[2016] IEHC 27

THE HIGH COURT

[2015 No. 4 MCA]

IN THE MATTER OF THE FREEDOM OF INFORMATION ACTS 1997-2003

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 42 OF THE FREEDOM OF INFORMATION ACT 1997

BETWEEN

PATRICK MCKILLEN

APPELLANT

AND

THE INFORMATION COMMISSIONER

RESPONDENT

AND

THE MINISTER FOR FINANCE

NOTICE PARTY

JUDGMENT of Mr. Justice Noonan delivered the 19th day of January, 2016

Introduction

1. This matter is an appeal on a point of law pursuant to s. 42 of the Freedom of Information Act 1997, as amended, against the decision of the respondent dated the 14th of November, 2014. At all material times, the appellant was the largest shareholder in an entity known as the Maybourne Hotel Group in London which owned a number of well known hotels. The appellant says that a hostile takeover bid of the Maybourne Hotel Group was launched by Sir David Barclay and Sir Frederick Barclay ("the Barclay brothers") which was vigorously opposed by the appellant. This led to litigation in the High Court of England and Wales in 2012. The appellant alleges that as part of the Barclay brothers' strategy in pursuing the takeover bid, they sought in 2011 to acquire certain personal and corporate loans of the appellant with Irish Bank Resolution Corporation and to that end lobbied various parties including the Minister for Finance and the National Asset Management Agency.

2. By letter of the 21st of August, 2012, the appellant requested from the notice party access to records concerning him or his personal or business loans held by the notice party. The appellant indicated that he wished to access any records concerning an approach concerning any individual or business seeking information about his loans or lobbying for the opportunity to acquire personal or business loans in which he had an interest.

Chronology of Relevant Events.

3. 21st of September, 2012 - the notice party responded to the appellant's request for information by letter enclosing a tabulated schedule of records which the notice party considered to be relevant to the appellant's request. Each "record" appears to comprise an item of correspondence or a chain of email communication. The schedule disclosed that there were 19 such records and in the case of each record, a variety of columns was used to describe the record and its date, to specify the decision on whether to grant, part grant or refuse access and the reason for the decision, inter alia. In the case of 13 of the records, the notice party refused access and in the case of the other 6 records, access was granted in part subject to redactions.

4. 3rd of January, 2013 - the appellant sought an internal appeal of the decision.

5. 23rd of January, 2013 - the result of the internal appeal was to confirm the original decision subject to variation in the case of records 8 and 11 by removing some of the redactions.

6. 5th of February, 2013 - the appellant applied to the respondent for a review of the notice party's decision.

7. 28th of March, 2013 - the respondent wrote to the appellant indicating that she had agreed to carry out a review and that the appellant could make submissions to be received by the 19th of April, 2013. This letter was accompanied by an information leaflet entitled "Important Information for Requesters" which included advice about making submissions. This stated that although submissions are not strictly necessary, it is recommended that the requester bring any relevant matters to the attention of the investigator assigned by the respondent.

8. 15th of April, 2013 - the appellant wrote a letter making submissions in relation to the matter.

9. 19th of February, 2014 - Ms. Brenda Lynch, an officer of the respondent, telephoned Ms. Breda Keena, the appellant's representative, to advise Ms. Keena that she had been assigned the review. She told Ms. Keena that the notice party had revised its position in relation to some of the documents, and these revised documents had now been received and would be examined by her the following week. Ms. Keena appears to have referred to litigation between the appellant and the notice party and the fact that a discovery order had been made in that litigation.

10. 7th of March, 2014 - Ms. Lynch emailed the notice party enquiring as to whether an order for discovery had been made against the notice party and if so, were the 19 records relevant to the review encompassed by the order for discovery. Subsequently Ms. Lynch telephoned Ms. Keena about this issue and Ms. Keena indicated that she would check if a discovery order had been made against the notice party and if records had been provided on foot of such order. Ms. Lynch further advised Ms. Keena that a release of such records under FOI could be contempt of court if amounting to a possible breach of the implied undertaking under discovery.

11. 10th of March, 2014 - Ms. Keena emailed Mr. Hugh Millar of Crowley Millar who appears to have represented the appellant in his litigation against the notice party. In this email, Ms. Keena informed Mr. Millar that she had received a telephone call from Ms. Lynch asking them to consider whether they had been supplied with FOI documents through discovery and to consider the legal implications of this under FOI legislation. She conveyed to Mr. Millar Ms. Lynch's view that if the FOI documents had been supplied through discovery, they cannot be supplied through FOI and they needed to consider the implications carefully and revert to Ms. Lynch.

12. 13th of March, 2004 – 11.10. Mr. Millar emailed Ms. Keena in the following terms:

> "I am not aware of any legal implications of progressing the FOI appeal. I discussed this at a meeting with senior and junior counsel today and they share my views. None of us understand the point the Commissioner's office is making.
>
> I suggest you seek clarification by email of the legal issue and then forward the reply to me. Absent clarification there seems to me to be no reason why the appeal should not progress. If and when discovery is necessary in any future proceedings that will be addressed in the normal course of events."

13. 15.06 – the notice party emailed Ms. Lynch to advise her that a discovery order had been made against the notice party which captured a significant number of the FOI documents.

14. 15.58 – Ms. Keena forwarded Mr. Millar's email to Ms. Lynch asking for clarification.

15. 16.57 – Ms. Lynch emailed Ms. Keena explaining the potential difficulty that arose from discovery and quoted a previous decision of the respondent in relation to the operation of s. 22 (1) (b) of the FOI Act. This decision explains that it is a rule of law that a party obtaining the production of documents by discovery in an action gives an implicit undertaking to the court that he or she will not make any use of the documents or the information contained therein otherwise than for the purpose of the action. The decision goes on to refer to the judgment of the High Court in *EH v. The Information Commissioner* [2001] 2 I.R. 463 in which O'Neill J. stated that in such circumstances, disclosure must be refused. Ms. Lynch went on to explain her understanding that an order for discovery had been made against the notice party and most of the 19 records the subject of the FOI request were provided in response to the discovery order. Ms. Lynch said she was awaiting details of the records provided. Ms. Lynch concluded by saying that access to any records provided under discovery must be refused under FOI on the basis of s. 22 (1) (b).

16. 17.17 – Ms. Keena replied saying she would forward Ms. Lynch's email to the legal team.

17. 14th of March, 2014 – 9.28. The notice party emailed Ms. Lynch indicating which of the FOI documents had been the subject of the discovery order. According to this email, record 5 had not been discovered but records 6 to 16 inclusive had been discovered. (Records 5 to 16 are the subject matter of this appeal).

18. 14.48 – Ms. Lynch emailed Ms. Keena advising her that she had today been advised by the notice party that records 6 to 16 inclusive had been provided under the order for discovery and so the position set out in her email of the previous afternoon relates to these records. She said she would be examining the notice party's position on records 1 – 5.

19. 17.10 – Ms. Keena emailed Ms. Lynch saying that the appellant's lawyer had recommended that they proceed with the appeal and they would leave it to Ms. Lynch to make a decision on the remaining records.

20. 20th of March, 2014 - Ms. Lynch emailed the notice party saying she had reviewed the documents and since records 6 - 16 inclusive were provided pursuant to an order for discovery, they are exempt from release. With regard to record 5, she agreed that s. 27 (1) (b) applied to some of the information therein and asked for clarification of the basis on which the notice party claimed that it was exempt.

21. Following receipt of this email, it would appear that an official of the notice party telephoned Ms. Lynch to say that they would change their position and release revised records shortly.

22. 25th of March, 2014 - The notice party emailed Ms. Lynch enclosing revisions to, *inter alia,* record 5.

23. 28th of March, 2014 - Ms. Lynch emailed Ms. Keena setting out her view on all the records and stating that records 6 – 16 inclusive were provided to the appellant pursuant to an order for discovery and s. 22 (1) (b) applies to these records and they are exempt from release under FOI. In respect of record 5, Ms. Lynch said that she agreed that s. 27 (1) (b) applies to the amounts and numbers in the emails and to the word(s) after "client/buyer from". She also agreed that the name and contact details of the person who sent the email are exempt under the same subsection. She did not consider the public interest is better served by the release of this information. She concluded by saying that her views were not binding on the respondent and any response the appellant wished to make would be taken into account before the final decision was made. If there were any comments on her views, these were to be provided by the 11th of April, 2014. If Ms. Lynch had not heard from Ms. Keena by that date, she would assume that her views were accepted and she would recommend to the respondent to issue a decision accordingly.

24. 10th of April, 2014 - Ms. Keena responded to Ms. Lynch by email stating that they did not agree that the public interest is best served by not releasing the information under FOI. She explained this as follows:

> "We believe it is in the public interest to see how public servants and state agencies have interacted with the Barclays and facilitated their hostile takeover attempt of significant Irish owned assets and businesses. The Barclays could never have attempted such a plan under normal banking conditions considering that the loans were fully performing and generating a profit. Mr. McKillen continues to defend against the Barclay takeover attempt and the stark difference between the way state officials interacted with the Barclays and Mr. McKillen is considerable. Mr. McKillen contributes significantly to the Irish economy through employment and businesses that generate millions of euros each year in revenue. Why state officials decided to work with the Barclays and against Mr. McKillen when it would result in the loss of hundreds of millions of euros for IBRC had their plan succeeded, is of public interest and surely a very good example of why the Freedom of Information Act is so important.
>
> We await the formal decision from the Information Commissioner."

25. Thus, the appellant's sole argument in support of the release of the disputed records was that same was in the public interest. It was not disputed that records 6-16 inclusive were the subject of an order of discovery obtained by the appellant nor was it disputed that s. 27 (1) (b) applied to record 5. As is apparent from the foregoing emails, the appellant had the benefit of legal advice

throughout.

26. 16th of May, 2014 - Ms. Lynch emailed the notice party pointing out that s. 34 (12) (b) provides that a decision to refuse a request "shall be presumed not to have been justified unless the head concern shows to the satisfaction of the Commissioner that the decision was justified." Accordingly, in relation to, *inter alia*, record 5, Ms. Lynch pointed out that as s. 27 is a harm based exemption, the notice party would have to identify the harm considered likely to arise.

27. 12th of June, 2014 - the notice party provided a lengthy response setting out details of why it was considered that record 5, *inter alia*, was commercially sensitive insofar as the redactions were concerned, and further that the redacted information was given in confidence to the notice party.

28. 6th of November, 2014 - The appellant's solicitor Mr. Paul Tweed of Johnsons Solicitors, emailed the respondent to complain of the delay in the respondent making a decision. It should be noted that whereas Messrs. Johnsons represent the appellant in the within proceedings, the solicitors previously referred to, Messrs. Crowley Millar, represented the appellant in his litigation against the notice party. Apart from complaining of the delay, Mr. Tweed's email raised no new arguments or submissions.

29. 7th of November, 2014 - Ms. Lynch replied to Mr. Tweed's email saying a decision would be made within two weeks. She continued:

> "As you may be aware, 19 records were identified as relevant to the review, some of which were released or part released during the course of the review. The position in relation to records 6 -16 and 17 – 19 remains as set out in my email to Ms. Keena of the 28th of March last. Records 6 – 16 (inclusive) were provided to the appellant pursuant to an order for discovery. Section 22 (1) (b) applies to these records and they are exempt from release under FOI. Records 17 – 19 are PQ's answered in the Dáil and as this information is publicly available, s. 46 (2) of the Act applies to these.
>
> In relation to records 1 – 5, these were all released by the Department so only the redacted parts are the subject of the review. This office's position is that some additional information in some of these records should be released, and that other information is exempt under s. 27 or 28 of the FOI Act …"

30. Mr. Tweed did not respond further to this email before the respondent's decision was made on the 14th of November, 2014.

Record 5

31. Record 5 consists of three emails. The first was sent on the 17th of June, 2011, at 01.51 and the identity of the sender is redacted. It is addressed to an official of the notice party, Mr. John Moran, and the subject is "Maybourne Group – NAMA Debt Purchase Offer". The sender refers to an offer on behalf of a client/buyer from what is presumably a geographical region that is redacted. The sender states that because of the sensitivity and confidentiality of earlier discussions concerning the matter, the client/buyer's name was not being committed to the email. The sender offers to confirm the identity of the client/buyer via a follow up phone call. The offer then appears in the following terms:

> "Option 1:
>
> Buyer will assume debt of [redacted] and will then renegotiate the debt with the banks. The covenant of the buyer is such that we believe that the banks will be delighted to have their loans in safe hands. Buyer will pay [redacted] cash payment to the shareholders. This is for [redacted] of the company.
>
> Option 2:
>
> In the event that we have a shareholder who wants to remain as part of the group…then we will be happy to go ahead with this transaction as follows:
>
> Buyer will assume debt of [redacted] and then renegotiate the debt with the banks. The covenant of the buyer is such that the banks will be delighted to have their loans in safe hands.
>
> Buyer will pay [redacted] to the shareholders. This is for [redacted] of the company, leaving any die-hard shareholder with the remaining 15%."

32. The second email comprised in record 5 is dated the 19th of June, 2011, and is from Mr. Moran to another official of the notice party, Mr. Scott Rankin wherein Mr. Moran posed the following question:

> "Do you have any sight on the underlying property and how and where NAMA are with it?"

33. The third and final email in record 5 is dated 20th June, 2011, and was sent by Mr. Aidan Carrigan, another official of the notice party, apparently on behalf of Mr. Rankin, who was copied in the email, to Mr. Moran in the following terms:

> "The Maybourne Group loans are held by NAMA and involved some of the bigger developers (including McKillen but these loans are not caught up in the McKillen court proceedings). These loans are performing loans and in such circumstances the normal procedure would be for NAMA to refer any prospective investors to the debtors/shareholders of the group."

The Respondent's Decision.

34. The respondent's decision was given on the 14th of November, 2011. Insofar as relevant to these proceedings, the respondent decided that s. 22 (1) (b) applies to records 6-16 and s. 27 (1) (b) applies to the withheld information in record 5. In elaborating on the reasons for her decision, the respondent in dealing first with record 1, said:

> "The information in record 1 to which access was refused on the basis of s. 27 (1) (b) and s. 27 (1) (c) refers to the borrowing position of a commercial entity, the identity, the commercial interests, current and potential ownership stakes, levels of borrowing and financing arrangements for a proposed financial arrangement which was not completed. The Department stated that release of the information could prejudice the commercial entity's strategy, competitive position and commercial and legal standing in relation to the matters to which the letter refers. It further said that revealing information such as a party's level of indebtedness, willingness to pay, financing partners, among other factors could provide an insight into the party's level of interest in the proposed arrangement, as well as its strategic approach,

financial position and flexibility. It contended that release of the information could provide a significant insight into the commercial interest of the organisation and that this could influence the entity's position in future similar situations. It argued that it could also be the case that revealing a particular party's interest in an asset and the nature of a proposal in relation to that asset could have a material impact on either the asset value or the financial return to the interested party in both current and future situations. The Department said that access to such information has the potential to alter the competitive landscape and strengthen or weaken a strategic or negotiating position at a cost to the party whose information has been revealed. While certain negotiating processes related to the contents of these records have concluded, according to the Department, it is not unreasonable to expect that further negotiations may be ongoing or take place in the future and release of the information in the records could prejudice any such negotiations."

35. The contention that s. 27 (1) (b) and (c) applied to record 1 was rejected by the respondent, not on the basis that it was not confidential or commercially sensitive for the reasons put forward by the notice party, but rather because the record had already been publicly disclosed in the course of litigation in the High Court of England and Wales. Accordingly since the information was publicly available, the harm envisaged by s. 27 could not arise.

36. With regard to record 5, the respondent said:

> "This record comprises a series of external and internal emails regarding a potential interest in an asset. The Department claimed that s. 27 (1) (b) applies to the information redacted from this record, which includes details of amounts and percentages and would identify the source of the proposals. The issues which arise here are similar to those set out above in relation to records 1 and 2. However, unlike records 1 and 2, there is no information available to me to suggest that the identity of the sources or details of the proposal in this record are already in the public domain. I am satisfied that disclosure of the withheld information could reasonably be expected to result in material financial loss or gain or could prejudice the competitive position of that person in the conduct of his or her business and I find that s. 27 (1) (b) applies to the withheld information.

Having found that s. 27 (1) (b) applies, s. 27 (3) of the FOI Act requires me to consider whether, on balance, the public interest would be better served by granting than by refusing the request. The FOI Act itself recognises the public interest in ensuring the openness and accountability of public bodies as to how they conduct their business. 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. There is a public interest in the ability of private companies to submit commercially sensitive information to public bodies in the knowledge that it would be treated as such. There is also a public interest in supporting an environment that is conducive to the conduct of business.

The Department stated that it is accepted practice to maintain the confidentiality of both the identity of interested parties and the details of proposals. In so doing, consideration is given to both the particular circumstances at a point in time and potential future opportunities. The Department also identified the importance of Irish officials being able to communicate with the market the steps being taken towards economic recovery and that such communications include both broad communications and bilateral communications. It also mentioned the role of the Department in fostering investor interest in Ireland and the importance of connecting interested parties with the relevant state authorities. The Department put forward the view that the advantages in terms of openness and transparency are not sufficient to outweigh the possible harm that might arise from the release of the information. It also stated its opinion that the release of the redacted details would not meaningfully advance the public interest considerations of openness and transparency.

The applicant argued that there is a public interest in seeing how public servants and state agencies interacted with particular individuals and/or businesses. He also stated that he contributes significantly to the Irish economy through employment and business.

Having considered the submissions on this point from both the applicant and the Department, I am satisfied that the public interest is served to some extent by the release of the record in redacted form. In my view, this satisfied the public interest in openness and accountability on the part of the Department. I conclude that, on balance, the public interest would not be better served by the release of the redacted information to which s. 27 (1) (b) applies to the extent that overriding the commercial sensitivity of that information, as set out above, would be justified and I find accordingly."

37. Dealing with records 6-16, the respondent noted that the notice party had informed her that these records had been provided by it to the appellant pursuant to an order for discovery. The respondent noted that s. 22 (1) (b) is a mandatory exemption and referred to the dicta of O'Neill J. in *EH and EPH v. The Information Commissioner* [2001] 2 I.R. 463 to the effect that in such circumstances, disclosure must be refused.

The Legislation.

38. The relevant sections of the Freedom of Information Act 1997, as amended, which arise for consideration in these proceedings are as follows:

> "22 (1) A head shall refuse to grant a request under section 7 if the record concerned—…
>
> > (b) Is such that its disclosure would constitute contempt of court."

39. Section 27 provides as follows:

> "(1) Subject to subsection (2), a head shall refuse to grant a request under section 7 if the record concerned contains:…
>
> > b) 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, or…
>
> (3) 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."

The Arguments.
40. Mr. O'Callaghan S.C. on behalf of the appellant in dealing with the scope of a s. 42 appeal submitted that to apply pure judicial review grounds to errors arising from a mistake of fact was too narrow an approach. He referred to some English authorities on this point including R. (*Alconbury Ltd*) *v. Secretary of State for the Environment* [2003] 2 A.C. 295 and *E v. Secretary of State for the Home Department* [2004] QB 1044. He contended that there was Irish authority for the proposition that manifest error of fact is a ground to be considered in an appeal on a point of law and cited *State (Davidson) v. Farrell* [1960] I.R. 438 on *State (Lynch) v. Cooney* [1982] 1 I.R. 137. He distinguished *Ryanair v. Flynn* [2000] 3 I.R. 240 and said that the Supreme Court considered in *NUI Cork v. Aherne* [2005] 2 I.R. 57 that an error of fact could also amount to an error of law. *Mara (Inspector of Taxes) v. Hummingbird* [1982] 2 ILRM 421 is to the same effect.

41. In dealing with record 5, counsel contended that the notice party had no interest in engaging in negotiations regarding the sale of an asset when that was the function of an independent statutory agency and accordingly there was no proper public interest served by preserving the confidentiality of what were described as inappropriate approaches to Government regarding a potential disposal of an asset by an independent State agency. He said that the public interest required that parties lobbying Government inappropriately be identified, particularly where the notice party's own officials considered that the appropriate course was to refer the bid to the shareholders. Furthermore he said that the non disclosure of the identity of the party making the bid tacitly recognised the non confidential nature of the communication. Finally, it was said that the antiquity of the offer meant that the respondent had failed to properly assess its commercial sensitivity. The appellant in this respect relied on *Sheedy v. Information Commissioner* [2005] I.R. 272, *Minister for Agriculture v. Information Commissioner* [2000] 1 I.R. 309 and *Westwood Club v. The Information Commissioner* [2014] IEHC 375.

42. Dealing with records 6 – 16, counsel submitted that the evidence of Ms. Watson, the appellant's solicitor, showed that contrary to the information supplied by the notice party, records 6 – 9 inclusive had not been subject to any order for discovery in the proceedings between the appellant and the notice party, and such discovery order in fact related only to records 10 – 16 inclusive. Accordingly there was a manifest error made by the respondent with regard to the applicability of s. 22 (1) (b) to records 6 – 9.

43. With regard to records 10 – 16, counsel sought to distinguish EH on the basis that the FOI application here had pre-dated the making of the discovery order in the later proceedings. In further support of the distinction between the instant case and EH, counsel said that the rationale underlying the implicit undertaking is explained in cases such as *Ambiorix Ltd v. Minister for the Environment* (No. 1) [1992] 1 I.R. 277 and *Greencore Group Plc v. Murphy* [1995] 3 I.R. 520.

44. As an alternative to distinguishing EH, the appellant submitted that it was wrongly decided and should not be followed. In this respect, a number of authorities was referenced including *Irish Trust Bank v. Central Bank of Ireland* [1976] ILRM 50, in *Re Worldport* [2005] IEHC 189, *Kadri v. Governor of Wheatfield Prison* [2012] IESC 27 and *Wicklow County Council v. An Bord Pleanála* [2015] IEHC 229. It would be quite unjust in the circumstances of this case if the appellant were precluded from accessing documents which were readily available, for example, to the press and media and this would be entirely contrary to the spirit of the FOI legislation generally. It would be unjust that the appellant should be denied access to documents on the basis of a mistake made by a State entity.

45. Mr. Foley B.L. on behalf of the respondent submitted that the appellant's case was characterised by the, possibly unique, feature that none of the appellant's arguments made in the course of this appeal had ever been addressed to the respondent. He submitted that the court could not consider grounds of appeal based on either submissions or material not before the respondent. He relied on *Minister for Education v. Information Commissioner* [2009] 1 I.R. 588, *Southwestern Health Board v. Information Commissioner* [2005] 2 I.R. 547 and the *Governors of the Hospital for the Relief of Poor Lying in Women v. Information Commissioner* [2013] 1 I.R. 1 (the *Rotunda* case) in that respect.

46. He contended that the onus of proof was on the appellant to prove error of law on the part of the respondent and the decision would not be interfered with unless it was demonstrated to be irrational or unreasonable. In that regard he relied on *Comhaltas Ceoltóirí Éireann v. Dun Laoghaire* (Unreported, High Court, 14th of December, 1977) and *Killilea v. Information Commissioner* [2003] 2 I.R. 402 respectively.

47. With regard to record 5, counsel said that the redacted information related solely to the terms of the bid put forward by the interested party and thus could not be more commercially sensitive. Further, notwithstanding the fact that the appellant was at all material times aware that the notice party was claiming that s. 27 (1) (b) applied to record 5 insofar as the redactions were concerned, the appellant never argued to the contrary or suggested that the record was not in fact commercially sensitive. Here again, all the appellant's arguments on appeal with regard to s. 27 (1) (b) were new and not previously raised. Unless the respondent's conclusions were unsupported by any evidence, they could not be reviewed by the court on appeal. There were many authorities which demonstrated that the standard identified in *O'Keeffe v An Bord Pleanala* [1993] 1 I.R. 39 applied to an appeal on a point of law. The terms of record 5 itself made clear it was intended to be confidential. The arguments now made about the antiquity of the allegedly sensitive information had never previously been raised. In fact the only argument made by the appellant in relation to record 5 was with regard to the public interest issue under s. 27 (3).

48. Counsel submitted that the public interest was entirely satisfied by the release of the record in redacted format. Whereas the appellant argued that there was a public interest in exposing allegedly improper approaches to a Government Department in respect of matters solely within the province of an independent statutory agency, that interest was fully served by the release of the record with the redactions. If the appellant wished to make any complaint about the matter, he has everything he needs to do so from record 5 as it stands. That would not be added to in any way by disclosure of the bid details and thus the respondent was perfectly entitled to conclude that there was no public interest in the redacted parts of the record. The balance struck by the respondent between the competing interests at play in this regard was perfectly reasonable and the appellant would have to demonstrate that the respondent had got the balance so wrong as to fly in the face of reason and common sense.

49. With regard to records 6 – 16, the respondent contended that the appellant could not now complain of the fact that records 6 – 9 were not in fact the subject of a discovery order, even if that were the case. If a factual error arose in that regard, it was entirely the responsibility of the appellant. The appellant was at all times aware that the respondent was dealing with the matter on the basis of the uncontested information from the notice party that records 6 – 16 were covered by the discovery order. The appellant was in a position to determine if that information was incorrect by simply comparing the schedule of allegedly discovered documents with the documents in respect of which he obtained discovery from the notice party. The English authorities relied upon by the appellant on the issue of reviewable error of fact made clear that such review could only arise in circumstances where the appellant was not himself responsible for the error.

50. With regard to s. 22 (1) (b), counsel said that here again, the arguments now made by the appellant had never been raised before the respondent. This was despite the fact that the appellant and his lawyers were made aware by the respondent of the fact

that the respondent considered that s. 22 (1) (b) applied as explained in *EH* and when this was pointed out to the appellant, he never demurred from it. There was no basis for distinguishing *EH* from the facts of the present case, the relevant dicta of O'Neill J. not being case specific but intended to give general guidance to public bodies considering FOI requests. The appellant's complaint of unfairness in the fact that the documents could be obtained by the media but not by him was the price of obtaining discovery and if such unfairness were alleged to arise, the appellant could apply to the court to be released from his undertaking as in *Roussel v. Farchepro Ltd* [1999] 3 I.R. 567.

51. Any alleged unfairness could not be a basis for the court to decline to apply *EH*, which the court was obliged to follow unless satisfied that it was overwhelmingly wrong. This was clear from a number of authorities including *Kadri v. Governor of Wheatfield Prison* [2012] IESC 27, in *Re Worldport Ireland Ltd (In Liquidation)* [2005] IEHC 189 and *Wicklow County Council v. Kinsella* [2015] IEHC 229.

Discussion.

52. In *Deely v The Information Commissioner* [2001] 3 I.R. 439, in the course of his judgment, McKechnie J. said (at p. 452):

> "There is no doubt but that when a court is considering only a point of law, whether by way of a restricted appeal or via a case stated, the distinction in my view being irrelevant, it is, in accordance with established principles, confined as to its remit, in the manner following:-
>
> (a) It cannot set aside findings of primary fact unless there is no evidence to support such findings;
>
> (b) It ought not 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 Limited* [1982] 2 I.R.L.M. 421, *Henry Denny and Sons (Ireland) Limited -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)."

53. In *Killilea v. The Information Commissioner* [2003] 2 I.R. 402, which like *Deely* was a s. 42 appeal, Murphy J. said (at p. 426):

> "If a decision of the respondent to discontinue a review, taken in the exercise of the discretion vested in him by the Oireachtas by means of s. 34 (9) of the Act is, properly speaking, within the scope of s. 42 (1) the court ought only to upset the respondent's exercise of such discretion if the same were found to have fallen foul of the judicial review standard of reasonableness. In other words, the Court ought not to interfere with the respondent's decision to discontinue his review of the decision made by the Department in this case unless it considers his decision to fly in the face of fundamental reason or common sense, or to be so irrational or unreasonable that no reasonable Commissioner could have come to it."

54. In *Sheedy v. Information Commissioner* [2005] 2 I.R. 272, Kearns J. (as he then was) in the course of delivering the majority judgment of the Supreme Court expressed a similar view (at p. 299):

> "Nor do I believe that any exhaustive analysis conducted by reference to detailed evidence was necessary before the respondent could decide to apply the public interest provision of s. 21(2) of the Act of 1997 to direct release of the reports. Once there was some evidence before him as to the circumstances in which these reports are compiled, as undoubtedly was the case here, the well established principles of O'Keeffe v. An Bord Pleanála [1993] 1 I.R. 39 makes it clear that his decision is not to be interfered with. This assessment, which involved a balancing exercise between various competing interests, was one uniquely within his particular remit."

55. In *Gannon v. The Information Commissioner* [2006] 1 I.R. 270, another s. 42 appeal, Quirke J. also applied the criteria set out in both *Deely* and *O'Keeffe*. More recently, in *Westwood Club v. Information Commissioner* [2014] IEHC 375, Cross J. followed *Deely* in determining that the onus of proof in a s. 42 appeal rests on the appellant who had to satisfy the test in *O'Keeffe*.

56. It seems to me therefore that at this juncture, it is beyond argument that the standard to be met by an appellant in a s. 42 appeal is virtually indistinguishable from that applied by the court in judicial review matters. Accordingly, a decision of the respondent will not be interfered with unless it is either based on no evidence or flies in the face of fundamental reason and common sense. It is thus immaterial if the court would have arrived at a different decision based on the same evidence. Inferences will not be set aside unless they are such that no reasonable decision maker could have drawn them.

57. The scope of a s. 42 appeal is further limited by reference to the materials that were before the Commissioner and the submissions made to her. In the *Rotunda* case, the appellant sought in the High Court, to canvass a point of law not raised before the respondent. On this issue, Fennelly J. in the Supreme Court said (at p. 29):

> "[90] I do not accept that the new point should have been considered either because many other cases raised the same issue or because it was a matter of importance. The Act is clear: an appeal to the High Court lies only in respect of a point of law. It must be a point of law involved in the decision under appeal. Thus, I do not think that the High Court should have entertained the point." (My emphasis).

58. In *Minister for Education v. Information Commissioner* [2009] 1 I.R. 588, McGovern J. observed (at p. 591):

> "[6] The Commissioner complains that the appellant made no argument to her, based on s. 19 (1) (c), but confined his argument to s. 19 (1) (a). This, indeed, appears to be the case. Accordingly, the Commissioner argues that the appellant should not be permitted to make submissions in his appeal against her decision based on s. 19 (1) (c).
>
> [7] The court should be slow to admit a new argument not advanced before the Commissioner. In the area of criminal law, the Court of Criminal Appeal has repeatedly stated that it will be reluctant to entertain arguments on appeal which were

not made at the original trial. In *Murray v. Trustees of Irish Airlines* [2007] IEHC 27, [2007] 2 ILRM 196, Kelly J. refused to allow additional evidence where the parties seeking to adduce the evidence made submissions to the Pensions Ombudsman on two occasions and never sought to introduce that evidence which was available. Although the case concerns evidence and not legal arguments or submissions, it is of some general relevance to the Commissioner's argument. In *South Western Area Health Board .v. Information Commissioner* [2005] IEHC 177, [2005] 2 I.R. 547, the issue of whether or not the High Court could entertain a point on appeal that was not raised before the Commissioner during the course of review was the subject of comment. Smyth J. said at paras. 17 and 18 at p. 553:-

> '… it would be wholly unsatisfactory that a decision on appeal should be made without the matter having first been raised before the Commissioner.
>
> In my judgment the Commissioner was correct in his submission that it was undesirable that as a matter of policy that a party in the position of the appellant would not advance all relevant arguments him in the first instance.' "

59. I find myself in agreement with these views. A s. 42 appeal is not a *de novo* hearing where the appellant is at large to advance new arguments or evidence not put before the respondent. It is an appeal on a point of law which was considered and dealt with by the respondent. It is not here suggested that there are new arguments or evidence not available to the appellant at the time the respondent decided the matter or that the appellant was disadvantaged in any way, for example, by the lack of legal advice. As Smyth J. remarked, it would be entirely unsatisfactory if appeals on pure points of law could be run on the basis of matters never raised before, let alone considered and decided by, the respondent. That would transform the appeal into something quite different from that envisaged by the Act.

60. With regard to record 5, the appellant claims that the s. 27 (1) (b) exemption did not apply because the respondent had failed to properly assess the commercial sensitivity of this record. As can be seen from the above chronology, despite the fact that the appellant was aware at the latest from the 28th of March, 2014, that the respondent considered that s. 27 (1) (b) applied, and made further submissions on the 10th of April, 2014, he never suggested any disagreement with that proposition. It seems to me therefore that the appellant cannot now advance this argument. In any event, there is no basis for suggesting that the respondent's assessment that the redacted information was commercially sensitive is based on no evidence or flies in the face of fundamental reason and common sense. It certainly could not be said that no reasonable decision maker could have arrived at these conclusions.

61. The sole argument that was raised by the appellant in relation to record 5 before the respondent related to s. 27 (3) and the contention that it was in the public interest that the redacted information be disclosed. The appellant's core complaint here is that there could be no public interest in preserving the confidentiality of improper approaches to a Government Department to influence the decision of an independent statutory agency regarding the disposal of an asset. This argument however applies, if it applies at all, to record 5 in its entirety and the appellant's complaint in the email of the 10th of April, 2014, was that he was being treated unfairly by the State in its dealings with him as against its dealings with the Barclay brothers. This of course assumes that record 5 relates to the Barclay brothers but there is no evidence of that.

62. The appellant was making the case that there was a public interest in exposing the fact that the notice party appeared to favour the Barclay brothers over him and this would give rise to a potential loss to the Exchequer whereas the appellant was a significant contributor to the Irish economy. Thus the appellant was saying that the public interest lay in exposing what he claimed was unfair dealing by the third party which could be harmful to the State's interest. In that context, any improper conduct by the third party complained of, if there was such, is disclosed by the release of record 5. The redacted information adds nothing to the alleged impropriety of the conduct in issue. It is difficult to understand therefore the basis on which the appellant alleges that there is a public interest in this redacted information, as distinct from his own private interest in accessing it.

63. In the *Rotunda* case, a person sought the disclosure of information relating to his natural mother in circumstances where the hospital said that it had been given in confidence. The respondent rejected that contention and considered that there was a public interest in "persons generally having the fullest possible information on their origins". This was found by the Supreme Court to amount to an error of law. In the course of her judgment, Macken J. said (at p. 76):

> "It seems not at all clear to me that there is anything in the Act which supports or suggests that there is, in law, an overriding public interest of the type invoked by the respondent. On the contrary, such an approach in considering only a so called public interest in a requester having information relating to the circumstances of birth, suggests an interpretation of the Act coming close to establishing a right of access to exempt information, which can only be denied by some exceptional circumstance. That is not a correct application of s. 26 (3) of the Act [*similar in its terms to s. 27 (3)*] and ignores the provisions of s. 6 (7) of the Act as they apply to part III. Rather, as mentioned above, in circumstances where a tension exists between a right of access under s. 6 (1) rights of access and other rights recognised as being important, and therefore exempt from disclosure under part III of the Act, the Act mandates a refusal of information. The right generating the exemption under s. 26 (1) (a) is a private interest right vesting primarily in the appellant, on the facts of this case, and the information sought must be refused, provided the appellant is in a position to meet the tests set out there. In such circumstances, any "public interest" would, in my view, require to be a true public interest recognised by means of a well known and established policy, adopted by the Oireachtas, or by law. In the present case, the respondent made a statement of alleged policy as constituting the "public interest". There is no evidence that the Oireachtas has adopted such a policy."

64. In the course of his judgment in the same case, Fennelly J. said (at p. 46):

> "I do not believe that s. 26(3) applies in a case where the reason for seeking access to the record is exclusively private. The respondent's jurisdiction pursuant to s. 26 (3) is to decide whether provision of access for a particular record is in the public interest. Whether a person in the position of the requesters in this case should be granted such access concerns their private interests."

65. Section 27 (1) (b) is a harm based exemption. This is demonstrated in the fact that the respondent upheld disclosure of records 1 and 2 on the basis that although they might be viewed as containing commercially sensitive information, such information was already in the public domain by the virtue of the UK litigation and thus no harm could arise from its disclosure. If there is a public interest in disclosure of the redacted information, and in my view it remains very much to be seen whether such a public interest recognised by means of a well known established policy adopted by the Oireachtas or by law has been established in this case, the respondent was required to balance that interest against the potential harm that might result from the disclosure of the information. There is nothing to my mind that suggests that the respondent in carrying out this balancing exercise did so other than correctly, and less still that

the balance struck could be said to fly in the face of reason and common sense. It is not the function of the court to reassess that balance unless manifestly arrived at in error, and no such error has been demonstrated here.

66. With regard to records 6 – 9, the appellant says that the failure to direct disclosure of these records on the basis that they were the subject of an order for discovery is a manifest error of fact amounting to an error of law. Not only was this argument never addressed to the respondent, but contrary to what is now alleged, if it was an error of fact at all, it was an error for which the appellant himself is directly responsible. As the chronology above demonstrates, on the 7th of March, 2014, Ms. Keena on behalf of the appellant advised the respondent that she would check if a discovery order had been made and if records had been provided on foot of such order.

67. Whatever about the various teams of lawyer involved in the different pieces of litigation, the appellant himself was in the position to ascertain if records 6 – 16 had been discovered. On the 14th of March, 2014, the respondent notified the appellant that the respondent had been advised by notice party that records 6 – 16 had been provided pursuant to an order for discovery. The appellant was again told on the 28th March, 2014, and the 7th November, 2014, that the respondent was proceeding on the basis that records 6-16 were the subject of a discovery order. At no time did the appellant suggest that this information was incorrect and in my view, the respondent was perfectly entitled to assume that it was correct and that the appellant was so satisfied. For the appellant to now suggest that this was a manifest error on the part of the respondent, when the only parties in a position to verify that were the appellant and the notice party, seems to me to be unfounded.

68. Indeed, this is confirmed by one of the principle authorities relied upon by the appellant in this respect, *Criminal Injuries Compensation Tribunal* [1999] 2 A.C. 330 where Carnwath L.J. in setting out the criteria to ground an appeal on error of material fact said:

> "First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers)_ must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the tribunal's reasoning." (My emphasis).

69. Here, the appellant was responsible for the mistake of which complaint is now made and therefore cannot rely on this as a ground of appeal.

70. In EH, O'Neill J. considered the effect of s. 22 (1) (b) as follows (at pages 484 -486):

> "The issue which arises on this appeal in relation to the undertaking given by the applicant to obtain discovery is whether or not the Commissioner was right in concluding as a matter of law that the disclosure of the documents sought would be a breach of the undertaking given and hence a contempt of court.
>
> Similarly an issue arises as to whether or not the disclosure of the information sought by the applicant under the Act of 1997 would be a breach of the order of Barr J. and thus also a contempt of court.
>
> As is clear from the decision of the Commissioner, he based his decision in regard to the undertaking on the basis that it was an express undertaking given to the court for the purposes of protecting the third parties. He formed the view that the disclosure of the documents would breach that express undertaking and because of that he arrived at the conclusion that a contempt of court would arise. For the guidance of public bodies he additionally expressed the view, that on the basis that the usual implied undertaking given in relation to discovered documents was for the benefit only of the party giving the discovery, that in his view a contempt of court in this situation would not arise.
>
> In my view the purpose of s. 22 (1) (b) is to prevent the Act of 1997 operating in such a way as to permit interference in the administration of justice, a function which is reserved by the Constitution solely to the courts established by or under the Constitution. If it were the case that one could under the provisions of the Act of 1997 obtain documents disclosure of which was prohibited by the ruling of a court or by a undertaking given to a court, I have no doubt that this would amount to a gross and constitutionally impermissible interference in the administration of justice…
>
> I have come to the conclusion that notwithstanding the entirely laudable and separate philosophy of disclosure which underpins the Act of 1997, that the Act construed in a manner consistent with the Constitution could not be used, so that access to documents under the Act would have the result of robbing an order of a court or an undertaking given to a court of the force and effect which the court in question intended these to have.
>
> In my view s. 22 (1) (b) is there to ensure that this does not happen, and it must operate accordingly…
>
> The Commissioner was, in my view wrong, in his conclusion that the usual undertaking given in relation to discovery would not give rise to a contempt of court. Breach of the implied undertaking given in respect of discovered documents is a contempt of court. Notwithstanding that the undertaking benefits solely the party making discovery, the undertaking is given to the court and like all undertakings given to a court, breach of it is a contempt of the court. Indeed this is abundantly clear from *Home Office v. Harman* [1983] 1 A.C. 280, a case which was cited to the court by counsel for the applicant and relied upon by counsel.
>
> True, in the case of the usual implied undertaking the party for whose benefit it is given i.e. the party making disclosure can waive the undertaking but in the absence of such waiver as in the present case the undertaking continues as an undertaking to the court with all of the attending consequences of a breach of an undertaking to the court…
>
> I have come to the conclusion that where a head of a public body or the Commissioner is aware that there is in existence an undertaking to a court be it expressed or implied, that disclosure must be refused on the basis of s. 22(1)(b)."

71. The respondent's investigator made it clear in communications with the appellant throughout, as did the respondent herself in the decision under appeal, that she considered that the above referred to dicta of O'Neill J. in *EH* applied to records 6 – 16 and accordingly disclosure must be refused. The respondent's position in this regard was conveyed not only to the appellant but also the appellant's lawyers. Yet at no time was this position challenged or disputed by the appellant. Despite that fact, the appellant argued before the court that *EH* was to be distinguished on the facts and if found not to be distinguishable, ought not to be followed on the basis that it was wrongly decided.

72. The instant case was said to be distinguishable on the basis that the request here was made prior to the making of the order for discovery, unlike in *EH*. To my mind however that makes no material difference. The views expressed by O'Neill J. could not be clearer. Disclosure of documents the subject of an order for discovery, whenever made, is a contempt of court. Section 22 (1) (b) is mandatory and in such circumstances, disclosure must be refused.

73. The appellant's alternative submission that *EH* ought not to be followed is not based upon any conflicting authority, but rather on the proposition that to follow *EH* would work an injustice to the appellant in circumstances where the records are freely available to anyone other than the appellant because of his undertaking. It is submitted that there may be many reasons why a party may have an independent entitlement to a document and the mere fact that it is covered by a discovery order could not operate as a matter of principle to frustrate that entitlement. This is said to be contrary to the intent and purpose of the Act.

74. The circumstances in which a court may decline to follow the decision of a court of equal jurisdiction have been considered on a number of occasions. In *Worldport*, Clarke J. said (at p. 7):

> "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 at 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, as was noted by Kearns J. (in *The Industrial Services Company* [2001] 2 I.R. 118, s.218 application), 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. In the absence of a definitive ruling from the Supreme Court on this matter I do not, therefore, consider that it is appropriate for me to consider again the issue so recently decided by Kearns J. and I intend, therefore, that I should follow the ratio in *Industrial Services* and decline to take the view, as urged by counsel for the Bank, that that case was wrongly decided."

75. The same judge, this time speaking in the Supreme Court, more recently reiterated his view in *Kadri v. Governor of Wheatfield Prison* [2012] IESC 27 when he said (at p. 2) :

"2. The Binding Nature of Consistent High Court Case Law

> 2.1 The jurisprudence of the High Court regarding the proper approach of a judge of that Court when faced with a previous decision of another judge of that Court is consistent. The authorities go back to the decision of Parke J. in *Irish Trust Bank v. Central Bank of Ireland* [1976-7] I.L.R.M. 50. Similar views have been expressed in my own judgment in *In Re Worldport Ireland Limited (In Liquidation)* [2005] IEHC 189, by Kearns P. in *Brady v. D.P.P.* [2010] IEHC 231, and most recently by Cross J. in *B.N.J.L. v. Minister for Justice, Equality & Law Reform* [2012] IEHC 74 where *Worldport* was expressly followed.
>
> 2.2 It seems to me that that jurisprudence correctly states the proper approach of a High Court judge in such circumstances. A court should not lightly depart from a previous decision of the same court unless there are strong reasons, in accordance with that jurisprudence, for so doing.
>
> 2.3 In his judgment Fennelly J. referred to the series of judgments of the High Court on the point in issue in this case. The trial judge considered himself bound by that line of authority. In the light of the case law to which I have earlier referred it seems to me that the trial judge was correct in that approach unless he viewed that line of authority as obviously wrong or having been arrived at without proper consideration of relevant case law or the like. In my view the trial judge was correct in the approach he took."

76. Accordingly, I am satisfied that I am bound to follow the judgment of O'Neill J. in *EH* unless it contains a clear error or fails to take into account any relevant authority which ought to have been considered. None of that appears to me to arise here. Rather the appellant simply seeks to argue that, on principle, it was wrongly decided. That does not in my view amount to a sufficient basis to justify me in departing from the well settled principles of judicial comity and *stare decisis* and I decline to do so in this instance.

Conclusion.

77. In the light of the foregoing, I am satisfied that no error of law has been demonstrated by the appellant in the respondent's approach to record 5 which I uphold. In relation to the remaining records 6 – 16, the respondent was bound to apply the decision of this court in EH and I am satisfied did so correctly.

78. For these reasons therefore, I must dismiss this appeal.