



SUPREME COURT



Record No: S:AP:IE:2019:000101

Respondent's Notice

Part I

1. Title of the Proceedings:

THE MINISTER FOR COMMUNICATIONS, ENERGY AND NATURAL RESOURCES

APPELLANT

v

THE INFORMATION COMMISSIONER

RESPONDENT

and

GAVIN SHERIDAN AND e-NASC EIREANN TOERANTA (TRADING AS "enet")

NOTICE PARTIES

2. Name of Respondent: The Minister for Communications, Energy and Natural Resources

3. Application to extend time: Yes No

4. Do you oppose the applicant's application to extend time:
n/a

5. Do you oppose the applicant's application for leave to appeal:

Yes (in part) No

6. Matter of general public importance:

1. The application for leave to appeal as regards the operation of the presumption as set out in s. 22(12)(b) of the Act and the standard of review is not opposed by the Minister for Communications, Energy and Natural Resources (“the Minister.”) (The Minister notes the assertion of potential coverage of the presumption was not deposed to and that the matters set out may overbear the situation.)
2. Insofar as the Applicant seeks leave on the ground that the Minister did not make submissions to it on the operation of the s. 22(12)(b), this does not reach the required threshold. The applicability and interpretation of s. 22(12)(b) is a matter of law for the Applicant to correctly apply, notwithstanding that it was not specifically addressed. The process before the Applicant is not designed to necessitate lawyers. No new issues of fact were raised. Section 22(12)(b) was applied within the decision by the Applicant which was necessarily thereby considered by it within the decision.
3. Insofar as the Applicant seeks leave on the ground that the Court of Appeal erred in impugning the s.36(3) findings of the Court of Appeal the required threshold required for leave is not reached. No specific reasons are cited as to why the issues raised are of general public importance given that they arise in the context of the impugned Decision.

Word count – 226

7. Interests of Justice:

1. The application made for leave to appeal as regards the operation of the presumption as set out in s. 22(12)(b) of the Act and the standard of review is not opposed by the Minister.
2. To assist the Court, the Minister notes the recent decision of the Court in *Minister for Health v Information Commissioner* [2019] IESC 40, where the impugned *obiter dicta* of Macken J. in *Rotunda Hospital v Information Commissioner* [2013] 1 I.R. 1 was cited with approval at paragraph 68.
3. The Minister repeats the Plea at paragraph 6(2) above as regards the application for leave against on the ground that the Minister did not make submissions to it on the operation of the s. 22(12)(b). No reasons as to why this issue ought to be addressed by this Court in the interests of justice are set out.

4. In accordance with the decision of this Court in *Price Waterhouse Cooper (A Firm) v Quinn Insurance Ltd (Under Administration)* [2017] IESC 73 the interest of justice basis for leave to appeal is best viewed as a residual category. None of the bases as set out therein as examples are applicable to the reasons set out by the Applicant: this is not a cross appeal, it is not necessary for resolution separately
5. The issue did not arise for the first time in the Court of Appeal, but had been considered in the High Court. No particular issue is identified by the Applicant such that the interests of justice necessitate leave being granted.

Word count: 256

8. Exceptional Circumstances Article 34.5.4.:

N/A

9. Respondent's grounds for opposing an appeal if leave to appeal is granted:

N/A

10. Cross Application for Leave:

The Minister does not appeal the Orders granted by the Court of Appeal, but reserves the right to supplement or add to the reasons given in the judgement of the Court of Appeal. In so far as the appeal is not disposed of on other grounds, the Minister will rely if leave be granted to appeal on the following grounds:-

- (1) The Court of Appeal correctly concluded that section 35(2) of the Act was unclear and ambiguous, but thereafter erred in fact and law in its interpretation of Section 35(2) and its application to the current appeal. The Operation of s.35 raises a matter of general public importance because it bears directly upon all contracts for the provision of services between a private entity and a public body and there is a need for certainty to as the manner in which confidentiality clauses are permitted therein.
- (2) The Court of Appeal concluded that section 35(2) of the Act was unclear and ambiguous, and determined the issue in favour of the Applicant herein "with considerable hesitation" [§41.] This means that a definitive interpretation is in the interests of justice, in particular where the interpretation bears on all contracts between a service provider and a public body.

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12. **Priority Hearing:**

Not Opposed.

13. **Reference to CJEU:**

N/A

Appendix
Grounds of Opposition (and Cross Appeal)

1. Title of the Proceedings: [As in the Court of first instance]

THE MINISTER FOR COMMUNICATIONS, ENERGY AND NATURAL
RESOURCES

APPELLANT

v

THE INFORMATION COMMISSIONER

RESPONDENT

and

GAVIN SHERIDAN AND e-NASC EIREANN TOERANTA (TRADING AS
“enet”)

NOTICE PARTIES

2. Respondent’s grounds for opposing an appeal if leave to appeal is granted:

Please list concisely in numbered paragraphs, the Respondent’s ground(s) of opposition to the grounds of appeal set out in the Appellant’s Notice of Appeal.

If leave be granted:-

1. Each of the grounds of appeal in the application for leave to appeal, listed 1 to 10 inclusive, is denied in full.
2. The Respondent will rely on each provision of the Freedom of Information Act 2014 and the 2014 Act as a whole and relevant caselaw when opposing the appeal.

Without prejudice to the generality of the foregoing:-

3. The Court of Appeal correctly interpreted and applied s. 22(12)(b) and s.36 of the Freedom of Information Act 2014.
4. The presumption set out in s. 22(12)(b) has no application to an exempt record nor to an assessment of the public interest under s.36(3) of the Act.

5. The impugned *obiter dicta* of Macken J. in *Rotunda Hospital v Information Commissioner* [2013] 1 I.R. 1 has been further upheld by this Court and was a well-considered statement.
6. The Appeal to the High Court under the 2014 Act concerns matters of law and permits an appeal of such matters that were operative within the decision and thus considered and applied by the Appellant. Without prejudice, that the High Court incorrectly determined those matters was a lawful and independent basis for consideration of those issues by the Court of Appeal.
7. Regarding s.35, in so far as the appeal is not disposed of on other grounds, the Respondent pleads: the Court of Appeal correctly concluded that s.35(2) was unclear and ambiguous, but thereafter erred in fact and law in its interpretation of s.35(2) and its application to the impugned decision.
8. The Court of Appeal's criticism of the principles of review as applied by the High Court was well founded.
9. The Appellant erred in its application of "exceptional circumstances" and erred in the application of a test of "totally undermine" and the decision of the Court of Appeal in those respects was correct.

3. Additional grounds on which the decision should be affirmed:

See above.

4. Cross Appeal

1. The Court of Appeal erred in determining that section 35(2) applied to the impugned decision of the Appellant. It erred in its interpretation of that subsection.
2. The Court of Appeal erred in favouring the meaning attributed to s.35(2) by the Applicant in circumstances where such a reading means there can never be a duty of confidence in such contracts. If the Oireachtas had so intended, it would have clearly so legislated.

5. Order(s) sought

Please set out in numbered paragraphs the order(s) sought if the Cross Appeal were to be successful.

1. An Order that Applicant erred in applying the provisions of s.35(2) to the contract as between the Respondent and the second Notice Party.
2. The Respondent reserves its position on any Costs Order that might arise (noting that in the Court of Appeal despite success the Respondent agreed to no Order as to costs).