THE HIGH COURT

[2024] IEHC 17

[Record No. 2022/279MCA]

IN THE MATTER OF AN APPEAL PURSUANT TO ARTICLE 13 OF THE EUROPEAN COMMUNITIES (ACCESS TO INFORMATION ON THE ENVIRONMENT) REGULATIONS 2007 - 2018

BETWEEN

ELECTRICITY SUPPLY BOARD

APPELLANT

-and-

COMMISSIONER FOR ENVIRONMENTAL INFORMATION

RESPONDENT

-and-

RIGHT TO KNOW GROUP CLG AND GWEN MALONE STENOGRAPHY SERVICES UNLIMITED COMPANY

NOTICE PARTIES

Judgment of Mr. Justice Mark Heslin delivered on 17th January 2024

Introduction

1. The present proceedings involve an appeal on a point of law against the decision of the Commissioner for Environmental Information ("the Commissioner") made on 29 August 2022 ("the decision").

2. In the originating motion of 28 October 2022 the Appellant (otherwise "ESB") seeks the following relief:

> *"(1) An order setting aside the decision of the Commissioner for Environmental Information made under Article 12(5) of the European Communities (Access to Information on the Environment) Regulations 2007-2018 under reference OCE-94897-N8Y8Y3 and issued on 29 August 2022.*
>
> *(2) A declaration that the Transcript of the hearing held in the proceedings entitled Sylvester and Philomena Murphy v Electricity Supply Board before the Property Arbitrator, Paul Good, on 19 and 20 June 2017 is not environmental information and within the meaning of Article 3(1) of the European Communities (Access to Information on the Environment) Regulations 2007 - 2018.*
>
> *(3) A declaration that the Commissioner for Environmental Information erred in law and acted ultra vires in determining that the Electricity Supply Board was not entitled to rely on Article 9(1)(d) of the European Communities (Access to*

Information on the Environment) Regulations 2007-2018 to decline to release the Transcript of the hearing held in the proceedings against Sylvester and Philomena Murphy v Electricity Supply Board before the Property Arbitrator, Paul Good, on 19 and 20 June 2017."

3. As I did at the conclusion of the hearing, I want to repeat my thanks to Ms. Barrington SC (for the Appellant) and to Mr. Browne SC (for the respondent). Both made oral submissions with great skill, supplementing detailed written submissions, all of which I have carefully considered. There was no participation by the notice parties, although I have considered the written submissions furnished on their behalf.

4. The position of the respondent can be summarised as follows:

(1) The Commissioner was entitled to conclude that the information requested by Right to Know is "environmental information" within the meaning of the AIE Regulations;

(2) The Commissioner was entitled to reach this conclusion, notwithstanding the Commissioner's previous decision of 13 December 2018 in case CEI/18/0003, which followed a request by a Mr. McKenna ("the Commissioner's first decision" or "the first decision"); and

(3) The Commissioner was correct to conclude that ESB could not rely on Art. 9(1)(d) of the AIE Regulations.

<u>The 2003 Directive</u>

5. To understand the Regulations referred to in the Appellant's motion it is necessary to turn to the antecedent Directive being *"Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC"* (the "2003 Directive" or the "AIE Directive"). The recitals to the 2003 Directive speak to its aim and begin as follows:

"Whereas:

(1) Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment …"

6. Recital (5) refers to "the Aarhus Convention" (being the UN/ECE Convention on access to information, public participation in decision-making and access to justice in environmental matters) to which the European Community is a signatory. Recital (5) states that provisions of Community law must be consistent with the Aarhus Convention.

7. Turning to the Articles themselves, these begin as follows:

" *Article 1*

Objectives

The objectives of this Directive are:

(a) to guarantee the right of access to environmental information held by or for public authorities and to set out the basic terms and conditions of, and practical arrangements for, its exercise; and

(b) to ensure that, as a matter of course, environmental information is progressively made available and disseminated to the public in order to achieve the widest possible systematic availability and dissemination to the public of environmental information. To this end, the use, in particular, of computer telecommunications and/or electronic technology, where available, shall be promoted.

Article 2

Definitions

For the purposes of this Directive:

1.'Environmental information' shall mean any information in written, visual, aural, electronic or any other material form <u>on</u>:

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) *<u>measures (including administrative measures) such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements</u> …*" (emphasis added)

In the manner which will presently become clear, the significance of the word *"on"* is at the heart of the principal issue in these proceedings.

<u>The 1927 Act</u>

8. It is not in dispute that Sylvester and Philomena Murphy ("the Murphys") made a claim for compensation following the exercise, by the ESB, of powers pursuant to s. 53(3) of the Electricity (Supply) Act, 1927, as amended ("the 1927 Act"). Briefly put, s. 53 entitles the ESB to serve notice of its intention to enter a landowner's land in order to lay an electricity line and, thereafter, to do so with or without the landowner's consent, subject to the landowner's entitlement to paid compensation. S. 53 (1) of the 1927 Act sets out the ESB's statutory power to place electric lines over land, in the following terms:

"The Board and also any authorised undertaker may subject to the provisions of this section and of regulations made by the Board under this Act place any electric line above or below ground across any land not being a street, road, railway, or tramway." (emphasis added)

9. Section 53(5) goes on to provide the following:

"*If the owner or occupier of such land or building fails within the 7 days aforesaid to give his consent in accordance with the foregoing subsection, the Board or the authorised undertaker with the consent of the Board but not otherwise may place such line across such land or attach such fixture to such building in the position and manner stated in the said notice, subject to the entitlement of such owner or occupier to be paid compensation in respect of the exercise by the Board or authorised undertaker of the powers conferred by this subsection and of the powers conferred by subsection (9) of this section, such compensation to be assessed in default of agreement under the provisions of the acquisition of land (Assessment of Compensation) Act 1919 the Board for this purpose being deemed to be a public authority.*" (emphasis added).

1919 Act

10. It is also common case that compensation payable to landowners is assessed, in the absence of agreement, pursuant to the provisions of the Acquisition of Land (Assessment of Compensation) Act, 1919 ("the 1919 Act") which, very obviously, pre-dates the 1927 Act. In short, the 1919 Act provided a mechanism for the determination of compensation with respect to compulsory purchases by the State. Whilst the placing of an electric line across land is done via a 'wayleave' rather than a compulsory purchase, the architecture of the 1919 Act is employed to determine compensation pursuant to exercise by the Applicant of its s. 53 powers. Section 1(1) of the 1919 Act provides the following:

> *"Where by or under any statute (whether passed before or after the passing of this Act) land is authorised to be acquired compulsorily by any Government Department or any local public authority, any question of disputed compensation, and, where any part of the land to be acquired is subject to a lease which comprises lands not required, any question as to the apportionment of the rent payable under the lease, shall be referred to and determined by the arbitration of a property arbitrator nominated for the purposes of such reference and determination by the Reference Committee in accordance with the rules made by the reference committee under this section"* (emphasis added)

The Arbitrator

11. There is no dispute about the Murphys' entitlement to make a compensation claim (*per* the 1927 Act). Mr. Paul Good ("the Arbitrator") was the "property arbitrator" (*per* the 1919 Act) who heard the Murphys' claim. The hearing before him was confined to the determination of the quantum of compensation payable by the ESB to the Murphys. The hearing before the Arbitrator was conducted in public. The Murphys were represented by senior and junior counsel. At the risk of stating the obvious, the Transcript which is at the 'heart' of these

proceedings, does not contain the Arbitrator's determination. Rather, it captures the arguments made by the parties to the dispute.

AIE Regulations

12. It is common case that the definition of 'environmental information' which appears in the 2003 Directive is replicated, *verbatim*, in national regulations which transpose the said Directive, namely, the "*European Communities (Access to Information on the Environment) Regulations 2007 to 2018*" ("the AIE Regulations"). The wording seen in Art. 2(1) (a) to (f), inclusive, of the 2003 Directive is found in s. 3(1) (a) to (f) of the AIE Regulations.

The Transcript

13. The Murphys were given the opportunity to share the cost of a transcript in relation to the hearing before the Arbitrator. They declined to do so, as was their entitlement. This is *the* Transcript referred to in the Appellant's motion. In the manner presently explained, the respondent determined that the Transcript (*i.e.* in its *entirety*) is 'environmental information'. It is common case that the Transcript runs to two volumes and is 488 pages in length. For obvious reasons, the Transcript was not exhibited in the proceedings before this court.

Entirety

14. At para. 27 of the decision giving rise to this point of law appeal, the Commissioner stated:

> *"In my view, the Transcript in its entirety comes within the definition of 'environmental information' contained in paragraph (c) of Article 3(1) of the AIE Regulations"*. (emphasis added)

Measure

15. The parties are agreed that the infrastructure project which formed the backdrop to the compensation hearing before the Arbitrator - which involved the construction of a high voltage electricity line - is a *"measure"* coming within the definition of 'environmental information'. Later in this judgment I will refer to an information request made to the ESB on 18 October 2017 by a Mr. McKenna who refers *inter alia* to *"the Clashavoon/Dunmanway 110kV line project"* and this would appear to be a description of the high voltage line project in question ("the project" or "the measure").

Compensation

16. Before proceeding further, it must be noted that the hearing before the Arbitrator exclusively concerned the compensation payable to the Murphys. The Arbitrator had no jurisdiction to decide, and certainly was not asked to decide, for example:

(i) whether or not the project should go ahead;
(ii) the merits or demerits of erecting electricity infrastructure;
(iii) the merits or demerits of the location of such electricity infrastructure; or
(iv) planning decisions in relation to the said project.

17. In other words, all planning and related decisions concerning the infrastructure project had already been made before the Arbitrator conducted the compensation hearing. This included decisions in relation to the specific route of the electricity line which passed over the Murphys' land.

18. Therefore, whilst the infrastructure project was a *sine qua non* for the Murphys' compensation claim under the 1927 and 1919 Acts, the reverse is not true. The outcome of the compensation claim (something *not* recorded in the Transcript) would determine the quantum of compensation payable to the Murphys, but this is something which could not affect the measure which predated it. To see how far divorced the Transcript is from the electricity infrastructure project, one need only note the following:

(i) There was no legal requirement for any Transcript;

(ii) The Transcript came into being because one party to a dispute concerning quantum of compensation wanted to have it;

(iii) The compensation hearing was not inevitable, i.e. had the Murphys and ESB agreed on the quantum of compensation payable, no hearing would have taken place;

(iv) Indeed, it seems uncontroversial to say that whilst a landowner has an entitlement to claim compensation, they are under no obligation to do so; and

(v) Thus, a project can proceed, irrespective of whether *any* landowner compensation claim is (a) made or not; (b) is agreed without a hearing or not; and/or (c) is the subject of a hearing before an Arbitrator or not, (with or without a transcript of that hearing).

Grounds for refusal

19. Returning to the AIE Regulations, Regulation 6 specifies the procedure for making a request for environmental information, whereas Regulation 7 mandates a public authority to make environmental information available to the applicant, subject to the provisions of the Regulations. Regulation 9 begins:

> *"Discretionary grounds for refusal of information*
>
> *9.(1) A public authority may refuse to make available environmental information where disclosure of the information requested would adversely affect -*
>
> *…*
>
> *(d) intellectual property rights*."

Intellectual property rights

20. In light of the foregoing, the second of the principal issues in these proceedings is whether copyright attaches to the Transcript. In the manner presently explained, the second notice party, Gwen Malone Stenography Services Unlimited Company ("GMSS"), has at all material times asserted copyright.

Balancing exercise – public interest in disclosure

21. For the sake of completeness, it should be noted that Regulation 10(3) provides that if the public authority refuses to make environmental information available on the basis of reliance upon one of the grounds in Regulation 9(1), it must nonetheless proceed to carry out a balancing exercise which Regulation 10(3) describes as follows:

> *"[10] …*
>
> *(3) The public authority shall consider each request on an individual basis and weigh the public interest served by disclosure against the interest served by refusal"*.

22. The aforesaid balancing exercise was not conducted in respect of the decision under challenge. This is because the Commissioner decided that the Regulation 9(1)(d) exemption did *not* apply.

23. The applicant contends that the Commissioner erred in determining that the ESB was not entitled to rely on the Regulation 9(1)(d) exemption. Moreover, the applicant points out that in a *prior* decision concerning the self-same Transcript, the Commissioner accepted that the Transcript was a literary work for the purposes of the Copyright and Related Rights Act, 2000 ("the 2000 Act") and was an original literary work for the purpose of s. 17(2) of the 2000 Act, yet, in the decision appealed against, has not given any reasons for reversing his position.

Sequence of events

24. Having carefully considered the pleadings and exhibits, it is clear that there is no dispute between the parties on the central facts or relevant chronology, including the following.

Hearing before Arbitrator

25. The compensation hearing was conducted before the Arbitrator on 19 and 20 June 2017.

Request by a Mr McKenna

26. By email sent on 18 October 2017, a Mr Lar McKenna made a request under the AIE Regulations in the following terms:

> *"1. I request a copy of the entire stenographer's report of the hearing as I believe that the entire report is Environmental Information.*
>
> *2. I request a copy of the notes taken at the hearing by ESB personnel and/or by ESB consultants at the hearing. The notes taken by or on behalf of the ESB record the information and discussions at the hearing before a Property Arbitrator, a Public Authority.*
>
> *3. Any economic or cost-benefit analysis held by ESB in relation to the Clashavoon–Dunmanway 110kV line project."*

27. It was submitted on behalf of the Appellant, without objection, that Mr McKenna operated an entity described as "Land & Utility Compensation Consultants" which provided advice in respect of compensation claims and that the Murphys had been his clients.

First instance refusal

28. The aforesaid request which Mr McKenna made to the ESB was declined on 17 November 2017.

ESB's position

29. ESB did not examine the Transcript, asserting that it was unreasonable given the length of same, but disagreed with Mr McKenna's contention that a transcript which *may* contain environmental information meant that the document, in its *entirety* constituted environmental information.

30. ESB also relied on Regulation 9(1)(d) on the basis that releasing the Transcript would breach the intellectual property rights of the stenography company (GMSS) which created it. ESB were of the view that the public interest in maintaining the Regulation 9(1)(d) exception outweighed the public interest in the disclosure of the Transcript.

Internal review

31. Mr McKenna requested an internal review of ESB's decision (as was his right pursuant to Regulation 11(1)). On 11 January 2018, ESB notified Mr McKenna of its internal review decision which was to affirm its 'first instance' decision.

Appeal

32. Mr McKenna appealed to the Commissioner on 20 January 2018. The Commissioner's decision issued on 13 December 2018 ("the Commissioner's first decision" or "the first decision") and a copy comprised one of the exhibits to the affidavit sworn on behalf of the Appellant by Ms Suzanne Moran. Ms Moran avers that she is "*the AIE Co-ordinator*" with the ESB in respect of the request for access to environmental information made by the first notice party in the present proceedings. Whilst it is not the decision which is the subject of these proceedings, it is appropriate to quote as follows from the Commissioner's first decision:-

> "*Summary of Commissioner's decision: The Commissioner found that ESB's decision to refuse access was justified under Article 9(1)(d) of the AIE Regulations. He also found that the interest in maintaining the exception in Article 9(1)(d) of the AIE Regulations outweighed the public interest in disclosing the information sought, where disclosure of the information required ESB to provide the Appellant with a copy of the Transcript in breach of the copyright holder's intellectual property rights…"*

33. In the manner touched on earlier, the later decision by the Commissioner, which is the subject of the present appeal, is one in which the Commissioner came to the very *opposite*

view in respect of Regulation 9(1)(d). For the sake of completeness, it is appropriate to quote the balance of the summary in respect of the Commissioner's first decision:-

"However, having regard to the public interest served by disclosure of the environmental information, he considered that it would be reasonable to require ESB to allow the Appellant to inspect the Transcript in situ at his office. He varied ESB's decision accordingly."

34. Given the Commissioner's finding that ESB's decision to *refuse* access with reliance on the Regulation 9(2) exemption was justified, it is not difficult to understand that an appeal was brought by ESB with respect to the Commissioner's decision to also *permit* access by way of inspection of the Transcript in ESB's office. The foregoing was at the heart of the irrationality argument which featured in legal proceedings which gave rise to a judgment by O'Regan J., delivered on 03 April 2020, to which I now turn.

ESB v Commissioner

35. In *Electricity Supply Board v Commissioner for Environmental Information* [2020] IEHC 190, O'Regan J found that there were deficiencies in the Commissioner's approach to his determination that the Transcript comprised environmental information within the meaning of Regulation 3(1)(c), rendering the decision unlawful. Furthermore, the learned judge made a finding of irrationality in respect of the Commissioner's decisions regarding Regulation 9(1)(d). Thus, the first decision was quashed, and the matter was sent back to the Commissioner. The relevant order issued on 30 April 2020.

Original literary work

36. With reference to the Commissioner's first decision, the learned judge began para. 51 of her judgment by noting:-

"At p. 10 of the decision, the Commissioner found that the Transcript is an original literary work for the purposes of s.7(2) of the 2000 Act and comprised the intellectual property of GMSS." (emphasis added)

37. In the motion that came before O'Regan J. ESB did *not* seek to challenge the Commissioner's findings with respect to the application of Regulation 9(1)(d).

GMSS

38. Before looking at events subsequent to the judgment by O'Regan J., it is important to understand the position which, at all material times, has been maintained by the author of the Transcript, GMSS.

39. It will be recalled that Mr McKenna appealed to the Commissioner on 20 January 2018 and the Commissioner's first decision issued on 13 December 2018. Between those dates, Arthur Cox, Solicitors for GMSS, made written submissions to the Commissioner which included the following:-

"Gwen Malone Stenography Services ('GMSS') holds the copyright in the stenographers report from the hearing before the property arbitrator in Cork on 19 and 20 June 2017 (the 'Transcript').
We are satisfied that our client's Transcript meets the originality requirement under copyright law [Copyright and Related Rights Act 2000 Section 17]. This position is supported by Walter v Lane [1900] [AC 539] whereby the House of Lords held that copyright can extend to a verbatim transcript since the preparation involves "considerable intellectual skill and brain labour beyond the mere mechanical operation of writing" [Ibid].

If our client's Transcript is released, this could result in subsequent economic loss for our client caused by its clients' ceasing to use stenography services and/or refusing to pay fees for work that can be released as and when requested by the Commissioner and/or pursuant to European Communities (Access to Information on Environmental) Regulations 2007 to 2014.

The Transcript was provided to ESB under licence by GMSS (the 'Licence').
GMSS does not agree to vary the terms of the Licence in any way, including to grant permission for the Transcript to be photocopied, reproduced, supplied or loaned by ESB to the Appellant in this review. Additionally GMSS does not permit ESB to view the Transcript in person in ESB's office.

In summary, any disclosure or use of the Transcript outside of the Licence would breach GMSS's intellectual property rights and cause harm to GMSS."

Terms and Conditions

40. Later in this judgment I will refer to a second set of submissions furnished on behalf of GMSS. For present purposes, it is sufficient to say that the reference in the aforesaid submissions to the "Licence" reflects entirely the terms and conditions of business which GMSS enter into with customers, including ESB, insofar as the use of the Transcript is concerned.

28 April 2020 request

41. Within days of the judgment of O'Regan J, the first named respondent in these proceedings made the following request by email, dated 28 April 2020:-

"Dear ESB,
Under the AIE Regulations:
Could you send us a softcopy of the Transcript that was requested by Mr Lar McKenna in a case that was appealed to the Commissioner for Environmental Information (htps://www.ocei.ie/decisions/lar-mckenna-ESB/index.xml).
Many thanks for your help.
RTK."

First instance refusal by ESB

42. The first instance response by the ESB is comprised in their letter, dated 27 May 2020, a copy of which was exhibited by Ms Moran. There, Mr Smyth *"Landowner Engagement Manager"* stated *inter alia*:-

> *"In order for me to reach a decision if the Transcript you requested is environmental information in its entirety, or contains environmental information, I would be required to carry out the following steps:*
>
> *(1) Search through and review the entirety of the Transcript (which runs to many hundreds of pages) for information which might constitute environmental information within the meaning of the Regulations.*
>
> *(2) Invite and consider the arguments of any identified third parties as to whether each item of environmental information should or should not be released.*
>
> *(3) Decide if any exemptions might apply to any environmental information located.*
>
> *(4) Weigh the public interest in disclosure against any interest served by refusal.*
>
> *It appears to me that a request in these terms, i.e., requiring me to carry out the review in step (1) above, would be manifestly unreasonable under Article 9(2)(a) of the AIE Regulations having regard to the length of the Transcript and the time it would take to complete this review. In order to make a determination as to the time needed to review this transcript, I extracted ten sample pages from the Transcript and carried out a full review of those pages. I would note that I did not locate any environmental information in the sample pages reviewed…"* (emphasis added)

43. I pause here to observe that, for the purposes of the proceedings before me, the principal question is whether the Transcript (namely the entire of the Transcript) is environmental information. The first named respondent asserts that *"entire transcript is environmental information"* (emphasis added). Whilst not at all determinative of the matter, it seems to me that a logical corollary of that assertion must be that no part or parts of the Transcript are *not* environmental information. Whilst there is no evidence before this Court that any page in the Transcript contains environmental information, there is certainly evidence that ESB was unable to find *"any environmental information"* located *"in the sample pages"* examined. Therefore, one might ask, rhetorically: *How can the entire of the Transcript be environmental information if, as a matter of fact, parts of the Transcript contain none?.* I stress that this observation has played no role in the outcome of this application.

44. Returning to the first instance refusal by ESB, Mr Smyth stated *inter alia* the following (without prejudice to a refusal of the request on the basis that it was manifestly unreasonable for a review of the Transcript to be carried out):-

"…it is my opinion that transcripts of these type of property arbitration hearings are not environmental information within the meaning of Article 3 of the Regulations (as reproduced in the Appendix hereto). I do not believe that the information in a transcript of this nature has any impact on the environment.

Although, you have not set out what part of the definition of environmental information you believe the information in the Transcript relates to, it's my opinion that these type of transcripts do not satisfy the definition of environmental information in parts (a), (b), (d), (e) or (f) of Article 3 of the AIE Regulations.

When considering part (c) of the definition, I note that the placement of an electricity transmission line can or is likely to have an effect on environmental elements or factors set out in parts (a) and (b) of the definition of environmental information. As a result, in and of itself, information on these activities could possibly be considered environmental information under part (c) of the definition, but the arbitration hearings themselves have no impact whatsoever on the manner in which the works are carried out. The hearings are solely concerned with the assessment of compensation and transcripts are a record of that valuation hearing. Therefore, these transcripts of the hearing of the Property Arbitrators are in themselves not a measure or activity affecting or likely to affect the elements or factors referred to in (a) and (b) of the definition of environmental information in Article 3 of the Regulations and as such are not environmental information under part (c) of the definition. Further, I believe the information in such transcripts is too remote to fall within the definition of environmental information.

Notwithstanding the foregoing, if the Transcript was in its entirety, or contained, environmental information (and due to the manifestly unreasonable nature of this request) (as outlined above), ESB have been unable to reach a decision on this point, the Transcript is subject to copyright. The holder of this copyright is the stenography company which created the Transcript. The transcript consists the intellectual property of that company and while ESB is licensed to use the Transcript for its own internal purposes, ESB is expressly precluded from photocopying, reproducing in any manner, loaning or supplying it to a third party…" (emphasis added)

Internal review

45. As will be seen, the concept of *remoteness* is central to the determination of the principal issue in dispute. To continue with the chronology of relevant facts, by email sent to the ESB on 10 June 2020, the first notice party called for an internal review of the first instance refusal. The basis for same can be seen from the following extracts from the said 10 June 2020 email:

"1. The request is not manifestly unreasonable – task one is unnecessary since the entire transcript is environmental information…

2. *The transcript is environmental information because it is information on land and measures affecting or likely to affect land (i.e., development of electricity infrastructure). Deploying the purpose of interpretation, access to this information meets the objectives of the AIE Directive by increasing transparency around environmental decision making, including the amounts payable in compensation when ESB uses CPO to acquire land and rights over land…*

3. *The transcript is not copyright because it is merely a verbatim record of an arbitration proceedings and therefore it is not the author's own intellectual creation which is the EU law standard of copyright that applies in this context…"* (emphasis added)

Certain observations

46. Before proceeding further, certain comments appear appropriate. With respect to point 1, I have previously noted the fact that, whilst there is no evidence that the Transcript contains any environmental information, there is certainly evidence that parts of it do not. From a first principles analysis, this seems utterly inconsistent with the proposition that *"the entire transcript is environmental information"*.

47. As regards point 2, the determination of the quantum of compensation payable to the Murphys has no effect *"on"* the land owned by them across which an electricity line passes. Furthermore, the assertion of greater transparency with reference to information about *"the amounts payable in compensation by the ESB"* ignores the fact that no such information is contained in the Transcript. At most, the Transcript records *arguments* made to the Arbitrator in relation to the quantum of compensation contended for. However, the Transcript of the hearing says nothing about what compensation amount was deemed *payable*.

48. Regarding point 3, the proposition that the Transcript *"is merely a verbatim record"* seems to me to ignore, entirely, the fact that it did not suddenly manifest out of nothing. Nor does the stenographer's role involve, say, taking a written text and copying it faithfully and without deviation, such that their work produces a *verbatim* copy or record of the 'raw material'. On the contrary, through the efforts of a stenographer, one form of 'raw material' (namely a stream of sounds, each at a moment in time) become tangible in the form of a document which is given meaning through a wide range of free choices made by the stenographer, intellectual and creative. This is a topic I will return to presently. For the time being, it is appropriate to continue with the chronology of events.

Second instance refusal by ESB

49. On 9 July 2020, the ESB delivered its 'second instance' decision following the internal review. The following comprise certain *verbatim* extracts from the relevant letter to the first named notice party by Mr. Madden, the Appellant's *"AIE Regulations Appeals Manager"*:-

"Having carried out this review, I am deciding to vary the decision made by Mr. Smith, as set out below.

In the first instance I disagree that your request is manifestly unreasonable within the meaning and for the purposes of Art. 11(2) of the AIE Regulations. Having decided that the request is not manifestly unreasonable, I must then make a decision on whether or not the information sought is to be released under the AIE Regulations.

As a first step a review of the information that is the subject of your request, namely the Transcript was carried out. Having done so, I have decided as follows:

First, I have decided that the Transcript in its entirety is not 'environmental information' as defined in the AIE Regulations..

…

… I agree with Mr. Smith that an arbitration hearing which takes place following the placement of the line, and whose <u>only</u> purpose is to determine an amount of money to be paid by ESB to a landowner, cannot possibly have any impact whatsoever either on the manner in which the works are carried out or on any other element of the environment. The hearing was solely concerned with the assessment of compensation and the Transcript is a record of that valuation hearing. Therefore, neither the Transcript, nor the proceedings recorded within it are a measure of activity affecting or likely to affect the elements or factors referred to in (a) and (b) of the definition of environmental information in Article 3 of the AIE Regulations, and as such the Transcript does not, in its entirety, constitute 'environmental information' under part (c) of the definitions …

…

Having taken legal advice on this issue I am advised that the Transcript of a public hearing is a literary work for the purposes of the Copyright and Related Rights Act, 2000 (the 'Copyright Act) and that under Irish law copyright can be asserted over it. I am also satisfied that the creator of the Transcript is fully entitled to - and does in this instance - assert copyright in the Transcript.

The creator of the Transcript is fully at liberty to determine the conditions upon which the Transcript is provided to ESB. The Transcript was provided to ESB under the terms of a licence stipulating that while ESB is licenced to use the Transcript for its own internal purposes, it is expressly precluded from photocopying, reproducing in any manner, supplying or loaning to any party without the permission of the stenographer …

…

Finally, as is evident from the manner on which your question is formulated, you are already aware the Commissioner has already considered the issue of the exemption under Article 9(1)(d) of the AIE Regulations in relation to the same Transcript [Lar McKenna v ESB CEI/18/0003] and upheld ESB's decision to refuse access to the Transcript under Article 9(1)(d). Further the Commissioner decided that the interest in maintaining the

exemption in Article 9(1)(d) outweighs the public interest in disclosing the information sought. As you may also be aware that decision of the Commissioner has been appealed to the High Court [ESB v Commissioner for Environmental Information 2019/47 MCA] but the Commissioner's decision on this particular point was not part of that appeal …"

Notice of appeal

50. By letter dated 28 July 2020, FP Logue, solicitors for the first respondent gave notice of their client's wish to appeal. The notice of appeal was acknowledged and communication passed between the parties and the Commissioner's office during August 2020.

ESB submissions to investigator

51. A Ms. Libreri of the Commissioner's office was assigned for the purposes of investigating matters and preparing a recommendation for the respondent. In that context, written submissions were made to her by the ESB on 24 February 2022. Those submissions addressed two issues namely:-

(i) whether the Transcript as a whole constitutes 'environmental information' within the meaning of the AIE Regulations; and

(ii) whether ESB is entitled to rely on Article 9(1)(d) of the AIE Regulations as grounds for refusal of the Transcript.

52. The nature of the submissions by ESB can be seen from the following extracts:-

"*It is notable that Right to Know do not assert that the Transcript is relevant to any environmental decision-making process. Instead, it relies on an assertion that the release of the Transcript would 'enhance transparency and accountability around the expenditure of public money in relation to the construction of electricity infrastructure as well as building public trust in the decisions awarding such compensation'. However, neither the Directive nor the Aarhus Convention were enacted for the purpose of enhancing transparency or accountability around the expenditure of public money or for the purpose of building trust in quasi-judicial decision-making in relation to the payment of compensation. Such trust is developed by the hearings being held in public.*

On its own case Right to Know do not link the disclosure of the Transcript to the aims and objectives of the Directive or the Aarhus Convention. That, of itself, demonstrates that anything relating to the hearing before the Property Arbitrator is simply too remote or incidental to the measure identified by them.

The status of the hearing before the Property Arbitrator and the functions being discharged by him are also relevant to this issue. The Property Arbitrator is exercising a quasi-judicial function. He has been found to be acting in a judicial capacity within the meaning of the AIE Regulations and is therefore not a public authority (see CEI/17/0016 Lar McKenna and Michael Neary, Property Arbitrator).

The compensation hearing therefore has the status of a judicial process, rather than an environmental decision-making process. The Court of Justice has drawn a distinction between the aim of promoting effective participation in environmental decision-making and the promotion of public information in judicial matters and public involvement in decision-making in that area. In Case-470/19 Friends of the Irish Environment v Commissioner for Environmental Information the CJEU noted that the promotion of public information in judicial matters was not a aim of the Directive or the Aarhus Convention.

That interpretation is supported by the objective pursued by the EU legislature in adopting Directive 2003/4, read in the light of the Aarhus Convention. As is clear from Recital 1 and Article 1 of that Directive, the purpose of the Directive is to promote increased public access to environmental information and more effective participation by the public in environmental decision-making, with the aim of making better decisions and applying them more effectively and, ultimately, promoting a better environment.

Thus, while the implementation of that objective means that administrative authorities must give public access to environmental information in their possession, in order to give an account of the decisions they take in that field and to connect citizens with the adoption of those decisions, the same is not true of pleadings and other documents adduced in court proceedings on environmental matters, since the EU legislature did not intend to promote public information in judicial matters and public involvement in decision-making in that area.

…

The classification of the Transcript, as a whole, as environmental information would, in effect, extend the scope of the AIE Regulations to any information concerned with the development of electricity infrastructure in the State. That would be contrary to the decision of the CJEU in Case C-316/01 Glawischnig.

…

Right to Know suggests that the Transcript is 'an integral document relating to a specific procedure and that its utility to the public would be significantly undermined if it were not to be considered environmental information in its entirety'. However, the 'procedure' to which the Transcript relates is a hearing as part of a quasi-judicial process which does not require any decisions relating to the environment to be made.

…

In its decision on the appeal brought by Lar McKenna against the decision by ESB to refuse him access to the Transcript (CEI 18/003), the Commissioner accepted that the Transcript was a literary work for the purposes of the Copyright and Related Rights Act 2000 ('the 2000 Act'). The Commissioner was also satisfied that the Transcript was an 'original literary work' for the purpose of s. 17(2) of the 2000 Act. ESB presumes that the Commissioner will adopt a consistent position and will continue to accept that the Transcript is an original literary work for the purposes of s. 17(2) of the 2000 Act. That

part of the Commissioner's decision was not subject to the appeal brought by ESB to the High Court. ESB relies on the Commissioner's analysis contained in decision CEI/18/003.

The prior conclusion of the Commissioner that the Transcript is an original literary work is consistent with the decision in Walter v Lane [1900] AC 539, which remains good law and which was approved by the Supreme Court in Gormley v EMI Records (Ireland) [2000] IR 74. In his decision in CEI/0003 the Commissioner has already rejected the argument made by Right to Know that European Union law does not permit the Transcript to be considered to be an original literary work for the purposes of the 2000 Act.

…

As the Commissioner is aware, the copyright in the Transcript is held by Gwen Malone Stenography Services of the Law Library, the Distillery Building, 145-151 Church Street, Dublin 7. Gwen Malone Stenography Services previously advised the Commissioner that it did not consent to the release of the Transcript (copy letter attached). ESB understands that Gwen Malone Stenography Services assert copyright over the Transcript and do not waive any rights over it. The Transcript was provided to ESB on condition that it is used for its own internal purposes and it is expressly precluded from photocopying, reproducing in any manner, supplying or loaning to any party without the written permission of the Stenographer. The Commissioner will note that this restriction is printed on the second page of each volume of the Transcript.

ESB relies on Article 9(1)(d) of the AIE Regulations to justify refusing to release the Transcript and concluded that the release of the Transcript would adversely affect the intellectual property rights of Gwen Malone Stenography Services.

…

If the Transcript were to be released, the interests of Gwen Malone Stenography Services would be adversely affected in two ways. First, if the Transcript was released, it would result in Gwen Malone Stenography Services entirely losing control over the manner in which it could be used. This entirely undermines the licence on foot of which ESB has been provided with the Transcript …

Second, it could cause potential economic harm to Gwen Malone Stenography Services as it would deprive it of the ability to generate further income from the sale of the Transcript.

…

Indeed, the submissions made by Right to Know specifically argue that the Transcript should be released under the AIE Regulations as it would otherwise have to pay for access to it. Of itself, that demonstrates the fact that the release of the Transcript would cause an adverse effect on the rights of the copyright holder."

A fresh review

53. By letter dated 3 March 2022 Ms. Libreri wrote to the ESB on behalf of the Commissioner stating *inter alia* the following:

"*The Commissioner's decision in CEI/18/0003 (Lar McKenna and ESB) accepted that the decision of the House of Lords in Walter v. Lane [1900] AC 539 supported the proposition that copyright can extend to a verbatim record such as a transcript. However, you should be aware from previous engagements with this Office that the Commissioner conducts a fresh review of all cases before him and is not bound to follow previous decisions.*" (emphasis added)

54. Before proceeding further, it is appropriate to note that the Appellant does *not* assert that prior decisions are binding on the Commissioner. Rather, the ESB assert that, where the Commissioner changes his mind on the same question, he has a duty to furnish adequate reasons for the change.

Stenographer's terms and conditions

55. On 9 March 2022 the Commissioner was provided with a copy of the GMSS "terms and conditions" under which the Transcript was produced. It is not disputed that GMSS provided the Transcript to ESB on the terms referred to earlier, namely, having asserted copyright, and on the basis that the ESB was prevented from copying, sharing or disseminating the Transcript.

28 March 2022 ESB submission

56. By letter dated 28 March 2022 the ESB wrote to the Commissioner stating *inter alia*:-

"*It is noted that the Commissioner intends to conduct 'a fresh review' of the case and does not consider himself bound by an earlier decision. This is a surprising assertion. The Commissioner frequently refers to his previous decisions to demonstrate his approach to particular issues. While previous decisions may not have the same precedential value as decisions of the Superior Courts, it is clear that the Commissioner looks to adopt a consistent position in respect of the application of specific legal principles.*

Further, the issue being considered by the Commissioner in this appeal does not simply relate to the scope of particular legal principles. In this instance, the Commissioner has already decided that the Transcript is an original literary work by reference to the relevant legal principles. In other words, the Commissioner has already considered the relevant legal principles and how they should apply to the facts in this appeal. That decision was reached having regard to all relevant case law, including that which is cited in your letter. Your letter does not identify any more recent decisions of either the domestic courts or the CJEU which would change the conclusion already reached by the Commissioner.

For this reason, ESB repeats that the issue as to whether the Transcript is an original literary work for the purpose of section 17(2) of the 2000 Act has already been determined by the Commissioner.

The previous decision of the Commissioner is also correct, having regard to the legal principles which can be derived from the decisions of the Supreme Court and the CJEU. In Gormley v EMI Records (Ireland) Limited [2000] IR 74, the Supreme Court cited the decision in Walter v Lane [1900] AC 539 with approval. It further approved of the following passage from Lord Aitkin in MacMillan and Co. Limited v Cooper [1923] 40 TLR 186:

> *'To secure copyright for this product it is necessary that labour, skill and capital should be expended sufficiently to impart to the products some quality or character which the raw material did not possess, and which differentiates the product from the raw material.'*

The Supreme Court concluded (at 93):

> *'These cases and the passages cited show that originality does not require the work to be unique, merely that there should have been original thought. Where there is treatment of materials already in existence, it is necessary to show some new approach. It cannot be copied directly. The work must truly belong to the person claiming to be the author.'*

I note your letter states that the decision in Gormley provides that 'the work in question needs to demonstrate a new approach in order to benefit from the protections of copyright law'. The reference to a 'new approach' must be seen in the context of the entire conclusion of the Supreme Court which also indicates that the requirement of originality does not mean that a work must be unique, merely that there must have been 'original thought'. The reference to 'new approach' is in the context of how the treatment of materials already in existence is to be assessed. …"

Stenographer's April 2022 submissions

57. On 11 April 2022, Arthur Cox, solicitors for GMSS, provided further submissions to the Commissioner. In those submissions, it was confirmed that GMSS enjoyed copyright in the Transcript and the basis for the assertion of intellectual property rights made reference to the decisions in *Walter v Lane* and *Gormley v EMI*. The submissions contained *inter alia* the following:

"*It is our client's position that the Transcript meets the test contained in Gormley as the Stenographer engages in 'original thought' in order to prepare a proper record of the hearing.*

Stenography is a specialised skill that utilises specialised tools which are not commonly available in order to produce the final literary work. Our client's stenographers have completed stenography training and at least six years of additional training before becoming a fully qualified Stenographer. The Stenographer employs a specialised machine and a unique shorthand method to produce the record of the hearing. After the hearing has been concluded, the shorthand is translated and the Stenographer then uses his or her skill to edit and format the material in order to produce the final literary work. The

Transcript reflects the author's original, intellectual and creative thought, given the skill, labour and creative choices exerted by the Stenographer in the production of the Transcript, both prior to the hearing, during the hearing and after the hearing has concluded. The Stenographer exercises his or her original thought, skill, judgment and creativity in not only the recording of the words in shorthand, but also the attribution of words and statements to particular persons, choosing how to format the work, making stylistic decisions throughout the editing process which results in the finished Transcript. Our client actively exercises and protects its intellectual property rights in its transcripts. Each Transcript contains a prominent disclaimer which clearly states that it is the subject of our client's copyright and must not be photocopied or reproduced in any manner or supplied or loaned to any party without the written permission of our client. As such, our client is clearly asserting its right, under section 17(1) CCRA, that only it, as the copyright owner 'may authorise other persons in relation to that work to undertake certain acts in the State, being acts which are designed by this Act as acts restricted by copyright in a work of that description'."

58. The submissions went on to detail the basis upon which the intellectual property rights of GMSS would be adversely affected by the disclosure of the Transcript. It was pointed out that the 'core value' of the protection provided by the 2000 Act is that only the copyright owner may authorise acts restricted by copyright. The submissions went on to state that:

"*Such 'acts restricted by copyright' are set out in section 37 of the CCRA and provide that a copyright owner has 'the exclusive right to undertake or authorise others to undertake' particular acts in relation to the copyright work, which include copying the work and making the work available to the public. Therefore, if the Transcript was to be disclosed to any party without our client's prior authorisation, it would be an infringement of our client's intellectual property rights under the CCRA.*

Furthermore, disclosure of the Transcript would fundamentally undermine both the value of our client's work product and the legal framework upon which our client's business is based. The creation of transcripts though the skill of stenography is the core offering of our client's business and has been for 27 years. Customers engage with our client on the basis that the Transcripts are protected by copyright and as such, our client, as copyright owner, has the sole authority to make the work available to the public, including by granting others the permission to do so. If the Commissioner were to disclose the Transcript at issue in this matter, it would fundamentally undermine the terms pursuant to which customers have engaged with our client, which are based on the fact that the Transcripts are subject to copyright protection and are not shared with any other party. This would have a detrimental impact on our client's business as it fundamentally alters the terms upon which our client's service is offered."

Infringement

59. Submissions were also made concerning the basis upon which the interest served by refusal of the Transcript would outweigh the public interest in disclosure. The submissions stated *inter alia*:

> "*Disclosure of our client's copyright protected transcript would represent an unwarranted infringement of our client's intellectual property rights and set a harmful precedent that has the potential to severely damage our client's business and erode its customer base …*"

Henney

60. Of the authorities to which counsel very helpfully drew to this court's attention, the following seem to me to be most relevant to resolving the matters in dispute. In *Department for Business, Energy and Industrial Strategy v. Information Commissioner & Henney* [2017] P.T.S.R. 1644, [2017] EWCA Civ 844 (*"Henney"),* the Court of Appeal in the neighbouring jurisdiction considered whether information on a measure which did not itself impact on the environment could, nonetheless, be information *"on"* another measure which did. By way of backdrop, the UK government developed a 'smart meter' programme. The applicant made a freedom of information request seeking information concerning a project assessment review of the 'communications and data component' of the said programme, but received a heavily redacted copy of the relevant report, in response. The applicant contended that his request should have been dealt with under environmental information regulations, arguing that it constituted 'environmental information' within Regulation 2(I) of the relevant regulations which (per Regulation 2(I)(c) included *"(a) for any information … on … measures… affecting or likely to affect"* the state of the elements of the environment or factors affecting those elements. The first tier decision maker found as a preliminary issue that the material *was* environmental information. A subsequent tribunal decision affirmed that conclusion. The government department appealed and the headnote from the reported decision states:

> *"Held, dismissing the appeal, that when determining whether information fell within Regulation 2(I)(c) of the Environmental Information Regulations 2004 it was first necessary to identify the measure which the disputed information was 'on'; that identifying the relevant measure was not strictly limited to the precise issue with which the information has directly, immediately or primarily concerned, although it was not permissible to look at issues with which the information was not concerned or was merely connected; that, further, identifying the relevant measure might require consideration of the wider context, including the purpose for which the information had been produced, how important the information was to that purpose, how it was to be used, and whether access to it would enable the public to be informed about, or to participate in, decision-making in a better way; that once the relevant measure had been identified it would then be necessary to consider whether it had the requisite environmental impact for the purposes of Regulation 2(I); that Regulation 2(I)(c) did not require that the information itself had to be intrinsically environmental, but information would not fall within Regulation 2(I)(c) if it was not consistent with or did not advance the purpose of the 2004 Regulations, Parliament and Council Directive 2003/4/EC and the Aarhus Convention; that*

the Upper Tribunal had been correct to find that the project assessment review was "on" the smart meter programme for the purposes of Regulation 2(I)(c) since although the review focussed on the communications and data component, it could nonetheless be described as being about the programme, because the communications and data component was integral to the programme as a whole; and that, accordingly, since it was common ground that the smart meter programme was a measure which fell within Regulation 2(I)(c), the information sought was "environmental information" for the purposes of Regulation 2(I)" (emphasis added).

Glawischnig* and *Fish Legal

61. At para. 17 of the *Henney* judgment, Beatson L.J. stated the following in respect of case C-316/01 and case C-279/12, respectively:-

"*17. The Glawischnig and Fish Legal cases, however, also show the limits of the broad approach. In the Glawischnig case it was stated, at para. 25, that the fact that the Directive is to be given a broad meaning does not mean that it is intended:*

> *'to give a general and unlimited right of access to all information held by public authorities which has a connection, however minimal, with one of the environmental factors mentioned … To be covered by the right of access it establishes, such information must fall within one or more of the … categories set out in that provision.'*

In the Fish Legal case it was stated, at para. 39:

> *'it should also be noted that the right of access guaranteed by Directive 2003/4 applies only to the extent that the information requested satisfies the requirements for public access laid down by that Directive, which means inter alia that the information must be 'environmental information' within the meaning of Article 2(1) of the Directive, a matter which is for the referring tribunal to determine in the main proceedings: see the Flachglas Torgau, case, para. 32)'*".

Purposive interpretation

62. Of particular significance is the *dicta* at paras. 45 to 47 of *Henney*:

"*(e) The role of a purposive interpretation in this context:*

45. A literal reading of regulations 2(I)(c) would mean that any information about a relevant 'measure' would be environmental information, even if the information itself could not be characterised as having, even potentially, an environmental impact as defined. However, as recognised by the judge, at para. 91, 'simply because a project has some environmental impact', it does not follow that 'all information concerned with the project must necessarily be environmental information'. Interpreting the provision in that way would be inconsistent with the decision in the Glawischnig case EU:C:2003:343 discussed at paras. 16-17 above. Since that case also stated that the Directive is to be given a broad meaning, I have concluded that the statutory definition in regulation 2(I)(c) does not mean that the information itself must be intrinsically environmental." (emphasis added).

How to 'draw the line'

63. Beatson L.J. proceeded, at para. 46, to state that: *"the question is how to draw the line between information that qualifies and information that does not"* proceeding, at para. 47, to state:

> "*47. In my judgment, the way the line will be drawn is by reference to the general principle that the Regulations, the Directive, and the Aarhus Convention are to be constructed purposively. Determining which side of the line information falls will be fact and context specific. But it is possible to provide some general guidance as to the circumstances in which information relating to a project will not be information 'on' the project for the purposes of s.2(I)(c) because it is not consistent with or does not advance the purpose of those instruments.*"

Very broad language

64. At para. 48 of *Henney,* Beatson L.J. began with the recitals to the Directive and the Convention and *"the very broad language of the text of the provisions"* which provide a framework for determining the "on"–question. He proceeded, at para. 49 to refer to the CJEU's decision in *European Commission v. Stichting Greenpeace Nederland* (Case C-673/13P) which concerned regulations in respect of public access to documents of certain EU institutions and on the application of the Aarhus Convention to community institutions and bodies, respectively.

More narrowly than its very broad literal meaning

65. At para. 50 his Lordship stated that the Greenpeace decision shows "*that a purposive approach can be used to interpret a provision more narrowly than its very broad literal meaning".* Later, at para. 52, the Beatson LJ stated that:

> *"[52] … the question is not simply whether there is a 'sufficiently direct link' between the disputed information and the smart meter programme. The judge, at para. 36, made clear that*
>
> > *'although the expression 'environmental information' must be read in a broad and inclusive manner, one must still guard against an impermissibly and overly expansive reading that sweeps in information which on no reasonable construction can be said to fall within the terms of the statutory definition'*."

I pause here to say that, in essence, the ESB asserts that the Commissioner has erred in law in the foregoing manner.

Not an incidental aspect of

66. At para. 53, Beatson L.J. went on to apply the principle to the specific matter in question, stating:

> *"[53] … While the project assessment review focused on the communications and data component, it could nonetheless be described as also being about the wider smart meter programme, because the communications and data component is integral to the*

programme as a whole. It would be unnecessarily narrow and artificial to draw a distinction between a Project Assessment Review on the communications and data component and a project assessment review on the smart meter programme. The communications and data component is not an incidental aspect of the smart meter programme: the former is critical to the latter's success and thus fundamental to it. The Upper Tribunal was entitled to find that there would be no smart meter programme without a communications and data component of some sort, and there is no basis for overturning this conclusion that." (emphasis added).

Critical to

67. Before proceeding further, it simply cannot be said that the hearing of arguments in respect of the quantum of compensation payable to a landowner *"is critical to"* the success of the electricity infrastructure project.

68. Whilst I will return to the matter later in this judgment, for present purposes it can be said that, wholly unlike the facts and context in *Henney*, (i) the Murphys' compensation claim post-dates the decision to lay the electricity line; (ii) the measure was in no way dependent on the compensation claim; and (iii) it could never be said that, but for the Murphys' compensation claim which post-dated all relevant (planning etc) decisions, *"there would be no"* electricity infrastructure project.

Incidental aspect

69. Whilst a landowner enjoys a right to compensation, the *"incidental aspect"* of the compensation hearing to which the Transcript relates can clearly be understood from the fact that no such hearing was inevitable. I touched on this earlier but the following bears repeating: (i) the compensation hearing was dependent on the landowners exercising their right and making a claim; (ii) even then, there would have been no hearing had the parties reached agreement on the quantum of compensation. Thus, the compensation hearing to which the Transcript relates would not (even at 'first blush') meet the "on"-test as articulated in *Henney*.

Redmond v. Commissioner

70. Returning to this jurisdiction, in its 3 April 2020 decision in *Redmond v. Commissioner for Environmental Information* [2021] 3 I.R. 695, [2020] IECA 83 ("*Redmond*") the Court of Appeal cited, with approval, the approach adopted in *Henney*. The backdrop to *Redmond* concerned a sale of certain lands by Coillte. Mr. Redmond sought access to various categories of information and documentation concerning the sale, pursuant to the AIE Regulations. The Commissioner decided that the information did not constitute environmental information. The Redmonds were unsuccessful in challenging the Commissioner's decision in this court by way of judicial review. The headnote from the reported decision states:

"*Held by the Court of Appeal (Faherty Haughton and Collins J.J.) in allowing the appeal,*

1. that in determining whether information fell within the scope of para. (c) of the definition of environmental information in Art. 3 (1) the 2007 Regulations, it was not correct to look at the information sought to see whether, in itself, it was information that could be described as "affecting or likely to affect" the elements and factors set out in paras. (a) and/or (b) of the definition of 'environmental information'. Rather, it was the 'measure', not the information 'on' that measure, that was to be assessed. Department for Business v. Information Commissioner COMR. [2017] EWCA Civ. 844, [2017] P.T.S.R. 1644 considered.

2. That for the purposes of para. (c) of the definition of environmental information, a measure or activity was 'likely to affect' the environment if there was a real and substantive possibility that it would affect the environment, whether directly or indirectly. Something more than a remote or theoretical possibility was required but it was not necessary to establish the probability of a relevant environmental impact. Glawischnig v. Bundesminster für soziale Sicherheit und Generationen (case C-316/01) EU:C:2003:343, [2003] E.C.R.I – 5995, Minch v. The Commissioner for Environmental Information [2016] IEHC 91, Department for Business v.Information Commissioners UNR. [2017] EWCA Civ. 844, [2017] P.T.S.R. 1644 and Minch v. The Commissioner for Environmental Information [2017] IECA 223 considered."

71. Delivering judgment on behalf of the court, Collins J. provided the following guidance, which is of obvious relevance to this court's determination of the present proceedings:

"[59]. The essential question, therefore, is not whether the sale of the Coillte Lands was or was capable of being a 'measure' but rather whether it was a 'measure affecting or likely to affect' the environment. If it was, then 'any information…on' the sale is prima facie required to be provided under the AIE Regulations. That is how this part of the definition of 'environmental information' operates. In my opinion, it is not correct to look at the information sought to see whether, in itself, it is information that can be described as 'affecting or likely to affect' the elements and factors set out in Article 3(1), paragraphs (a) and/or (b). It is the 'measure', not the information 'on' that measure, that is subject to that threshold test.

[60] In this context, I agree with the view of Beatson LJ at para 45, p. 1658, in Department for Business v. Information Commissioner [2017] EWCA (Civ) 844, [2017] P.T.S.R. 1644 that the definition in Article 2.1(c) of the AIE Directive (para. (c) of the definition of "environmental information" in Reg.2(1) of the UK Regulations) 'does not mean that the information itself must be intrinsically environmental'."

At para. [61] Collins J. indicated that the foregoing was not in controversy before the court. He went on to make clear that it was not the case that the information sought by Mr. Redmond had to "*be shown, in itself, to be information 'affecting or likely to affect' the environment".*

Minch v Commissioner

72. From para. [62] of the Redmond decision, Collins J looked at another of the authorities which featured in the hearing before me, stating:

> *"[62] Although immediately concerned with para. (e) of the definition of 'environmental information' in Art. 3(1), Minch v. Commissioner for Environmental Information [2017] IECA 223 provides at para. 38 an illustration of how a document that '[i]n itself … could obviously have no implications for the environment since it was concerned with financial modelling' (emphasis in original) was nonetheless 'environmental information' for the purposes of the AIE Regulations.*
>
> *[63] Minch v Commissioner for Environmental Information [2017] IECA 223 also provides guidance as to how the reference in paragraph (c) to measures 'likely to affect' the environment should be understood and applied. It does not involve any prediction based on probability; rather, according to Hogan J., at para. 40, the question is whether the measure is 'capable' of affecting the environment. On that basis, the court concluded at para. 49, that the National Broadband Plan (NBP) was a measure 'likely to affect the environment' because it discussed a variety of options for the national delivery of broadband which would have significant environmental impacts and which could not be dismissed as remote or incidental. The likelihood of the NBP and/or particular options within the NBP actually being implemented was not the touchstone for the purposes of para. (c). A similar approach had been taken by the High Court in Minch v Commissioner for Environmental Information [2016] IEHC 91, where Baker J. at para. 58 considered that the approach adopted by the Commissioner had been too narrow and had failed to identify the range of information 'that might affect the elements of the environment i.e. where the consequential effect is not direct or not yet apparent'."* (emphasis added)

Options

73. I pause to observe that, irrespective of the likelihood (or not) of the various *"options"* discussed in the aforesaid NBP ever being implemented, the position, in temporal terms, is that these *were* options or possibilities. By contrast, the determination of the quantum of compensation payable to the Murphys was not at all concerned with future options and/or any potential effect of those options on the environment. The effect on the environment flowed from *prior* decision-making in an entirely different process, in particular, planning decisions regarding the electricity infrastructure project. Nor was there any possibility that anything disclosed in the Transcript (comprising of arguments made on both sides to support, or undermine, a sum, or sums, contended to be payable, or not) could conceivably affect the environment in any *future* process (also bearing in mind that the Transcript concerns only the hearing of arguments, and says nothing about what monies the Property Arbitrator did or did not award or the basis for same).

A real and substantial possibility that it will affect the environment

74. The *dicta* at paras. 64 and 65 in *Redmond* is of particular significance:

"[64] Department for Business v Information Comr. [2017] EWCA Civ 884, [2017] P.T.S.R. 1644 suggests at para. 31, p. 1654, that 'likely' in para. (c) of the definition of 'environmental information' in reg. 2.1 of the UK Regulations denotes 'something more substantial than a remote possibility but did not impose the relatively high standard of a balance of probabilities'. That was the approach adopted by the Upper Tribunal judge and no challenge to that approach appears to have been advanced before the Court of Appeal of England and Wales where it was common case at para. 38, p. 1656, that the UK Government's smart meter programme was clearly a measure 'affecting or likely to affect' the environment.

[65] Drawing together these statements, it appears to me that, for the purposes of paragraph (c) a measure or activity is 'likely to affect' the environment if there is a real and substantial possibility that it will affect the environment, whether directly or indirectly. Something more than a remote or theoretical possibility is required (because that would sweep too widely and could result in the 'general and unlimited right of access' that Glawischnig v Bundsminister für soziale Sicherheit und Generationen (Case C-316/01) EU:C:2003:343 indicates the AIE Directive was not intended to provide) but it is not necessary to establish the probability of a relevant environmental impact (because that would, in my opinion, sweep too narrowly and risk undermining the fundamental objectives of the AIE Directive)." (emphasis added)

75. The respondent contends that the Transcript is information "*on*" a measure. Whilst it is common case that the electricity infrastructure project *is* a measure, and keeping in mind that one must consider the question through the 'lens' of the EIA Directive as transposed in the Regulations, the following rhetorical question is key: *What is the 'link' between the measure and the information in the Transcript it is said to be 'on'* ? In the manner explained in this judgment, I can identify no link and it does not seem to me that the decision challenged in this appeal, to which I now turn, identified any such link.

The decision of 29 August 2022

76. The decision is a detailed one and, very obviously, involved considerable time and effort on the part of the Commissioner. The commitment on the part of the Commissioner to address the matters before him in a diligent, comprehensive and professional manner is not at all in doubt. Nor is it in doubt that the Commissioner identified the relevant authorities and engaged with them. However, the fundamental question arising is whether or not an error of law was made. To answer this question, it is necessary to look in some detail at the decision.

77. The background is set out from paras. 1 to 6, after which the Commissioner correctly identified the relevant questions, namely:-

"(i) Whether the Transcript constitutes 'environmental information' within the meaning of the Regulations; and

(ii) whether Article 9(1)(d) of the Regulations provides grounds for refusal of the Transcript in the circumstances of this appeal."

Paras 8 - 12

78. At para. 8, the Commissioner identified the materials which he had regard to and, from para. 10, the Commissioner addressed the first question, citing Article 3(1) of the AIE Regulations. Thereafter, he summarises the submissions made by the first named respondent in the present proceedings ('Right to Know' being the *"Appellant"* in the matter before the Commissioner). At para. 12, the Commissioner referred to and summarised the ESB's submissions.

Paras 14 - 15

79. At para. 13, the Commissioner cited the significance of the decision in *Redmond*. At para. 14, he referred to the *RTÉ* decision which endorsed the approached in *Henney*. At para. 15, the Commissioner stated:-

"15. Both parties agree that the development of electricity infrastructure is a measure or activity within the meaning of paragraph (c) of the definition contained in article 3(1) of the Regulations. ESB does not accept however that the Transcript is information "on" that measure."

Para 16 - 17

80. At para. 16, the Commissioner cited paras. 47 and 48 of the *Henney* decision and para. 17 of the Commissioner's decision began in the following terms:-

"Henney suggests that, in determining whether information is "on" the relevant measure or activity, it may be relevant to consider the purpose of the information such as why it was produced, how important it is to that purpose, how it is to be used, and whether access to it advances the purposes of the Aarhus Convention and AIE Directive (paragraph 43; see also ESB at paragraph 42). Information that does not advance the purposes of the Aarhus Convention and AIE Directive may not be "on" the relevant measure or activity (Redmond at paragraph 99)."

Para 18

81. Paragraph 18 of the Commissioner's decision began as follows:-

"18. The guidance provided by the Courts therefore suggests that there is a sliding scale, with information integral to a measure at one end (in the sense that it is quite definitively information "on" a measure) and information considered too remote from the measure on the other end (in the sense that it is not)."

Para 19

82. From para. 19, the Commissioner gave consideration to what the Transcript *is* and, with a view to considering whether there was a sufficient connection between the information contained in the Transcript and the relevant measure, he looked at the legal framework of the

ESB and EirGrid in the context of the Electricity Regulation Act 1999. At para. 21, the Commissioner referred to s. 53 of the 1927 Act with respect to Wayleave Notices.

Integral

83. Paragraph 22 is of central importance and it is appropriate to quote same *verbatim*:-

> *"22. Compensation is therefore specifically referred to in section 53(5) of the 1927 Act, which provides that although the consent of a landowner or occupier is not required in order to place an electricity line on land, adequate compensation must be paid to the landowner or occupier in question. The level of compensation may be agreed between the parties or it may be the subject of arbitration proceedings. My understanding is that the statutory reference to an entitlement to compensation was introduced following the decision of the Supreme Court, in ESB v Gormley [1985] IR 129, that the previous iteration of section 53 was unconstitutional as it failed to provide for a right to compensation which could be assessed, in default of agreement, by an independent arbiter or tribunal. As noted by Denham J in ESB v Harrington [2002] IESC 38, under section 53 of the 1927 Act, ESB's entitlement to proceed with a line placement is "subject to the [owner/occupier]'s right to compensation". If the entitlement to proceed with line placement is subject to the entitlement to compensation to be independently assessed in default of agreement, it appears to me that both compensation and arbitration of the type referred to in the Transcript are integral parts or key elements of the line placement project. Indeed, the import of the Supreme Court's decision in Gormley is that the entitlement to compensation and the ability to avail of the arbitration process to exercise that entitlement is an integral part of the line placement powers conferred on ESB under section 53 of the 1927 Act since, in the absence of such entitlements, those powers would be unconstitutional*." (emphasis added)

84. The right to compensation is plainly an integral part of the legislative landscape, post-*Gormley*. This is because the Supreme Court in *Gormley* held that, viewed through the prism of constitutional rights, the *ex-gratia* payment of compensation to a landowner was inadequate. The response by the Oireachtas was to enact s.53(5). However, viewed through the 'prism' of the 2003 Directive and the AIE Regulations, it is not easy to see why compensation should be considered *integral* to the measure, which (i) preceded it in temporal terms; and (ii) which went ahead pursuant to decisions the Arbitrator has no hand, act, or part in; and (iii) where decisions concerning the measure were taken in an entirely distinct process from that which deals with compensation.

85. It will be recalled that, at para. 45 in *Henney*, the court emphasised that a literal reading of [the equivalent of Regulation 3(1)(c)] *"would mean that any information about a relevant 'measure' would be environmental information, even if the information itself could not be*

characterised as having, even potentially, an environmental impact as defined". It seems to me that the Commissioner fell into error by paying insufficient regard to the foregoing.

86. In the manner articulated in para. 22 of his decision, the Commissioner found that a right to compensation renders the *entire* transcript *integral* to the measure (i.e. the electricity infrastructure project). However, in so doing, the Commissioner erred in law in my view.

87. I take this view in circumstances where (although it will involve repetition) at least the following was known to the Commissioner in respect of the Transcript and the hearing before the Arbitrator to which the Transcript relates:-

1. The Arbitrator had no decision to make on the measure itself (i.e. the electricity infrastructure project).
2. Nor did any decision affecting the environment fall to be made in the hearing before the Arbitrator.
3. The decision with which the Arbitrator was concerned was exclusively one of compensation to private landowners.
4. The fact the line would be placed and the route of the line were decided prior to the compensation hearing.
5. The property arbitrator had no jurisdiction to make decisions which would alter, or affect in any way, the placing of, or the route taken by, the electricity line.
6. The compensation process with which the Transcript was concerned is a fundamentally distinct process to the planning process (wherein decisions affecting the measure itself are taken).
7. The said project did not depend upon the compensation hearing (the Transcript was very obviously not a *sine qua non* of a compensation hearing).
8. By contrast, the hearing before the property arbitrator depended on the electricity infrastructure project.
9. There was nothing inevitable about any compensation hearing taking place.
10. Had the land owners decided, for whatever reason, not to make a claim for compensation, no hearing would ever have occurred.
11. Had the parties to the compensation claim (i.e. the ESB and the Murphys) agreed on the level of compensation, no hearing would ever have taken place.
12. Nor was there anything inevitable about any Transcript coming into existence.
13. Had neither of the parties to the dispute in respect of compensation decided to pay for any transcript, none would have been created.
14. Even then, had the ESB (being the only party willing to pay for the Transcript) decided that they were, for whatever reason, unwilling to agree to the terms and conditions insisted upon by GMSS, no transcript would have been produced.
15. The Transcript captures only those arguments made to the property arbitrator.
16. The Transcript of the hearing does not set out what compensation the property arbitrator decided to award.
17. The Transcript does not record the reasons for the particular award decided upon by the property arbitrator.

18. Even on the assumption that the Transcript may have contained evidence concerning an allegedly adverse effect on property owned by the landowners, the Transcript does not identify what evidence the Arbitrator (i) accepted or (ii) regarded as relevant for the purposes of his decision.
19. Whilst the entire of the Transcript is contended to be environmental information, there is evidence that parts of same contained none.
20. The process by which compensation is due, claimed, and assessed, is public knowledge (i.e. clearly set out in legislation, in particular the 1927 Act; and the 1919 Act).
21. Given that the Transcript is merely a record of competing arguments in a dispute, it cannot enhance transparency and accountability around the *expenditure* of public money in the construction of electrical infrastructure (it says nothing about what public money was, in fact, *expended*).
22. For the same reason, the Transcript says nothing about the cost, or any element of cost, of the infrastructure project.
23. It does not seem to me that (having regard to Recital 1 and Article 1) that the aim of the Directive or the implementing Regulations are to enhance accountability or transparency with respect to the use of public money, *per se.*
24. Even if it were, such an aim could not be advanced by making the Transcript available, given the reality that it does not record the compensation awarded, or the reasons for the Arbitrator's determination.
25. By contrast, the aim of enhancing accountability and transparency is plainly advanced by the fact that compensation hearings take place in public.
26. Similar comments apply in relation to the aim of trust in quasi-judicial decision making processes (no aim of the Directive).
27. Even if such *were* an aim, it is impossible to see how that aim would be furthered by the making available of a transcript which says nothing about what was, in fact, paid by way of compensation, or the reasons for same.

88. Whilst the Commissioner acknowledges that there is a limit to what might be regarded as "environmental information" it is submitted on behalf of the Commissioner, that his approach was consistent with that outlined by Collins J. in the Court of Appeal's decision in *Redmond.* Respectfully, I cannot agree. The submission that the Transcript is information "on" the measure because (a) it records a hearing to determine the compensation to be paid to those whose land has been used as part of the measure and (b) compensation and arbitration are "integral parts or key elements" of "the measure" ignores the factors identified above, in particular, that the Transcript says nothing about (i) what compensation was payable; (ii) what evidence or submissions, including in respect of adverse effect on the land, the Property Arbitrator did or did not accept or rely upon; and (iii) what approach the Property Arbitrator, in fact, adopted with respect to the compensation to be paid.

Merits-based challenge

89. Despite the skill with which the submission is made on behalf of the respondent, I cannot accept that the Appellant's case constitutes a merits-based attack on the Commissioner's decision.

Whilst oral submissions on behalf of the respondent focused on the use of the word *"misapplied"* in the originating notice of motion, that word is, in every instance, preceded by the plea that *"the Commissioner erred in law"*. This is not a situation where the Commissioner considered *evidence* following which he reached findings of fact and law. Rather, the Commissioner considered a range of submissions and, at the core of this claim, is whether the Commissioner's decision is wrong in law, or not. Thus, this is not a situation where this court is required to show any form of curial deference to the decision-maker. Nor is the correct question whether the Commissioner's decision was reasonable or irrational in the sense in which those terms are used in judicial review [see the *State (Keegan) v Stardust Victims Compensation Tribunal* [1986] I.R. 642 *per* Henchy J: and *O'Keeffe v An Bord Pleanála* [1993] 1 I.R. 39, *per* Finlay CJ.]

90. In other words, the question is not whether *"the decision-making authority had before it no relevant material which would support its decision"* (see *O'Keeffe*) or *"whether the impugned decision plainly and unambiguously flies in the face of fundamental reason and common sense* (see the *State (Keegan)*). On the contrary, these proceedings concern whether or not errors of law were made and the proper approach for this court to take is well settled [see *Minch v Commissioner for Environmental Information* [2017] IECA 223 ("*Minch*"); *Deely v Information Commissioner* [2001] IEHC 91, [2001] 3 I.R. 439 ("*Deely*") ; and *Sheedy v Information Commissioner* [2005] 2 I.R. 272 ("*Sheedy*"]. In *Minch,* the Court of Appeal analysed the scope of an appeal to this Court, pursuant to Article 13(1) and stated the following (*per* Hogan J.) from para. 11 onwards:

> "*[11] It seems implicit in the judgment of the Supreme Court in NAMA v. Commissioner for Environmental Information [2015] IESC 51 that questions of statutory interpretation of the 2007 Regulations are ultimately purely questions of law to be judicially determined by reference to the underlying objectives of the 2004 Directive.*
>
> *[12] In that respect I broadly agree with the approach taken by Baker J. in the High Court when she said:*
>
> > *"In my view the approach that I take in the appeal is that identified by O'Neill J. [in An Taoiseach v. Commissioner for Environmental Information [2013] 2 I.R. 510], namely, I may consider whether the conclusion reached by the Commissioner was based on a correct or erroneous view of the law, as noted by McEochaidh J. in [the High Court in] NAMA v. Commissioner for Environmental Information. I may engage "all legal issues arising", and I may consider the issues of the interpretation of the underlying Directive and of the Regulation. The appeal does engage the full jurisdiction of the court, but not as argued by the Appellant, in that I cannot substitute findings of fact, and I cannot reverse the inferences drawn by the Commissioner with regard to the nature of the Report."*
>
> *[13] I would, for my part, slightly qualify that statement by saying that the High Court could review findings of fact or inferences drawn from those facts where these were*

findings of fact which could not reasonably have been found or inferences which could not reasonably have been drawn: see generally the analysis of this issue found in the judgment of McKechnie J. in Deely v. Information Commissioner [2001] IEHC 91, [2001] 3 I.R. 439."

91. *Deely* involved an appeal on a point of law under the Freedom of Information Act 1997 wherein (at 452) McKechnie J. stated:-

"*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 to set aside inferences drawn from such facts unless such inferences were ones which no reasonable decision making body could draw;

(c) it can however reverse such inferences, if the same were based on the interpretation of documents and should do so if incorrect; and finally;

(d) if the conclusion reached by such bodies shows that they have taken an erroneous view of the law, then that also is a ground for setting aside the resulting decision."

92. In light of the foregoing, this court may review all points of law which arise from the Commissioner's decision. The court may also review findings of fact or inferences drawn from facts where it is established that those findings could not reasonably have been found or those inferences could not reasonably have been drawn. It is important to note that there has never been any material dispute in respect of any background facts. Nor, as I say, was any evidence put before the Commissioner, as opposed to submissions.

93. In short, the Commissioner referred to relevant legal principles and made the decision impugned, the key question before this court being whether the Commissioner took an erroneous view of the law. For the reasons identified, I am satisfied that he did. I am fortified in this view by the following analysis.

Directly* relevant to the compensation *process

94. The information in the Transcript is *directly* relevant to a compensation *process.* However, there is no lack of clarity in relation to the compensation process, given that (i) the entitlement to compensation is established in the Supreme Court's decision in *Gormley*; and (ii) it is statutorily provided for pursuant to the 1927 Act; and the 1919 legislation; and (iii) compensation hearings take place in public.

Indirectly* relevant to compensation *payable

95. Given that the Transcript (a) does not say what evidence the Arbitrator relied upon for his decision; (b) does not identify the evidence which the Arbitrator regarded as admissible; (c)

does not identify the evidence which the Arbitrator regarded as probative/relevant to his decision; (d) does not identify any facts found; (e) does not identify the method used by the Arbitrator to reach his decision; (f) does not contain the reasons for the compensation decided upon;(g) does not identify the quantum of compensation; and (h) as the appointed expert, it would be open to the Arbitrator to bring his expertise to bear on the issue (including, to depart from such methodology urged on him by the parties or either of them) in order to determine the quantum, the contents of the Transcript can only be *indirectly* relevant to the specific sum of compensation payable (i.e.. the sum not specified in the Transcript, arrived at by virtue of a methodology not specified in the Transcript, taking into account evidence not specified in the Transcript).

At a 'further remove'

96. Not being directly relevant to what compensation was, in fact, paid to the Murphys (even though the very *raison d'etre* for the hearing before the Arbitrator was to determine the compensation payable) the Transcript is at an even further 'remove' from the measure (i.e. the electricity infrastructure project).

Remoteness

97. By that I mean, the information in the Transcript i.e. which does not identify the compensation sum (arrived at for unknown reasons; based on unknown evidence; pursuant to an unknown methodology) can only be *indirectly* relevant to the public moneys in fact paid, which in turn, is of only indirect relevance to the measure (decided upon in an entirely separate, and antecedent, process). The foregoing, in my view, highlights the *remoteness,* to the measure, of anything which could conceivably be contained in the Transcript.

Real and substantial

98. Recalling the *dicta* of Collins J. in *Redmond*, the Transcript is plainly not "*intrinsically"* environmental information. That does not, of course, *exclude* the Transcript from possibly being environmental information, but certainly does not mean that it is. In light of the aforementioned factors, where is the "*real and substantial possibility"* that the information in the Transcript will affect the environment directly or indirectly? (*per* Collins in *Redmond* at para. 66). In my view, there is no real or substantial possibility. There is only the very most remote of possibilities, so remote as to be negligible. To quote from *Henney* (at para. 46), I am satisfied that the information in the Transcript could not qualify, given that it is *"too remote from or incidental to the wider project to be "on" it for the purposes of Regulation 2(1)(c)"*. I now return to the decision.

Yet to be placed

99. At para. 23, the Commissioner's decision stated:-

> *"23. ESB argues that it is difficult to see how access to the Transcript would enable the public to be informed about environmental decision-making or to participate in environmental decision-making as the sole purpose of the hearing recorded in the*

Transcript is to determine the compensation which will be payable to individual landowners and decisions on the location of that infrastructure, its design, the merits or otherwise of using such infrastructure or the appropriate methods of constructing that infrastructure will be "entirely complete" by the time of the hearing. It submits therefore that the Transcript is too remote from the development of electricity infrastructure to be considered information "on" that measure. Having reviewed the Transcript however, I note that it is suggested therein that the electricity line had yet to be placed on the relevant land at the time of the hearing and one of the arguments put forward by the landowners was that ESB had not provided sufficient detail as to the impact such placement would have on their rights in respect of the land.

24. Regardless of whether or not decisions in relation to the electricity line had been complete at the time of the hearing, I do not agree with ESB's argument that providing the public with the Transcript would not contribute to greater public participation in environmental decision-making." (emphasis added)

100. I pause at this stage to make certain observations. Whereas the Commissioner appears to have laid some emphasis on whether the line had been placed on the Murphys' land at the time of the compensation hearing, nothing could possibly turn on this issue, insofar as a connection between (i) the information in the Transcript, on the one hand, and (ii) the measure itself, on the other. This is because the Arbitrator had no jurisdiction whatsoever to decide on, or alter, the route of the line. That being so, the fact that the line was not *in situ*, as opposed to the route having been previously decided on (in a completely separate process), does not increase in any way the potential relevance of the information to the measure.

101. Put simply, there was no increased possibility of any effect on the measure, regardless of whether the line (the route of which had previously been decided upon and could not be altered by means of a process presided over by the Arbitrator) was in place or not. There was never a possibility of the compensation hearing affecting the measure and that is just as true for a line in place, as opposed to a line decided upon, but yet to be placed across the land in question. The point is that the decisions which impact on the environment are *not* made in the compensation process. Nor can they be. They are made in an entirely *different* process. Moreover, they are made at an *earlier* point in time.

102. Furthermore, what the Commissioner does *not* address at all in his decision is what the Transcript does and does not do. Again, whilst it involves repetition, the Transcript does not identify the compensation payable to the Murphys; the Transcript does not identify the evidence which the Arbitrator relied upon; the Transcript does not identify the reasoning of the Property Arbitrator. Despite this, the Commissioner fails to address *why* access should be

granted to what are, at most, arguments made to the Property Arbitrator as to what compensation should or should not be paid in this particular case.

103. Those arguments, and the information upon which they were based, may well be relevant, albeit indirectly, to the specific sum of compensation ultimately decided upon, but the decisions regarding the measure had already been taken in an entirely separate process and the Transcript self-evidently cannot provide information in respect of the measure or any decision relating to the measure *previously* taken.

104. Whilst the Commissioner states that he does not agree that providing the public with the Transcript would not contribute to greater public participation in environmental decision-making, he does not explain *how* he believes this to be so. Indeed, and with very genuine respect, I find it impossible to understand such a view.

Might shape decision-making

105. Paragraph 24 of the Commissioner's decision continues as follows:-

> *"Ideally, public participation would take place at a time when the public's views might shape the relevant decision-making."*

106. I pause here to say that there is simply no question of information in the Transcript 'shaping' any decision in relation to the measure. This is for two very obvious reasons. First, the Arbitrator had no role to play in the planning process and was exclusively concerned with a *separate* compensation process. Second, compensation for *effect* self-evidently arises *after* the relevant decision-making in relation to the measure (e.g. planning decisions about whether or not the measure will go ahead at all; and thereafter, decisions about what route the electricity line will take, etc.).

Ideally

107. There would appear to be a tacit acknowledgement (in the use, by the Commissioner, of the word *"ideally"*) that there is simply no question of any meaningful participation by the public in environmental decision-making, with reliance upon or reference to information contained in the Transcript. Why? For a member of the public to participate in any meaningful way in respect of a project or measure affecting the environment, that person needs information in *advance* of relevant decision-making, whereas the information in the Transcript post-dates all decisions on the measure (if it were otherwise, it would be impossible for the Arbitrator to determine the question of what compensation was due for the *effect* on the land in question).

Para. 24

108. Paragraph 24 of the Commissioner's decision continues as follows:-

> *"However, at the very least, having access to information about the arbitration procedure relating to the compensation payable to landowners in respect of one line-placement project might contribute to the public's ability to participate in debate concerning further projects"* (emphasis added)

Arbitration procedure

109. It is clear from the foregoing that the Commissioner, quite rightly, recognised that the Transcript contains information about what he called the *"arbitration procedure"* (i.e. what I have previously described as the compensation *process*). However, as addressed earlier in this judgment, there is no lack of publicly available information about the said process or procedure. As the Commissioner was aware, the procedure is clearly set out in the 1927 Act. Moreover, the approach to compensation is *per* the 1919 Act. In addition, compensation hearings, pursuant to the said legislation, are conducted in public. All of this is publicly known just as, since the Supreme Court's decision in *Gormley*, the public is aware that a landowner enjoys a *right* to receive compensation, as opposed to an *ex-gratia* payment.

Might contribute

110. The Commissioner does not suggest that his views are based on the proposition that, knowing precisely what compensation was *paid* to the Murphys *"in respect of one-line placement project"* might assist the public in any way. This is because, of course, the Transcript says nothing about what was, in fact, determined by way of compensation. Thus, the Commissioner's view is 'squarely' based on the proposition that information about the "*arbitration procedure*" i.e. compensation process *"might"* contribute to the public's ability to participate in debate concerning future projects.

Tentative suggestion

111. This very tentative suggestion (evident from the use of the word *"might"*) is not at all explained. Standing back from the matter, it is clear to me that this is because, despite the obvious diligence with which the Commissioner approached the task, he fell into error in respect of applying the law. In essence, the Commissioner failed to have due regard to the *dicta* of Collins J. in *Redmond*. The Commissioner's approach was wrong in law and, in my view, contrary to the approach taken in *Glawisching.*

Debate

112. It also seems fair to ask: what "*debate"* does the Commissioner have in mind? It cannot be a debate in relation to the *right* to compensation. Why? Because the will of the Irish people as expressed through legislation enacted by the Oireachtas is for a landowner to be entitled to receive compensation, as of right. The relevant legislation was an amendment to the 1927 Act introduced in the wake of the Supreme Court's decision in *Gormley* in the form of s.53(5).

113. Nor is there any debate in relation to the *methodology*. Why? because all of this is provided for in legislation, namely, the 1927 Act and the 1919 Act. Thus, if the ESB and the landowner fail to agree, the matter is determined by a Property Arbitrator acting as expert.

114. In short, and intending no disrespect, what the Commissioner describes as *"information about the arbitration procedure"* cannot conceivably contribute to a debate which does not arise.

Payable

115. Furthermore, what the Commissioner describes as information about the arbitration procedure *"relating to the compensation payable to landowners in respect of one line-placement project"* (emphasis added) ignores, with respect, the fact that the Transcript says nothing about monies *"payable"*. The Transcript comprises arguments put to an expert. It seems uncontroversial to suggest that these will have been competing arguments. Why? Because if it were otherwise, the parties would be in agreement and there would have been no need for any hearing before the Property Arbitrator.

Arbitrator's determination

116. Whilst the Transcript itself was not before this court, both sides acknowledge that it does not contain the Arbitrator's determination i.e. judgment. Thus, and focusing on that factor, the Transcript simply cannot inform any member of the public about:

(i) what reasons the Property Arbitrator based his decision upon;

(ii) what evidence, if any, the Property Arbitrator regarded as probative, be that in relation to any alleged impact on land or otherwise;

(iii) what evidence, if any, the Property Arbitrator discounted, be that in respect of alleged loss or otherwise;

(iv) whether the Property Arbitrator accepted one approach over another;

(v) whether, and if so to what extent the Arbitrator, as expert, decided against adopting such submissions as were made by the parties and, instead, employed his own expertise, to reach the determination as to quantum.

117. Whilst it involved repetition, the Transcript cannot possibly identify, or elucidate in any meaningful way, the compensation which was determined by the Arbitrator to be *payable*. Thus, it is impossible to see how it can offer any assistance to any member of the public in relation to any future environmental project or measure, being only indirectly or potentially relevant to what compensation was, in fact, payable to this landowner. By taking the view that the entire information in the Transcript comprises environmental information *"on"* such a measure, I am satisfied that the Commissioner adopted far too broad an approach, breaching the principles identified by Collins J. in *Redmond*. Doubtless, the Commissioner was acting very sincerely, but his decision involved a legal error, by sweeping far too widely in a manner inconsistent with the fundamental aims of the Directive and the enabling Regulations.

Costs of the project

118. I now return to the Commissioner's decision wherein from para. 24 he stated:

> *"[24] … In addition, Henney makes it clear that the definition should be applied purposively and participation in environmental decision-making is not the only purpose of the AIE Directive and the Aarhus Convention. While Recital 1 of the Directive emphasises that one of the key purposes of the Regulations is to enable greater public participation in environmental decision-making, it is not the only purpose referred to. Recital 1 also notes that access to environmental information*

contributes to a "greater awareness of environmental matters" and a "free exchange of views".

[25] The recitals to the Aarhus Convention also note that 'in the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public an opportunity to express its concerns and enable public authorities to take due account of such concerns' which in turn furthers 'accountability of and transparency in decision-making and [strengthens] public support for decisions on the environment'. Information does not therefore need to enable participation in a manner that influences the decision-making process to which that information directly relates in order for it to fall within the definition of 'environmental information'. Indeed, this is recognised by the Court of Appeal in Henney when it notes that regard should be had to 'whether access to [the information] would enable the public to be informed about, or to participate in, decision-making in a better way. Compensation payments form part of the cost of the development of electricity infrastructure projects and information on the costs of the project is likely to be a public concern which impacts on the level of support for that project which itself amounts to a measure with environmental impact. Having information about the arbitration and compensation process therefore enables the public to better understand the system for the development of electricity infrastructure and in turn to better participate in decisions relating to such development." (emphasis added).

119. In the manner previously examined, the Transcript does not identify any *"compensation payments"* due to the Murphys. Thus, it provides no *"information on the costs of the project"*.

Compensation process

120. Furthermore, the public already has the *"information about the arbitration and compensation process"* from the trinity of sources previously referred to i.e. (i) the Supreme Court's analysis in *Gormley*; (ii) the 1927 Act (as amended, to include the statutory right, *per* s.53(5) to have compensation determined in default of agreement) coupled with the methodology set out in the 1919 Act; and (iii) the fact that such hearings are held in public.

Link

121. It can also be seen from the foregoing that the fundamental rationale of the Commissioner's decision is that having information about the compensation *process* links that information to the *measure*. However, this is done without the Commissioner saying what can be learned from the Transcript which is not already known to the public and/or readily available to the public from the sources I have referred to. Given that the planning/development consent process has already taken place, coupled with the fact that information on the compensation process is already publicly available, it is impossible to see how making available such arguments as may

have been proffered during a single compensation hearing (where no determination was made of the compensation payable) can add anything to public knowledge in respect of the compensation process (the measure having been the culmination of a different process). Indeed, the Commissioner's reference to the *process* seems to be an appropriate acknowledgment that the hearing before the Arbitrator says nothing whatsoever about what compensation was found to be *payable*.

'Cast the net' too wide

122. In my view, any information in the Transcript is plainly far too remote to constitute information *"on"* the measure. It must be stressed that nothing in this judgment is intended to be a criticism of someone who performs such an important and difficult role with such dedication and who went about this specific task, *bona fide*, and with very obvious diligence, commitment and professionalism. However, in attempting, entirely appropriately, to give a purposive interpretation, the Commissioner 'cast the net' too wide and erred in law when he took the view that the Transcript was information *"on"* a measure within the meaning of Article 2.1(c) of the AIE Directive/Regulation 3(1)(c) of the AIE Regulations.

Quasi-judicial capacity

123. The Commissioner also stated *inter alia* the following from para. 26 of his decision:

> *"[26] …I am unconvinced that the status of the Property Arbitrator, and whether he acts in a judicial capacity so as to be excluded from the definition of 'public authority' under the Regulations, has a bearing on whether the Transcript constitutes 'environmental information' as no argument has been made that ESB holds the Transcript on the Property Arbitrator's behalf. ESB engaged the stenography company to prepare the Transcript, which records a public hearing, and there is no argument as to the ESB's status as a 'public authority' within the meaning of the Regulations."*

124. With regard to the foregoing, it is common case that when making decisions as property arbitrator, with respect to compensation payable to landowners, the Arbitrator is acting in a quasi-judicial capacity. The point made by the ESB, relying on the *Friends* decision (Case-470/19) is that: if the directive is not intended to extend to pleadings or documents adduced in court proceedings, it is difficult to understand why the Commissioner could take the view that the Directive does apply to a transcript of a hearing of a quasi-judicial process.

Friends of the Irish Environment (Case 470-19)

125. Earlier in his decision, when summarising the ESB's submissions (at para. 12 thereof), the Commissioner made reference to this specific submission by the ESB at para 12 (vi), stating, *inter alia*:

> *"ESB argues that the Transcript has been generated in the context of a judicial process and is akin to the type of document referenced by the CJEU in Friends of the Irish Environment."*

126. With respect, the Commissioner's decision does not appear to engage directly with that argument, which does not hinge around the concept of *"public authority"*. It is true that the issue which the Court of Justice was asked to assist with, concerned whether the Courts Service was a public authority, but to understand the context, a brief reference to the facts is necessary. The backdrop concerned the delivery by this court, on 25 February 2016, of judgment in the case of *X & Y v An Bord Pleanála* in relation to a challenge to a building permit issued for the construction of wind turbines in Cork. On 9 July 2016, Friends of the Irish Environment wrote to the Central Office of the High Court (management of which is under the Courts Service) to request copies of the pleadings, affidavits, documents and written observations lodged by all the parties, in addition to final orders. That request was made under the Aarhus Convention and the AIE Directive.

Advocate General's opinion

127. As can be seen at para 115 of the Advocate General's Opinion, AG Bobek proposed that the court answer the question referred by finding that the relevant Directives: *"must be interpreted as meaning that the control of access to court records, whether carried out by a court, that is to say a body formally part of the judiciary, or by a private entity established for the same purpose and acting on behalf and under the control of the judiciary, constitutes an activity falling outside the scope of …"* Article 2(2) of Directive 2003/4/EC (which refers to and defines a "Public authority").

Documents and the purpose of the Directive

128. It is noteworthy, however, that having dealt with the "Public authority" question, in particular at paras. 34 and 35, the decision of the Court in *Friends* went on to state *inter alia* the following at paras. 36 and 37 with respect to the AIE Directive, read in the light of the Aarhus Convention:

> *"[36] …As is clear from Recital 1 and Article 1 of that Directive, the purpose of the Directive is to promote increased public access to environmental information and more effective participation by the public in environmental decision-making, with the aim of making better decisions and applying them more effectively, and ultimately, promoting a better environment.*
>
> *[37] Thus, while the implementation of that objective means that the administrative authorities must give public access to environmental information in their possession, in order to give an account of the decisions they take in that field and to connect citizens with the adoption of those decisions, the same is not true of pleadings and other documents adduced in court proceedings on environmental matters, since the EU legislature did not intend to promote public information in judicial matters and public involvement in decision-making in that area*." (emphasis added)

129. The foregoing statement of principle would appear to apply equally to the quasi-judicial process which the legislature have tasked the Arbitrator to determine as expert. Focusing on

the purpose of the AEI Directive, as articulated in *Friends*, the logic of the principle highlighted above would appear to apply to a consideration of whether it could ever have been intended that information about this quasi-judicial compensation process (concerning arguments, not any determination, or the basis for same, about compensation payable to a particular landowner) could come within the definition of 'environmental information'.

Public participation

130. This is particularly so given the fact that, whilst compensation proceedings are open to the public, there is no role for public *participation* in that process (in stark contrast to, say, the planning process, pursuant to which the measure proceeds, or not). Why there is no question of public participation in the compensation process is not difficult to understand given that - against the backdrop of a statutory right, reflective of constitutional imperatives identified by the Supreme Court in *Gormley* - the Arbitrator is simply dealing with a dispute over quantum in a process where there are only *two* relevant parties, namely, the landowner who is due compensation and the ESB who is liable to pay compensation, and where these specific parties cannot agree on the quantum of compensation. If, as *Friends* makes clear, the Directive is not intended to capture documents adduced in court proceedings on an environmental measure, it seems to me that the principle must apply with equal force to the process by which the quantum of compensation is determined (being a process which is at a further remove from the measure).

Para 27

131. Returning to the Commissioner's decision, para. 27 is in the following terms:

> *"[27] ESB have also argued that while some of the information contained within the Transcript is 'environmental information', other parts of the Transcript do not constitute 'environmental information'. I find that ESB's submissions in this regard are not entirely clear since it has made general arguments that the information contained in the Transcript is too remote from the development of electricity infrastructure to be considered information 'on' that measure or activity and has also declined to identify the parts of the Transcript which it accepts to be environmental information. I am satisfied, from a review of the Transcript, that there is nothing in the Transcript which can be considered so remote as to render it outside the scope of what I consider to be information 'on' the development of electricity infrastructure. In my view, the Transcript in its entirety comes within the definition of 'environmental information' contained in paragraph (c) of Article 3(1) of the AIE Regulations*."

Finding

132. Without meaning any disrespect, the foregoing would appear to me to be a finding, rather than any articulation of the reasons for that finding. I am also satisfied that, for the reasons set out in this judgement, it is a finding which is based on an error of law. Although touched on earlier, nothing turns on whether the ESB conceded that the Transcript may contain some environmental information (albeit a concession which appears to have been made without a

comprehensive review of the entire of the Transcript). I say this because it is common case that the first named respondent contended that the *entire* of the Transcript is environmental information (*i.e.* asserts that the *entire* Transcript is information 'on' the measure).

Article 9(1)(d) of the Regulations

133. This Court's finding that the Commissioner's decision regarding the "on"-question is vitiated by error of law is sufficient to dispose of these proceedings. However, lest I be entirely wrong in the foregoing, I propose to look at the second of the key questions.

134. From para. 29 onwards of his decision, the Commissioner went on to consider the question: *"Does article 9(1)(d) provide ESB with grounds to refuse the Transcript?"*. He first considered whether Article 9(1)(d) could be said to apply and identified two conditions which required to be fulfilled:-

> *"i. Intellectual property rights must arise in respect of the Transcript; and*
>
> *ii. Those intellectual property rights must be adversely impacted by release of the Transcript."*

135. The Commissioner proceeded to set out the arguments made by the ESB and by Right to Know at paras. 32(i)-(vii) and 33(i)-(xi), respectively. At para. 34, the Commissioner stated the following:-

> *"34. As ESB had indicated an assumption that the decision of my predecessor in CEI/18/0003 would be adopted in this case, my Investigator wrote once more to advise ESB that I would conduct a fresh review in these proceedings and was not bound by the decision in CEI/18/0003. She also advised ESB that in fact her preliminary view was that the test for originality set out in Walter v Lane sets a lower threshold than the more restrictive test under EU law as set out by the Court of Justice in decisions such as Infopac, Football Dataco and Painer. ESB provided further submissions in response to this correspondence which may be summarised as follows:"*

136. The Commissioner's decision proceeded to set out ESB's submissions at (i)-(vi) of para. 34, which included:-

> *"(v) ESB argues that there is no inconsistency between the relevant principles of national law and those which can be derived from decisions of the Court of Justice in decisions such as Infopac, Football Dataco and Painer. It submits that the test propounded by the Court of Justice focuses on whether the work in question is the author's own intellectual creation. It further submits that that the language used in Painer arose in the specific context of a discussion as to whether a photograph met the test and the use of the terms "creative freedom" and "personal touch" are simply illustrative of situations in which a work will meet the relevant test rather than specific criteria which must be met. It submits that the preparation of the Transcript clearly involves the author's own intellectual creation and*

requires the stenographer to engage in intellectual rigour in order to ensure that an accurate record of the hearing is prepared.

(vi) ESB thus argues that whether the terminology used by the Supreme Court or that which is found in the decisions of the Court of Justice is applied, the result is the same i.e. that the Transcript is an original literary work and the conclusion already reached by the Commissioner in CEI/18/0003 should be followed."

137. The decision went on to set out, at para. 35(i)-(x) the submissions by GMSS. Earlier in this judgment, I quoted at some length from those submissions. At para. 36, the Commissioner expressed the view that *"the protection afforded to 'intellectual property rights' is to be interpreted in accordance with the operation of such rights as a matter of EU law"*.

Afresh

138. At para. 37, the Commissioner stated that, notwithstanding the previous decision of the Commissioner in CEI/18/0003: *"I consider that the appropriate course of action is to consider the application of the relevant legal principles afresh"*. At para. 38, the Commissioner considered the decision of the House of Lords in *Walter v. Lane* and the Commissioner summed up his view at the end of para. 38 as follows:-

"I therefore consider it fair to say that the decision in Walter v Lane was reached in circumstances where the House of Lords expressly considered a requirement of 'originality' did not apply."

139. At para. 39, the Commissioner referred to the 1998 decision by the Supreme Court in *Gormley* stating:-

"*The Supreme Court did refer to the decision in Walter v Lane in considering the question of whether the recording of a copyrighted work could be done by someone other than the author. However, the judgment of the Supreme Court also notes that at the time of the decision in that case "it was not…necessary for the work to have been 'original' to obtain copyright" (para 19). The Supreme Court went on to conclude that while "originality does not require the work to be unique" it did require "original thought" and that "where there is treatment of materials already in existence, it is necessary to show some new approach" and the material "cannot be copied directly" (para 34). It explained that "it is not the language which creates the copyright, it is the creativity*" (para 42)."

Original intellectual creation

140. At para. 40, the Commissioner referred to The Copyright and Related Rights Act 2000, which provides protection for *"original literary works"* and the Commissioner noted that the intellectual property rights claimed by GNSS is provided for by s. 17(2)(a) of the 2000 Act. The Commissioner went on, in para. 40, to refer to EU Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (the "InfoSoc Directive"). He went on to refer to Directive 96/9/EC on the legal protection of

databases and Directive 2006/116/EC on the term of protection of copyright and certain related rights. Having stated that the aim of the InfoSoc Directive was to harmonise certain aspects of copyright law at EU level, the Commissioner referred to the ECJ's decision in the *Infopaq* case, and para. 40 of the Commissioner's decision concluded as follows:-

> "*The Court of Justice therefore held that copyright 'is liable to apply only in relation to a subject-matter which is original in the sense that it is its author's own intellectual creation.' It is therefore clear that although the question of copyright is dealt with at EU level across a number of Directives, the threshold of originality required to be met in order to avail of copyright protection is the same, that is, the work must be 'the author's own intellectual creation*.'"

Features of the Transcript

141. Before proceeding further, it is appropriate to look in some detail at the nature of a transcript, as produced by a stenographer. A stenographer is not a "copy-typist" *i.e.,* their work does not involve taking a printed page of text and copying that printed page such that the latter is *a verbatim record* or copy of the former.

142. The 'raw material' with which the stenographer works comprises of vocal sounds made by individuals in their own accent; tone; and volume. Operating, with obvious intellectual as well as manual skill, a machine for which they have undertaken specialist training, a stenographer produces, in 'real time', a record of these vocal sounds.

143. I deliberately employ the terms 'vocal sounds' for two reasons. First, because it obviously involves intellectual effort to interpret these sounds as words and to make a record of what the stenographer recognises, intellectually, as language, *via* applying pressure to the keys of their mysterious machine, in such variety of combinations as the brain of the stenographer decides to be necessary.

144. Second, as anyone who has participated in even a single hearing can attest, witnesses do not speak in perfect prose, nor is every vocal utterance a word (Mmm and Aaaa etc). Thus, one of the many intellectual functions performed by the stenographer is to distinguish the meaningless vocal sound from the meaningful. Nor is this where the intellectual effort ends.

145. Certain vocal sounds are identical, but comprise of different words with very different meanings *("there" and "their"; "cite" and "site"; "baring"* and *"bearing"; "real"* and *"reel"; "incite"* and *"insight"; "it's"* and *"its"; "role"* and *"roll"; "whole"* and *"hole"; "pique", "peak",* and *"peek"* being just some of the more common homophones a stenographer will be confronted with). Thus, another aspect of the stenographer's intellectual work when presented with the 'raw material' of *identical* sounds is to decide, based (i) on their knowledge of language; and (ii) their insight into the context in which the sounds were made, what word the particular sound was intended to express.

146. Deploying further intellectual effort, the stenographer edits the account produced in real time and *creates,* in every sense of the terms, a work of literature *i.e.,* a page or pages of words brought into being by them, and self-evidently involving decisions regarding, but by no means limited to (i) the exclusion of meaningless sounds; (ii) the context-specific choice between alternative words which sound identical; and (iii) the attributing of words to a particular participant.

147. This latter point seems to me to deserve emphasis. Participants in a 'live' hearing (be they a witness; counsel; solicitor; Arbitrator or Judge) do not identify themselves (be that by name, complete with spelling instructions, or by role) prior to making every vocal contribution. This highlights further intellectual work done by a stenographer *i.e.,* from what, at times, might be a cacophony of vocal sounds (in circumstances where it is not unusual for more than one person to be speaking, or attempting to speak, at the same time, e.g. when counsel is cross-examining a witness or when one counsel is interrupting the task their friend is engaged, in order to make an objection) the stenographer's choices create order.

148. To look at things from a sensory perspective, the raw material was something available to be heard in 'real time' only by those present. The ephemeral nature of the raw material is that, in a literal sense, nobody other than the persons present during the hearing could ever hear those words uttered 'live'. However, as a result of this stenographer's contemporaneous efforts during the live hearing and editing thereafter, an original work is created. It has a physicality which the raw material lacked. A different one of the senses (sight, not hearing) can be brought to bear, in that the Transcript can be read, potentially forever, wholly unlike the 'words on air' which, if unheard, cease to be.

149. Even if it assumed that every sound made during the hearing was a word, it is exclusively due to the intellectual work and creative efforts of the stenographer that the totality of the words spoken during the hearing by various participants do not all appear in a single unbroken 'sentence'. It is a statement of the obvious that, when someone speaks, they do not simultaneously provide a 'running commentary' on their punctuation-choices in the event that their words are committed to print. Rather, all choices are for the stenographer.

150. It could not seriously be suggested by anyone who has ever read or written something in the English language that punctuation is either (i) unnecessary; (ii) irrelevant to meaning; (iii) divinely or naturally ordained; and/or (iv) does not involve important choices from (v) a range of alternatives. The worldwide success of the publication *"Eats Shoots & Leaves"* illustrate that even four simple words, spoken in the same order, can produce dramatically different meanings, depending on the punctuation applied. *"Eats Shoots & Leaves"* denotes that the verb is *"Eats"* and the diet comprises of *"Shoots"* and *"Leaves"*, whereas *"Eats, Shoots and Leaves"* means it eats, then it shoots and, thereafter, it leaves. One needs only to have a passing familiarity with the English language to know the vital role which punctuation plays in written text.

151. Without punctuation, even the most faithful rendering, in print, of every word spoken aloud, would amount to an endless 'stream' of words either entirely devoid of meaning, or where the meaning is decipherable only by reference to a sound-recording where the listener can, for themselves, attempt to understand (i) who said what; (ii) when; (iii) in what order; and (iv) the context in which the otherwise endless stream of words arose (thereby enabling them to try and 'fish' for meaning in this endless word 'stream'). It is the intellectual and creative efforts of the stenographer which gives meaning to the raw material.

152. It is exclusively due to the stenographer's choices, self-evidently involving creative and intellectual input, which ensures that it is not the "Tower of Babel" which appears on the printed page. To do so, they discriminate. They distinguish. By doing so, not only is the 'raw material' altered from (i) fleeting vibrations in air, to (ii) the physical and material, it is changed and materially *improved* by their contribution. This is amply illustrated by contrasting, on the one hand, a stenographer's transcript which includes all the choices referred to in this judgment; and, on the other, the results on a slavish setting-out, in (i) a never-ending stream, of (ii) every word and/or sound; and (iii) only same (i.e. without attributing any words or sounds to any individual, by identifying the speaker); (iv) in the strict order in which these words or sound were made; (v) without punctuation; and (vi) without discrimination (e.g. where two people 'talked over' each other, simultaneously). The latter would *truly* be "*a vebatim record*". It would also be a 'word salad' of no utility whatsoever.

153. Not only does the stenographer's original effort ensure that meaning is given to the words spoken, choices made by the stenographer will necessarily affect the manner in which that meaning is conveyed to the reader. Whether a submission made by counsel or an answer provided by a witness appears as a single, lengthy sentence with sub-clauses divided by commas (as opposed to a series of short, 'staccato' sentences, broken up by full stops) is entirely down to the creative choices made by the stenographer, who is 'at large' in this regard. The choice actually made will necessarily involve an element of creativity, reflective of the stenographer's personal style.

154. Furthermore, there is no third party who provides the equivalent of contemporaneous 'stage directions' during a hearing, e.g. by saying aloud things like:-

> **[MR…] WAS EXAMINED IN CHIEF BY [MS…]**
>
> **[MS…] WAS CROSS-EXAMINED BY [MR…]**
>
> **RE-EXAMINED BY…**
>
> **THE HEARING ADJOURNED BRIEFLY AND RESUMED AS FOLLOWS**:
>
> **SUBMISSION BY [MS…]**

END OF SUBMISSION OF [MS…]

FURTHER SUBMISSION BY [MR…]

RULING

155. Yet, the foregoing are just some common examples of the stenographer acting as third party 'narrator' in the Transcript which is, without doubt, improved by the stenographer's creative choices in this regard. These choices are creative in both senses. First, the stenographer is *adding* words never uttered and, thus, *not* merely making *a verbatim record* of what was said but creating *more* than was said.

156. Second, by adding extra words unspoken at the hearing (at their sole discretion and unbound by any pre-determined decisions as to whether, or how, that is done) the stenographer creates added and improved meaning insofar as the 'end product' (the Transcript) is concerned. In other words, were the stenographer merely to produce, slavishly, on a page, every word or sound in the order it was produced, the 'end result' would be closer to *a verbatim record,* albeit next to useless. The intellectual and creative efforts of the stenographer produces an original work which is given added meaning, transforming and improving the 'raw material'.

157. Where an interruption occur during a hearing, be it by a member of the public or another participant at the hearing, or otherwise, no person says the words "*there is now an interruption*". The stenographer who chooses to employ the term "**INTERRUPTION"** makes both an intellectual and a creative choice. Again, they add a word never uttered during the proceedings and, by so doing, give added meaning to the literary work, to better convey to the reader what occurred. Indeed every word added by the stenographer which was not, in fact, uttered during the proceedings is, by definition, a 'creative' act, in both senses of the term.

158. Another obvious example is where the stenographer divides the text between "Q" (for question) and "A" (for answer). No hearing runs on the basis that, before asking a question, the individual on their feet says aloud the letter "Q" or the word "Question". Nor does the witness begin every answer by first saying "A" or "Answer". This work by the stenographer involves adding what was never said and these numerous acts of creation by the stenographer change the 'raw material' which is improved as a consequence, and is not only made meaningful but given added meaning by virtue of the stenographer's creative input.

159. It is the stenographer's work alone that ascribes page and line numbers to words spoken (without any such instructions, having been given). What line number a particular word appears on will be a function of the formatting decisions (involving personal and stylistic choices) made by the stenographer. It is common for the stenographer's Transcript to include

at the very start, a list of *dramatis personae* and, at the very end, an index, wherein words are listed in alphabetical order alongside a 'count' of how many times the word appears; and directions as to the page number and line number where the word can be found. Again, this comprises originality. It involves, in a very real way, the stenographer adding what was never said or done in the 'raw material', thereby transforming and giving added meaning and greater utility to same. This involves skill, intellectual and creative effort, resulting in the product being utterly different from, and being of far more utility than, a mere verbatim record of the raw material.

160. Although not, of itself, determinative, it should also be said that the stenographer's choices (no such choice having been made by the participants at the hearing) include the 'font' to employ in what is, in a literal sense, an original work of literature. This choice is very obviously a creative one, given that the choice, whilst it does not affect the *meaning* of the words used, undoubtedly has an effect in terms of visual aesthetics. The same is true for the choice of font size made by the stenographer. Subject to the requirement that the text is large enough to read, the choice speaks not to meaning but to visual appeal or aesthetics.

161. This is also true in relation to layout, including but not limited to (i) margin-size, (ii) spacing; (iii) how many words to include per page; and (iv) the use of **bold** or *italics*. Even something as apparently 'simple' as the choice to employ italics (e.g. where a participant quotes directly from a document, thereby conveying meaning more effectively) is a free, stylistic and creative choice. The foregoing choices, none of which are pre-ordained, are creative, in that the outcome of those choices will affect, i.e. improve, both the attractiveness and utility of the document to the reader.

162. Thus, the Transcript is, self-evidently, far more than *a verbatim record* of what was said. From the 'raw material' of sounds made on air in a never-ending stream, by different persons, the stenographer brings into being, (literally, creates) a tangible and original literary work. Their intellectual and creative choices give meaning to the raw material which a mere slavish setting out of the sounds made would entirely lack. Not only that, the Transcript is replete with what was *never* said, the addition of which words and information is reflective of free and creative choices made by the stenographer, employing intellectual effort as well as specialist skills, to create a truly original work which is fundamentally different, in nature, to the original 'raw material' and is improved, in material ways, by the stenographer's work and choices.

Para 41

163. Returning to the Commissioner's decision, para. 41 began as follows:-

> *"41. The findings of the Court of Justice in Infopaq were affirmed in Painer. In that case the Court was required to consider whether copyright existed in portrait photographs or whether 'because of the allegedly too minor degree of creative freedom such photographs can offer, that protection, particularly as regards the regime governing reproduction of*

works provided for in Article 2(a) of Directive 2001/29, is inferior to that enjoyed by other works, particularly photographic works' (see para 86)."

164. Later in para. 41, the Commissioner stated:-

"*The Court reiterated the finding in Infopaq that 'copyright is liable to apply only in relation to a subject-matter, such as a photograph, which is original in the sense that it is its author's own intellectual creation' (see para 87). It went on to elaborate that 'an intellectual creation is an author's own if it reflects the author's personality' which 'is the case if the author was able to express his creative abilities in the production of the work by making free and creative choices' (paras 88 and 89). It found that a portrait photograph was subject to copyright protection because 'the photographer can make free and creative choices in several ways and at various points in production' including through the choice of background, the subject's pose, the lighting, the framing, the angle of the view and the atmosphere created. As such, the Court was of the view that 'the freedom available to the author to exercise his creative abilities will not necessarily be minor or even non-existent' although this was a matter for the national court to determine in each case (see para 93 and 99).*"

165. In the manner previously examined, free choices made by the stenographer (i) transform; (ii) add to; and (iii) improve the 'raw material' of sounds and result in the production of the Transcript. It is based on, but materially different in nature and content, to the raw material and reflects the stenographer's creative choices as much as their intellectual effort and specialist skills. For the reasons given, I am entirely satisfied that the principles in *Painer* and *Infopaq* apply to the Transcript, which - no less than a photograph – is the original intellectual creation of the stenographer. A single example suffices.

166. In the absence of contemporaneous 'ticker tape' directions in relation to how the vocal utterances by a speaker, or speakers, should be given meaning through punctuation, as well as differentiated from the words spoken by others, and unless one accepts the proposition that punctuation is either unnecessary, irrelevant or divinely ordained (such that *every* person who hears a stream of words will make the very *same* punctuation and formatting choices, were they to produce the spoken word in documentary form) *Infopaq* applies. This is to say nothing of the textual *additions* made by the stenographer to the raw material.

The test for originality

167. At para. 42, the Commissioner stated:-

"*Although the 2000 Act and the decision of the Supreme Court in Gormley predate some of the Directives mentioned above and the decisions in Infopaq and Painer, the requirement for originality set out in the 2000 Act and in the Supreme Court's decision can be read in accordance with the test for originality which applies as a matter of EU law. Indeed, this would appear to be the view of the Irish legislature as evidenced by the explanatory note to SI No 16/2004 European Communities (Copyright and Related Rights) Regulations 2004*

which transposed the InfoSoc Directive. That explanatory note provides that the SI 'completes the transposition into Irish law of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society.' It goes on to note that 'while Ireland was already in substantial compliance with this Directive through the enactment of the Copyright and Related Rights Act 2000 this Order makes a small number of amendments to the 2000 Act to ensure it fully achieves the result intended by the Directive.'" (emphasis added)

168. It is appropriate to note that the foregoing view by the Commissioner would appear to be materially different to that expressed by his investigator in the 3 March 2022 letter to the ESB, where the following was stated:-

"While my views are not binding on the Commissioner, it appears to me that the test for originality set out in Walter v. Lane sets a lower threshold than the more restrictive test under EU law, set out by the CJEU in Case C-05/08 Infopaq International AS v. Danske Dagblades Forening which provides that in order for a work to be covered by copyright it must be the author's own intellectual creation. In his opinion in case C-604/10 Football Data Co v. Yahoo! UK Ltd Advocate General Mengozzi also clarified that the EU standard requires a 'creative aspect' and it is not sufficient that the nature of a specific work (a database in that case) has required labour and skill. Although Football Data Co referred to the Directive 96/9/EC (the Database Directive), the Infopaq case related to Directive 2001/29/EC (the Infosoc Directive), Article 2 of which provides for a much broader application and which I consider to be of relevance in this case. In Case C-145/10 Panier v. Standard Verglas GmbH & Ors the CJEU reiterated that for a work to benefit from copyright protections, it must be the author's intellectual creation, reflecting their personality and their free and creative choices."

169. It will, of course, be recalled that the Supreme Court in *Gormley* considered the decision in *Walter v. Lane* and I can see nothing in the judgment of Barron J. to suggest that *Walter v. Lane* no longer represents good law. At para. 43, the Commissioner went on to state the following:-

"It is therefore clear that the test which applies to the intellectual property right claimed in this case (i.e. the copyright applying to an 'original literary work' as provided for in the 2000 Act) is that the work must be the author's own intellectual creation. This will be the case if the work demonstrates original thought, reflects the author's personality or expresses their creative abilities through the making of free and creative choices. The Court of Justice in Infopaq noted 'words as such do not…constitute elements covered by the protection' and 'it is only through the choice, sequence and combination of those words that the author may express his creativity in an original manner and achieve a result which is an intellectual creation' (see para 45). I am not persuaded that the Transcript satisfies this test." (emphasis added)

170. It is clear that the Transcript is the stenographer's own intellectual creation, demonstrating the stenographer's original thought and, *inter alia*, expressing their creative abilities by the making of free and creative choices. It seems to me that, having taken the view that the approach in *Gormley* was consistent with EU law, the Commissioner fell into error, misdirected himself, and misapplied the law. The headnote in the reported decision in *Gormley* states:-

> *"Held by the Supreme Court (Barrington, Murphy and Barron JJ.)…That originality did not require the work to be unique, merely that there should have been original thought. Where there was treatment of materials already in existence, it was necessary to show some new approach. The difference between a copy and the original lay in the treatment of the source material. Where material was copied, the necessary skill, labour and judgment must be shown to create a truly new work."*

171. Whilst the Commissioner stated *"I am not persuaded that the Transcript satisfies this test"*, the foregoing seems to me to be a conclusion, rather than reasons for that conclusion. It is also a conclusion which is impossible to 'square' with that the Commissioner knew about the Transcript, as examined above. The Supreme Court's decision in *Gormley* makes clear that originality does not require a work to be unique. That said, the Transcript is self-evidently so. *Gormley* emphasises that there must have been original thought. That is plainly the case with respect to the Transcript. When materials are already in existence, it is necessary to show some new approach. The foregoing is manifestly satisfied with respect to the Transcript. The stenographer creates a fundamentally different 'product' to the 'raw materials' they were presented with. They bring meaning to the otherwise meaningless. They give permanence to the ephemeral. This is not a situation where material was merely copied. The stenographer's skill and labour, both intellectual and creative, creates a truly new and original work, containing that which was not in the raw material of sound.

172. In deciding that the Transcript could not satisfy what the Commissioner seems to have considered to be an originality requirement, he erred in law. I want to emphasise again and in the clearest terms that this is not to criticise the Commissioner in any personal sense. The sheer length and detail of the Commissioner's decision speaks to the *bona fide* commitment to the difficult role they perform and a determination to discharge that role in the most professional of manners. However, despite what was plainly enormous effort on the Commissioner's part, an error of law arose.

173. Considering the decision as a whole, the error in respect of Regulation 9(1)(d) appears to stem from an overly-narrow emphasis on *creativity*, as an aspect of originality. This seems clear from para. 44 of the decision wherein the Commissioner stated:-

> "*While I accept that the preparation of such transcript involves significant skill, I cannot see how it involves any element of creativity or original thought so as to satisfy the test for originality."*

174. Thus, the Commissioner begins (at para. 42) by indicating that the requirement for originality per the decision in *Gormley* is consistent with the approach in EU law, but he proceeds to look at originality in a far 'narrower' way than expressed by the Supreme Court in *Gormley*. Given the contents of para. 42, the Commissioner does not appear to suggest that EU law imposes a more stringent approach than the test in *Gormley* but, even if he took such a view, it is not at all clear *why* the Transcript failed to meet any such 'higher' test. Nor is it at all clear what the Commissioner means by his use of the word *"creativity"* when he stated: *"I cannot see how it involves any element of creativity or original thought so as to satisfy the test for originality."* It would appear that he is drawing a distinction between creativity, on the one hand, and original thought, on the other. Why he is not satisfied that there is any element of either, is entirely unclear. In the manner examined in this judgment, even if one applies a creativity, in addition to, an originality standard, the Transcript manifestly satisfies both. Para 46 of the Commissioner's decision is as follows:-

> "*I am therefore not persuaded that the 'intellectual property' right asserted by ESB and the stenography company (i.e. the copyright applying to an 'original literary work' as provided for in the 2000 Act) arises in the circumstances of this case. As a result, the grounds for refusal set out in Art. 9(1)(d) of the Regulations do not arise and it is not necessary for me to consider the question of adverse impact nor is it necessary for me to consider the public interest balancing test.*"

175. For the reasons set out in this judgment, the foregoing was an error of law by the Commissioner. At para. 43 of the respondent's written submissions it is stated:

> "*43. The Commissioner was obliged to consider the appeal de novo and was entitled to reach a different outcome based on an interpretation of the 'intellectual creation' test, and the decisions of the Court of Justice of the European Union in Case 05/08 Infopaq International AS v Danske Dagblades Forening ("Infopaq"), Case C-604/10, Football Dataco v Yahoo! UK Limited ("Dataco") and Case C-145/10, Painer v Standard Verglas GmbH & Ors. ("Painer")*
>
> *44. While the judgments in Infopaq and Painer were referred to in the Commissioner's Previous Decision, the judgment in Dataco was not. Furthermore, the submission by RTK referred to the opinion of the Advocat General in Case C-469/17, Funke Medien NRW GmbH ("Funke Medien") in which he noted that the concept of a 'work' under EU copyright law is an autonomous EU law concept, and the main component of the definition is that the work must be 'its author's own intellectual creation'.*
>
> *45. Therefore, the Commissioner was not bound by, and was entitled to depart from, the findings in the earlier decision, based on the arguments presented in the submissions, which in this case included the appeal and submission by RTK. Indeed, the Commissioner was entitled to reach a different conclusion where the previous decision of the Commissioner contained an error of law in relation to the test for originality as it applies to the protection of intellectual property rights by concluding (p. 15) that release of the Transcript would*

breach GMSS' intellectual property rights, namely copyright in the Transcript, and would adversely affect its property rights."

176. Even if one ignores para. 42 of the Commissioner's decision (wherein he is satisfied that there is no inconsistency between the Supreme Court's approach in *Gormley* and that mandated by the jurisprudence of the Court of Justice) the Transcript meets the principles outlined in *Infopaq*; *Painer*; and *Dataco*, in my view.

Funke Medien

177. During the hearing I was also provided by the respondent with a copy of the judgment of the Court in *Funke Medien* [case C-469/17]. The background facts were as follows. The Federal Republic of Germany prepared a military status report each week on the deployments of armed forces abroad and on the developments at the deployment locations. These reports (referred to as 'UdPs') were sent to selected members of the Federal Parliament; to sections of the Federal Ministry for Defence; to other federal ministries; and to certain bodies subordinate to the Federal Ministry of Defence. UdPs were categorised as 'classified documents - restricted' being the lowest of four levels of confidentiality laid down under German law. At the same time the Federal Republic of Germany published summaries of UdPs (*i.e.* 'public briefings') which were available to the public without any restrictions.

178. Funke Medien operated a website of a German daily newspaper. It applied for access to all UdPs drawn up between 1 September 2001 and 26 September 2012. That application was refused on the grounds that disclosure could have an adverse effect on security-sensitive interests of the Federal Armed Forces. Funke Medien nevertheless obtained, by unknown means, a large proportion of the UdPs which it published in part as 'the Afghanistan papers' which could be read online as individually scanned pages accompanied by an introductory note, further links and a space for comments.

179. The Federal Republic of Germany took the view that Funke Medien infringed its copyright over the UdPs. It brought an action for an injunction which was upheld by the Regional Court in Cologne. The appeal by Funke Medien was dismissed by the Higher Regional Court. It brought an appeal on a point of law to the referring court, maintaining that the action for an injunction should be dismissed. From para. 16 of the Grand Chamber's decision, the following was stated:

"*Consideration of the questions referred*

Preliminary observations

16. The referring court notes that, in dismissing Funke Medien's appeal, the [Higher Regional Court, Cologne] relied on the premise that UdPs can be protected under copyright as 'literary works', but has not made any finding of fact from which it can be concluded that UdPs are original creations.

17. In that regard, the court considers it appropriate to make the following clarifications.

18. Article 2(a) and Article 3(1) of Directive 2001/29 provide that the Member States are to provide authors with the exclusive right to authorise or prohibit direct or indirect reproduction by any means and in any form of their 'works' and with the exclusive right to authorise or prohibit any communication to the public of those 'works'. Thus, subject matter can be protected by copyright under Directive 2001/29 only if such subject matter can be classified as a 'work' within the meaning of those provisions (see, to that effect, judgment of 13 November 2018, Lavola Hengelo, C-314/17, EU:C:2018:899, at para. 34).

19. As is clear from well-established case-law, in order for subject matter to be regarded as a 'work', two conditions must be satisfied cumulatively. First, the subject matter must be original in the sense that it is the author's own intellectual creation. In order for an intellectual creation to be regarded as an author's own it must reflect the author's personality, which is the case if the author was able to express his creative abilities in the production of the work by making free and creative choices (see, to that effect, judgment of 1 December 2011, Painer, C-145/10, EU:C:2011:798, paragraphs 87 to 89).

20. Second, only something which is the expression of the author's own intellectual creation may be classified as a 'work' within the meaning of Directive 2001/29 (judgment of 13 November 2018 Lavola Hengelo, C-310/17, EU:C:2018:899, paragraph 37 and the case-law cited).

21. In the present case, Funke Medien has contended that UdPs cannot be protected under copyright, since they are reports, the structure of which consists of a standard form, drawn up by different authors, of a purely factual nature. As far as concerns the German Government, it claims that the very creation of such a standard form may be protected under copyright.

22. It is for the national court to determine whether military status reports, such as those at issue in the main proceedings, or certain elements thereof, may be regarded as 'works' within the meaning of Article 2(a) and of Article 3(1) of Directive 2001/29 and therefore be protected by copyright (see, to that effect, judgment of 16 July 2009, Infopaq International, C-5/08, EU:C:2009:465, paragraph 48).

23. In order to determine whether that is in fact the case, it is for the national court to ascertain whether, in drawing up those reports, the author was able to make free and creative choices capable of conveying to the reader the originality of the subject matter at issue, the originality of which arises from the choice, sequence and combination of the words by which the author expressed his or her creativity in an original manner and achieved a result which is an intellectual creation (see, to that effect, judgment of 16 July 2009, Infopaq International, C-5/08, EU:C:2009:465, paragraphs 45 to 47), whereas the mere intellectual effort and skill of creating those reports are not relevant in that regard (see, by analogy,

judgment of 1 March 2012, Football Dataco & Ors, C-604/10, EU:C:2012:115, at paragraph 33).

24. If military status reports, such as those at issue in the main proceedings, constitute purely informative documents, the contents of which is essentially determined by the information which they contain, so that such information and the expression of those reports become indissociable and that those reports are thus entirely characterised by their technical function, precluding all originality, it should be considered, as the Advocate General stated in point 19 of his Opinion, that, in drafting those reports, it was impossible for the author to express his or her creativity in an original manner and to achieve a result which is that author's own intellectual creation (see to that effect, judgment of 22 December 2010, Bezpečnostní softwarová asociace, C-393/09, EU:C:2010:816, paragraphs 48 to 50, and of 2 May 2012, SAS Institute, C-406/10, EU:C:2012:259, paragraph 67 and the case-law cited). It would then be incumbent on the national court to find that such reports were not 'works' within the meaning of Article 2(a) and of Article 3(1) of the Directive 2001/29 and, therefore, that they cannot enjoy the protection conferred by those provisions." (emphasis added)

180. It cannot be said of the Transcript that all originality was precluded in their creation by the stenographer. Nor can it be said that it was impossible for the stenographer to express his or her creativity in an original manner. There is a 'surface attraction' to the submission made on behalf of the respondent that a transcript is "*merely a verbatim record*". However that is to ignore how a transcript comes to be, which includes free creative choices, in particular, as regards punctuation, which gives meaning to the raw material (which a verbatim setting out of same would lack) and ignores the numerous additions by the stenographer, at their sole discretion, of words never uttered at the hearing, all of which transforms and improves the raw material into an original literary work, which includes stylistic choices made by the work's author and no one else. It should also be said that the court's decision in *Funke Medien* did *not* exclude the possibility of the national court in Germany holding that military status reports could attract copyright protection. For the reasons expressed in this judgment I am entirely satisfied that a transcript can fairly be considered to be its author's own intellectual creation. Thus, even if the Commissioner had focused on *Funke Medien*, the Commissioner's decision in relation to the application of Article 9(1)(d) involved an error of law.

The Commissioner's first decision

181. It will also be recalled that, in an *earlier* decision by the Commissioner, in respect of the *same* Transcript, the Commissioner reached an entirely *different* decision. That was in case CEI/18/0003 by means of a decision of 13 December 2018. I made reference to it earlier and it is sufficient for present purposes to make the following observations.

182. In the Commissioner's 'first' decision, his consideration of Art. 9(1)(d) begins at internal page 7. His consideration proceeded under the following headings: "*Original literary works*" (with

reference made to the 2000 Act; and jurisprudence including *Walter v Lane*; *Infopaq*; and *Painer*); "*Court of Justice of the European Union Case law*" (with reference made to *Infopaq*; *Painer*; and the Supreme Court's decision in *Gormley*); "*United Kingdom Case law*" (where *inter alia Walter v Lane* and *Gormley* were discussed); "*Copyright holder*" (wherein the Commissioner was satisfied that the Transcript constituted an original literary work within the meaning of s. 17(2) of the 2000 Act and that copyright in the Transcript vests in the stenography company which created it, pursuant to s. 23 of the 2000 Act); "*Would disclosure of the Transcript adversely affect the copyright holder's intellectual property rights?*" (wherein Article 9(1)(d) was analysed and the Commissioner accepted that releasing the Transcript under the AIE Regulations could result in economic loss); "*Exemptions to copyright*" (wherein the Commissioner found no basis for any exemptions); and "*Public interest Test"* (wherein the Commissioner found that the interest in maintaining the exemption in Art. 9(1)(d) outweighed the public interest in disclosing the information sought).

The Commissioner does not stand over the analysis

183. During the hearing before me, Counsel for the Commissioner made clear that his client's instructions are that the Commissioner does not stand over the analysis in the Commissioner's first decision. In short, counsel for the Commissioner was instructed to inform this court that the Commissioner was *wrong* in respect of the first decision (CEI/18/0003) with regard to the Art. 9(1)(d) analysis.

Wrong

184. However, nowhere in the Commissioner's second decision is it stated that the first decision was wrong. It is not in dispute that, in advance of making the second decision, the Commissioner's Investigator 'flagged' that the Commissioner would be looking at matters afresh.

Why

185. However, it is also fair to say that, in coming to a radically different decision, nowhere does the Commissioner explain the reasons *why* his first decision was wrong. Insofar as counsel for the Commissioner suggests that these can be found in communication sent by the Investigator, I am satisfied that this cannot be so, not least because (i) there would appear to be a materially different approach suggested by the Investigator with respect to the relevant test; as well as (ii) the Investigator made clear that her views were not at all binding on the Commissioner.

186. In *PPA v Refugee Appeal Tribunal* [2007] 1 ILRM 288, Geoghegan J. indicated that fair procedures requires a mechanism whereby it is possible to: "*achieve consistency in both the interpretation and the application of the law in cases like this of a similar category"*. The first and second decisions by the Commissioner were in respect of the self-same Transcript and involved a consideration of the self-same legal principles derived from European law; European jurisprudence; domestic legislation; and Irish authorities. In *Kelly & Doyle v Criminal Injuries Compensation Tribunal* [2020] IECA 342, Ní Raifeartaigh J. noted that there are types of decisions which require *"a measure of consistency"* (at 157) whilst accepting that this does not

amount to decisions being of precedential value. In *Chubb European Group S.E. v Financial Services and Pensions Ombudsman* [2023] IEHC 74, Simons J. was of the view that decisions of a body in the nature of the Ombudsman have the status of *"persuasive precedent"* (see in particular paragraphs 39 and 40).

Reasons for 'change of mind'

187. It was neither submitted by the Appellant nor is it suggested by this court the Commissioner's first decision was *binding* upon him. That is not the point, however. In circumstances where there was no intervening decision which clarified the legal position, the Commissioner's 'change of mind' came with the obligation to provide adequate reasons so that his change of mind could be understood. It has long been settled law that a decision maker is obliged to give reasons for its decision (see, for example, *Connelly v An Bord Pleanála* [2018] IESC 31 ("*Connelly"*); and *Mallak v Minister for Justice, Equality and Law Reform* [2012] IESC 59). It is sufficient for present purposes to quote para. 6.15 of the Supreme Court's decision in *Connelly,* wherein then Chief Justice Clarke stated:

> *"[6.15] … it seems to me that it is possible to identify two separate but closely related requirements regarding the adequacy of any reasons given by a decision-maker. First, any person affected by a decision is at least entitled to know in general terms why the decision was made. This requirement derives from the obligation to be fair to individuals affected by binding decisions and also contributes to transparency. Second, a person is entitled to have enough information to consider whether they can or should seek to avail of any appeal or to bring judicial review of a decision. Closely related to this latter requirement, it also appears from the case law that the reasons provided must be such as to allow a court hearing an appeal from or reviewing a decision to actually engage properly in such an appeal or review*."

188. I am satisfied that the Commissioner's decision fell short of providing adequate reasons *per* the principles outlined by the Supreme Court in *Connolly*.

Summary

189. In summary, the Commissioner erred in law in finding that the Transcript, in its entirety, is environmental information (i.e. information, "on" the development of electricity infrastructure, coming within para. (c) of the definition of 'environmental information' in Art. 3(1) of the AIE Regulations).

190. The Commissioner failed to provide adequate reasons for his conclusions (e.g. *why* access to information about the arbitration procedure *"might"* contribute to the public's ability to participate in debate concerning future projects, given that information on the procedure is already publicly available in the form of the 1919 and 1927 Acts, compensation hearings are held in public, particularly where the quantum of compensation and the basis upon which the property arbitrator decided same is not contained in the Transcript).

191. The Commissioner erred in law by misapplying the test as to whether the Transcript benefits from copyright. The Transcript comes within the scope of both national and European law on copyright and the Commissioner's conclusion to the contrary is incorrect as a matter of law. The Electricity Supply Board was entitled to rely on Article 9(1)(d) of the AIE Regulations.

192. The Commissioner failed to give any or any adequate reasons for his decision to reverse his finding (made in case CEI/18/0003) that Art. 9(1)(d) of the AIE Regulations *applies* to the Transcript.

193. On 24 March 2020 the following statement issued in respect of the delivery of judgments electronically: *"The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate."*

194. In terms of a preliminary view on the costs question, section 169 (1) of the Legal Services Regulation Act, 2015 ("the 2015 Act") provides as follows:

*"169 (1) A party who is **entirely successful** in civil proceedings **is entitled to an award of costs** against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including—*

(a) conduct before and during the proceedings

(b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings,

(c) the manner in which the parties conducted all or any part of their cases,

(d) whether a successful party exaggerated his or her claim,

(e) whether a party made a payment into court and the date of that payment,

(f) whether a party made an offer to settle the matter the subject of the proceedings, and if so, the date, terms and circumstances of that offer, and

(g) where the parties were invited by the court to settle the claim (whether by mediation or otherwise) and the court considers that one or more than one of the parties was or were unreasonable in refusing to engage in the settlement discussions or in mediation".

195. I have not identified any fact or circumstance which would merit a departure from what is, of course, the 'normal' rule (i.e. that 'costs' should 'follow the event'). The parties should correspond with each other, forthwith, regarding the appropriate form of order including as to costs which should be made. In default of agreement between the parties on any issue, short

written submissions should be filed in the Central Office within 14 days (i.e. by Wednesday 31 January 2024). In the event of agreement on the form of final order reflecting this decision, within the same period, a draft should be submitted to the Registrar as soon as possible.