APPROVED **[2024] IEHC 713**

THE HIGH COURT
JUDICIAL REVIEW

2018 942 JR

IN THE MATTER OF THE EUROPEAN COMMUNITIES (ACCESS TO INFORMATION ON THE ENVIRONMENT) REGULATIONS 2007 – 2018

AND IN THE MATTER OF DIRECTIVE 2003/4/EC ON PUBLIC ACCESS TO ENVIRONMENTAL INFORMATION

BETWEEN

RIGHT TO KNOW CLG

APPLICANT

AND

AN TAOISEACH

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 20 December 2024

INTRODUCTION

1. For the reasons explained in an earlier judgment in these proceedings, the High Court referred a number of questions to the Court of Justice pursuant to Article 267 TFEU. The Court of Justice has since delivered its ruling. The present judgment seeks to apply that ruling to the circumstances of the case.

NO REDACTION REQUIRED

PROCEDURAL HISTORY

2. These proceedings have their genesis in a request for access to information on the environment made on behalf of the applicant on 8 March 2016. The request for access to the relevant records had been made pursuant to the EC (Access to Information on the Environment) Regulations 2007 (S.I. No. 133 of 2007) ("*the domestic implementing regulations*"). These regulations transpose the provisions of the Directive on Public Access to Environmental Information (Directive 2003/4/EC) ("*the Environmental Information Directive*").

3. The information which had been requested is as follows: all documents which show cabinet discussions on Ireland's greenhouse gas emissions from 2002 to 2016. This request had been refused, by an initial decision dated 5 May 2016; and, following an internal review, the refusal had been affirmed by a subsequent decision dated 10 June 2016.

4. The applicant instituted judicial review proceedings seeking to challenge the decision of 10 June 2016 ("*the first judicial review proceedings*"). The applicant had been partially successful in the first judicial review proceedings. In a reserved judgment dated 1 June 2018, the High Court (Faherty J.) set aside the decision of 10 June 2016 and remitted the request for access to the respondent for reconsideration: *Right to Know clg v. An Taoiseach* [2018] IEHC 372, [2019] 3 I.R. 22.

5. A fresh decision was duly made on 16 August 2018 ("*the decision on remittal*"). The decision on remittal was to the effect that access would be granted in respect of one record; partial access would be granted in respect of seventeen records; and access would be withheld in respect of the remaining thirteen records. Relevantly, part of the stated reasons for the decision on remittal included

reference to cabinet discussions comprising the "*internal communications*" of a public authority, and more generally, to the principle of cabinet confidentiality under domestic constitutional law.

6. The applicant seeks to challenge the decision on remittal in these judicial review proceedings ("*the second judicial review proceedings*"). For the reasons explained in a reserved judgment, this court made a reference to the Court of Justice for a preliminary ruling: *Right to Know CLG v. An Taoiseach* [2021] IEHC 233 ("*the first judgment*"). The Court of Justice has since delivered its ruling: *Right to Know*, Case C-84/22, EU:C:2023:910.

7. The parties were invited to make submissions on the implications of the Court of Justice's ruling for the outcome of these judicial review proceedings. The parties were both agreed that this should be dealt with by way of the exchange of written submissions and that an oral hearing was not necessary. In the event, a total of five sets of written submissions were filed. The last set was filed on 6 December 2024.

ENVIRONMENTAL INFORMATION DIRECTIVE

8. These judicial review proceedings give rise to significant questions of law in respect of the limits of cabinet confidentiality. The principal question for determination concerns the circumstances, if any, in which the constitutional imperative that discussions at meetings of the Government remain confidential must yield to the requirements of the Environmental Information Directive. The answer to this question turns, in large part, on how discussions at meetings of the Government are to be characterised for the purposes of the European Directive. Where convenient, I will refer to this principal question as the

"*characterisation issue*". The rival positions of the parties have been summarised in the first judgment. In brief, the parties are in disagreement as to whether the correct characterisation is as "*internal communications*" of a public authority, or, alternatively, as the "*proceedings*" of a public authority. The significance of this distinction is as follows.

9. The Environmental Information Directive attaches a special status to information relating to *emissions* into the environment. The grounds upon which access to such information can be refused are narrower than those in respect of other types of information on the environment. This result is achieved by providing that certain exceptions to disclosure, which are otherwise available under the Environmental Information Directive, do not apply in the case of information relating to emissions into the environment. The applicant, in its written legal submissions, has used the shorthand "*the emissions override*" to describe these provisions.

10. Relevantly, the emissions override operates to oust the exception otherwise applicable to the confidential "*proceedings*" of a public authority. It follows, therefore, that were the applicant to be correct in its characterisation of meetings of the Government as the confidential "*proceedings*" of a public authority, then disclosure would be mandatory insofar as the information relates to emissions into the environment, and the Government could not rely on the principle of cabinet confidentiality to refuse access to such information. Conversely, if the respondent is correct in characterising the meetings of the Government as the "*internal communications*" of a public authority, then the emissions override would not apply.

11. The Court of Justice has explained, in its ruling on the preliminary reference, that a "*cumulative application*" of the two exceptions is not possible. Rather, if the conditions for applying the more specific exception laid down in respect of the "*proceedings of public authorities*" are in fact satisfied, then the application of that exception takes precedence over that of the exception relating to "*internal communications*", which is more general in scope.

12. The Court of Justice elaborated upon the distinction between the two categories as follows:

> "Having regard to all the foregoing considerations, the answer to the first question is that Article 4 of Directive 2003/4 must be interpreted as meaning that:
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> – the exception laid down in point (e) of the first subparagraph of Article 4(1) of that directive in respect of 'internal communications' covers information which circulates within a public authority and which, on the date of the request for access to that information, has not left the internal sphere of that authority – as the case may be, after being received by that authority, provided that it was not or should not have been made available to the public before it was so received;
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> – the exception laid down in point (a) of the first subparagraph of Article 4(2) of that directive in respect of the 'proceedings of public authorities' covers only information exchanged in the course of the final stages of the decision-making process of public authorities which are clearly defined as proceedings under national law and in respect of which such law provides for a duty of confidentiality, and
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> – the cumulative application of the exceptions to the right of access laid down, respectively, in point (e) of the first subparagraph of Article 4(1) and in point (a) of the first subparagraph of Article 4(2) of that directive is precluded on the ground that the latter provision relating to the protection of the 'proceedings of public authorities' takes precedence over the former provision relating to the protection of 'internal communications'."

13. As appears from the foregoing, the final stages of the decision-making process of a public authority are properly characterised as the proceedings of public authorities for the purpose of the Environmental Information Directive. It would seem to follow that it is only when a formal decision is being made by the Government, in the exercise of the executive power, that a meeting of the cabinet falls to be characterised as the proceedings of a public authority. Discussions which fall short of the final stages of the decision-making process can avail of the broader exception provided for internal communications.

IMPLICATIONS FOR EARLIER DOMESTIC CASE LAW

14. The judgment of the Court of Justice on the Article 267 reference has implications for the correctness of the earlier domestic case law. The High Court (Ó Neill J.) had previously held, in *An Taoiseach v. Commissioner for Environmental Information* [2010] IEHC 241, [2013] 2 I.R. 510 ("*Cabinet Confidentiality No. 1*"), that meetings of the Government can only be regarded as the internal communications of a public authority. See paragraphs 83 and 84 of the reported judgment as follows:

> "Meetings of the Government are but one aspect of its constitutional role and its many and varied functions as described briefly in the Constitution and set out in great detail in a vast array of legislation. To describe meetings of the Government as 'the proceedings' of the Government as the public authority in question seems to me somewhat artificial and strained. Applying the natural and ordinary meaning of these terms as used in art. 4(2)(a) in the Directive, would in my opinion result in a conclusion that art. 4(2)(a) did not, and was not intended to, apply to meetings of the Government such as and in so far as these are provided for in our Constitution and laws.
>
> On the other hand, meetings of the Government are the occasions when, as provided for in Article 28.4.2° of the

> Constitution, the members of the Government come together to act as a collective authority, collectively responsible for all departments of State. Meetings of the Government are the constitutionally mandated means or system of communication between its members for the purpose of discharging their collective responsibility. These meetings and their records are required by the Constitution to be private and confidential unless otherwise directed by the High Court under Article 28.3 of the Constitution. Whereas many aspects of the functions of the Government are essentially public and external in nature, meetings of the Government are quintessentially private and internal to the overall functions of the Government. Thus, in my judgment, this constitutionally mandated form of communication between members of the Government can only be regarded as the internal communications of a public authority. Any other conclusion would lead to absurd results, as pointed out by counsel for the appellant, in that communications between members of the Government in any other context apart from formal meetings of the Government would have to be regarded as internal communications and protected from disclosure but the same communications at a Government meeting would, as 'the proceedings of a public authority', attract disclosure. Manifestly such a state of affairs, apart from its obvious absurdity, would seriously undermine the discharge of collective responsibility by the Government, as required by Article 28.4.2° of the Constitution. In this regard, I should further add that I am quite satisfied that the distinction sought to be drawn between communications between the members of a public authority and between officials of that authority or between officials of the authority and the members of the authority is devoid of any rational merit and has no discernible basis either in the express provisions or, by way of necessary implication, in the Directive or the Regulations of 2007."

15. This approach has since been endorsed in the more recent judgment of the High Court (Faherty J.) in *Right to Know clg v. An Taoiseach* [2018] IEHC 372, [2019] 3 I.R. 22 ("*Cabinet Confidentiality No. 2*"). This judgment was delivered in respect of the first judicial review proceedings taken by the applicant.

16. It is now apparent, having regard to the ruling of the Court of Justice on the Article 267 reference, that the High Court's interpretation of the Environmental Information Directive had been erroneous. The legal position is more nuanced.

Depending on the content of same, an extract from the minutes of a meeting of the Government will fall to be characterised as a record concerning the "*internal communications*" of a public authority, or, alternatively, as a record concerning the "*proceedings*" of a public authority. The correct characterisation of any individual extract from the minutes will be contingent on whether or not the extract chronicles the final stages of a decision-making process being carried out by, or on the authority of, the Government in the exercise of the executive power of the Irish State pursuant to Article 28 of the Constitution of Ireland.

RES JUDICATA / ISSUE ESTOPPEL

17. The respondent contends that the applicant is precluded from reagitating the characterisation issue by reference to the doctrine of *res judicata*. More specifically, the respondent contends that the characterisation issue has been determined against the applicant by the judgment in *Cabinet Confidentiality (No. 2)*. That judgment held that records of the meetings of the Government fall to be characterised as the "*internal proceedings*" of a public authority, and, as such, are not subject to the emissions override. The applicant did not appeal that finding at the time. The respondent contends that the finding in *Cabinet Confidentiality (No. 2)* is now binding on the applicant *in personam*, irrespective of whether the finding is right or wrong.

18. The term *res judicata* is often used as an umbrella term, embracing a number of related principles all of which seek to advance the public interest in the finality of litigation. The strictest form of *res judicata* is cause of action estoppel, whereby a party is precluded from pursuing a particular cause of action in consequence of a final judgment in earlier proceedings. The next form of *res*

judicata is issue estoppel, whereby a party will, generally, be precluded from relitigating an issue of fact or law which has previously been determined against them in earlier proceedings. The determination of that issue must have been necessary to the outcome of the earlier proceedings, i.e. the finding on the issue must have been fundamental rather than merely collateral or incidental.

19. Put otherwise, notwithstanding that the judgment in earlier proceedings may not have entailed a final determination on the legal right asserted in subsequent proceedings, it may nevertheless have determined an *issue* which is common to both sets of proceedings. Provided that the determination of this issue had been an essential part of the rationale for the earlier judgment, then the finding on the issue will, generally, be binding in the subsequent proceedings.

20. There is a third species of *res judicata*, whereby a party will, generally, be precluded from litigating an issue in a second set of proceedings if that party should have—but failed—to raise the issue in an earlier set of proceedings. This principle is described as the rule in *Henderson v. Henderson*.

21. The doctrine of *res judicata* (including issue estoppel) is directed to the conduct of the parties and the need to avoid questions, which have already been determined conclusively in earlier proceedings, from being relitigated between the same parties or their privies. If a party is aggrieved by a judicial determination, then the remedy is to appeal that determination rather than attempt to reagitate the same question in a second set of proceedings. If a party allows an earlier judicial determination against them to go unappealed, then they will ordinarily be bound *in personam* by that determination on that issue, even though it may be incorrect in law. Put shortly, the doctrine of *res judicata* places a premium on the finality of litigation.

22. The form of *res judicata* asserted against the applicant in the present proceedings is issue estoppel. The respondent, very properly, does not allege cause of action estoppel. There has been no final judicial determination in respect of the applicant's entitlement to access the relevant records under the domestic regulations implementing the Environmental Information Directive. The judgment in *Cabinet Confidentiality (No. 2)* did not represent a final judicial determination on that controversy. Rather, the question of access to the relevant records had been remitted, pursuant to Order 84 of the Rules of the Superior Courts, to the original decision-maker for reconsideration.

23. The contention of the respondent is narrower. It is said that the judgment in *Cabinet Confidentiality (No. 2)* has determined an identified issue of law against the applicant. More specifically, the judgment held that, for the purposes of the Environmental Information Directive, meetings of the Government are properly characterised as entailing "*internal communications*" of a public authority. The significance of this determination being, of course, that the requirement for mandatory disclosure of records relating to information on emissions into the environment did not apply.

24. The determination of this issue of law fulfils the traditional criteria for an issue estoppel as per *McCauley v. McDermot* [1997] 2 I.L.R.M. 486. First, the legal issue is precisely the same as that which the applicant seeks to agitate in the present proceedings. Secondly, the determination had been final: no appeal was taken against the High Court judgment in *Cabinet Confidentiality (No. 2)*. Thirdly, the legal issue arises in proceedings between the same parties as before. (As it happens, it even concerns access to the same records).

25. The requirement that the determination of the issue be fundamental, rather than collateral, to the outcome of the earlier proceedings is also met. The question of the correct characterisation of records of meetings of the Government had been one of the principal issues in dispute in *Cabinet Confidentiality (No. 2)*, and the determination on this issue had been fundamental to the outcome of the proceedings. Had the High Court reached a *different* finding on the issue, and ruled that the records related to the confidential "*proceedings*" of a public authority within the meaning of Article 4(2)(a) of the Environmental Information Directive, then disclosure of the records would have been mandatory if and insofar as the request related to information on emissions into the environment. Had the High Court reached this finding, then the only basis upon which disclosure could have been resisted would be for the Government to advance its inchoate argument that *discussions* are not subject to the so-called "*emissions override*" because the only type of information which can constitute "*information on emissions into the environment*" is *factual information* relating to such emissions.

26. In the event, the High Court actually determined the issue against the applicant, holding that the records represented the "*internal communications*" of a public authority, and, as such, would not be subject to mandatory disclosure even if they constituted "*information on emissions into the environment*". This finding dictated the outcome of the proceedings in *Cabinet Confidentiality (No. 2)*. In particular, it determined the basis upon which the access request was to be remitted to the decision-maker for reconsideration. The decision-maker was being directed to reconsider the request by weighing the public interest served

by disclosure against the interest served by the refusal (as required under Article 4 of the Environmental Information Directive).

27. In circumstances where the issue has already been determined against it in *Cabinet Confidentiality (No. 2)*, the applicant would not normally be entitled to reagitate the question of the proper characterisation of records of meetings of the Government. The anterior question which now arises for determination is whether the principle that a party is estopped from pursuing an issue previously determined against it is absolute, or whether, alternatively, the court retains a discretion to allow an issue to be reagitated where it is in the interests of justice to do so. This question assumes an especial importance in the present case in that it is now apparent, having regard to the ruling of the Court of Justice on the Article 267 reference, that the High Court's interpretation of the Environmental Information Directive had been erroneous.

28. The opening gambit of the applicant had been to argue, at the level of general principle, that *res judicata* and issue estoppel has limited relevance to judicial review proceedings. With respect, this argument is incorrect: the Supreme Court has expressly held, in *Arklow Holidays Ltd v. An Bord Pleanála* [2011] IESC 29, [2012] 2 I.R. 99 (at paragraph 51), that it is not just individuals who must be protected from a multiplicity of suits. Rather, the rationale underlying the doctrine of *res judicata* and the rule in *Henderson v. Henderson* extends to the area of public law and to the protection of public bodies.

29. The applicant had next sought to argue that the strict application of the doctrine of *res judicata* (in the form of issue estoppel) might undermine the effectiveness of EU law. Having regard to this argument, the reference to the Court of Justice included a number of questions in relation to *res judicata*.

30. The Court of Justice summarised the legal position in respect of *res judicata* as follows (at paragraph 82 of its judgment):

> "Having regard to all the foregoing considerations, the answer to the second, third and fourth questions is that Article 6 of Directive 2003/4, read in the light of the principles of equivalence and effectiveness, must be interpreted as not precluding a national rule according to which the principle of res judicata prevents a person, who, in a first judgment, obtained the quashing of a decision which had refused his or her request for access to environmental information, from raising, in the context of a dispute between the same parties concerning the legality of a second decision which relates to the same request for access and was adopted in order to give effect to the first judgment, a ground of challenge alleging an infringement of Article 4 of Directive 2003/4, where that ground of challenge was rejected in the first judgment but such a rejection is not referred to in the operative part of that judgment, and where that judgment became final in the absence of any appeal which could have been brought by the applicant seeking access. However, to the extent that it is authorised to do so by the applicable domestic rules of procedure, a national court must allow that person to raise the abovementioned ground of challenge so that, if necessary, the situation at issue in the main proceedings is brought back into line with EU legislation."

31. As appears, EU law does not require any modification of the domestic law rules governing *res judicata* (including issue estoppel). Such rules fall within the procedural autonomy of the Member States, subject to the principles of effectiveness and equivalence. This is subject to the proviso that, to the extent that it is authorised to do so by the applicable domestic rules of procedure, a national court must allow a party to raise such a ground of challenge so that, if necessary, the situation is brought back into line with EU legislation.

32. The first judgment in these proceedings had been prepared on the *working assumption* that the Irish Courts would have discretion, in special circumstances, to allow a party to reagitate an issue of law which had previously been decided against it. It had not been necessary, for the purpose of that first judgment, to go

further than a working assumption in circumstances where questions in respect of the parameters of *res judicata* under EU law were to form part of the reference for a preliminary ruling.

33. Having regard to the answer since provided by the Court of Justice, it is now necessary to reach a definitive conclusion on the question of whether the applicant is precluded by *res judicata* from reagitating the characterisation issue. The parties were directed to file written legal submissions on this question. The parties were also requested to address the implications of the judgment of the Court of Appeal in *Small v. Governor of Bank of Ireland* [2018] IECA 393.

34. The respondent has cited the judgment in *Moffitt v. Agricultural Credit Corporation* [2007] IEHC 245, [2008] 1 I.L.R.M 416 as authority for the proposition that there is no discretion to relieve against an issue estoppel. The position is summarised as follows (at paragraphs 3.8 to 3.10 of the unreported judgment):

> "The importance of the distinction lies in the consequences. If a matter is *res judicata* then, in the absence of a defence to the application of the doctrine such as fraud, the availability of fresh evidence in respect of issue estoppel only, estoppel, or other special cases, the plea will necessarily succeed.
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> On the other hand, where reliance is placed on the rule in *Henderson v. Henderson* to the effect that it would be an abuse of process to now allow the party concerned to raise a different issue which could have been raised in the original proceedings, it is well settled that the court adopts a more broad based approach. In *A.A. v. The Medical Council* [2003] 4 I.R. 302 Hardiman J. (speaking for the Supreme Court) noted the principle to the effect that a party to previous litigation is bound not only by matters actually raised, but matters which ought properly have been raised but were not. However Hardiman J. went on to determine that a rule or principle so described could not, in its nature, be applied in an automatic or unconsidered fashion and that the public interest in the efficient conduct of litigation did not render the raising of a defence in later proceedings

> necessarily abusive where in all the circumstances the party was not misusing or abusing the process of the court.
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> The distinction is, therefore, quite material. If the actual matter in issue has been determined in previous proceedings, then in the absence of a specific reason, such as estoppel or fraud, it will not be open to the party who lost to re-litigate that question. However, where a party seeks to make a new and different case which, it might be said, ought to have been included in the earlier proceedings, the court enjoys a wider discretion to consider what the result should be having regard to the competing interests of justice."

35. The respondent cites *dicta* to similar effect in *Mount Kennett Investment Company v. O'Meara* [2010] IEHC 216, [2011] 3 I.R. 547.

36. These two High Court judgments have to be read now in the light of the recent case law of the Court of Appeal. This case law suggests that whereas there is a principled distinction between (i) *res judicata* (in the form of cause of action estoppel), and (ii) the rule in *Henderson v. Henderson*, an issue estoppel is subject to a discretion similar to that available in respect of the rule in *Henderson v. Henderson*.

37. The rationale for the proposition that an issue estoppel is not necessarily an absolute bar to a party reagitating an issue has been explained as follows by the House of Lords in *Arnold v. National Westminster Bank plc* [1991] 2 A.C. 93 (at 108):

> "[…] It was argued that there was no logical distinction between cause of action estoppel and issue estoppel and that, if the rule was absolute in the one case as regards points actually decided, so it should be in the other case. But there is room for the view that the underlying principles upon which estoppel is based, public policy and justice, have greater force in cause of action estoppel, the subject matter of the two proceedings being identical, than they do in issue estoppel, where the subject matter is different. Once it is accepted that different considerations apply to issue estoppel, it is hard to perceive any logical distinction between a point which was previously raised and decided and one which might have been but was not. Given that the

> further material which would have put an entirely different complexion on the point was at the earlier stage unknown to the party and could not by reasonable diligence have been discovered by him, it is hard to see why there should be a different result according to whether he decided not to take the point, thinking it hopeless, or argue it faintly without any real hope of success. In my opinion your Lordships should affirm it to be the law that there may be an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings. One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result, […]".

38. The decision in *Arnold* has been cited, with seeming approval, by the Court of Appeal in *Small v. Governor of Bank of Ireland* [2018] IECA 393. The decision in *Arnold* has also been cited in argument before the Supreme Court in *Minister for Justice and Equality v. Fassih* [2022] IESC 10.

39. The respondent submits that, properly analysed, *Arnold* confines the possibility of departing from the rules relating to issue estoppel to "*special circumstances*", i.e. a situation whereby new material becomes available which was material that could not by reasonable diligence have been adduced in the earlier proceedings. It is further submitted that there are no such special circumstances in the present case.

40. The respondent also draws attention to the emphasis which the Court of Appeal in *Small* had placed on the proposition that parties should not be required to defend the same proceedings repeatedly, and upon the public interest in ensuring court time is not wasted.

41. For the reasons which follow, I have concluded that a court has discretion to mitigate against the strict application of an issue estoppel. Put otherwise, an

issue estoppel should be bracketed with the rule in *Henderson v. Henderson*, rather than with a cause of action estoppel. To relieve against an issue estoppel inflicts less damage to the values which the various species of *res judicata* seek to advance. This is because there will not have been a final determination of the cause of action between the parties. It is, of course, undesirable that an argument, which has previously been rejected in litigation between the same parties, should be reagitated in subsequent proceedings. This imposes a potentially unfair burden on the opposing party in terms of the cost and time in redefending its position. In certain circumstances, however, the proportionate approach is to attempt to redress the balance by making costs orders against the party seeking to reagitate the argument. The case law in relation to the rule in *Henderson v. Henderson* has consistently held that the rule is not to be applied in a mechanistic manner and that the ultimate objective is to do justice between the parties. There is no principled distinction in this regard between (i) an argument made and rejected in earlier proceedings, and (ii) an argument which should have been but was not advanced in earlier proceedings. In each instance, an attempt to advance such argument in subsequent proceedings gives rise to the same mischief. It follows as a corollary that the court has a discretion to relieve against each of these two species of *res judicata* in certain circumstances.

42. The principle that a party is estopped from pursuing an issue previously determined against it is not absolute. The court retains a discretion to allow an issue to be reagitated where it is in the interests of justice to do so. In exercising this discretion, the court must seek to strike an appropriate balance between the competing rights of the parties, and, more generally, between the constitutional right of access to the courts and the public interest in the finality of litigation.

The court should consider whether the allowing of an exception to the general rule, i.e. that a party should be bound by the earlier determination of an issue, would undermine the values which the principle of issue estoppel seeks to protect. Relevantly, these include the prejudice caused to the opposing party in being subject to a second set of proceedings raising the same issue; and the wider implications for the administration of justice and judicial economy of duplicative litigation.

43. In the present case, the correct balance is achieved by allowing the applicant to advance its argument on the characterisation issue, subject to the caveat that it may be necessary to address the matter by way of an appropriate costs order. It may be, for example, that the applicant should be denied some or all of its costs notwithstanding that it has succeeded on this aspect of the proceedings.

44. The distinguishing feature of the present case is that, even following the delivery of the judgment in *Cabinet Confidentiality (No. 2)*, a significant dispute remained to be resolved between the parties. There continued to be a live controversy as to the applicant's entitlement, if any, to access the relevant records. The applicant had advanced a number of alternative arguments for saying that the respondent's first decision to refuse access had been incorrect as a matter of law. These arguments had, in most part, been accepted by the High Court in *Cabinet Confidentiality (No. 2)*. The matter had, accordingly, been remitted to the respondent in accordance with the provisions of Order 84 of the Rules of the Superior Courts. It is the decision on remittal that is impugned in the present proceedings.

45. The question of access to the relevant records had not been settled by the judgment in *Cabinet Confidentiality (No. 2)*. The legal position remained

uncertain and unstable. The present case may be contrasted with one where say, for example, the validity of an administrative decision had been upheld in earlier judicial review proceedings, and the parties were entitled to assume that the issue had been resolved and to act on that basis. It follows that the disruptive effect of allowing the characterisation issue to be reagitated is of a lesser order.

46. The case law on issue estoppel indicates that one of the factors to be considered in deciding whether the preclusion arises is the conduct of the party said to be estopped. In the present case, the conduct of the applicant cannot reasonably be said to involve an abuse of process. The applicant had found itself in a quandary following the delivery of the judgment in *Cabinet Confidentiality (No. 2)*. Whereas it had, obviously, been unsuccessful on the characterisation issue, it did succeed on its alternative arguments. The decision impugned in the proceedings had been set aside and the matter remitted to the respondent for reconsideration. Against this background, there is some force in the submission made by the applicant to the effect that it would have been in an invidious position had it sought to appeal the judgment in *Cabinet Confidentiality (No. 2)*. The applicant suggests that any such appeal would likely have been met with a response that it was premature to appeal pending the determination on remittal. It is further submitted that as issue estoppel is meant to discourage pointless repetitive litigation, it would be surprising if it were applied in a way that effectively encouraged defensive litigation by a party in anticipation of future proceedings that might never be needed.

47. One of the justifications for the strict application of issue estoppel is that it would be an abuse of process for a party—who had a clear-cut route of appeal available but failed to exercise their right of appeal—to reagitate the issue in a second set

of proceedings before the court of first instance. That abuse of process justification does not apply to the applicant for the reasons outlined above.

48. Having regard to the various considerations outlined in all of the preceding paragraphs, it would be disproportionate to preclude the applicant from pursuing the "*characterisation*" issue in these proceedings. The public interest in allowing the applicant to ventilate what are undoubtedly significant issues of EU law and domestic constitutional law outweighs the countervailing public interest in the finality of litigation. In the special circumstances of this case, the values sought to be protected by the principle of *res judicata* can, instead, be vindicated by the making of an appropriate costs order at the conclusion of the proceedings. If, for example, the respondent is able to demonstrate that the effect of the "*characterisation*" issue being agitated in two sets of proceedings has resulted in unnecessary duplication of costs, then this can be addressed by an appropriate costs order. This measured approach is sufficient to ensure that any prejudice suffered by the respondent is mitigated. More generally, the prospect of an adverse costs order being made against them in similar cases will serve to deter other litigants from pursuing duplicative proceedings.

WHETHER MATTER SHOULD BE REMITTED

49. The manner in which this matter came before the High Court is somewhat unusual in that the proceedings take the form of an application for judicial review pursuant to Order 84 of the Rules of the Superior Courts rather than an appeal to the High Court on a point of law pursuant to article 13 of the EC (Access to Information on the Environment) Regulations 2007. The respondent had made a formal objection to the form of procedure, and in particular, to the failure to

exhaust the statutory right of appeal. This objection was dismissed for the reasons explained at paragraphs 65 to 76 of the first judgment.

50. The form of procedure nevertheless continues to have a potential relevance for the next steps. One practical consequence of the Court of Justice's ruling on the Article 267 reference is that it is now apparent that the legal test which the respondent applied is predicated on an erroneous interpretation of the exceptions under the Environmental Information Directive. It is necessary, therefore, that the exercise of examining the relevant records by reference to the correct legal test now be carried out. The question which arises is whether this exercise should be performed by the respondent, pursuant to an order for remittal, or whether, alternatively, it should be performed by the High Court in the context of these judicial review proceedings.

51. The parties were requested to address this question in supplemental written submissions. The position of the applicant is that the High Court should now examine the records and determine the "*characterisation*" issue itself. The respondent has adopted a more neutral position. Counsel on his behalf has helpfully drawn my attention to the recent judgment of the Supreme Court in *Right to Know clg v. Commissioner for Environmental Information* [2024] IESC 7.

52. For the reasons which follow, I have concluded that the appropriate approach is to make an order for remittal. First, a party seeking access to environmental information will generally be expected to exhaust the prescribed appeal processes. This envisages an appeal to the Commissioner of Environmental Information, with a second right of appeal thereafter to the High Court on a point of law. These judicial review proceedings were only entertained because they

raised questions of EU law which necessitated the making of a reference to the Court of Justice pursuant to Article 267 TFEU. This allowed the reference to be made promptly. These questions of EU law have now been resolved. The prescribed statutory procedure is more than ample to accommodate all further decisions in relation to the request for access. Put otherwise, the applicant having been permitted a detour by way of judicial review for the purpose of having the EU law issues resolved by the Court of Justice, must now return to the conventional procedural track.

53. Secondly, the application of the correct legal test, as clarified by the Court of Justice, to the records the subject-matter of the access request is a mixed question of law and fact. In particular, the decision-maker must consider the factual circumstances against which the individual records were created in order to decide whether they relate to the final decision-making procedures of the Government. This nuance is not immediately apparent from the records themselves. It would be preferable, therefore, were the application of the legal test to be performed by a decision-maker with corporate knowledge of the factual circumstances. The stated reasons should make reference to the factual circumstances (insofar as this can be done consistently with any claimed confidentiality). The decision and reasoning can then be scrutinised in accordance with the appeals process prescribed under the regulations.

54. In this regard, a loose analogy might be drawn with the judgment of the Supreme Court in *Right to Know clg v. Commissioner for Environmental Information* [2024] IESC 7. The case is not on all fours in that the matter had come before the courts pursuant to an appeal on a point of law (rather than by way of judicial review). It is nevertheless instructive that the Supreme Court made a remittal

order. O'Malley J., writing for the Supreme Court, held that the nature of the errors had been such that it had not been appropriate for the High Court and Court of Appeal to reach their own determination on the issues, without sufficient factual findings having been made by the Commissioner.

SHOULD REMITTAL BE POSTPONED

55. The final question to be addressed in this judgment is whether an order for remittal should be postponed pending a determination by the High Court upon the other grounds remaining in the judicial review proceedings. The grounds which potentially remain for determination relate to whether the records comprise "*environmental information*" and whether the respondent erred in weighing the public interest served by disclosure of the records against the interest served by the refusal of access.

56. The position adopted by the applicant is that these issues should be decided first, prior to any remittal. It is submitted that the question of whether the records comprise "*environmental information*" is a jurisdictional issue which determines whether the scope of the request comes within the AIE Regulations at all. It is further submitted that a remittal would serve no purpose if the records do not comprise "*environmental information*".

57. The position adopted by the respondent is that the preferable course would be for remittal *simpliciter*. This would allow for a fresh decision which would include the updated analysis undertaken by the respondent as regards the status of each of the records, and the updated public interest balancing test carried out following the judgment of the Court of Justice. It is submitted that any other course may require further argument by the parties which may not be an efficient

use of court time. It is further submitted that the impugned decision was not, in fact, premised on a finding that the information requested was not "*environmental information*". The point is made that had such a finding been reached, then the question of the application of the exceptions under the Environmental Information Directive would never have arisen for consideration.

58. I have concluded that it would be premature for the High Court to embark upon a consideration of these issues in the context of these judicial review proceedings. The fact of the matter is that the impugned decision is not premised on a finding that the records do not comprise "*environmental information*". Rather, the records were withheld on the basis that same came within the exception for the internal communications of a public authority. This finding must now be revisited having regard to the elaboration since provided by the Court of Justice. It is the failure to apply the correct legal test—as now propounded by the Court of Justice—that has resulted in the setting aside of the impugned decision. This is dispositive of the judicial review proceedings.

59. In the hypothetical event that the respondent were to decide, as part of his reconsideration pursuant to the order for remittal, that the records do not comprise "*environmental information*", the applicant will be entitled to challenge such a decision by way of the tiered appeal process prescribed.

CONCLUSION AND NEXT LISTING

60. It is now apparent, in light of the judgment of the Court of Justice on the Article 267 reference, that the legal test which the respondent applied is predicated on an erroneous interpretation of the exceptions under the Environmental Information Directive. Depending on the content of same, an

extract from the minutes of a meeting of the Government will fall to be characterised as a record concerning the "*internal communications*" of a public authority, or, alternatively, as a record concerning the "*proceedings*" of a public authority. The correct characterisation of any individual extract from the minutes will be contingent on whether or not the extract chronicles the final stages of a decision-making process being carried out by, or on the authority of, the Government in the exercise of the executive power of the Irish State pursuant to Article 28 of the Constitution of Ireland.

61. It is necessary, therefore, that the exercise of examining the relevant records by reference to the correct legal test now be carried out. For the reasons explained at paragraphs 52 to 54 above, this exercise should be carried out, in the first instance, by the respondent rather than the High Court. Thereafter, the applicant will be entitled to challenge such a decision by way of the tiered appeal process prescribed under the EC (Access to Information on the Environment) Regulations 2007 to 2018.

62. Accordingly, an order of *certiorari* will be made setting aside the respondent's decision of 16 August 2018. An ancillary order will be made, pursuant to Order 84, rule 27, remitting the application for access to the records to the respondent for reconsideration in light of the findings of the Court of Justice on the Article 267 reference.

63. These judicial review proceedings will next be listed before me on 30 January 2025 at 10.30 am to address the allocation of the legal costs of the proceedings. If this date is not suitable, the parties are to notify the registrar and to suggest an agreed alternative date.

Appearances

Noel Travers SC and David Browne SC for the applicant instructed by FP Logue LLP
Brian Kennedy SC and Aoife Carroll SC for the respondent instructed by the Chief State Solicitor