

**THE HIGH COURT**  
**IN THE MATTER OF THE FREEDOM OF**  
**INFORMATION ACT, 2014**

[2017 No. 321 MCA]

**BETWEEN****IPB INSURANCE CLG****APPELLANT****AND****THE INFORMATION COMMISSIONER****AND****THE LOCAL GOVERNMENT MANAGEMENT AGENCY****AND****PRICEWATERHOUSE LIMITED COMPANY****AND****DOROTHEA DOWLING****NOTICE PARTIES****JUDGMENT of Mr. Justice Meenan delivered on the 29th day of March, 2019****Background**

1. The appellant is an insurance company. On or about September 2015 a value for money review ("the review") of the appellant's offering to its members was established and was completed in or around July 2016. The review was conducted on behalf of the Local Government Management Agency ("LCMA") by PricewaterhouseCooper ("PwC"). In facilitating this review, the appellant granted access to commercially sensitive information to a limited number of LGMA representatives and PwC experts, subject to strict confidentiality and to the terms of a non-disclosure agreement.

2. On or about 1 December 2016 a request under the Freedom of Information Act 2014 ("the Act of 2014") was made by Ms. Dorothea Dowling to the LGMA in respect of the review. The LGMA identified eight records of relevance to this request, two of which were released in full. Three of the remaining six records were released in part. Having carried out a review under s. 22 (2) of the Act of 2014, the respondent, in a decision dated 15 September 2017, found that the LGMA was not justified in withholding access to the records, the subject of the request in December 2016, and directed their release.

3. The proceedings before the Court are the appellant's appeal from the respondent's decision on points of law.

**Motion for directions**

4. The appellant issued a notice of motion wherein it seeks the following order: -

"That all or part of the hearing of the appellant's appeal from a decision of the Information Commissioner dated 15th September, 2017 be heard otherwise than in public pursuant to O. 130, r. 9 of the Rules of the Superior Courts, as provided for in s. 25 of the Freedom of Information Act, 2014 and/or pursuant to the inherent jurisdiction of this Honourable Court."

5. The reason for the appellant's request for the appeal to be heard otherwise than in public is set out in an affidavit of Ms. Emily Chambers, Director Legal and Company Secretariat of the appellant. Ms. Chambers states that to ensure that an effective review was conducted, a limited number of LGMA representatives and appropriately qualified PwC experts were given access to the appellant's commercially sensitive information on its pricing processes, matrix relating to profitability, capital adequacy ratios, strength of claims reserves, risk analysis and strategies. These individuals were also given access to technical statistical analyses and information relating to internal governance controls and to the monitoring of how risk is to be assessed to determine rates.

6. Ms. Chambers is concerned that, in order for the appeal to be properly considered, it will be necessary for the court hearing the appeal to examine the contents of the records "due to the fact that the respondent's decision on the grounds of appeal are inseparably fused with the contents of the said records."

7. The respondent submitted that there is no requirement that the appeal be heard otherwise than in public as the Act of 2014 has specified that the appeal is an appeal on a point of law and thus it will not be necessary for the court hearing the appeal to examine the records and they will therefore not be put into the public domain.

**Consideration of issues**

8. Article 34 of the Constitution requires that justice "save in such special and limited cases as may be prescribed by law, shall be administered in public."

9. Section 25 of the Act of 2014 provides: -

"(1) In proceedings in the High Court under or in relation to this Act, that Court shall take all reasonable precautions to prevent the disclosure to the public or, if appropriate, to a party (other than a head) to the proceedings of —

(a) information contained in an exempt record, or

(b) information as to whether a record exists or does not exist in a case where the head concerned is required by

this Act not to disclose whether the record exists or does not exist.

(2) Without prejudice to the generality of *subsection (1)*, precautions under that subsection may include—

- (a) hearing the whole or part of any such proceedings as aforesaid otherwise than in public,
- (b) prohibiting the publication of such information in relation to any such proceedings as it may determine, including information in relation to the parties to the proceedings and the contents of orders made by the High Court in the proceedings, and
- (c) examining a record or a copy of a record without giving access or information in relation thereto to a party (other than a head) to the proceedings.”

10. There are numerous authorities on the requirement to hold legal proceedings in public and the various exceptions to this. In the instant case, the relevant statute does provide a court with the discretion to hold the hearing of an appeal, or part thereof, otherwise than in public. There is also provision in the statute allowing for access to certain documentation to be restricted even where the hearing of the appeal is held in public. As to how a court should exercise its discretion in a case such as this, I refer to the Supreme Court decision in *Gilchrist v. Sunday Newspapers Limited* [2017] 2 I.R. 784 wherein O'Donnell J., having reviewed the law in this area, stated at p. 316: -

“Accordingly, I would summarise the principles as follows: -

- (i) Article 34.1 requirement of administration of justice in public is a fundamental constitutional value of great importance.
- (ii) Article 34.1 itself recognises however that there may be exceptions to that fundamental rule.
- (iii) Any such exception to the general rule must be strictly construed, both as to the subject matter, and the manner in which the procedures depart from the standard of a full hearing in public.
- (iv) Any such exception may be provided for by statute but also falls under the common law power of the court to regulate its own proceedings.
- (v) An exception from the principle of hearing in public is sought to be justified by reference to the common law power and in the absence of legislation, then the interests involved must be very clear, and the circumstances pressing. Here that demanding test is capable of being met by the combination of the threat to the programme and the risk to lives of people in it or administering it. This is not a matter of speculation, but seems an unavoidable consequence of the existence of a witness protection programme.
- (vi) Though it can be shown that justice cannot be done unless a hearing is conducted other than in public, that will plainly justify the exception from the rule established by Article 34.1, but that is not the only criterion. But constitutional interests and values of considerable weight may be damaged or destroyed by a hearing in public, it may be appropriate for the legislature to provide for the possibility of the hearing other than in public, (as it has done) and for the court to exercise that power in a particular case is satisfied that it is a case which presents though features which justify a hearing other than in public.
- (vii) Requirement of strict construction of any exception to the principle of trial in public means that a court must be satisfied that each departure from that general rule is no more than is required to protect the countervailing interest. It also means that the court must be resolutely sceptical of any claim to depart from any aspect of a full hearing in public. Litigation is a robust business. The presence of the public is not just unavoidable, it is necessary and welcome. In particular, this will mean that even after concluding that the case warrants a departure from that constitutional standard, the court must consider if any lesser steps are possible such as providing for witnesses not to be identified by name, or otherwise identified or for the provision of a redacted transcript for any portion of the hearing conducted *in camera*.”

11. It is clear from the foregoing principles that any departure from the general rule that hearings should be conducted in public must be minimal. This is so even where there is statutory provision allowing for same. In this case, s. 25(2) of the Act of 2014 allows the whole or part of the proceedings to be held otherwise than in public. Subsection (2)(c) of the same section allows for the hearing to be in public but privacy be maintained in respect of certain documentation.

12. Though this appeal is an appeal on a point of law it may be that the appellant will not be permitted to rely on this point as it was not raised at first instance (see *Rotunda Hospital v the Information Commissioner* [2013] 1 I.R. 1). However, it seems to be likely, if not inevitable, that the contents of the records will be the subject of legal submissions. I accept the appellant's submissions as to the confidentiality of these records and so will make an order under s. 25(2)(c) of the Act of 2014.

13. I do not propose, at this stage, to give any further direction. It may be that in the course of the hearing of the appeal it may be necessary for the trial judge to broaden the exception as provided for in s. 25 of the Act of 2014 .

#### **Conclusion**

14. By reason of the foregoing, I will make an order pursuant to s. 25(2)(c) and will hear counsel as to the wording of such order.