Judgment delivered by O'Donnell, J.

THE SUPREME COURT

[2015] IESC 51

159/2013

Denham C.J.
Murray J.
Hardiman J.
O'Donnell J.
Dunne J.

Between/

National Asset Management Agency

Appellant

and

Commissioner for Environmental Information

Respondent

Judgment of O'Donnell J. delivered on the 23rd of June, 2015.

1. This is a long drawn out and contentious dispute conducted between two public bodies at public expense, which is one further illustration of the truth that some disputes are so bitter because the stakes are so low. The increased public availability of information held by official bodies in relation to the environment is part of the international trend towards both greater sensitivity to, and protection of, the environment and greater disclosure of information, transparency if you will, in relation to public bodies. In Ireland, this development can be traced to international roots, and in some cases to specific provisions of European law. It is important therefore, in seeking to understand the provisions of Irish law, to set them in their European and international context.

2. A useful starting point is Council Directive 90/313/EEC adopted on the 7th of June 1990 on the freedom of access to information on the environment ("Directive 90/313/EEC"). This Directive provided that member states should ensure, subject to limitations and exceptions contained within Directive 90/313/EEC, that "public authorities" were required to make available information relating to the environment to any natural or legal person at his request, and without he or she having to prove any specific interest. "Public authorities" were defined, with some logic, as authorities having responsibilities possessing information in relation to the environment. Thus the definition contained at Article 2(b) of the Directive provided as follows:

> "'public authorities' shall mean any public administration at national, regional or local level with responsibilities, and possessing information, relating to the environment with the exception of bodies acting in a judicial or legislative capacity."

While the concepts of "public administration" and "responsibilities…relating to the environment" might require some elaboration, this provision was relatively clear, and in particular established that for an entity to be subject to the provisions of the Directive it must satisfy at least two criteria: (1) it must be a public authority; and (2) it must have responsibilities relating to the environment.

3. The next step in this chronology was the adoption of the Aarhus Convention on the 25th of June 1998 (Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters) ("the

Convention" or "the Aarhus Convention") which was an international agreement under the auspices of the United Nations to which both Ireland and the European Union ("EU") are parties. While the Convention sought to pursue the same aims and had the same focus as Directive 90/313/EEC, it had a different drafting history, since it was the product of an international consensus extending well beyond Europe. In respect of access to information it adopted a very similar structure to the Directive in imposing a requirement of disclosure of information on public authorities. However, it deliberately defined public authority more broadly than the Directive. Thus Article 2.2 of the Convention provided:-

> "'Public authority' means:
>
> (a) Government at national, regional and other level;
>
> (b) Natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment;
>
> (c) Any other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of a body or person falling within subparagraphs (a) or (b) above;"

4. When the above definition of public authority is placed alongside that contained in Directive 90/313/EEC, it is obvious that a broader approach was taken in the Aarhus Convention. It is clear that it is only in subparagraph (c) (a natural or legal person under the control of a body or person falling within subparagraph (a) or (b)) that it is required that the particular entity functions or provides services in relation to the environment. In the case of entities coming within subparagraph (a) or (b), that qualification does not apply. The concept of "[g]overnment at national, regional and other level" addressed in subparagraph (a) is reasonably clear, although there may perhaps be some debate at the margins as to what is captured by that definition. More difficulty however is created by subparagraph (b), particularly when regard is had to the fact that the Convention is meant to apply in, and relate to, the legal systems of very many contracting states with different legal systems. In one sense the last portion of the definition ("including specific duties, activities or services in relation to the environment") might be thought to be superfluous since it does not limit or otherwise define or indeed describe the type of entity captured by the definition. The

concept can perhaps be understood as meaning "including but not limited to" such specific duties, activities etc. Once that is understood, subparagraph (b) can be read as applying to "natural or legal persons performing public administrative functions under national law" which directs attention to the key concept of "public administrative functions" and in particular the qualifying adjective "administrative" which is not otherwise defined in the Convention.

5. In pursuance of its obligations under the Convention, the European Community (as it then was) repealed Directive 90/313/EEC and replaced it with 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 ("Directive 2003/4/EC"), and which became part of the route by which the provisions of the Convention became part of Irish law, although of course Ireland had a self-standing obligation under international law to adopt some such provision. Recital 11 of the Directive records that it is adopted:

> "To take account of the principle in Article 6 of the Treaty, that environmental protection requirements should be integrated into the definition and implementation of Community policies and activities, the definition of public authorities should be expanded so as to encompass government or other public administration at national, regional or local level whether or not they have specific responsibilities for the environment. The definition should likewise be expanded to include other persons or bodies performing public administrative functions in relation to the environment under national law, as well as other persons or bodies acting under their control and having public responsibilities or functions in relation to the environment."

It should be noted in passing that Recital 24 provides that member states could maintain or introduce measures providing for broader access to information than required by Directive 2003/4/EC.

6. The definition of "public authority" is contained in Article 2.2 of Directive 2003/4/EC as follows:

> "'Public authority' shall mean:
>
> (a) government or other public administration, including

public advisory bodies, at national, regional or local level;

(b) any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment; and

(c) any natural or legal person having public responsibilities or functions, or providing public services, relating to the environment under the control of a body or person falling within (a) or (b)."

With the exception of the words "including public advisory bodies" and other purely grammatical and syntactical changes, this is functionally identical to the provisions contained in the Aarhus Convention. Of particular note in this case is that subparagraph (b) is in effectively identical terms to Article 2.2 (b) of the Convention.

7. Directive 2003/4/EC was implemented in Irish law by Regulations contained in a statutory instrument, S.I. No. 133 of 2007, European Communities (Access to Information on the Environment) Regulations 2007 ("the Regulations" or "the 2007 Regulations"). In this case Article 3(1) of the Regulations contains the relevant definition of "public authority" as follows:

"'public authority' means, subject to sub-article (2)-

(*a*) government or other public administration, including public advisory bodies, at national, regional or local level,

(*b*) any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment, and

(*c*) any natural or legal person having public responsibilities or functions, or providing public services, relating to the environment under the control of a body or person falling within paragraph (*a*) or (*b*),

and includes-

(i) a Minister of the Government,

(ii) the Commissioners of Public Works in Ireland,

(iii) a local authority for the purposes of the Local Government Act 2001 (No. 37 of 2001),

(iv) a harbour authority within the meaning of the Harbours Act 1946 (No. 9 of 1946),

(v) the Health Service Executive established under the Health Act 2004 (No. 42 of 2004),

(vi) a board or other body (but not including a company under the Companies Acts) established by or under statute,

(vii) a company under the Companies Acts, in which all the shares are held-

(I) by or on behalf of a Minister of the Government,

(II) by directors appointed by a Minister of the Government,

(III) by a board or other body within the meaning of paragraph (vi), or

(IV) by a company to which subparagraph (I) or (II) applies, having public administrative functions and responsibilities, and possessing environmental information;" (emphasis added)

It will be noted that the definition at subparagraph (a), (b) and (c) of Article 3 reproduces word for word the provisions of Directive 2003/4/EC (and therefore effectively the Convention). What have proved problematical in this case are the additional provisions contained at (i) to (vii) and the further subparagraphs to subparagraph (vii).

8. It may be appropriate to pause here and make some observations on both the method, and terms, of the implementation of Directive 2003/4/EC into Irish law. If this Directive had been implemented by primary legislation, then some difficulty in interpretation might be lessened since even if the provisions of Irish law were interpreted as more extensive than required by the Directive, that would not pose any problem as the Directive already contemplates and permits the possibility that member states could adopt more extensive provisions. However, this Directive is implemented by statutory instrument pursuant to the provisions of the European Communities Act 1972. It is the making of law by a body other than the Oireachtas (in this case the Minister) but is protected from constitutional challenge because it

benefits from the terms of the Constitution adopted on accession to what was then the European Economic Communities under what was then Article 29.4.3 (subsequently renumbered) which provided that no provision of the Constitution would invalidate any laws enacted, acts done or measures adopted by the State necessitated by the obligations of membership of the European Communities or European Union as the case may be. This exemption however only extends to provisions "necessitated by the obligations of membership" and thus in this context permits the making of law by statutory instrument insofar as it faithfully implements a Directive pursuant to the obligations on Ireland as a member state to do so. If however a statutory instrument goes further than the implementation of the directive necessitates, it would to that extent be unconstitutional, since it would be the making of law by a body other than the Oireachtas, and not protected by the provisions of Article 29. There is thus a specific importance in Irish law in understanding the extent and terms of a directive, where implemented by secondary legislation. In addition to the obvious benefits therefore of democratic oversight that implementation by primary legislation would entail, that route would also avoid some of the difficulties of interpretation which arose in this case.

9. There is a further difficulty in this case as to the manner chosen for the implementation of the directive as distinct from the legal vehicle adopted. In principle, it might be said that there are two broad options open to a member state like Ireland in the implementation of directives which are not considered to all already be covered by the provisions of national law. A state can simply adopt into national law the language and terms of the directive in effect placing the national emblem on what is and remains European language. Alternatively, if confident as to the reach, scope and interpretation of the directive, it may adopt and use its own language to implement it in national law. That route has the benefit that the European norm to take effect in national law is in effect translated into the language and concepts of the national legal system, and may therefore be more readily understood and applied. Either route therefore has attractions. Here it will be apparent, that the approach has been a mix of the two. Superficially that might appear to be an unobjectionable belt and braces approach. But as this case illustrates, it gives rise to real problems of interpretation. Subparagraph (a) to (c) reproduces the terms of Directive 2003/4/EC (and therefore the Convention) with no material change. Subparagraphs (i) to (vi) are

therefore clearly matters of national law but cannot, or at least should not, materially extend (or indeed reduce) the scope of the provision. The problem of interpretation posed in this case calls to mind the observations of the Caliph of Baghdad on the burning of the library of Alexandria quoted by Lord Hoffman in the United Kingdom House of Lords in *Kirin-Amgen Inc v. Hoechst Marion Roussel Ltd* [2005] R.P.C. 169: if it contained nothing that was not in the Koran it was superfluous, and if it contained something different it was dangerous. In the same way it can be said that if subparagraphs (i) to (vi) say something different to subparagraphs (a) to (c) then they are possibly dangerous and certainly difficult.

Interpretation

10. While it will be necessary to address the specific questions of interpretation arising here in some detail, it is necessary to make some general observations at this stage on the approach to interpretation of a statutory instrument introduced in to Irish law pursuant to the State's obligations to implement in national law the provisions of a directive of the EU which itself was adopted in compliance with an obligation undertaken by the EU (and Ireland) under an international agreement. It does not seem to me to be possible, and if possible, would not be correct, to approach the question of interpretation solely through the prism of national law, and the sometimes elaborate approach to statutory interpretation in Irish law in particular. There are rules for the interpretation of legislation introduced implementing an international treaty. In particular, this specific obligation undertaken by Ireland as a member of the EU requires that the courts approach the interpretation of legislation in implementing a directive, so far as possible, teleologically, in order to achieve the purpose of the directive. But furthermore, the language used in this statutory instrument, and in particular subparagraphs (a) to (c) is derived directly from Directive 2003/4/EC addressed to member states and intended to take effect in different national legal systems. That language is in turn derived from an international treaty negotiated between and agreed upon by a large number of international states with different legal systems.

11. In this particular context, it is important to bear in mind that the concepts of administrative law and public law can differ substantially between countries, and in particular between common law systems and civil law systems. It does not appear

possible, or indeed lawful, therefore to address the meaning of this statutory instrument in isolation from that context. In particular, even the provisions of subparagraphs (i) to (vi), while clearly terms introduced by the Irish legislator, must nevertheless be understood as implementing the provisions of Directive 2003/4/EC (and indirectly the Convention) and for the reasons touched on above, ought not to go further (but not fall short of) the terms of that Directive. If even as a matter of purely domestic interpretation, the provisions of those subparagraphs might appear to either fall short of what is required by the Directive, or go further, an Irish court might be required to adopt another interpretation which is consistent with the provisions of the Directive, if that is possible. Accordingly, in order to understand what the statutory instrument means and does in this case, it is necessary, perhaps first, to understand exactly what the Directive does and means, which in this case may also mean interpreting the provisions of the Convention. I propose therefore to outline the essential facts of this case before addressing the specific issue of interpretation which has arisen.

Facts

12. Few people in Ireland can be unaware of the existence of the National Asset Management Agency ("NAMA"), established under the National Management Agency Act 2009 on the 21st of December 2009, as part of this country's response to the financial crisis which engulfed it. In simple terms its function involves the acquisition of bank assets from participating institutions and holding, managing and realising the value of the acquired assets. It must manage its acquired assets with a commercial mandate and its aim is to obtain the best achievable financial return for the State. None of its duties relate directly to the environment. Given the scale of the collapse in the property market in Ireland, and the consequent impact on bank lending liquidity and viability, NAMA became the holder of very substantial property assets in Ireland and elsewhere, and, depending also on the terms and exercise of the lending agreements, the owner of substantial assets. There is no doubt that NAMA is a major influence in commercial affairs in Ireland and therefore the Irish economy, and is created by, and is a creature of, public law. It would not normally be thought of as a body possessing environmental information or operating in the environmental field. Nor would its functions be considered administrative in nature in the sense of pertaining to the executive or governmental power. On the other hand, it is a major

vehicle deployed as part of the executive and legislative response to the recent financial crisis.

The Request

13. On the 3rd of February 2010 a Mr Gavin Sheridan sent an email to NAMA requesting access to environmental information under the 2007 Regulations. The records he sought were as follows:

> "(1) A breakdown of all assets, loans and properties due to be transferred to the agency. This should include the value placed on the asset and by whom. It should include the addresses of all assets and properties.
>
> (2) A breakdown of all properties and property loans currently owned or controlled by the agency.
>
> (3) Minutes of board meetings relating to the transfer of assets and properties to the agency. The date range for this request is January 2009 to January 2010 inclusive."(emphasis added)

14. It is not perhaps surprising that NAMA reacted defensively to such a broad request, which was only justified by reference to the bare terms of the Regulations. As we have seen, Directive 2003/4/EC, and the Regulations, do not require that the requestor demonstrate any particular interest in the information. However, it was not explained why this information was sought even in general terms, or why it was thought to come within the meaning of the definition of environment information. Without wishing to trespass on an issue which has not yet been determined by the Commissioner, it is clear that the information sought is at some remove from the common understanding of information relating to the environment, is very extensive, and obviously of significant commercial importance to NAMA, particularly at the rather fraught time when the information was requested. Article 4 of Directive 2003/4/EC permits the refusal of environmental information when the request is manifestly unreasonable or formulated in too general a manner taking in to account Article 3(3). In retrospect, it is perhaps unfortunate that these issues were not addressed at the outset, since that might have avoided the necessity to engage in the dispute which has occupied so much time since the making of the request. Instead however, a dispute ensued over the meaning of public authority in respect of a request which was in the event, subject to drastic and fundamental revision.

15. NAMA responded to the request on the 16th of February 2010 in a short email refusing to accede to the request on the grounds that it did not consider it was a "public authority" within the definition set out in the Regulations. Mr Sheridan challenged that assertion and on the 19th of March 2010 NAMA repeated its position. Thereafter, on the 19th of March 2010, Mr Sheridan initiated an appeal to the Office of the Commissioner for Environmental Information ("the Office of the Commissioner"), and followed it up with an additional submission of the 27th of April 2010. NAMA for its part sought to justify its decision by a detailed letter of the 7th of May 2010, setting out the powers of NAMA and maintaining that it was not a "public authority" because it was not engaged in a function of administration, and contended further and in any event, that the information was not environmental information.

16. On the 29th of June 2010 an investigator in the Office of the Commissioner for Environmental Information set out her preliminary view which was furnished to the parties. It is perhaps necessary to say at this point that the Office of the Commissioner does not engage in a process of exchange of submissions unless that is expressly agreed to by the parties, and accordingly, one or other party might learn of the substance of the submissions made by the opposing party in the context of a preliminary or final determination. The position taken by Mr Sheridan was in essence that NAMA should be considered a public body and he relied in particular on subparagraph (vi) of the Regulations and the definition of public authority while conceding that NAMA "may or may not fall under the administrative element of the EIR". He maintained that it came within the clear words of subparagraph (vi) of the Regulations, in that it was a "board or other body…established by or under statute". NAMA for its part maintained that while it could not deny that it was such a board or body established pursuant to statute, it did not automatically follow from this that it was a public authority within the meaning of Directive 2003/4/EC and Regulations. In essence it maintained that only such boards and bodies as also satisfied the test that Article 3(1)(b) of the Regulations outlined, i.e. one "performing public administrative functions", came within the Regulations.

17. The investigator considered that the question presented was whether notwithstanding its commercial mandate, NAMA performed "public administrative

functions" within the meaning of Article 3(1)(b). She referred to the implementation guide to the Aarhus Convention (The Aarhus Convention: An Implementation Guide). That guide described a "public administrative function" as "a function normally performed by governmental authorities, as determined according to national law" (p. 35). This suggests that the function performed should be governmental in nature. Ultimately the investigator concluded as follows:

> "I conclude that public administrative functions are activities connected with the exercise of public or sovereign powers, i.e. activities which are typically governmental in nature. The activities which "by their nature, their aim and the rules to which they are subject, are connected with the exercise of powers … which are typically those of public authority". Such functions generally involve the exercise of supervision and control, with the typical examples being regulatory functions. Public and administrative functions are distinct from activities which are economic or commercial in nature, even if the economic or commercial activities are performed by a public sector body on a statutory basis and in the public interest. In my view this interpretation is also consistent with the Aarhus guide."

The language quoted by the investigator was drawn from a decision of the House of Lords of the United Kingdom in *Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire v. Wallbank & Anor* [2003] U.K.H.L. 37.

18. The structure of the analytical approach taken by the investigator at this stage seems to me to be broadly correct. She concluded that it was not sufficient merely to look at the broad words of subparagraph (vi) of the Regulations alone, and that it was necessary to consider whether the entity also satisfied the provisions of subparagraph (b) of the Regulations which were the only applicable provisions in this case. In that regard, for reasons which I have already touched on and will address later, I consider that she was correct. Whether however she was correct in the interpretation adopted of "public administrative functions" was more debatable. That was ultimately a matter of European law, and might have been resolved shortly at that point, or thereafter, by a reference to the European Court of Justice ("ECJ"). However, at this point, rather than address this issue which I consider to be central to this case, the matter took the

first of a number of surprising turns, which rendered the dispute both more complex and more entrenched.

19. In the normal sequence of events, the next step would be for the Commissioner for Environmental Information ("the Commissioner") to issue her decision. It is not normal for the Office of the Commissioner to engage in a further round of submissions, but that was the course which was followed here. The original investigator was due to take leave, and queries were therefore to be directed to the senior investigator. The preliminary decision of the investigator was then the subject of a very detailed and comprehensive submission by Mr Sheridan. He referred to the guidance notes issued by the Minister for Environment Heritage and Local Heritage (Guidance for Public Authorities and Others on Implementation of the Regulations, May 2013) which referred to the definition of public authority as follows:-

> "As indicated at paragraph 3.2 above, 'public authority' is broadly defined to comprehend all such bodies that have public administrative functions and that hold environmental information. The definition makes it clear that certain public bodies – such as Government Departments and local authorities – fall within the scope of the definition. The definition also makes it clear that bodies established by statute and certain companies established under the Companies Act are comprehended by the definition. Broadly, it is intended to cover bodies that are subsidiary public bodies and would include non-commercial and commercial semi-state bodies that perform public administrative functions and that hold environmental information." (para. 5.3)

20. Mr Sheridan made it clear that he was asserting that NAMA was subject to the Regulations because it was a board or other body established under statute. At paragraph 35 of the submission he contended:

> "As already submitted NAMA falls unambiguously within the meaning of Article 3(1)(vi). Given that the legislature saw fit to provide a non exhaustive list of the types of entity to which the regulations apply, the Commissioner must find that NAMA is a public authority and it should not be necessary to carry out an analysis of the functions of NAMA under Article 3(1)(b)".

For good measure however, Mr Sheridan went on to provide detailed reasons why he considered that NAMA was a public authority under that Article.

21. On the 16th of August 2010, the senior investigator to whom the matter was temporarily assigned wrote to NAMA stating that the views expressed by the investigator in her preliminary decision "may be accepted or rejected by the Commissioner". Important legal issues were still under consideration. She continued:

> "For instance I am aware that some commentators hold the view that the issue is relatively straight forward because they read Article 3(1) of the regulations as stating that the definition of public authority includes (vi) "a board or other body … established by or under statute."

She included Mr Sheridan's response to the investigator's preliminary report, and invited further submissions from NAMA. It should be said at this stage that since the provisions of subparagraph (vi) of the Regulations are matters of purely Irish origin, any commentary that held the view that the issue was straight forward must likely have been of Irish origin. However, the senior investigator did not identify any such commentary, and none was subsequently identified in the extensive correspondence that follow, or indeed in the course of these proceedings. The status and expertise of any commentator as well as the reasons given for any interpretation may be relevant to the weight to be given to such commentary.

22. NAMA responded in some detail maintaining its position. Mr Sheridan was in turn allowed to make a further replying submission. Again he emphasised the terms of Article 3(1)(vi) and contended:

> "As a matter of plain English and logic, the body falls within one of the categories 3(1)(i) – (vii) . It is a public authority because it is included in the definition. The applicant is at a loss to understand how this article may be interpreted in any other way."

There followed a hiatus in the correspondence, which was subsequently explained by the Commissioner, as occasioned by a desire to await the outcome of the *Dellway Investments & Ors v. NAMA and Ors* case, which was heard and determined by the

Divisional Court of the High Court ([2010] IEHC 364), and subsequently this Court on appeal ([2011] IESC 14), and which involved a consideration of the terms and operation of the National Asset Management Agency Act of 2009. A further ruling was then issued on the 27th of May 2011. Shortly before that, on the 19th of May 2011, Mr Sheridan wrote to the investigator (who was now back from leave of absence) further to a conversation which he had had with her. In the later ruling by the Commissioner, it stated that this conversation was initiated by the investigator who "suggested the narrowing of the request". Mr Sheridan identified his original request (set out above) and stated that he wished to narrow this request in the following way:

> "Parts 1 and 3 can be disregarded entirely. Part 2 can be narrowed as follows:
>
> > "A breakdown of all properties and property loans currently owned or controlled by the agency. This should be limited to the Leitrim Local Authority area covered by Leitrim County Council. It should also include information related to non residential properties, or loans secured on non residential properties."

23. This was a very dramatic narrowing of the original request. But this version did not remain in place for very long. One week later, Mr Sheridan wrote again, wishing to "further narrow" the scope of his request to "any and all environmental impact assessments carried out by the agency in relation to all properties and property loans currently owned or controlled by the agency." If the email of the 19th of May 2011 had indeed narrowed the request to property loans in the Leitrim area, it is hard to see how this request could be described as a further narrowing of the scope of his request. Predictably NAMA took issue with this and whether it could be said to be a refinement of the original request rather than an entirely new request. Since that matter may remain to be decided, I do not wish to express any view upon this issue. However, this episode was addressed in the Commissioner's determination of the 30th of September 2011 where it was described as an effort made by the investigator "in the context of an attempt to bring the parties to the appeal together with a view to settling the matter whether in full or in part by agreement". The Commissioner expressed the view that she was entitled to proceed with the determination since "it would be unconscionable that an appellant acting in good faith in the context of seeking to settle his case, would when settlement efforts fail, be deprived of his right

to an adjudication by the appeals authority". I very much doubt that the unilateral correspondence entered into by the Commissioner with the requestor, which is not the subject of any parallel initiative with the requested entity, could be properly described as an effort to settle the case, particularly since it left standing the significant issue over which the parties were in such bitter dispute. One sided communications with the requestor coupled as it happened with a change of stance on the outcome of the request, could give rise to a suspicion of lack of even handedness in the administration and determination of the complaint. I do not propose to say more about this however, since it was not directly an issue in these proceedings.

24. The ruling issued on the 27th of May 2011 by the original investigator now came to the opposite conclusion to that expressed in the preliminary view issued on the 29th of June 2010. In fairness, I should say that the investigator was disposed to reverse her view and to conclude that NAMA was indeed carrying out a function of "public administration" and therefore qualified as a public authority under subparagraph (b) of the Regulations, but it is I think fair to say that the focus of her decision was a conclusion that NAMA fell plainly within the provision of subparagraph (vii). She restated her view that it made more sense to see subparagraphs (i) to (vii) as subsets of paragraphs (a) to (c). She remained of the view that in European case law and case law of the United Kingdom distinction was generally made between public administrative functions and activities which are commercial, and that it would be surprising if Ireland had taken an expansive approach to the definition of public authority beyond that which was strictly required by Directive 2003/4/EC. However, she held that Ireland had "apparently chosen to take an expansive approach to the definition". In doing so, she relied on *Murdoch's Dictionary of Irish Law* (Brian Hunt; Tottel Publishing; 2009; 5th edition) which stated that "[t]he word *include* has been held to be a word of extension when used in a statutory definition: *Attorney General (McGrath) v Healy* [1972] IR 393" (p. 600). She referred to a definition of public authority in the same work which drew on the Environmental Protection Agency Act 1992. That definition included "a body established by statute". (p. 975). Accordingly she concluded:

> "I regret that I did not refer to Murdoch's, or was not otherwise made aware of the above provision, at an earlier stage in this appeal because I consider that it settles the matter conclusively. The focus on UK and European law, while

interesting, was clearly misplaced. It now seems obvious to me that, in promulgating the AIE Regulations, the Minister intentionally, and logically adopted a definition which would be consistent with environmental protection law in Ireland. Whether he acted ultra vires in doing so is not for me to say; but I must add it seems doubtful to me in the circumstances."

It seems that this conclusion was reached by reliance solely on national law and on principles of statutory interpretation under which considerable weight was given to the supposed clear words of subparagraph (vi).

25. This second preliminary view provoked further disputes, both as to its terms, and the process by which it emerged. In the event, on the 30th of September 2011, the Commissioner issued her decision. In that decision, she noted that a key element in NAMA's submission was the contention that in interpreting the provisions of the Regulations she was obliged to have regard to the provisions of Directive 2003/4/EC which the Regulations transposed into Irish law. NAMA contended that:

> "having regard to the provisions of the Directive, it is clear that the definition of "public authority" is intended to be more restrictive than that apparently provided for by the Irish Regulations; interpreting the Regulations in the context of the Directive would avoid a situation where the definition of "public authority" is extended beyond what is envisaged in the Directive".

26. The Commissioner commenced by observing that NAMA came within the plain meaning of subparagraph (vi) of the Regulations and was, clearly, a board or other body established by or under statute. Relying on the extract from *Murdoch's Dictionary of Irish Law* already referred to, she concluded that the word "includes", when used in a statutory definition, is ordinarily a word of expansion of Irish law. She continued:

> "The National Assets Management Agency has argued that allowing the word "includes" its ordinary meaning will have the consequence, in the present context, of extending the definition of public authority beyond what is envisaged in the EU directive. What NAMA proposes is that the plain and ordinary meaning of the word, as used in the Regulations, be set aside in favour of a meaning which implies a restriction rather than an expansion or an

inclusion. It is not at all clear, that as Commissioner for Environmental Information, I can abandon the plain language of the Regulations in favour of an interpretation which is arguably more in keeping with the provisions of the Directive. This is particularly the case where the language of the Regulations, and in this particular instance, is neither obscure nor ambiguous.

In any case I am not persuaded that reliance on the plain meaning of the word "includes" as used in the definition of "public authority" in the Regulations give rise to an outcome which is at odds with the Directive. In fact it is very arguable that the Directive encourages and enables member states to taken an expansive approach to what constitutes a "public authority". Recital (11) of the Directive refers expressly to an expansive intent in relation the definition; and Recital (24) expressly permits Member States "*to maintain or introduce measures providing from broader access to information than required by this directive*". Therefore I do not accept that subparagraphs (a) to (c) of the definition of "public authority" in the Regulations should be interpreted as restrictive criteria where a member state has apparently chosen to take an expansive approach to the definition."

Accordingly the Commissioner found that NAMA came within the definition of "public authority" in subparagraph (vi) of the Regulations and that it was not necessary in the present case to consider whether NAMA was captured also by any of the categories (a), (b) or (c) as contained in the definition. She accordingly annulled the decision of NAMA and found that it was a public authority under Article 3(1)(vi) of the Regulations. In the light of this decision, NAMA had to deal with the applicant's request as first made on the 3rd of February 2010 although it was open to the requester to narrow the range of information which he sought.

27. Article 13 of the Regulations permits any party to the appeal affected by the decision of the Commissioner to "appeal to the High Court on a point of law from the decision". It is also clear from Article 13 that it is contemplated that there may be further appeal to this Court. In due course, NAMA invoked this provision and the single ground specified was that the respondent Commissioner had erred in law "in finding that the appellant was a public authority within the meaning of the AIE regulations ("the decision")."

28. The original decision of the investigator of June 2010 was well reasoned and competent although it might be argued it took an unduly narrow view of the concept of administration. However it ought to have been clear that if the investigator was not going to resolve the case on the basis either that the information requested was not environmental information, or that the request was unreasonable, that the question of what was meant by a "public authority" was a pure issue of law, and one moreover, on which there was a strong element of European law. Accordingly it would have been sensible and perhaps desirable to have sought advice on that issue and perhaps guidance from, the Office of the Attorney General, since two state bodies were involved, and if that course was not taken, to seek to have the legal issue determined definitively as soon as possible. Instead there was considerable delay, and then a different conclusion advanced by the same person, which only illustrated the fact that this was an issue upon which competing views were possible. None of this was ideal. But this third version advanced by the Commissioner was in my view, particularly flawed and unhelpful.

29. It is tempting I think to consider that statutory interpretation demands no particular legal expertise, and merely requires an understanding of language, and perhaps some common sense. This decision with its confusions, contradictions and wrong turnings, illustrates, with respect, why that is not always so.

30. First and most clearly it was a dangerous and misleading shortcut to approach this issue on the basis that since Directive 2003/4/EC by Recital 24 recognised the possibility that member states might maintain and introduce measures providing for broader access to information, subparagraph (vi) could and should be given its natural and wide meaning extending to every body established by statute. But if European law permitted such a course, Irish law does not, at least by secondary legislation, for the reasons already discussed. Accordingly, if the Commissioner's interpretation was correct, and subparagraph (vi) was to be read as *extending* beyond the scope of subparagraphs (a) to (c), and therefore the provisions of the Directive, it would be an unconstitutional exercise of legislative authority by a body other than the Oireachtas. On established principles of interpretation, if this was so, and another interpretation was possible, that interpretation must be adopted, even if it was not the most plausible

or obvious one, so that the provision would be given a constitutional interpretation. Recital 24 was not therefore a plausible or safe route to a decision in this case. I confess that I find this reasoning process all the more frustrating since the Commissioner did not determine definitively that NAMA was not within the provision of subparagraphs (a) to (c). Nor did she determine that those subparagraphs had a more narrow meaning than the interpretation she was applying to subparagraph (vi), and furthermore, that NAMA fell outside the narrower interpretation of subparagraphs (a) to (c) but within the broader interpretation of subparagraph (vi). The conclusion of the Commissioner was based therefore on an assumption, and one that has not been shown to be necessary, at that. Recital 24 of Directive 2003/4/EC was in this case not a shortcut, instead it was a trap for the unwary.

31. Furthermore, the finding that the word "include" operates to *extend* the scope of the provision is in my view a dubious generalisation, and wrong if applied in these particular circumstances. *Murdoch's Dictionary of Irish Law* is a valuable tool, but it is no substitute for the thoughtful consideration of the many elaborate works on statutory interpretation. Nor is it a substitute for the careful reading and analysis of decided cases. The fact that the word "include" *can* be read to extend the meaning of a class, does not mean it *must* be so read in every case. Similarly, the fact that the word "include" has been held to be a word of extension, as correctly observed by the Commissioner, does not mean that it must always be so held, irrespective of context. The Commissioner referred to the decision in *Attorney General (McGrath) v. Healy* [1972] I.R. 393, which referred in turn to the judgment of Davitt P. in *Bolger v. Doherty* [1970] I.R. 233n. It is true that Davitt P. said:

> "When a definition section in a statute provides that a word shall "include" something, it implies usually that something would be outside the ordinary meaning of the word and that it is necessary, therefore, to include it in the meaning of the word for the purpose of the statute". (p. 235)

But that judgment continued in a passage not quoted by the Commissioner, "[a] lot must depend upon the context, and this whole definition section should be looked at in order to see the context in which the word "includes" is used" (p. 235). The earliest authority on "includes" and which was referred to by the Commissioner, is the judgment of Lord Watson in the House of the Lords of the then United Kingdom in

Dilworth & Ors v. Commissioner of Stamps [1899] A.C. 99 (*"Dilworth"*) at pp. 105-106. It is invoked for a general, and absolute, proposition by the author of *Murdoch's Dictionary of Irish Law* as follows: "[t]he word *include* has the function of enlarging the meaning of the words or phrase with which it is associated: *Dilworth v Stamp Commissioner* …".

32. In fact, the decision in *Dilworth* makes it clear that the word "include" is ambiguous and must be read in its context:

> "The word 'include' is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. But the word "include" is susceptible of another construction, which may become imperative if the context of the Act is sufficient to shew that it was not merely employed for the purpose of adding to the natural significance of the words or expressions define. It may be equivalent to "mean and include," and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions." (p. 105/106)

33. For my own part, I would have thought that the ordinary meaning of "include" is to shut in, enclose, confine, embrace, comprise or contain and comes from the Latin root *claudere* meaning to close or shut. It is thus a statement that the things included are within the term or definition. Where the term or definition is very clear, it may be natural to interpret the word "include" as somehow extending that meaning, since otherwise it would be superfluous. But there are many circumstances in ordinary language where the word "include" is used for clarity, to resolve any doubt, or for emphasis. For my part I see merit in the approach of Mazza J. in the Canadian case of *Allen v. Grenier* (1997) 145 D.L.R. (4th) 286: "'include' as defined in the *Black's Law Dictionary* is a 'term which may, according to context, express an enlargement and have the meaning of *and* or in *addition*, or merely specify a particular thing already included within general words theretofore used'." I do not however seek to make any observation of general application. It is clear to me that in the context in

which it is used, the word "include" here was not used to extend the meaning of subparagraphs (a), (b) and (c), but rather to illustrate the type of thing included within the core definition.

34. There are a number of indicators within the section which support this interpretation. First, the section does not say "shall include" which might suggest that the provisions are only included by virtue of the statute, i.e. by enlargement. Instead the language is "and includes" which might suggest description rather than prescription. Second, for the reasons already discussed, it does not make sense to approach the statutory instrument on the basis that it was intended to invade an area of constitutional law-making reserved for the Oireachtas. Third, had the intention of the law maker been to exercise the power referred to in Recital 24 it would have been more natural to have listed the various provisions in sequence, and without the word "include". But perhaps the most important thing about the Regulations is precisely that they are intended to implement Directive 2003/4/EC, as is stated in the Recital to the Regulations. This is also clear from the fact that the definition of "public authority" reproduced at subparagraphs (a) to (c) uses the precise language of the Directive. The Regulations must be approached in this light. However, the concepts described at (a) to (c) are derived through European law from concepts adopted at the level of international law. Unlike purely domestic legislation therefore, they were not chosen with a view to immediate application within the Irish legal system, or by reference to concepts immediately recognisable here. It is in my view the most natural interpretation of the definition section therefore to see it as reproducing the international and European law terms, and thereafter attempting to clarify the scope of application of those terms within the Irish legal system, rather than somehow extending them.

35. This conclusion perhaps can be tested by comparing some of the more specific provisions of subparagraphs (i) to (vii) with the provisions of subparagraphs (a) to (c). Thus, it seems clear for example that a "Minister of the Government" within subparagraph (i) comes without much argument within subparagraph (a) as being government at national level. Similarly, the Health Service Executive established under the Health Act 2004 (subparagraph (ii)) would be one of the clearest examples of a legal person performing public administrative functions under national law

(subparagraph (b)), since it succeeded to the functions which had previously been carried out by the Department of Health. Certainly, in neither case could it be said that the provisions of subparagraph (i) in the case of a minister of the government and subparagraph (v) in the case of the Health Service Executive, are terms of extension. It seems to me that similarly, subparagraphs (vii) - (IV) relating to a company performing administrative functions and responsibilities and possessing environmental information, and whose shares are held by or on behalf of the minister of the government of directors appointed by the minister of the government, is intended to fit closely with subparagraph (c) which includes any natural or legal person having public responsibilities or functions or providing public services relating to the environment under the control of a body or person falling within paragraph (a) or (b).

36. One further point is contained within the text of the Directive and the implementing Regulations. The Directive refers to natural or legal persons performing public administrative functions under national law *including* specific duties, activities or services in relation to the environment. It could not be said that the word "include" here is being used as a term of extension. Instead it is illustrative of a specific category falling within the general descriptions. Finally, it is perhaps noteworthy that in *Dilworth,* a distinction is drawn between the formulation "includes" and "means and includes". Here in fact the statutory formulation is the latter since the statutory instrument provides that the term shall "mean" subparagraphs (a) to (c) and "includes" subparagraphs (i) to (vii). Accordingly, in my view it is clear that whatever the word "include" may mean in other statutory definitions, it was not here intended to operate as extending the meaning of the prior paragraphs. Accordingly, the reasoning of the Commissioner in this regard is flawed, and cannot be supported.

37. Given the frailties which the decision of the Commissioner exhibited, it is not surprising that NAMA sought to invoke the provisions of the regulations permitting the decision to be appealed on a point of law to the High Court. There, the case took a further turn. There, both parties agreed that the Court was *not* concerned with the issue of whether the appellant fell within subparagraphs (a) to (c). This followed, it was agreed, from the fact that the Commissioner had not ruled whether the appellant was within subparagraphs (a) to (c). The learned High Court Judge sought

supplemental submissions from the parties as to whether the High Court Judge had power to quash the decision and remit it to the Commissioner for further consideration, in particular, if the High Court Judge concluded that the Commissioner came to the right decision but for the wrong reasons. Both parties agreed that the Court had no jurisdiction to decide that NAMA was a public authority for reasons which were not canvassed before or considered by the Commissioner. They referred to *Vavasour and The Employment Equality Agency v. Northside Centre for the Unemployed Ltd., and Ors* [1995] 1 I.R. 450 (*"Vavasour"*) where Costello J. (as he then was) observed:

> "The final ground of appeal raises a point which was not argued before the equality officer or the Labour Court and which did not form any part of the grounds of appeal in the appellants' special summons. I do not think that it is one which can properly now be relied on. The appellants complaint to the Labour Court was that discrimination contrary to s. 2(c) of the Act of 1977 had occurred and it was this complaint that was considered firstly by the equality officer and then by the court itself. Now the appellants seek to argue that even if the discrimination under s. 2(c) did not occur, discrimination prohibited by s. 2(b) (which provides that discrimination occurs when because of marital status a person is treated less favourably than another person of the same sex) took place. But this claim was never advanced at any time prior to the hearing before me – it was no part of the Labour Court's deliberations, and no part of its determination. As the statute only permits appeals to this court on a point of law arising from a determination of the Labour Court and as the Labour Court made no determination in relation to the point now advanced, this court has no jurisdiction to entertain it." (p. 485)

38. It appears, that the case before the High Court proceeded on the basis therefore, that the only question was whether NAMA came within subparagraph (vi) since the Commissioner had considered that she did not have to determine whether it came within subparagraphs (a) to (c). But in the High Court, the Commissioner's argument was significantly different to that which was the basis of the decision appealed against (although not far removed perhaps from the second determination of the investigating officer). This was that subparagraph (i) to (vii) must be understood

as deeming provisions, i.e. that the Minister was deeming those matters and anything within these subparagraphs to be within subparagraphs (a) to (c).

39. The learned High Court Judge delivered a careful and comprehensive judgment on the 27th of February 2013 ([2013] IEHC 86). I infer, perhaps wrongly, that the trial judge found the restrictions imposed by the agreement by the parties as to the scope of argument, somewhat restrictive. If he did, then in my view, for reasons which I will address, he was right to do so. In the end however, he sought to deploy that argument with its consequent limitations, to arrive at the conclusion, that the decision of the Commissioner should be upheld. That reasoning, as I understand it, was that the proper approach to a measure implementing a directive of the European Community (or Union) was outlined by Cooke J. in *M.S.T. and J.T. v. Minister for Justice, Equality and Law Reform* [2009] IEHC 529, namely: "the Court must presume, in the absence of explicit wording to the contrary effect, that the legislative purpose is to give full and accurate effect to the provisions of the Community measure and no more" (para. 27), and as the trial judge added "no less". However, he concluded that the presumption was *not* rebutted here because it had not been argued that NAMA did not come within the definition of public authority in the Directive. Accordingly on a presumption of faithful transposition (which had not been rebutted), it must follow, the trial judge considered, that the bodies listed at subparagraph (vi) were public authorities within the meaning of the Directive.

40. The key reasoning of the judge was set out in extracts from paragraphs 81-83 of his judgment as follows:

> "If Ireland had expanded the European definition of 'public authority' by statutory instrument, it would have offended section 3 of the European Communities Act 1972 and Article 29 of the Constitution. Had it limited the definition, it would have breached EU Treaty obligations to transpose and give full effect to the parent directive.
>
> 82. The Minister could not lawfully deem a body or person to be a public authority unless such a body or person conformed to the definition of public authority in the directive. Thus the bodies or persons listed at 3(1)(i)-(vii) are public authorities within the meaning of the directive, and I must so presume,

unless I am persuaded that such a person or body is not embraced by the definition of public authority in the directive.

83. This presumption of faithful transposition, as described by Cooke J. in *M.S.T*, is rebuttable. If the appellant established that NAMA did not come within the definition of public authority in the Directive that would rebut the presumption of faithful transposition. No such argument was addressed to me. Nor was that case made to the respondent at first instance. For the sake of completeness I should add that at an early stage of the investigation of this matter it was suggested by an officer of the respondent that NAMA was a public authority because of the operation of Article 3(1) (b)- *viz.*, NAMA was a body performing public administrative functions. NAMA made a submission to the respondent contesting this proposition and this matter was not pursued by the respondent who confined her decision to the applicability of Article 3(1)(vi) and thus the question of whether NAMA was involved in any of the activities described in Article 2(2) (a), (b) and (c) of the Directive or the Irish replication of these provisions (at 3 (1) (a), (b) and (c)) was not before the respondent and was not before this court."

41. This was an ingenious approach which sought to resolve this case within the constraints created first by the decision of the Commissioner which had sought to resolve the matter by holding that an expansive definition could be given to the provisions of subparagraph (vi), and thereafter by the limitations imposed upon the argument in the High Court, by the agreement as to the scope of the appeal. But it was in my view, a further, and ultimately unhelpful, shortcut leading to a complicated and unsatisfactory result.

42. It is undesirable to resolve a case such as this on the basis of a presumption of faithful transposition which has not been rebutted. At a minimum that leaves unresolved the fundamental legal issue as to whether NAMA is in truth captured by the provisions of the Regulations as properly construed. It also renders the decision of virtually no effect as a precedent for the Commissioner and for any member of the public or institution dealing with that body. NAMA would be able to argue on a subsequent occasion that it wished to seek to rebut the presumption and address

argument in that regard. In any event, it also lays undue weight upon the approach taken by Cooke J., which in my view did no more than identify an appropriate starting point for analysis. Furthermore, I think counsel for NAMA, the appellant, is correct to say that it was wrong to conclude that no attempt had been made to rebut any presumption of faithful transposition. Indeed the entire thrust of the appellant's arguments was to the effect that a narrower meaning was to be given to subparagraphs (a) to (c) and *consequently* to subparagraph (vi). It is clear that the appellant did argue before the Commissioner that NAMA did not fall within categories of subparagraphs (a) to (c) of Article 3(1) and the definition of public authority in the Regulations (and therefore the Directive), and perhaps more importantly the entire thrust of the appellant's arguments depended on an assertion that this was so. Indeed, if the Commissioner had not accepted that this argument was at least plausible (and therefore made) it would not have been necessary to seek to resolve the matter on the basis that member states were entitled to adopt broader provisions permitting greater access to environmental information than was provided for in the Directive.

43. In my view, this case at all of its stages manifests the difficulty of seeking to resolve difficult issues by reference to rules of thumb and proposed shortcuts, whether of permitted expansive implementing provisions, a supposed meaning of the word "include", or a presumption of faithful transposition. Fundamentally, for the reasons addressed at the outset of this judgment, I consider that the Regulations themselves cannot be truly interpreted, and in particular, meaning cannot be assigned to subparagraph (vi), without considering the scope and meaning of the definition section in the Directive (and prior to that in the Aarhus Convention), and which since the words are identical has the effect of defining the scope of the provisions contained in subparagraphs (a) to (c).

44. NAMA has strongly argued however, that it is not open to the Court to adopt this approach. Instead it is said that the Court may only determine whether the Commissioner was correct to adopt a meaning of "public authority" on the assumption, or possibility, that Ireland as a member state had adopted a broader implementing measure than was strictly necessitated by the terms of the Directive. If, as NAMA contended, this was incorrect, then the case should be remitted to the Commissioner to consider the true interpretation of the scope of the Directive (and

therefore subparagraphs (a) to (c)), albeit that that in itself is an issue of law which would almost inevitably give rise to a further appeal. Furthermore, the possibility of a reference to the European Court of Justice would be very likely. While not suggesting that this is by any means a desirable course, the appellant nevertheless maintained that it was required by law.

45. I do not accept that this Court, or indeed the High Court, should be, or is, constrained in this way. There is a fundamental distinction between a case such as this and *Vavasour*. This case would be akin to *Vavasour* if the Commissioner sought to argue either in this Court or in the High Court, and the Court had purported to determine, that NAMA did not fall within the meaning of subparagraph (vi) but did fall within the meaning of one of the other subparagraphs, (i) to (vii), although this was not argued before the Commissioner. Here however, the appeal brought by the appellant, by originating notice of motion on the 21st of November 2011, sought to appeal the decision of the Commissioner "on the grounds that the respondent erred in law in finding that the Appellant was a public authority within the meaning of the AIE regulation[s]". Unlike the notice of appeal in *Vavasour* this is expressed in sufficiently broad terms to encompass the argument that NAMA is within the meaning of subparagraph (vi) when read in the light of subparagraph (b), or even that NAMA is within subparagraph (b) alone. Even if the point of law is narrowed to whether NAMA is within subparagraph (vi), i.e. that it is a board or other body established by or under statute, that point of law cannot be resolved (and certainly cannot be resolved in favour of the appellant) without determining the proper scope of subparagraphs (a) to (c) of Article 2.2 of Directive 2003/4/EC, and accordingly the meaning of those self same words in the Regulations.

46. The difficulties posed for the appellant in this Court by the trial judge's decision based on non-rebuttal of a presumption of faithful transposition flow in large measure from the narrow scope sought to be imposed upon the argument in that Court. But if it had been argued before the Commissioner that NAMA did not come within the provisions of the Directive, sufficient to rebut the presumption of faithful transposition, it is hard to understand how it cannot have been argued sufficiently to allow the High Court and this Court on appeal to properly determine that matter. For

reasons addressed at the outset of this judgment, I do not consider that it is possible to arrive at a lawful interpretation of the provisions of the Regulations without considering the scope of the definition section contained in the Directive. This issue was clearly within the notice of appeal and was part and parcel of the argument before the Commissioner. I am satisfied that it is properly within the scope of this appeal: indeed the appellant cannot advance its appeal, and argue that there is any ambiguity in, or different interpretation to be given to, the provisions of subparagraph (vi) without invoking the terms and meaning of the Directive. In any event, it is well settled that an agreement between counsel as to the scope of argument cannot constrain this Court in the interpretation it may give to a legislation of general application. Here it cannot, and does not, prevent the Court from interpreting the provisions of the Regulations which at least in principle, apply to everyone in the State.

47. A further complication arose in this case because after the decision of the High Court, and the filing of submissions in this court, the parties brought to the Court's attention a recent decision of the European Court of Justice, Grand Chamber, and the opinion of Advocate General Cruz Villalón in Case C-279/12, *Fish Legal & Emily Shirley v. Information Commissioner, United Utilities Water Plc, Yorkshire Water and Services Ltd and Southern Water Services Ltd* [2014] 2 C.M.L.R. 36 ("*Fish Legal*"), 19th December 2013. The opinion of Advocate General Villalón delivered on the 5th of September 2013, addressed the concept of "public administrative functions" contained in the Directive and considered at paragraph 75 that the concept "does not refer strictly to administrative or executive institutions in the true sense but rather, in general terms, to the full panoply of State powers". He drew this conclusion because of the exemption in the Directive of judicial or legislative functions. These could not properly be considered to be administrative in any sense, and it was only by giving therefore a broad interpretation to public administrative functions, and making it akin to public functions, that judicial or legislative functions could be said to be within the initial definition and require exemption from it. Accordingly at paragraph 83 he stated that:

> "I believe that, for the purposes of the present proceedings, it can be concluded that, in the context of Directive 2003/4 'public administrative functions' as an equivalent of public authority and save for possible legislative

and judicial exceptions – which are not relevant in the present case – are functions by virtue of which individuals have imposed on them a will the immediate effectiveness of which albeit subject to review, does not require their consent."

48. The Court did not go so far in its determination. At paragraph 38 the Court noted that implementation guide to the Aarhus Convention may be regarded as an explanatory document to be taken in to account for the purposes of interpreting the Convention but that the observations had no binding force and do not have the normative effect of the provisions of the Convention. It stated at paragraph 49 that in referring to public authorities the authors of the Convention "intended to refer to administrative authorities, since within States it is those authorities which are usually required to hold environmental information in the performance of their functions", citing C-204/09 *Flachglas Torgau GmbH v. Federal Republic of Germany* [2012] 2 C.M.L.R. 17, paragraph 40. At paragraphs 51 and 52 however the Court observed:

> "51 Entities which, organically, are administrative authorities, namely those which form part of the public administration or the executive of the State at whatever level, are public authorities for the purposes of Article 2(2)(a) of Directive 2003/4. This first category includes all legal persons governed by public law which have been set up by the State and which it alone can decide to dissolve.
>
> 52 The second category of public authorities, defined in Article 2(2)(b) of Directive 2003/4, concerns administrative authorities defined in functional terms, namely entities, be they legal persons governed by public law or by private law, which are entrusted, under the legal regime which is applicable to them, with the performance of services of public interest, inter alia in the environmental field, and which are, for this purpose, vested with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law."

It was for the national tribunal or court to determine whether the rights and powers accorded to the particular bodies or companies, could be classified as special powers.

49. NAMA argues that while a broad interpretation may be given to the term "public authority" and in particular "public administrative functions" there must in principle be some limit, otherwise it would not be necessary to use the adjective "administrative" at all. In an appendix to its submissions, NAMA sets out a non-exhaustive list of bodies which would be captured by a literal reading of subparagraph (vi), some at least of which it argued could not be said to be carrying out public administrative functions, such as the Citizens Information Board, the Company Law Review Group, the Combat Poverty Agency, the HSE Crisis Pregnancy Programme, the Human Rights Commission, the Irish National Stud Company Limited, the Irish Blood Transfusion Service, the Irish Museum of Modern Art, the Judicial Studies Institute, the Science Foundation Ireland, the National Museum of Ireland, the State Laboratory, and Victims Support

50. If the law stood as it was at the time of the High Court decision I would have considered it necessary to refer a question to the ECJ as to whether a body such as NAMA was a public body for the purpose of the Directive which exercised public administrative functions. The definition section of the Directive is unclear, and it is also necessary to consider the Aarhus Convention. However the decision in *Fish Legal* provides an authoritative interpretation of the Directive, and moreover does so in the context of a common law system. Applying that test it is clear that NAMA is indeed a public authority exercising public administrative functions. Although like the water companies in *Fish Legal*, it is obliged to act commercially, it is undoubtedly vested with special powers well beyond those which result from the normal rules applicable in relations between persons governed by private law. If anything, the case is clearer here. The water companies in *Fish Legal* were companies established in private law whereas NAMA is established pursuant to a statute which confers upon it substantial powers of compulsory acquisition, of enforcement, to apply to the High Court to appoint a receiver and to set aside dispositions. The Act also restricts or excludes certain remedies against NAMA. The establishment and operation of NAMA is a significant part of the executive and legislative response to an unprecedented financial crisis. The scope and scale of the body created is exceptional. Indeed if it were not so it would not be in a position to carry out the important public functions assigned to it in the aftermath of the financial crisis. Accordingly, for the reasons set out above, I would dismiss the appeal. Donal O'Donnell

23/6/15