

**THE HIGH COURT**

**Record No. 2023/406 MCA**

**BETWEEN**

**THE COURTS SERVICE OF IRELAND**

**PLAINTIFF**

**-and-**

**THE INFORMATION COMMISSIONER**

**DEFENDANT**

**-and-**

**PAUL FARRELL**

**NOTICE PARTY**

**JUDGMENT of Ms. Justice Hyland delivered on 7 June 2024**

**Background**

1. Mr. Farrell, a litigant in person, sought the Dublin County Registrar Civil Motion lists from 1 February 2022 to 24 May 2022 inclusive (the “Court lists”) from the Courts Service under the Freedom of Information Act 2014 (the “2014 Act”). The Courts Service refused him access on 6 January 2023. Mr. Farrell applied to the Freedom of Information Commissioner (the “Commissioner”) for a review of that decision. By

decision of 1 November 2023 (the “Decision”), the Commissioner decided to release the records to Mr. Farrell under the 2014 Act, deciding that the Court lists related to the general administration of the courts.

2. On 28 November 2023, the Courts Service appealed that decision to the High Court, as provided for under s.24 of the 2014 Act, by way of an originating notice of motion under Order 84C of the Rules of the Superior Courts. This Rule provides a procedure for statutory appeals. Mr. Farrell was served with the book of papers on 12 December 2023 as a notice party.
3. Following correspondence between the Commissioner and the Courts Service, by letter of 17 January 2024, the Commissioner stated that he intended to concede the appeal and have the matter remitted to his office for further consideration and for a new decision to be issued. He agreed to let the matter be handled by a new investigator. A copy of that letter was provided to Mr. Farrell.

### **Mr. Farrell’s Objection**

4. The matter came before me in the non-jury list for mention and the Courts Service and the Commissioner indicated that an agreed form of Order could be made whereby the Commissioner’s Decision could be set aside and the matter remitted back for a new decision. However, Mr. Farrell, being the notice party, and the person who had originally sought the documents in question from the Courts Service, indicated that he did not consent to the agreed Order and that he was entitled to be heard on whether such an Order should be made. I adjourned the matter to allow submissions to be made on the question as to whether an appellant and respondent could agree to resolve a statutory appeal despite the notice party objecting to such a course.

5. Before any hearing on this issue took place, the Supreme Court gave a decision that was potentially of relevance, being *Ballyboden Tidy Towns Group v. An Bord Pleanala & Ors.* [2023] IEHC 114. That raised similar issues, albeit in the context of judicial review rather than a statutory appeal. I therefore directed further written submissions and raised the following three questions in advance of the hearing:

*“1. Whether the appeal ought to have been brought pursuant to Order 130 or whether it was correctly brought pursuant to Order 84C;*

*2. Whether the notice party, Mr. Farrell is seeking liberty to defend;*

*3. The extent to which the principles identified in the Supreme Court decision of Ballyboden Tidy Towns Group v. An Bord Pleanala [2023] IEHC 114 are applicable to a statutory appeal.”*

6. At the hearing, counsel for the Courts Service and the Commissioner made detailed submissions on the law in the area. However, at the very end of his submissions, Mr. Farrell indicated for the first time that he was not in a position to take over carriage of the proceedings, and to resist the application of the Courts Service for a set aside of the Decision. He explained he had taken this decision largely for costs reasons.
7. In those circumstances, it appears that Mr. Farrell’s opposition to the decision of the Commissioner to consent to an order quashing his decision and remitting it back for a fresh decision to be taken falls away. This means that I do not need to consider the legal issues raised by any such opposition.

### **Correct procedural path**

8. In the course of argument before me, Mr. Farrell had raised an issue about the procedural approach of the Courts Service when issuing the proceedings. He criticised the Courts Service for issuing proceedings by way of Originating Notice of Motion under Order

84C of the Rules of the Superior Courts. In Mr. Farrell’s supplementary written submissions of 5 March 2024, and in his oral submissions, he argued that any FOI appeal should be brought under Order 130 Rules of the Superior Courts, rather than under Order 84C. He notes that as Order 84C, rule 1(2) precludes itself from any appeal where another Rule of the Superior Courts provides for the procedure for bringing an appeal to the High Court, Order 84C is irrelevant. He relies on the fact that Order 130, rule 3 says the Notice of Motion must be served on any person affected by the decision of 1 November 2023 and that he is therefore an “*automatic, generic, non-litigant, defacto notice party, ab initio, whether served or not*”. In fact, as set out above, Mr. Farrell was in fact served with the book of papers on 12 December 2023 as a notice party although there is no such requirement in Order 84C.

9. There is undoubtedly an issue about what is the appropriate way to proceed when seeking to bring a statutory appeal to the High Court against a decision of the Information Commissioner. *Prima facie*, Order 130 of the Rules of the Superior Courts appears to be the appropriate basis to seek to challenge a decision of the Information Commissioner. However, when one considers the wording of that Order, there is a difficulty. Order 130 is in the following terms:

*“Freedom of Information Act 1997 1.*

*1. In this Order:*

*“the Act” means the Freedom of Information Act 1997;*

*“the Act of 2003” means the Freedom of Information (Amendment) Act 2003;*

*“the Commissioner” means the Information Commissioner as defined by the Act;*

*“decision” includes the issue of a certificate under section 25 of the Act.*

2. *An appeal to the Court pursuant to section 42(1), section 42(2) or section 42(3) of the Act as amended by the Act of 2003 shall be brought by way of originating notice of motion.*

3. *The notice of motion shall be issued within eight weeks after notice of the decision concerned is given to the person bringing the appeal. The notice of motion shall be served upon the Commissioner and upon any other person affected by the decision the subject matter of the appeal. Service shall be effected by ordinary pre-paid post.*

4. *The notice of motion shall be entitled “In the matter of the Freedom of Information Acts 1997 and 2003” and on the application of the appellant.*

5. *Every notice of motion bringing an appeal shall be grounded upon the affidavit of the appellant which shall:*

*(a) state the nature of the decision against which the appeal is brought;*

*(b) exhibit a copy of the decision, if any;*

*(c) state the grounds of the appeal and the point of law, where appropriate;*

*(d) state the nature of the direction or order sought from the Court;*

*(e) exhibit all relevant documentation; and*

*(f) specify whether the appellant is requesting that the appeal be heard otherwise than in public.*

6. *An appeal brought pursuant to section 42(1), (2) or (3) of the Act as amended by the Act of 2003 shall be heard and determined upon affidavit unless the Court*

*otherwise directs, and the Court may give such directions as to the giving of oral evidence as appear appropriate in the circumstances.*

*7. Any question of law referred to the Court by the Commissioner pursuant to section 42(5) of the Act as amended by the Act of 2003 shall be brought by way of a case stated entitled "In the matter of the Freedom of Information Acts 1997 and 2003 and on the reference of the Commissioner under section 42(5) of the Act of 1997". The case stated shall be signed by or on behalf of the Commissioner and shall be served on all parties to the review under section 34 of the Act as amended by the Act of 2003.*

*8. The said case stated shall contain a statement of the facts found by the Commissioner insofar as they are relevant to the reference to the Court and shall state concisely the question of law referred for determination by the Court. The case stated shall have annexed to it:*

*(g) the written decision, if any, in respect of which the review pursuant to section 34 of the Act as amended by the Act of 2003 was sought;*

*(h) the application for a review pursuant to section 34 of the Act as amended by the Act of 2003 where such application was in writing; (i) all other relevant documentation.*

*9. Any party to an appeal under section 42(1), (2) or (3) of the Act as amended by the Act of 2003 or to a reference under section 42(5) of the Act as amended by the Act of 2003 may, either by affidavit or by letter in writing or at the hearing, request that the Court take precautions to prevent disclosure to the public or, if appropriate, to a party, of information referred to at section 43(1)(a)*

*and (b) of the said Act as so amended. The Court shall take all such reasonable precautions as it thinks fit for the purposes of section 43 of the Act as so amended whether or not any such precautions have been requested by the parties or any of them.”*

10. However, the Freedom of Information Act 1997 (the “1997 Act) and the Freedom of Information (Amendment) Act 2003 have been repealed in their entirety by the 2014 Act (see s.5 on repeals and Schedule 4 to the 2014 Act). Any appeal to the High Court against a decision of the Information Commissioner is now brought pursuant to s.24 of the 2014 Act. Yet, as may be seen from the full text of Order 130 set out above, Order 130 is replete with references to the 1997 Act as amended by the 2003 Act. None of the parties were aware of any amendment to the statutory instruments that introduced Order 130 RSC to reflect the 2014 Act, being SI 325 of 1998 and SI 471 of 2004.
11. As a result, there is no coherent way to read Order 130 given the repeal of the 1997 and 2003 Acts. As a result it is unclear to a party seeking to appeal a decision of Information Commissioner what procedural route they should follow, given the terms of the 2014 Act. For example, there are many references in Order 130 RSC to the appeal to the Court pursuant to s.42 of the 1997 Act; but s.42 is gone. Similarly, entitling the motion “*In the matter of the Freedom of Information Acts 1997 and 2003*”, as required by Order 130(4), would be a legal nonsense given that those Acts have been repealed.
12. Thus, any appellant seeking to appeal a decision of the Freedom of Information Commissioner under s.24 is in a quandary: a provision of the Rules of the Superior Courts specifies how such appeals are to be brought, but that provision is now out of date. In those circumstances, it is unsurprising that some parties have resorted to Order

84C, which governs statutory appeals not otherwise regulated by specific provisions. Yet this must also give rise to concern, given that proceedings should only be brought under Order 84C where provision for the procedure applicable to the relevant statutory appeal is not made either by the enactment concerned or by another Order of the Rules of the Superior Courts (see Order 84C, rule 1(2)). An obvious solution to this situation would be an amendment of Order 130 by the Superior Courts Rules Committee so that it reflects the terms of the 2014 Act.

13. However, returning to the instant case, Mr. Farrell did not bring a motion seeking relief in respect of the points I have described above. Rather, these points arose in the context of the initial objection of Mr. Farrell to the matter being conceded by the Commissioner. As described above, that objection was not ultimately maintained by him due to his concerns about costs if he should prove unsuccessful. That means that an Order will be made setting aside the decision of 1 November 2023. In the circumstances, these proceedings are at an end and it seems to me that it would be inappropriate to adjudicate on any ancillary arguments raised by Mr. Farrell, particularly where no motion was brought seeking relief in respect of any of those arguments.

### **Conclusion**

14. Accordingly, I propose making an Order in the terms agreed by the Courts Service and the Commissioner:

*“An order pursuant to s.24 of the Freedom of Information Act 2014 setting aside the decision of the Respondent in Case Number OIC-133747-V8Q5Y7 of 1 November 2023.”*

15. The parties should appear before me to make submissions as to costs on **Wednesday 11 June at 2.30**. If this date is not convenient for the parties, the parties should agree an

alternative Wednesday afternoon at 2pm and apply to the Non-Jury/JR registrar at [nonjuryjudicialreview@courts.ie](mailto:nonjuryjudicialreview@courts.ie) for the date to be varied.