

THE HIGH COURT

[2020 No. 53 MCA]

BETWEEN

MAURICE D. LANDERS

APPLICANT/APPELLANT

AND

THE INFORMATION COMMISSIONER

RESPONDENT

JUDGMENT of Mr. Justice Cian Ferriter delivered on the 15th day of March 2022

Introduction

1. This is an appeal against a decision of the respondent (“the Commissioner”) taken on 24th January, 2020 in which the Commissioner, in exercise of his powers under s. 22(2)(b)(i) of the Freedom of Information Act, 2014 (“the 2014 Act”), affirmed the decision of the NTMA to refuse access to the internal audit plans for the National Pension Reserve Fund for the years ending 31st December, 2009, 2010 and 2011 on the grounds that the records sought do not exist.

2. Pursuant to s. 24 of the 2014 Act, an appeal to the High Court, from a decision of the Commissioner following a review under s. 22, may only be on a point of law. There is another basis upon which an appeal to the High Court may be brought but it is not relevant for present purposes.

3. The applicant, who represented himself on this appeal, sought in his notice of motion “*an order directing the Information Commissioner to compel the release of the Internal Audit Plan (“engagement letter”) between PwC and the NTMA and the National Pensions Reserve Fund (NPRF) as part of PwC’s role as internal auditor for the NTMA (NPRF) for the financial years ending December 31 2009, 2010 and 2011*”.

4. While this relief did not on the face of it identify a point of law which was the subject of the appeal, it became clear in the course of oral submissions by the applicant that the alleged error of law on the part of the Commissioner in arriving at the decision under appeal is that the Commissioner's decision was said to be irrational, i.e. one that no reasonable decision-maker could have reached on the basis of the material before it.

5. The applicant had, in the material he put before the court, also sought to contend that the Commissioner was in error in not using his powers under s. 45 of the 2014 Act to direct that PwC and Chartered Accountants Ireland (CAI) be directed to hand over copies of the internal audit plans said to be in their possession. Ultimately, the applicant did not push the s. 45 point at the oral hearing on the basis that he was satisfied to rest his case in irrationality.

Applicable Legal Principles

6. The legal principles governing an appeal on a point of law from a decision of a statutory body are well settled. They were summarised as follows in the judgment of McKechnie J. in *Deely v. Information Commissioner* [2001] 3 IR 429 at 452:

"It was submitted on behalf of both the respondent and notice party that findings made by the respondent on questions of primary fact should not be reviewed by this court as part of the appeal process under s. 42 of the Act. 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.”

These principles have been endorsed in a number of subsequent authorities including by the Supreme Court in *Sheedy v. Information Commissioner* [2005] 2 IR 272.

7. It is clear that the test for irrationality (which may amount to an error of law for the purposes of an appeal on a point of law from a decision of the Commissioner) is irrationality in the “*O’Keefe*” sense, i.e. is the impugned decision one which “*flies in the face of fundamental reason and common sense*” per the judgment of Henchy J. in *The State (Keegan) v. Stardust Compensation Tribunal* [1996] IR 642 at 658: see Quirke J. in *Gannon v. Information Commissioner* [2006] 1 IR 270 at 278.

8. It follows that, if there is some material before the decision-maker to enable him make the decision which he has made, the decision will not be held to be irrational in the legal sense.

9. The NTMA based its internal review decision on s. 15(1)(a) of the 2014 Act, i.e.:

“A head to whom an FOI request is made may refuse to grant the request where—

(a) the record concerned does not exist or cannot be found after all reasonable steps to ascertain its whereabouts have been taken”

10. In *Ryan v. Information Commissioner* (Unreported, High Court, 20th May, 2003), in a case with factual similarities to this case, Quirke J. held that it was open to the decision-maker in that case to reach a decision pursuant to s.10(1)(a) of the Freedom of Information Act 1997 (which was in materially identical terms to s. 15(1)(a) of the 2014 Act) on the basis that there was a substantial amount of material before the

decision-maker upon which he could reasonably have found the facts which he found to the effect that the relevant FOI body was entitled to form the view that it could not find the relevant records after all reasonable steps to ascertain their whereabouts had been taken.

11. The question that arises on this appeal therefore is whether there was sufficient material before the Commissioner to form the view that the requirements of s. 15(1)(a) had been met on the facts of this case.

The Decision

12. In the decision under appeal, the decision-maker held as follows:

“Having considered the NTMA’s description of the searches and of the consultations that took place with members of staff, I am satisfied that it has carried out all reasonable steps in an effort to locate the audit plans sought by the applicant. I find, therefore, that the NTMA was justified in refusing access to the records sought on the grounds that the records cannot be found or do not exist.”

13. In the “analysis and findings” section of the decision, the decision-maker stated as follows:

“Analysis and Findings

Section 15(1)(a) of the FOI Act provides that access to records may be refused if the records concerned do not exist or cannot be found after all reasonable steps to ascertain their whereabouts have been taken. The role of the Commissioner in a case involving section 15(1)(a) is to decide whether the decision maker was justified in coming to the decision that the records do not exist or cannot be found, after all reasonable steps to ascertain their whereabouts have been taken. The evidence in such cases includes the steps actually taken to search for records. It also comprises miscellaneous other evidence about the record management practices of the FOI Body, on the basis

of which the decision maker concluded that the steps taken to search for the records were reasonable.

In submissions to this Office, the NTMA provided details of searches conducted to identify and locate any records entitled or compromising the final agreed 'internal audit plans'. As this Office has already provided the applicant with those details, I do not propose to repeat them in full here.

In summary, the NTMA said that on foot of the request, the staff member who performed the role of NPRF Commission Secretary was asked to search for relevant records and no relevant internal audit plans were located. It understands that PwC did not submit final or formal audit plans once an audit plan was agreed at Audit Committee level. It said further searches were conducted at internal review stage. Staff members considered most likely to have had involvement in the NPRF internal audit process were requested to undertake manual and electronic searches (using key words) for any relevant records. These searches did not identify any additional records entitled or comprising internal audit plans for the NPRF for the years in question.

It is the NTMA's position that based on the searches it carried out, the knowledge of the former NPRF Commission Secretary, relevant staff members and the content of the applicable Audit Committee minutes, that no PwC Internal audit plans exist for the years in question. The only records located relating to the scope of the internal audit work carried out by PwC have already been provided to the applicant."

14. The applicant's case was that the Commissioner's decision was irrational in that it had been demonstrated clearly to both the NTMA and to the Commissioner that internal audit plans did exist and, therefore, there was no basis on which the Commissioner could have arrived at the view that the records either did not exist or that they could not be found.

How the Decision was arrived at

15. In order to put the applicant's case in context, it is necessary to describe in a little detail the background to the decision the subject of this appeal.

16. On 5th June, 2019, the applicant submitted a request to the NTMA for copies of the internal audit plans for the NPRF for the years 2009, 2010 and 2011 as per the NTMA's engagement with PwC. In his request, he stated that the documents would verify:

"The decision I received from Chartered Accountants Ireland [CAI] regarding my case i.e. 'the scope of the internal audit work undertaken by the member firm was specific scope and the scope was agreed with and approved by the audit committee of the NTMA and NPRF Commission each year. The member firm provided us with a copy of the internal audit plan for the NPRF as presented to and subsequently agreed with, the NPRF Commission and the NTMA and the matter complained of appears to have been outside the scope of the internal audit work undertaken by the member firm.'

17. The CAI decision appears to have arisen from a separate complaint lodged by the applicant with CAI in relation to the internal audit work conducted by PwC for the NTMA.

18. Following correspondence between the NTMA and the applicant, it was ultimately agreed on 6th September, 2019 that the request would be treated as a request under FOI.

19. In a decision dated 24th September, 2019, the NTMA stated it had conducted searches and located three audit plan presentations dated 2009, 2010 and 2011, copies of which were released to the applicant. The relevant PowerPoint presentations were in evidence before me on the appeal and are detailed presentations running to some 40 pages. They appear to be entirely consistent with the reference in the CAI decision to "a copy of the internal audit plan for the NPRF as presented to and subsequently agreed with the NPRF commission and the NTMA". [emphasis added]

20. The applicant sought an internal review of the NTMA's decision. When he did not receive a decision sufficiently quickly for his purposes, the applicant sought a review, by email of 6th November, 2019, by the Commissioner of the deemed refusal of his request.

21. On 8th November, 2019, the NTMA issued its internal review decision. In this internal review decision, the NTMA referred to the original requests made by the applicant for "*internal audit plans for the financial years ending 31 December 2009, 2010 and 2011 as per the NTMA's engagement with PwC*". The internal review decision noted:

"that the initial decision-maker advised you that PwC audit plan presentations were located for 2009, 2010 and 2011 and released those records in full to you via email on 25 September 2019. Your request for an internal review requested a copy of the internal audit plans.

For the reasons outlined below, this internal review decision constitutes a variation of the original decision made in relation to your request."

22. It is clear, therefore, that the NTMA was distinguishing between the PwC audit plan presentations, on the one hand, and internal audit plans on the other. It is important to note that the NTMA is, therefore, addressing itself as to the existence or availability of internal audit plan documents from PwC beyond those documents consisting of the audit plan presentations for the three years in question, which had already been released to the applicant.

23. The NTMA then gave the following decision on its internal review:

"I confirm that upon receipt of your internal review application, additional searches were carried out for PwC audit plans for the years in question. I have been advised that no audit plans have been located. It is evident from the searches that were carried out (both at initial stage and at this internal review stage) that the internal audit plan presentations previously released to you are

the only records held by the NTMA in this regard. These documents were presented by PwC to the NPRF audit committee for their approval. There is no indication from the searches conducted that these documents were subsequently developed into separate internal audit plans.

Accordingly, I am refusing this request on administrative grounds pursuant to s. 15(1)(a) of the FOI Act... on the basis that the records that you have requested do not exist, and the records with the most relevance to your requests have been released to you in full already, namely the internal audit plan presentations.”
(emphasis added)

24. The applicant forwarded on this decision to the Commissioner on 18th November, 2019. The Commissioner then sought to consider the substance of the applicant’s appeal i.e. that the NTMA was wrong in its s.15(1)(a) decision. As part of its investigations in the course of the appeal, the Commissioner’s office contacted the NTMA by letter of 12th December 2019 and raised a series of detailed and specific questions as follows:

- (1) *Is it the NTMA’s position that no further records sought in the request exist? If so, please explain the background to this case and the reasons why the NTMA came to the conclusion that no relevant records exist.*
- (2) *What areas were searched and can the NTMA outline whether this was done manually or by computer?*
- (3) *Were the relevant individuals consulted?*
- (4) *Did PwC submit audit plans following the audit presentations?*
- (5) *Section 11(9) of the FOI Act provides that a record held by a service provider, insofar as it relates to the service, shall be deemed to be handled by the FOI body. Can the NTMA confirm if PwC were consulted about the records sought in this case?*
- (6) *Is it possible that any relevant records were destroyed, in accordance with policy or otherwise?*

25. The NTMA replied to the above requests by a four-page letter of 15th January, 2020. This letter gave a detailed background to the matter including detail as to the

searches, both manual and electronic, carried out by the NTMA to establish what records were held in relation to the scope of audit work undertaken by PwC during the relevant years. The letter noted that *“based on these searches, the knowledge of the former NPRF Commission Secretary and the content of the applicable audit committee minutes, the NTMA’s understanding is that PwC did not submit ‘final’ or ‘formal’ audit plans once an audit plan presentation was agreed at audit committee level”*. It further noted *“accordingly, the NTMA was satisfied that no other records comprising internal audit plans for the relevant years would be located, and that the internal audit plan presentations were the only records held by the NTMA that were relevant to Mr. Landers’ query concerning the scope of work undertaken by PwC”*.

26. The precise nature of the manual and electronic searches carried out by staff members considered most likely to have had involvement with the matter (namely the NPRF Commission Secretary and certain former NPRF staff) were detailed. As already noted, it was stated that *“the NTMA’s understanding is that PwC did not submit ‘final’ or ‘formal’ audit plans once an audit plan presentation was agreed at audit committee level”*. It was further stated that the NTMA contacted PwC via email prior to issuing its original decision on 25th September, 2019 notifying PwC of the intention to release the audit plan presentations in full. The NTMA expressed the view that it did not believe that internal audit plans were received and subsequently destroyed but, rather, that the *“internal audit plan presentations encompassed the scope of the internal audit work for the relevant period”*.

27. The NTMA concluded in this letter by stating that it was:

“satisfied that the searches undertaken to locate any and all relevant records within the scope of Mr. Lander’s request were appropriate and adequate in the circumstances. The NTMA is also satisfied that no PwC internal audit plans exist for the years in question, and that the only records located relate to the scope of the internal audit report carried out by PwC have already been provided to Mr. Landers.”

28. The investigator dealing with the matter in the Commissioner’s office wrote to the applicant on 17th January, 2020 to provide him with a summary of the NTMA’s

submissions and to give him an opportunity to make any final comment. She expressed the view that:

“Having carefully examined NTMA’s submissions, it would appear that no records exist or can be found in relation to your FOI request. Presently, I am of the view that NTMA has conducted all reasonable searches to locate the relevant records and that section 15(1)(a) of the FOI Act applies. Therefore, should this case proceed to a formal legally binding decision, I intend to recommend to the Senior Investigator that he affirm the decision of the NTMA under section 15(1)(a).”

The investigator invited the applicant to consider withdrawing his application while making clear that he had a right to have the matter proceed to a formal legally binding decision.

29. The Senior Investigator then issued his decision on behalf of the Commissioner on 24th January, 2020. In his conclusion in the decision, as set out at paragraph 12 above, he found that the NTMA was justified in refusing access to the records sought on the grounds that the records cannot be found or do not exist.

Discussion

30. In my view, it simply cannot be tenably said that the Commissioner’s decision was irrational. There was clearly ample material before the Commissioner, in the form of the detailed responses provided by the NTMA to the Commissioner, to justify the view that the NTMA had taken all reasonable steps to locate the audit plans sought by the applicant, but that such audit plans (above and beyond the audit plan presentations already furnished to the applicant) did not exist. I can find no error of law in the decision in the circumstances.

31. The applicant appears to have convinced himself that there must be audit plan documents beyond the presentations he has received. However, my role on this application is to objectively assess whether, in accordance with the well-established legal test, it can be said that there was no material before the Commissioner which could

justify the decision made by him. I am quite satisfied that there was such material available before the Commissioner which could more than justify the conclusion reached by him.

32. The applicant contended that CAI's decision referenced at paragraph 16 above, and a separate letter from CAI which was expressed in the same terms, demonstrated beyond doubt that there were audit plan documents beyond the presentations. He finds this to be revealed by the sentence "*the member firm provided us with a copy of the internal audit plan for the NPRF as presented to, and subsequently agreed with, the NPRF commission and the NTMA*". However, this is clearly a reference to the "*internal audit plan presentations*" as had already been supplied to the applicant by the NTMA. There is no objective basis in the communications from CAI to suppose that some other undisclosed audit plan documents exist. This was clearly the outcome of the NTMA's own detailed search process and investigations as detailed in the NTMA's correspondence with the Commissioner's investigation team in the course of the appeal process. It was clearly open to the Commissioner in the circumstances to come to the view that the requirements of s.15(1)(a) had been satisfied.

33. The applicant submitted that the Commissioner should have used its powers under s. 45 of the 2014 Act to call upon the NTMA or PwC to provide the other, undisclosed audit plans. The powers in s. 45 are a matter of discretion for the Commissioner. They are not an issue on this appeal. It should be noted, however, that it is difficult to see on what basis the Commissioner would have needed to have recourse to the exercise of such powers on the facts of the case here in light of what was submitted to his investigation Team by the NTMA in the course of the appeal process.

34. The applicant also sought relief on his originating notice of motion asking the Court to direct PwC and Chartered Accountants Ireland to provide copies of the internal audit plan and then requested the Court "*to verify the authenticity of this document, the reason being that it would be too easy to forge such a document and backdate it*". These reliefs are inappropriate and misconceived and have no basis in the statutory scheme governing an appeal to this Court on a point of law from a decision of the Information Commissioner pursuant to s. 24 of the 2014 Act.

35. In the circumstances, I refuse the appeal. The respondent's decision accordingly stands.

Cia Ferite
15/3/22