Case No: CO/6933/2008

Neutral Citation Number: [2009] EWHC 3186 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Sitting at:
Birmingham Civil Justice Centre
Priory Courts
33 Bull Street
Birmingham
B4 6DS

Date: Monday, 24th July 2009

Before:

MR JUSTICE WYN WILLIAMS

- -

Between:

SZUCS

Appellant

- and -

INFORMATION COMMISSIONER AND UKIPO

Respondent

- -

(DAR Transcript of
WordWave International Limited
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Official Shorthand Writers to the Court)

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The Appellant appeared in person.

The Respondent did not appear and was not represented

- -

Judgment

(As Approved)

Mr Justice Wyn Williams:

1. This is an appeal against the decision of the Information Tribunal promulgated on 26 February 2008. On that date the Tribunal dismissed the appellant's appeal against a decision of the Information Commissioner, who had refused to order the United Kingdom Intellectual Property Office to disclose a document to the appellant.

2. This appeal was instituted by an Appellant's Notice received in the Administrative Court on 23 July 2008. A right of appeal to the High Court from the Information Tribunal arises by virtue of section 59 of the Freedom of Information Act 2000. That statute does not provide a time limit within which an appeal should be brought. I am satisfied, however, that the provisions of the Civil Procedure Rules apply and I refer, in particular, to CPR 52. It follows that the appellant's Notice of Appeal was issued very nearly four months out of time.

3. The first issue which arises, therefore, is whether I should grant an extension of time for bringing this appeal. In his Appellant's Notice and in a document produced this morning, the Appellant explains the delay in bringing the appeal. He sets out that he was aware of the fact that an appeal to the High Court could be brought under section 59 of the Freedom of Information Act and he tells me that the Information Tribunal's decision actually referred to that possibility. However, having been alerted to the possibility of an appeal to the High Court, the Appellant next says that he made a telephone call to administrative staff at the Royal Courts of Justice and was told by a person that he should ask for a judicial review. On being told that, the Appellant tells me that he was not surprised, because he had engaged in possible judicial review proceedings previously in consequence of a long-running dispute, to which I will refer shortly.

4. In any event the Appellant did not issue a notice of appeal but rather wrote a pre-action protocol letter in advance of proposed judicial review proceedings. As I understand it, this pre-action protocol letter was written on or about 19 March 2008, by which time of course the time for appealing had very nearly expired.

5. Apparently the appellant did not receive a response to his pre-action protocol letter. Certainly he did not receive a response which satisfied him. Accordingly he commenced judicial review proceedings on 22 April 2008. When permission to bring those proceedings was refused by Hodge J, the learned judge pointed out that judicial review was not appropriate; there was a statutory right of appeal; the appellant should exercise his statutory right of appeal; but by this stage the appeal was out of time.

6. Obviously I must be wary about accepting that an employee of the Royal Courts of Justice had given wrong information to the appellant. I simply have no means of checking the point. However, I am not disposed to refuse to accept the appellant's explanation in all the circumstances. It seems to me that he was intent upon challenging the Information Tribunal's decision and it seems likely to me that he would have issued a Notice of Appeal had he been told to do

that. It does seem to me that there is room for possible confusion at the very least about the appropriate procedure to be adopted.

7. Accordingly, if I were to take the view that this was an appeal which was likely to succeed, I would probably also take the view that it was appropriate to extend time for bringing the appeal. Conversely, if I am of the view that the appeal is likely to fail or very likely to fail, there would be no purpose in me extending time. One way or the other, it seems necessary for me to consider the merits of this appeal and, accordingly, I propose to do just that.

8. The start of the relevant history is the late 1980s. As I understand it, in that period of time a dispute arose between the Appellant and his former employers as to two patent applications. On 14 December 1987 a hearing took place before a Mr Lyon, who was a supervising patent examiner. As I understand it, the Appellant was not satisfied with Mr Lyon's decision and so he appealed to the Patent Court, as was his right. That appeal was heard by Whitford J on 13 June 1988, and the learned judge dismissed the appeal which had been brought by the appellant. As I understand it, a patent agent by the name of Mr Thorpe represented GKN before Mr Lyon and Mr Thorpe instructed counsel to appeal at the appeal before Whitford J.

9. On 27 October 1989 the Appellant made a formal complaint to the relevant Office against Mr Thorpe. The complaint was made under rule 14 of the Register of Patent Agent Rules 1978. Those rules were made, I am quite satisfied, under section 123 of the Patents Act 1977.

10. An assistant controller of the Patent Office, a man by the name of Mr Tarnofsky, was appointed to deal with the appellant's complaint on behalf of the Secretary of State. On 6 November 1989 Mr Tarnofsky wrote to Mr Thorpe with a copy of the allegations which had been made by the appellant. Mr Tarnofsky invited Mr Thorpe to make written representations in response. Mr Thorpe did so by letter to Mr Tarnofsky dated 21 November 1989. Thereafter the appellant's complaint was considered. On 23 January 1990 Mr Tarnofsky wrote both to the appellant and Mr Thorpe to say that the Secretary of State was not satisfied that Mr Thorpe had been guilty of conduct discreditable to a patent agent.

11. As I understand the Rules to which I have referred, the Register of Patent Agent Rules 1978, if the outcome of an investigation is that the investigator is not satisfied that conduct discreditable to a patent agent has been established, there is no obligation under the rules to disclose the response which the patent agent has made about the complaint. If, on the other hand, the conclusion is that there may have been conduct which is discreditable to a patent agent, the response is disclosed to the complainant and the investigation proceeds. Because Mr Tarnofsky had concluded that he was not satisfied that Mr Thorpe had been guilty of conduct discreditable to a patent agent, Mr Thorpe's response of 21 November 1989 was not disclosed to the Appellant.

12. It is apparent that the Appellant has been aggrieved by the conduct of the investigation which occurred and which culminated in the decision of Mr Tarnofsky on 23 January 1990. In short summary, he has never been satisfied

that a proper inquiry or a proper investigation was carried out before Mr Tarnofsky made his decision. It is to be observed, however, that no step was taken, for whatever reason, by the Appellant in or about 1990 to challenge Mr Tarnofsky's decision in the courts. He has been complaining to various agencies about it for many years, but there was no claim for judicial review made within the time limit prescribed for a challenge to the decision of Mr Tarnofsky. If I am wrong about that (because the history is complicated), then I am completely satisfied that no successful judicial review was launched by the Appellant at that time. However, the appellant did not let it lie, as I have indicated. Over the years he has made many complaints to various bodies about the decision made in 1990.

13. The Freedom of Information Act 2000 came into force in 2005. On 2 February 2005 the appellant requested that the Patent Office should grant him access to the content of all the files on his complaint going back to 1989. This was a valid request for information under section 1 of the Freedom of Information Act and the Office treated it as such. It is common ground that in response the Office disclosed almost all of the information requested, except that it withheld Mr Thorpe's response dated 21 November 1989. The Appellant was not happy with the decision to withhold the disputed statement. He asked the Office to reconsider. In response the Office reiterated its decision not to disclose. He complained to the Information Commissioner, who upheld the Office's decision not to disclose Mr Thorpe's response of 21 November 1989.

14. The reason why the Commissioner concluded that the statement should not be disclosed was by virtue of the terms of section 32(2) of the Freedom of Information Act 2000. This section creates an absolute exemption from the general duty of disclosure. Its relevant parts are:

> "Information held by a public authority is exempt information if it is held only by virtue of being contained in --
>
> (a) any document placed in the custody of a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration, or
>
> (b) any document created by a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration."

By section 32(4)(c) inquiry is defined to mean "any inquiry or hearing held under any provision contained in, or made under, an enactment".

15. In summary the Information Commissioner accepted that the inquiry into the appellant's complaint against Mr Thorpe constituted an inquiry within the meaning of section 32(4)(c), and section 32(4)(a) applied to the information contained in the disputed statement. It necessarily followed that the Office had been entitled to withhold the disputed statement.

16. As I have indicated, the Appellant was not satisfied with the decision of the Information Commissioner. Accordingly, he exercised his right to appeal to the Information Tribunal. The decision of the Tribunal is contained within the trial bundle between pages 268 and 276. The whole of that decision needs to be considered, but I do not propose to read it out in full. I am completely satisfied that the Appellant is wholly familiar with the terms of the decision of the Information Tribunal.

17. At paragraph 22 of its decision the Tribunal said that the following questions needed to be determined. First, was the inquiry into the complaint against the patent agent made by Mr Szucs an inquiry held under any provision contained in, or made under, any enactment? Second, if so, was the disputed information held by the United Kingdom Intellectual Property Office only by virtue of being contained in a document that was placed in the custody of the person conducting an inquiry for the purposes of the inquiry? Third, had the UKIPO been inconsistent in its application of Section 32 of the Freedom of Information Act? Fourth, had there been any inconsistency by the UKIPO in dealing with the Appellant's request for information under the Act? It seems to me that the Tribunal formulated its questions in that way since, by so doing, it was in a position to answer the points which had been raised by the Appellant upon the appeal to the tribunal.

18. In paragraphs 23 to 37 the Tribunal goes on to answer the questions it posed for itself. Specifically it concluded, as did the Information Commissioner, that the consequence of the Appellant's complaint against the patent agent was that an inquiry was conducted by the assistant controller. As part of the inquiry, the patent agent's written representations to the complaint were sought and obtained. The Appellant submits that the inquiry was improperly conducted. The question for the Tribunal was whether the inquiry was held under any provision contained in, or made under, any enactment and not whether the inquiry was conducted properly or not.

19. The Tribunal concluded that the inquiry was conducted under Rule 14 of the relevant Rules. Having made that finding, it was almost bound to conclude, as it did, that the answers to the other questions posed meant that disclosure should not be ordered.

20. An appeal lies to me only upon a point of law. In his presentation to the court reduced to writing, for which I am very grateful, the Appellant, it seems to me, takes the following points in order to persuade me that the Tribunal erred in law. First, he submits that an inquiry under the rules must be a proper inquiry. If it is not a proper inquiry, the absolute exemption contained in section 32 does not apply. Second, he submits that in order to ascertain whether or not a proper inquiry was carried out, the Tribunal should have conducted an oral hearing of the appeal. Only in that way could it have come to a proper conclusion upon the issue of whether a proper inquiry had been undertaken. In this case the Tribunal conducted its appeal on paper and, accordingly, it erred in law in so doing, submits the appellant.

21. I have reduced his points to those two main ones, although I acknowledge and make it clear that the written presentation presented to the court by the Appellant both elaborates in detail upon those points and refines them in various ways. Having said that, it seems to me that my decision on this appeal can be confined to dealing with the two points which I have identified.

22. I do not agree with the Appellant that the Information Tribunal had a duty to look into the sufficiency of the inquiry in deciding whether the exemption under section 32 applied. Section 32, in my judgment, is clear. It is concerned with how the document came to be in the possession of the relevant Office. It is not concerned at all with the sufficiency of an inquiry but, rather, whether the document came to be in the possession of the Office as a consequence of an inquiry. In my judgment there is only one answer to that question. This document, the response of 21 November 1989, made by Mr Thorpe, is in the possession of the Office by virtue of an inquiry under the relevant Rules.

23. Accordingly, it seems to me that the error of law which the appellant alleges in this case, the primary error of law, is not made out. Would it have made any difference if there had been an oral hearing? In my judgment, clearly not. The issue before the Information Tribunal turned upon a proper interpretation of section 32. In my judgment I am quite satisfied that the interpretation of section 32 adopted by the Tribunal was correct. It follows that the four questions which it posed for itself and which it answered in paragraphs 23 to 37, both encompassed all the relevant issues and were answered correctly by the Tribunal. In my judgment no purpose whatsoever would have been served by an oral hearing of this appeal.

24. In any event, whether or not an oral hearing is held is a matter of discretion for the Tribunal. This court will only interfere with an exercise of discretion by the Tribunal if it is satisfied that the exercise has been unreasonable or irrational. In my judgment, there is no conceivable basis for reaching a conclusion that the decision to conduct the appeal on paper, as opposed to holding an oral hearing, was unreasonable or irrational.

25. Accordingly it seems to me that there is no error of law identified by the Appellant in his appeal. That means, of course, that his appeal would be bound to fail and that also means that it would be wrong in all the circumstances of the case for me to extend time for bringing this appeal. Nothing turns on my decision not to extend time. As I have indicated in this judgment, I have carefully considered the merits of the proposed appeal. It seems to me that the Appellant has put his best foot forward and has advanced every conceivable point that might have been taken in order to seek to persuade me that the Information Tribunal erred in law. Accordingly he has had a full hearing of his appeal in reality, notwithstanding the fact that I have ruled that I should not extend time.

26. I should record that in reaching my conclusion I have also had regard to a skeleton argument presented on behalf of the Information Commissioner although I should also record that counsel did not appear to present his argument orally. I was asked to take the written skeleton into account in reaching my decision and I have done so.

27. I should also further record that the Treasury Solicitor on behalf of the United Kingdom Intellectual Property Office presented a detailed letter dated 9 July 2009 containing reasons why I should dismiss this appeal. I have also had regard to the points made in that letter.

28. I should say finally that, as well as asking me to allow the appeal, the appellant asked me to consider, alternatively, that I should adjourn the appeal so as to permit alternative dispute resolution to take place. There seems to me to be no purpose in making such an order. The stance of the United Kingdom Intellectual Property Office is clear: it will not engage in alternative dispute resolution with the appellant over the disputed document because it has taken the stance, which it does not propose to change, that section 32 prohibits the disclosure of the document in question. Accordingly, there seems to me to be no basis upon which adjourning the appeal for alternative dispute resolution would achieve anything. If that is the proper conclusion to reach, as I believe it is, then it would not be correct for me to adjourn this appeal.

29. The result is that I have reached the conclusion that I should refuse to extend time for bringing this appeal and in any event, on the merits, I have reached the clear conclusion that had the appeal been brought within time I would have dismissed it, since there is no error of law disclosed in the judgment of the Information Tribunal.

30. Finally I should record my gratitude to the appellant for presenting his case with courtesy and for providing a detailed written argument in advance which allowed me to consider this case carefully even before the appellant started to address me. Thank you very much.

Order: Appeal dismissed

MR SZUCS : May I ask, one of the reasons for me keeping on with the appeal is that the UKIPO keeps referring to any proceedings regarding this document as an approval of the proceedings themselves which haven't been investigated by the Parliamentary Ombudsman (I didn't know about making a judicial review request at the time, I would have done) and also the Information Commissioner's decision; all these decisions, which I don't particularly reject, about not releasing the document. None of these decisions were an approval of the actual proceedings and, as I raise it, it was not a bona fide inquiry, and that issue hasn't been addressed.

MR JUSTICE WYN WILLIAMS: Well, I am sorry I can't address that issue. As I think I have made clear, I have to apply just the Freedom of Information Act.

MR SZUCS: Yes but you could comment that in actual fact that issue hasn't been addressed.

MR JUSTICE WYN WILLIAMS: Well, as far as I am aware, there has never been a ruling by a court upon whether or not there was a sufficient inquiry. All right? Thank you.