondent did give some consideration the fact that the Notice Party was 100% shareholder of Shoreline, that the Notice Party had two current and one former local authority staff members on the board and I am prepared to accept also she considered the issue that the initial caretaker board of the company was comprised of the Notice Party's engineer, town clerk and manager and that representatives elected to the Notice Party constituted half of the advisory committee. The Respondent also clearly considered that the pool was constructed on Council lands.

95. I do not find, however, that all relevant matters were adequately considered by the Respondent in relation to the issue of control and indeed that some matters were not considered at all and some matters were given erroneous consideration.

96. What was not considered was that the Notice Party provided a loan to Shoreline in a sum in excess of €10m. This was referred to erroneously by the Respondent as a "payment of grant monies". The accounts of the company clearly referred to the fact that it has this debt to the Notice Party and clearly a company that is dependent upon the goodwill of the Notice Party might well be deemed to be controlled by that Notice Party. Clearly, this is an issue that ought to have been considered. The respondent gave no consideration at all to this issue and in fact, seems to have misconstrued this vast loan and debt which remains on Shoreline's books as being the payment of "grant money".

97. Whatever about the day to day activities of Shoreline as long as they proceed to conduct the swimming pool and leisure facilities, I have no doubt that if the directors of Shoreline in their independent capacity deemed it appropriate to change the swimming pool to a casino that the Notice Party would not be likely to approve of such a change and would be in a position, due to the loan, to prevent it if they so wished. I find that the Notice Party must be said to control Shoreline and indeed the conclusion to the contrary is irrational within the meaning of the *O'Keeffe* decisions on judicial review and the failure to even consider the issue is an error of law which must and did effect the final conclusion of the respondent.

98. In addition, the Respondent did not comment or take into account the fact that Shoreline was in possession of the property under a lease (which only came into existence a considerable length of time after the construction of the pool) which is not a commercially viable one. In other words, if the commercial relationship of two arms lengths corporations were to apply and an economic rent were to be charged, I am satisfied that Shoreline would in all probability not be able to meet such rent and would be insolvent.

99. Accordingly, I find that the Respondent erred in law in its consideration of the matters of control by concentrating entirely on what it defined as the day to day control of the operations of the swimming pool and leisure facility rather than the obvious, clear and, in my view, undoubted real control that the Notice Party exercises over Shoreline and thus its records.

Burden of Proof

100. It is accepted by all the parties that the burden of proof lies in favour of disclosure and the Notice Party at all times carries the burden of demonstrating why the documents should not be released.

101. The Respondent at all times in its decision, save in one significant matter, clearly accepted that that is the case.

102. The Respondent, however, in my view has fallen into an error of law in relation to the burden of proof in the preliminary decision of its investigator dated 28th February, 2013. The investigator having made its decision proceeded properly to advise the applicant that it might accept the preliminary decision in writing and in which case their application fee of €150 would be refunded – this was very properly stated as not being in any way an attempt to persuade an application for review, or if the preliminary view was not accepted:-

> "It is open to you to make submissions to the Commissioner as to why this is the case. Any submissions you wish to make will be taken into account by the Commissioner in arriving at her decision. It is important to note, however, that the onus lies on you as requestor of the records at issue to demonstrate the further records of relevance to your request or control by the Town Council orally to a contract for service. In respect of those records held by the Town Council in its capacity as shareholder of the company, the onus lies on you to demonstrate that they do not contain information that if released could prejudice the company's competitive position or alternatively that the public interest warrants the release of the company's commercially sensitive information…."

103. It is fair to say that the response by the Appellant dated 6th March, 2013, which dealt in the main with a parallel application in respect of a Kildare County Council leisure facility did not really engage anymore with the preliminary view and in particular it is correct the submission did not make any reference to the view of the preliminary decision that it was now encumbent upon the Appellant to demonstrate why the record should be released.

104. The decision of the Respondent did not refer to this shift in the onus of proof to the Appellant and whereas the language of the decision of the Respondent might well lead one who is reading that decision on its own to conclude that the Respondent at all times accepted that it was incumbent upon the notice party to demonstrate why the documents should not be released. I have, however,

formed the view that the failure of the Respondent to repudiate the legally erroneous statement in the preliminary view (that it was now encumbent upon the Appellant to show why the documents should be released *etc.*) and indeed the incorporation of the reasoning of the preliminary decision maker into the final decision without such a repudiation, has fatally undermined the final decision itself. This error in the preliminary view is a significant error in the process of the decision making and the decision itself is tainted by that error.

105. The final decision rests upon the preliminary view and this clearly and expressly requires the applicant to prove something that the applicant never is required to prove.

106. Section 34(12)(b) of the Act is clear:-

> "decision to refuse to grant a request under section 7 shall be presumed not to have been justified unless the head concerned shows to the satisfaction of the Commissioner that the decision was justified." (Emphasis added)

107. I have previously held that the general argument on behalf of the Appellant in relation to the burden of proof is not valid. I must conclude, however, that a decision resting so clearly upon an erroneous statement of the law as contained in the preliminary decision must, of itself be contaminated by that error and cannot stand.

Conclusion
108. For the reasons as outlined above, I find that the Respondent has erred as follows:-

(a) in its failure to properly analyse the issue of confidentiality;

(b) in its failure to properly analyse the issue of the control; and

(c) in its reliance upon its preliminary view that was clearly tainted by illegality.

109. I have formed the view that each of the above error was a material error and that I should allow this appeal to succeed. If the only error were that identified at para. 108(c) above, it may have resulted in a different final order, but I will hear counsel at a later date for submissions of the final order to be made.