AN CHÚIRT UACHTARACH
THE SUPREME COURT

[S:AP:IE:2019:000100]

Clarke C.J.
O'Donnell J.
MacMenamin J.
O'Malley J.
Baker J.

In the Matter of the Freedom of Information Act 2014 And

In the Matter of an Appeal Pursuant to Section 24 of the Aforesaid Act And Orders 130 and 84C of the Rules of the Superior Courts

Between/

University College Cork

Appellant/Respondent

And

The Information Commissioner

Respondent/Appellant

And

Raidió Teilifís Éireann

Notice Party

JUDGMENT of Ms Justice Baker delivered the 25th day of September, 2020

1. This is the leapfrog appeal of the Information Commissioner ("the Commissioner") against the order of the High Court in a statutory appeal under the Freedom of Information Act 2014, as amended (hereinafter "the Act"). This Court granted leave to appeal in its determination of 31 July 2019, *University College Cork v. Information Commissioner* [2019] IESCDET 180.

2. Simons J., for the reasons in his reserved judgment of 3 April 2019, reversed the decision of the Commissioner who had previously directed disclosure of four records: *University College Cork v. Information Commissioner* [2019] IEHC 195. He held that the Commissioner had erred in the interpretation and application of the "competitive prejudice" threshold for the purpose of the application of the commercial sensitivity exemption set out in s. 36(1)(b) of the Act, had failed to consider the public interest override in s. 36(3), and had erred in the application of the presumption set out in s. 22(12)(b) of the Act.

3. As noted in the determination granting leave to appeal, Simons J. followed the decision of the Court of Appeal in *Minister for Communications, Energy and Natural Resources v. Information Commissioner* [2019] IECA 68, (hereinafter "*Enet*") in respect of which leave to appeal was also granted by the Court: *Minister for Communications, Energy and Natural Resources v. Information Commissioner* [2019] IESCDET 179, the judgment in which is delivered today. The appeals were heard together.

4. The main issue of law to be decided in this appeal is the correct interpretation and application of s. 36(1)(b) of the Act. The judgment in *Minister for Communications, Energy and Natural Resources v. Information Commissioner* contains an analysis of the overall system created by the Act, of the presumption in s. 22(12) and of the public interest override in s.35(3) and 36(3).

Background facts

5. In November 2016, University College Cork ("UCC") agreed a €100 million loan agreement with EIB to support a €241 million development plan involving a range of projects including, *inter alia*, student accommodation, a €37 million investment in a new dental school, and funding of a campus development costing €27 million.

6. On 6 January 2017 Raidió Teilifís Éireann, the Irish national broadcaster notice party ("RTÉ"), through John Cunningham, a journalist in its investigative unit, made a freedom of information request ("the FOI request") to the Freedom of Information Officer of UCC. The request sought access

to various records of "financial management within UCC" regarding the loan provided to UCC by EIB.

7. UCC identified the records falling within the scope of the request as the finance contract between UCC and EIB of 11 July 2016 and internal UCC records including memoranda of Finance Committee meetings regarding the loan application, the cashflow, the loan agreement, matching funding, and withdrawals in 2016 from the loan account.

8. UCC maintained that the information requested was commercially sensitive and fell within the exemption in s. 36(1)(b) of the Act, and refused to grant the FOI request on the grounds that the disclosure of such records:

> " […] would prejudice the competitive position of private third parties in the conduct of their business, would result in a material financial loss to those organisations and would decrease the likelihood of meaningful engagement by private firms willing to partner with the University. This would discourage such agencies/companies from working with UCC in the future which would, in turn, have a detrimental effect on the University's ability to fulfil its objects and to combine with external private bodies for that purpose."

9. In its response, UCC considered the public interest in s. 36(3) of the Act:

> "[…] the public interest arguments in favour of release (the general right of access under the FOI legislation to records held by UCC and the transparency of the process) are outweighed by the arguments against release (namely, that the granting of access would result in the company involved being commercially disadvantaged by the disclosure). The University's ability to contract with external bodies is in many instances critical to fulfilling institution objectives in the public interest. Release of information relating to third parties which would be deemed commercially sensitive to those parties would restrict the University's ability to attract such parties to engage with or partner with the University in the future."

10. RTÉ sought an internal review of that decision pursuant to s. 21(2) of the Act, and by its decision dated 25 April 2017, UCC's Freedom of Information Internal Review Board recommended that the disclosure be refused.

11. The President of UCC accepted the recommendation and refused disclosure for the reason that it:

> "would decrease the likelihood of meaningful engagement by private firms willing to partner with the University. This in turn would have a negative impact on the University's ability to fulfil its institutional objectives and attract external bodies for that purpose", and that
>
> "the public interest would be better served by the exemption of the records in question."

12. RTÉ sought a review by the Commissioner pursuant to s. 22(2) of the Act. The review was conducted by a Senior Investigator in the Office of the Information Commissioner, Ms Elizabeth Dolan, who was authorised by the Commissioner pursuant to s. 9 of Schedule 2 to the Act to issue the decision. For ease, I will refer to her as "the Commissioner".

13. The Commissioner thereafter invited UCC to make submissions under s. 22(8) and set out the legal basis on which she proposed to consider the review: that under s. 22(12)(b) of the Act the burden was on UCC to justify its decision to refuse access to the records, that general assertions or blanket claims were not sufficient to meet that burden. Additionally, that full and succinct reasoning should be provided to show how, or why, the particular information met the criteria of the relevant exemption provisions, and, where applicable, how the public interest had been addressed. The letter addressed a series of questions to UCC.

14. UCC engaged with EIB and it expressed its agreement with the position taken by UCC:

> "Given that the financial contract between the EIB and UCC is commercially sensitive information, we agree with your position and we would prefer not to consent to the release of this financial agreement. Further, the EIB is a supranational bank and our transparency policy is on our website. […] In particular, I refer to Article 5.5.: […] Access to

information/documents shall also be refused where disclosure would undermine the protection of: […] commercial interests of a natural or legal person" (email of 28 August 2017).

15. In its submissions to the Commissioner on the 7 September 2017, UCC relied both on the reasons stated in the decision at first instance and in the internal review. It is necessary to set out UCC's submissions in some detail because it is contended that the trial judge erred in considering new points not before the Commissioner, and that he also erred in his findings that the Commissioner's decision did not take into account all relevant factors.

The arguments of UCC to resist disclosure

16. UCC contended first that no records in the form of a formal loan contract existed, and that whilst there was a finance agreement between it and EIB to provide a facility for a range of capital projects, the key financial terms would be determined only at the point of drawdown. UCC submitted that it was not in a position to release reports or memos of meetings of the Finance Committee of UCC regarding the terms, purpose, governance or arrangements that exist for monies drawn down as part of the loan. It submitted in respect of the request for records of drawdowns in 2016 that "[t]he University has drawn €15m of the total €100m in November 2016. The drawdown was requested and approved in line with […] EIB's disbursement process" and that "further amounts from the facility will be drawn." In respect of the request for the details of non-capital spending, UCC submitted that:

"EIB is funding UCC's campus Development programme agreed by Governing Body. It comprises Investment in fixed assets which include: a new Student Hub, Dental School, Cork Science & innovation Park, Health facilities, outdoor Sport and a refurbishment programme".

17. In response to the specific questions posed by the Commissioner on the possibility that the disclosure requested might adversely affect the interests of EIB, UCC made the arguments of EIB that:

"EIB is not a public organisation, but as they describe, a supranational bank which operates in a commercial environment and regularly competes with other providers of finance including commercial banks and providers of placement funding. Ultimately, they remain a bank albeit

owned by the member states, and charge commercial competitive terms. UCC's relationship with the EIB could be seriously damaged by divulging such commercial third party details. Disclosure of the information would compromise the University's ability to attract the EIB and other such institutions to engage with the University in the future. This, in our view, is contrary to the public interest."

18. In response to the request to identify the relevant information (financial, commercial, *etc*.) contained in the records and how disclosure could reasonably be expected to cause material financial loss or gain to EIB, UCC stated as follows:

"Disclosure of UCC's cost of capital will compromise UCC in the future were it to enter into lease agreements of its assets, Public Private Partnerships or when setting fees. Such disclosure would compromise UCC in it[s] negotiations with other financing providers and also disclose commercially sensitive information on UCC's cost of capital for a range of projects which do not received any public funding."

19. In response to the request to explain how the competitive position of EIB could be prejudiced by disclosure UCC answered:

"Disclosure of EIB's margin applied to the UCC facility, would compromise EIB's competitive position when competing for future loans with other potential customers. It would not be in the public interest of UCC or its students were such future investment compromised by the disclosure requested."

20. Finally, in response to the request for details of the public interest factors in favour of and against release, UCC said:

"All Universities operate in a competitive environment for research funding, international students and for certain HEA [Higher Education Authority] funding. Whilst UCC always endeavours to be transparent in all activities, given that it is competing with private Higher Education providers in Ireland e.g. Hibernia for On Line Students and with international Universities – many of which are private, for overseas students, such disclosure as requested

would compromise UCC's competitive position, none of which is in the public interest and would be commercially damaging to UCC. Whilst the University considered the transparency of its dealings with the EIB as a public interest factor in favour of release, this was greatly outweighed by the public interest factors against release as outlined above."

21. Following correspondence between them, EIB and UCC agreed to propose the disclosure of a redacted finance contract, deleting what they considered to be commercially sensitive information. The information proposed to be redacted was names of individuals as well as financial information which, if disclosed was argued to be likely to undermine the protection of privacy and the integrity of individuals, in particular, in accordance with EU legislation (Article 5.4.b of the EIB Transparency Policy) and commercial interests of a natural or legal person (Article 5.5 of the EIB Transparency Policy).

22. The proposed redacted version was furnished to the Commissioner on 27th November 2017 by EIB.

23. It is fair to say that the proposed solution was a material change in the position of UCC to the request.

The decision of the Commissioner

24. In her decision issued on 13th December 2017, the Commissioner identified the records at issue as:

a) the finance contract between UCC and EIB, which also covered that part of the FOI request which sought the terms of the loan contract that exists between UCC and EIB ("record 1");

b) the report to the Finance Committee in October 2015 concerning EIB, including tables of financial details and a presentation ("record 2");

c) the February 2016 spreadsheet setting out UCC's income and expenditure, balance sheet and cashflow ("record 3");

d) the report to the Finance Committee in May 2016 regarding the loan agreement ("record 4").

25. The Commissioner found that UCC had made only "general submissions" that the disclosure of its cost of capital would compromise it, and had not pointed to any "specific information" contained in the records that could reasonably be expected to give rise to financial harm. The conclusion therefore was that UCC had failed to show that the exemption in s. 36(1)(b) had been engaged. While the Commissioner determined the review on the basis that UCC had not shown to her satisfaction that either limb of s. 36(1)(b) applied, and therefore, did not come to consider the approach of UCC to the public interest override, she took as her starting point the presumption in s. 22(12)(b). The relevant provisions of the sub-section reads as follows:

"In a review under this section—

(a) […]

(b) a decision to refuse to grant an FOI request shall be presumed not to have been justified unless the head concerned shows to the satisfaction of the Commissioner that the decision was justified."

26. She said that the essence of the test in s. 36(1)(b) of the Act "is not the nature of the information but the nature of the harm which might be occasioned by its release" as follows:

"The harm test in the first part of subsection (1)(b) is that disclosure of the information could reasonably be expected to result in material financial loss or gain. I take the view that the test to be applied in this regard is whether the decision maker's expectation is reasonable. The harm test in the second part of subsection (l)(b) is whether disclosure of the information "could prejudice the competitive position" of the person concerned. The standard of proof necessary to meet this test is considerably lower than the standard to meet the test of 'could reasonably be expected to' in the first part of subsection 36(l)(b)."

27. There is no argument that this approach is incorrect, but it is inexplicably at odds with a later finding in the decision that the mere possibility of some adverse effect is not sufficient. Her conclusions are not based on that approach, and I make this comment only for completeness.

28. The Commissioner noted that UCC had submitted that disclosure of the records would prejudice the competitive position of private third parties in the conduct of their business (presumably EIB), and that this in turn would result in a material financial loss to these organisations**,** and decrease the likelihood of future meaningful engagement by private firms willing to partner with UCC. This would have a consequential detrimental effect on the University's ability to fulfil its objectives and would negatively impact "UCC and Ireland" in any future negotiations for financial support from EIB. Furthermore, EIB had also stated that the finance contract (record 1) was "commercially sensitive information", that it would prefer not to consent to release. UCC also argued that release of such commercially sensitive information would compromise the EIB in its negotiations with other universities in Ireland and across Europe, and that disclosure of ElB's margin on the loan would compromise EIB's competitive position in future loans with other potential customers.

29. The requester in response argued that EIB did not make commercial loans in the strict sense and was not in competition with retail banks, and that as records 2 to 4 inclusive were internal UCC documents the arguments pertaining to record 1 did not therefore apply to them.

30. The Commissioner's view was that the EIB is "very different from a commercial bank", and does not appear to offer standard interest rates to all customers as its rates are dependent on the merits of the project, its risks, the collateral and the loan conditions. She observed that EIB described itself on its website as "a non-profit, policy driven public bank… [which] is financially autonomous". She also noted that EIB had not argued that its competitive position could be harmed by release, had made no objection to the release of the finance contract in redacted form removing the details of interest rates and conditions and other uncontroversial information for reasons of privacy. EIB made no comment with regard to the other three records.

31. Importantly, she noted that EIB did not state whether it was its own or UCC's interests which it expected to be harmed by release, neither did it point to the harm it envisaged by disclosure of the information regarding interest rates and conditions .

32. The substance of the Commissioner's decision can be found at pp. 5 and 6:

> "UCC stated in its submission that the specific interest rates to be applied to each drawdown of funds and whether the rates were to be fixed or floating were not set until the relevant drawdown dates. Therefore, I am not satisfied that release of *the overall terms of the contract* would reveal the specific terms applied to each tranche of funds drawn down by UCC. Furthermore, while the EIB was given the opportunity to support UCC's case *by explaining why the information concerned should be exempt and identifying the harm which could be occasioned by its release, it has not done so.* In my view, there is nothing before me to demonstrate *how the EIB's competitive position would be prejudiced or how it could incur a material loss by release of the information concerned.* […] Much of the information in Records 2-4 does not relate to the EIB in anything but the *broadest terms*. Records 2 and 3 contain details of UCC's holdings, loans, projected income and expenditure and cashflow and Record 4 is a summary of the loan agreement. I note that much of Record 4's content *appears to have been put in the public domain by UCC when its plans were announced.* […] In this case, while I accept that UCC has outlined a potential harm arising from the release generally of records of the type at issue here, it has not explained how such harm might arise having regards to the contents of the specific records at issue. […]." (Emphasis added)

33. The Commissioner found that UCC had not justified or explained its reasons for withholding the bulk of the information in the records, and as can be noted from the highlighted parts of her decision, she was not satisfied with what she regarded as the general and broad arguments made by UCC, and concluded that it had not shown, by reference to the information in the records, an arguable link between the information contained therein and potential harm from release to itself or third parties.

34. She made express reference to the presumption in s.22(12)(b) that presumes not to be justified a refusal to grant disclosure of records, and that this means the onus was on UCC to satisfy her that the decision to refuse access was justified.

35. The Commissioner varied the decision of UCC accordingly, and directed the release of the finance contract (record 1) with the redaction of EIB staff names and signatures and references to third party companies (not UCC or EIB) and individuals, and the release of records 2 to 4 in full. She held that UCC had not "met the burden of proof to show it was justified in refusing access to the majority of record 1 under section 36(1)(b)."

36. With regards to records 2 to 4 inclusive, she said:

> "In this case, while I accept that UCC has outlined a potential harm arising from the release generally of records of the type at issue, it has not explained how such harm might arise having regard to the contents of the specific records at issue. As such, it seems to me that UCC has not shown that section 36(1)(b) applies to Records 2-4."

37. The Commissioner then went on to consider whether the public interest override in s. 36(3) required the release of the information pertaining to third party companies:

> "Section 36(1) itself reflects the public interest in protecting commercially sensitive information. I recognise that there is a legitimate public interest in entities being able to conduct commercial transactions with public bodies without fear of suffering commercially as a result. On the other hand, the FOI Act recognises, both in its long title and in its individual provisions that there is a significant public interest in public administration being open and accountable."

38. She held that the public interest did not justify the release of that information and therefore permitted redaction of that information. She made no observations regarding the public interest override in respect of records 2 to 4, presumably because she had already directed their release.

39. UCC brought a statutory appeal against the decision of the Information Commissioner by notice of motion of 15th January 2018 pursuant to s. 24 of the Act. The redacted version of the finance contract was exhibited in the grounding affidavit.

The decision of the High Court

40. The trial judge found a number of errors in the decision of the Commissioner:

1) that she took as "starting point" a presumption requiring UCC to justify the refusal of access, at para. 3;
2) that she misinterpreted and/or misapplied the threshold for the "competitive prejudice" exemption under s. 36(1)(b) of the Act, at para. 88;
3) that she had not considered the separate public interest balancing test set out in s. 36(3) of the Act;
4) he found error in the approach of the Commissioner who had focused almost exclusively on the potential of harm or adverse effect to EIB and failed to have regard to the likely impact on UCC.

The trial judge held that such failures constituted material errors of law, such that the decision of the Commissioner had to be set aside. and he remitted the matter to the Commissioner to reconsider.

41. The trial judge found himself bound by the decision of the Court of Appeal in *Enet*, delivered after the main hearing had concluded and on which he invited further submissions. The approach of the Court of Appeal to the presumption favouring release was held to be in error in the judgment of this Court delivered today, and the trial judge was in turn led into error by following that decision. But his judgment raises some other questions which deserve separate comment and which did not arise in *Enet*.

The grounds of appeal

42. This Court granted leave to appeal on grounds which can be conveniently summarised and grouped as follows:

a) the trial judge erred in his interpretation of the presumption set out in s. 22(12)(b) of the Act (Ground 2), and in the light of the findings of the Court of Appeal in *Enet*;
b) the trial judge erred in the standard of review failing to accord any proper deference or margin of appreciation to the Commissioner (Grounds 4 and 10);

c) the trial judge erred in allowing UCC to rely on points which it had not advanced before the Commissioner (Grounds 3 and 8);

d) the trial judge erred in his interpretation of the commercial sensitivity test in s. 36(l)(b) of the Act (Grounds 1, 4, 6, and 9);

e) the trial judge erred in his findings that the Commissioner failed to take into account relevant considerations in his decision (Grounds 3, 5, 7); and

f) the trial judge erred in overturning the Commissioner's conclusions in respect of the disclosure of records 1, 2, 3, and 4 (Ground 10);

43. UCC argues that the trial judge was correct in the approach he took to the decision of the Commissioner, and traverses the grounds of appeal.

The presumption issue

44. In his interpretation of the presumption in s. 22(12)(b) of the Act the trial judge erred by reason of following, as he was compelled to, the decision of the Court of Appeal in *Enet*. Simons J. applied the *dicta* of Macken J. in *Rotunda Hospital v. Information Commissioner* [2011] IESC 26, [2013] 1 IR 1, as applied by the Court of Appeal in *Minister for Communications v. Information Commissioner*, at para. 58 of his judgment.

> "The essence of the Rotunda Hospital case, now confirmed by the Court of Appeal in ENET, is that where a record comes within the terms of one of the statutory exemptions, then no additional justification for non-disclosure is required to be demonstrated. (This is subject to the separate statutory consideration of the public interest)."

45. In the light of the conclusions in *Enet*, I am satisfied that the Commissioner was correct that the onus was on UCC to establish that the records were commercially sensitive under one of the limbs of s. 36(1)(b) of the Act and, if so, that the public interest is not better served by the release of the records under s. 36(3).

46. I therefore do not consider that the Commissioner fell into error in the approach she took to the records by requiring UCC to justify refusal to disclose by addressing the contents of the records and explaining by reasoned argument that they met one or other of the tests for exemption. .

The standard of review

47. The Commissioner argued that the findings of the trial judge that redacted provisions are "self-evidently commercially sensitive" amounted to a substitution by **t**he High Court of its own assessment for that of the Commissioner, where she should have enjoyed instead some deference and a margin of discretion.

48. UCC argued that the judgment did not substitute the judge's own assessment of the commercial sensitivity, but rather identified what was absent from the decision and the adjudicative process that led to it. Counsel emphatically said that there was no room for deference to the Commissioner in this case as the flaws in the Commissioner's decision, identified by the trial judge, concern statutory interpretation and the failure to take into account relevant considerations.

49. The correct approach to an appeal on a point of law under the Act was dealt with in some detail in *Enet* and for the reasons there set out I am satisfied that the correct standard of review in a statutory appeal under s. 24 of the Act was applied by Simons J. where, at para. 38 of his judgment, he held that:

> "it would be 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."

50. However, I do not think that the trial judge in fact adopted a test that certain information in the disputed records was "self-evidently" exempt, and what he actually said was that they seemed to be self-evidently commercially sensitive, a wholly different and, to my mind, uncontroversial assessment on the facts. He did not thereby decide that this information was exempt from disclosure but was commenting on the nature of the material.

51. I have considered this proposition contained in para 167 of *Enet* and repeat it here for convenience:

> "[…] I do not consider that he posited a test in those terms, but will here observe that in the light of the provisions of s.36(1)(b) which information in a record may be readily and controversially commercially sensitive, other information may be obviously not sensitive, or may already be in the public domain, and still other information may be less easily treated as sensitive, no information can be said to be self-evidently exempt as treating the contents of record as exempt can only be done if disclosure is capable of giving rise to one of the two limbs of the subsection: wither there is a reasonable expectation of material financial loss or gain, or disclosure could prejudice the competitive position of the person to whom the information relates."

52. This is not to say that the trial judge took the correct approach to the records and I accept the argument of the Commissioner that the judge fell into error in himself attempting to produce an acceptable version of record 1 that might meet the statutory test. Deference to the Commissioner in her field of expertise requires that the Court not itself engage with the content of a disputed record in this way, and an appeal on a point of law does not permit the Court to come to a conclusion on the appropriate redactions to contested records.

Were new arguments raised on appeal?

53. That an appeal on a point of law must be from a matter that arises from the decision is well established: for example, see *McKillen v Information Commissioner* [2016] IEHC 27, at para. 59, and is accepted by both parties to the appeal.

54. The Commissioner argued that the reliance by UCC in the High Court on the EIB's redactions was a new argument in the High Court which UCC was not entitled to make on a statutory appeal, and that the trial judge, who relied on a comparison between the redacted and unredacted versions of the finance contract to "pinpoint the information in dispute", at para. 8 of the judgment, was, in turn, wrong. Counsel for the Commissioner conceded that EIB did made a redacted version of the finance

contract available to the Commissioner prior to her decision but argued that such version was never expressly endorsed by UCC, although EIB informed the Commissioner that the decision to propose a redacted version had been made after consultation with UCC. The redacted version relied on in the pleadings was a somewhat, although perhaps not materially, different one from the redacted version by EIB, and counsel for the Commissioner conceded the differences between the two redacted versions are "limited".

55. The redacted version was properly before the Commissioner and, in turn, the High Court judge and this Court, even though it was not formally brought to the Commissioner by UCC. The trial judge so held and his finding of fact that the redacted version was submitted to the Commissioner with the implicit endorsement of UCC was not appealed. That approach is consistent with the inquisitorial nature of the process before the Commissioner who is not to be treated as an adjudicator in an *inter partes* process.

56. A different conclusion must be reached in respect of UCC's "change in position" on disclosure, to use the words of Simons J., at para. 41 and again at para 43 of the judgment, in respect of records 2 to 4 inclusive and the proposition put on affidavit that redacted versions of these records could be disclosed, and which were exhibited in the affidavit at 181. This was not the position adopted by UCC before the Commissioner.

57. The approach of the court in a statutory appeal under s. 24 is to examine the extent to which the Commissioner has correctly assessed the facts and correctly interpreted and applied the law. There was before her a decision of the head of an FOI body in internal review that refused the disclosure of certain records on the grounds of a claimed exemption under the provisions of the Act. She had the proposed redactions to the finance contract and was obliged to address them as a proposal to meet the requirement to justify refusal to disclose.

58. UCC did change its position at litigation stage with regard to the other three records and that is impermissible by reason of the fact that the appeal is confined to a point already before the Commissioner and also for reasons of fairness. It also bears comment that the requester was not

furnished with UCC's proposed redacted versions before they were exhibited in the High Court, and the statutory process required that its observations be invited and considered.

59. The Commissioner, in my view, did not fall into error in considering the redacted version of record 1, but her process can be said to be flawed procedurally on account of the failure to inform the requester of the proposed variation in regard to the other records. The issue of whether judicial review would have been the appropriate remedy in relation to fairness arguments was considered in passing by the trial judge at paras. 81 *et seq.* of his judgment but it is not an issue in the appeal.

60. The trial judge did not fall into error in regard to record 1, but he should not have permitted UCC to approach the appeal regarding the other records in the way he did.

The test for "commercially sensitive"

61. The test to be applied when the decision maker is considering whether a record is an "exempt record" because it contains commercially sensitive information is the central issue in the appeal.

62. Section 36(1) of the Act provides as follows:

> "Subject to subsection (2), a head shall refuse to grant an FOI request if the record concerned contains—
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> (a) trade secrets of a person other than the requester concerned,
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> (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
>
> (c) information whose disclosure could prejudice the conduct or outcome of contractual or other negotiations of the person to whom the information relates."

63. UCC argued that the trial judge was correct in his interpretation of the subsection, in that the two limbs are disjunctive, and that the wording of the section is clear and requires a consideration of the likely harm to the person to whom the information in question relates.

64. The Commissioner contended for a twofold construction of the test: first, the decision-maker has to be satisfied that the record at issue contains information of a particular character and second, that disclosure of that information must be capable of giving rise to one of the two types of effects referenced in the first or second "limb" of s. 36(1)(b), *i.e.* reasonable expectation of material loss/gain, or possible prejudice to one's competitive position in business/occupation. Counsel argued that the second part, *i.e.* the "harm" or "effects" element, is something which could never properly be "self-evident" on a mere reading of a record. Rather, it is something which a public body must, of necessity, explain, and that s. 22(12)(b) offers further support for that approach.

65. She therefore argued that the trial judge was wrong to say that information such as the appraisal fee, the non-utilisation fee, and the rate of interest was "self-evidently, commercially sensitive". She relied on *Westwood v. Information Commissioner* [2015] 1 IR 489 as authority for the proposition that there must be a specific explanation of why the particular documents could prejudice the financial position of a person. I have already said above that I do not consider that Simons J. adopted an approach that treated some records as "self-evidently" exempt.

66. I am satisfied that the correct test as to whether a record is qualified "exempt" as commercially sensitive is that outlined by Simons J. in his judgment at para. 64, which is not dissimilar to that test as outlined by the Commissioner:

> "there are two limbs to the test under section 36(1)(b). The first limb refers to information whose disclosure could reasonably be expected to result in a material financial loss or gain to the person to whom the information relates. The second limb refers to information whose disclosure could prejudice the competitive position of the person to whom the information relates in his or her profession or business or otherwise in his or her occupation."

67. The wording of the section is clear. I agree with Simons J. that the two limbs are disjunctive and that it is sufficient to exempt information from disclosure if it fulfils either one of the two, as he stated at para. 70 of his judgment.

68. The trial judge was also correct when he stated, at para. 65, that the threshold in each limb is different and he correctly relied upon *Westwood Club v. Information Commissioner* [2014] IEHC 375, [2015] 1 IR 489 where Cross J. held that the standard of proof in relation to the second limb is "very low".

69. The trial judge was also correct when at para. 68 he held that the Commissioner failed to apply the test correctly:

> "Notwithstanding the fact that the decision under appeal correctly identifies at the outset that the standard of proof necessary to meet the second limb under section 36(1)(b) is considerably lower, the Information Commissioner fails to advert to this distinction in the operative part of the decision".

70. For the reasons more fully explored in *Enet*, I am not satisfied that it is sufficient for an FOI body to identify the records and merely assert that they could prejudice the competitive position of a person. An FOI body must also have a reasonable basis for that position. A bare assertion will never do**,** albeit it may be relatively easy to meet the low test in the second limb.

71. I am satisfied that the Commissioner had before her submissions as to how the information *could* prejudice the position of EIB. A key consideration in this respect was made by the trial judge in relation to the interest rate, at para. 75, with which I agree:

> "The key point, of course, is that the margin for the floating/variable interest rate is referenced in the finance contract. Moreover, if UCC chose to drawdown all the funds on a floating/variable basis-rather than on a fixed basis-this would mean that the actual interest rate would be disclosed. Alternatively, if UCC did not opt for the variable rate, then the interest rate would become known at the time of the drawdown."

72. The Commissioner considered that UCC had not either itself or through the submissions made by EIB shown how it might be harmed by the release of record 1. The extract quoted at paragraph 32 *supra* shows that she was not satisfied that UCC had explained what interests might be harmed or what harm was envisaged. By "harm" in that context I take her to mean "material financial loss or

gain", the test in the first limb of the subsection, and although she went on later to address the possible prejudice to the competitive position of third parties she did not then address whether UCC or EIB had met the second limb.

73. With regard to the records to 2 to 4 inclusive, she expressly made reference to the language of the first limb but considered that UCC's justifying explanation was no more than a "general assertion" of compromise, and that UCC's submission had not explained how harm might arise by reference to the specific records at issue. I take her reference to "potential harm" to be a reference to the second limb. The Commissioner did make reference to the two limbs of the test in section 36(1)(b), but she did in my view fail to assess whether the proffered release of the redacted documents might have sufficed. I return to that point later in this judgment.

74. The trial judge noted that, whilst the bulk of UCC's submissions had focused on the potential harm to EIB and that its position was largely derivative of the position of EIB, the position evolved over the course of the process before the Commissioner and he considered that the Commissioner had not taken this properly into account in her assessment of the overall argument. EIB was not concerned at all with records 2 to 4 inclusive, and UCC had not made on the Commissioner's view a focussed, reasoned and clear justification with regard to those records. UCC was resisting disclosure of all four records, it did not make an argument regarding variable interest rates before the Commissioner, and in fact had asserted that the interest rates would only be ascertainable at the time of drawdown. That argument was not made in the High Court, and for the reasons that later appear, UCC's change of position in the High Court was impermissible.

75. However, the primary reason the trial judge rejected the approach of the Commissioner was not these findings but because he considered that she had fallen into error in failing to have regard to relevant considerations and in the approach she took to the presumption contained in section 22 (12). His approach to that presumption was in error for the reasons already explained, and I turn now to examine the finding that the Commissioner failed to have regard to all relevant considerations.

The relevant considerations issue

76. The trial judge considered that the Commissioner was required to consider the objection based on commercial sensitivity from the perspective of each body, UCC and EIB, and that she was wrong in focusing almost exclusively on whether there would be any harm to EIB.

77. The parties agree that a failure on the part of the Commissioner to take into account relevant considerations is a ground of review on an appeal to the High Court, as was set out in broad terms *P&F Sharpe Ltd v. Dublin City and County Manager* [1989] IR 701, at pp. 718 and 718. Counsel for UCC also relied on the judgment of the Supreme Court in *Kelly v. Information Commissioner* [2017] IESC 64 [2017] 3 IR 381 as authority for the proposition that the Commissioner in particular is required to determine the review on the entirety of the information before him or her, and that a failure to have regard to relevant considerations was a valid ground of appeal.

78. The trial judge, at para. 8, considered that:

> "The existence of this redacted version of the finance contract makes it possible to identify with precision the information which it is sought to exempt from disclosure. More specifically, the court has had the opportunity to carry out a "compare and contrast" exercise between the redacted version and the full version of the finance contract (which has been made available to the court but not, obviously, to the notice party). This exercise has allowed this court to pinpoint the information in dispute. Crucially, the Information Commissioner – in reaching the impugned decision – also had the benefit of both the redacted and non-redacted version of the finance contract. Notwithstanding this, the Information Commissioner failed to have proper regard to this material in reaching the impugned decision".

79. Counsel for the Commissioner argued that the trial judge was wrong in his findings that the Commissioner failed to have regard to the redacted version of the finance contract. I disagree. The Commissioner ought to have had regard to the fact that UCC and EIB consulted before EIB submitted its considerations, because she has an inquisitorial function and should have taken all material into account in assessing whether the threshold to justify exemption had been met.

80. The Commissioner argued that the approach taken by the trial judge means that the Commissioner must make a "jigsaw" of the information. The Commissioner does perform an inquisitorial role but cannot be expected to recreate documents or make a "jigsaw" from various pieces of documents and thereby produce a hybrid document. While the presumption does not lead to an inevitable decision to disclose if an FOI body fails to justify refusal to the satisfaction of the Commissioner (see *Enet* at paras. 133 *et seq*.), and while the Commissioner has an investigative and active role in the review and may annul or vary a decision, the Act enables and requires the Commissioner to make a decision on the records furnished, assess the commercial sensitivity of their contents, and direct the redaction of some or all of that information. It could not require that the Commissioner rewrite the records, but her approach seems to me not to have sufficiently engaged with the proposed redactions and to consider whether to exercise her independent statutory power to herself direct the redaction of parts of a record.

81. For that reason I am not satisfied that her approach was correct as she did have a statutory power and corresponding duty to herself assess the records.

Records 2-4

82. Ground of appeal number 10 is that the trial judge erred in overturning the Commissioner's conclusions to require disclosure of records 2-4, internal UCC documents that relate to the (then) proposed finance contract with the EIB, containing detail of existing borrowings and repayment levels, the commercial details on EIB borrowings, together with details of planned future forecast financial details for the term of the EIB borrowing, inclusive of all existing debt and planned future matching EIB debt, all income including non-exchequer, expenditure, balance sheet and cash flow. All of this information is forecast up to the year 2038.

83. Because of the errors in the High Court judgment regarding the statutory presumption I would allow that ground of appeal although the EIB had no involvement in the submissions on these records, and the problem I have identified is that the requester was not informed of the change of position of UCC before the hearing in the High Court. It is not possible in these circumstances for this Court to

assess what might have happened had the concessions made in the High Court been made before the Commissioner.

Summary and conclusion

84. For the reasons set out above in this judgment, I would allow the appeal and having regard to the conclusions in *Enet*, the prudent approach is to remit the matter to the Commissioner for further decision in the light of this judgment .