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Case No: CO/10738/2008

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 June 2009

Before :

MR JUSTICE MUNBY

- -

Between :

THE FINANCIAL SERVICES AUTHORITY	**Appellant**
- and -	
THE INFORMATION COMMISSIONER	**Respondent**

- -
- -

Mr Charles Flint QC and Mr Jason Coppel (instructed by Robert Dedman, General Counsel's Division, Financial Services Authority) for the Appellant
Ms Jane Oldham (instructed by Michele Voznick, Solicitor, Information Commissioner) for the Respondent

Hearing date: 30 March 2009

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Judgment
As Approved by the Court

Mr Justice Munby :

1. This is an appeal from a decision of the Information Tribunal (Mr David Marks, Chairman, Dr Malcolm Clarke and Dr Henry Fitzhugh) on an appeal by the Financial Services Authority (FSA) in relation to section 44 of the Freedom of Information Act 2000 (FOIA). The appeal raises a short but important question of construction as to the true meaning and effect of section 348 of the Financial Services and Markets Act 2000 (FSMA), the successor to section 179 of the Financial Services Act 1986 and a provision of FSMA which the FSA understandably sees as critical to its proper functioning.

The legal framework

2. Before going any further it is convenient to set out the relevant statutory provisions. I need not rehearse the provisions of FOIA. It suffices for present purposes to note that, in accordance with section 2(3)(g), section 44(1)(a) of FOIA provides an absolute exemption from the relevant provisions of section 1 if the disclosure of the information is "prohibited by or under any enactment." It is common ground that section 348 of FSMA is such an enactment: see the decision of the Tribunal in *Slann v Information Commissioner* (EA/2005/0019).

3. Subject to certain exceptions set out, in accordance with section 349 of FSMA, in the Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001 No 2188, but none of which are relevant for present purposes, section 348 of FSMA provides so far as material that:

> "(1) Confidential information must not be disclosed by a primary recipient, or by any person obtaining the information directly or indirectly from a primary recipient, without the consent of –
>
> (a) the person from whom the primary recipient obtained the information; and
>
> (b) if different, the person to whom it relates.
>
> (2) In this Part "confidential information" means information which –
>
> (a) relates to the business or other affairs of any person;
>
> (b) was received by the primary recipient for the purposes of, or in the discharge of, any functions of the Authority, the competent authority for the purposes of Part VI or the Secretary of State under any provision made by or under this Act; and
>
> (c) is not prevented from being confidential information by subsection (4).
>
> (3) It is immaterial for the purposes of subsection (2) whether or not the information was received –

(a) by virtue of a requirement to provide it imposed by or under this Act;

(b) for other purposes as well as purposes mentioned in that subsection.

(4) Information is not confidential information if –

(a) it has been made available to the public by virtue of being disclosed in any circumstances in which, or for any purposes for which, disclosure is not precluded by this section; or

(b) it is in the form of a summary or collection of information so framed that it is not possible to ascertain from it information relating to any particular person."

The FSA (the "Authority" as it is referred to in section 348(2)(b)) is for this purpose a "primary recipient" by virtue of section 348(5)(a).

4. Section 352 makes it a criminal offence to disclose information in breach of section 348, it being a defence pursuant to section 352(6)(b) for the accused to prove that he took all reasonable precautions and exercised all due diligence to avoid committing the offence.

5. It will be noticed that section 348 provides its own autonomous definition of what is "confidential" for this purpose, a definition which is quite distinct from the common law or equitable conceptions of confidentiality. In particular, it will be noticed that there is no need for information to be inherently confidential in the common law or equitable sense for it to be confidential for the purposes of section 348. Subject only to section 348(4), information received by the FSA is confidential for this purpose if it "relates to the business or other affairs of any person" and "was received by" the FSA "for the purposes of, or in the discharge of, any [of its] functions."

6. There is a distinction between information which has been "received" within the meaning of section 348 and information which merely expresses the opinion of the recipient about received information or is a mere possible deduction from received information: see *Melton Medes Ltd v Securities and Investments Board* [1995] Ch 137 per Lightman J at pages 149, 151 (a decision on section 179 in relation to a predecessor of the FSA). But given the terms of the requests with which I am here concerned (see further below) there is no need for me to explore the extent to which, if at all, the latter class of information is within the prohibition in section 348. So I need not consider further the possible implications of Lightman J's analysis, save to note that, as he also said (at page 151), and I agree, "The fact that [a] person … has supplied information to the [FSA] relating to a particular topic is information relating to the investigation or inquiries carried out by or on behalf of the [FSA]; but it is not information relating to that person's business or affairs."

7. The Parliamentary intention underlying section 348 was considered at some length by the Court of Appeal in *Real Estate Opportunities Ltd v Aberdeen Asset Managers Jersey Ltd and others* [2007] EWCA Civ 197, [2007] 2 All ER 791, a case where the

focus of the argument was on the meaning of the words "obtaining" and "obtained" in section 348(1). Arden LJ, in a judgment with which both Tuckey LJ and Lawrence Collins LJ agreed, said this at paras [30]-[34]:

> "[30] … The obvious purpose of s 348 is to protect confidential information that has found its way into the FSA's hands. The information may have been volunteered. Alternatively it may have been given to the FSA in pursuance of request made by the FSA in exercise of its statutory functions. Once the information has reached the FSA's hands, the FSA is restricted from disclosing it to third parties and must use one of the gateways available to it in s 349 or regulations made thereunder …
>
> [31] What is the apparent object of preserving confidentiality in information provided to the FSA? The preservation of confidentiality appears to serve a number of purposes. First, it ensures respect for the private life of the person who was the subject of information: if none of the gateways provided by s 349 is available, neither the FSA nor a secondary recipient can disclose the information without obtaining the consent of the subject of the information (s 348(1)). Disclosure in those circumstances without such consent might involve a violation of art 8 (respect for private and family life) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). Secondly, restrictions on the disclosure of confidential information in the financial markets are likely to assist in the process of regulation because of the encouragement that it is likely to give to people in the market to disclose timeously information which may be of importance to the regulator for the purpose of exercising its regulatory functions. As the judge accepted, the position of the FSA may in this respect be compared to the position of the Bank of England under the Banking Act 1987, of which Lord Woolf MR, giving the judgment of the Court of Appeal in *Barings plc (in liq) v Coopers & Lybrand* [2000] 3 All ER 910 at 915, [2000] 1 WLR 2353 at 2359 (para 16) said:
>
> > 'The maintenance of confidentiality under Pt V of the 1987 Act for information provided to the Bank is plainly of great importance. Protecting those who provide information to the Bank encourages voluntary disclosure from institutions, third parties and whistle blowers, any of whom might otherwise be unwilling to divulge material. The Bank is of the view that, absent such protection, it would be deprived of the raw material it requires for effective supervision.'
>
> [32] In *Re Galileo Group Ltd* [1998] 1 All ER 545 at 552, [1999] Ch 100 at 110, Lightman J made the point that

confidentiality enhances candour in favour of other regulators. He said:

> 'The maintenance of confidentiality as provided in s 82 is of vital importance to the discharge by the bank of its supervisory responsibilities under the [Banking Act 1987]. Confidentiality is vitally important to encourage the maximum free flow of information from supervised institutions and third parties whether such disclosure is obligatory or voluntary.'

> [33] Accordingly, there are strong reasons for restricting disclosure of information provided to a regulator …

> [34] The importance which Parliament attached to the restrictions on disclosure is emphasised by the fact that a breach of s 348 is made a criminal offence under s 352."

The factual background

8. The facts are set out in some detail in the decision of the Tribunal. For present purposes I can take them quite shortly.

9. The appeal relates to two distinct matters, one arising out of a request under FOIA by a Mr Evan Owen and the other out of a request under FOIA by a Mr Paul Lewis. Although the Tribunal gave a single decision in relation to the two matters, and although there is only a single appeal to the High Court, there were in fact two appeals to the Tribunal, one (EA 2007/0093) in relation to Mr Owen's request and the other (EA 2007/0100) in relation to Mr Lewis's request. In accordance with the procedure in such matters, neither Mr Owen nor Mr Lewis was a party to the appeal. It is, however, convenient to refer to the two matters as, respectively, the Owen Appeal and the Lewis Appeal.

The factual background: the Owen Appeal

10. In 2001 the FSA had carried out a review into the selling of mortgage endowment policies between 1988 and 1994 by firms which had, at the material times, been regulated by LAUTRO. The background to this review was the fact that LAUTRO had required the firms it regulated to use standard levels of charges when formulating quotations and projections for customers – the purpose being to assist customers in making comparisons between different providers. But some firms, once policies had been taken out, applied charges higher than the LAUTRO charges, with the consequence that the level of premium in the original quotation or projection would likely not be sufficient to produce the returns sought by the customer.

11. For the purposes of conducting its review, the FSA sought from a large number of firms a wide range of marketing and product literature, including premium quotations, the charges used in formulating those quotations and information about the charges which were actually applied during the life of the policy. This information was then evaluated by the FSA, in connection with which reference was made to a number of

'Decision Trees' published on its website by the Financial Ombudsman Service (FOS).

12. The one which is relevant for present purposes is number 25, entitled 'Inappropriate charges used in setting the premium'. The first line of Decision Tree 25 contains two boxes. The first, on the left of the page, reads "Appropriate charges confirmed to have been used in setting the premium", which leads to a box on the second line reading "Reject complaint". The other box on the first line, on the right of the page, reads "Inappropriate charges (lower than own charges) confirmed to have been used in setting the premium". This leads, via the linking word "and", to the other box on the second line, which reads "This is a material misrepresentation or alters the risk profile of the product such that the customer would not have chosen or should not have been advised to use this method of mortgage funding", leading in turn to a box on the third line reading "Uphold complaint" and a further box on the fourth line reading "Consider redress category 1." I am concerned only with the four lines appearing on the right of the page, that is, where "inappropriate charges" were used in setting the premium.

13. Looking, therefore, to the right side of the page, what is important to note for present purposes is that, whereas the box on the second line contemplates an exercise which is at least in part a matter of evaluation and judgment by the recipient of the information (here, the FSA), the box on the first line focuses attention exclusively on a simple question of primary fact – were the firm's "own charges" higher than those "used in setting the premium"; a question which involves no process of evaluation more complex than that involved in determining, as it were, that 6 is greater than 4, and, moreover, a fact which being, in the nature of things, known only to the firm itself, can only have come to the knowledge of the FSA as a result of information supplied to it by the relevant firm (there is no suggestion that the FSA had any other source for this information).

14. On 1 January 2005 Mr Owen sent the FSA an email which sought the following information:

> "How many and which providers used 'inappropriate charges' to set premiums as described in the FOS 'Decision Trees'. I believe the FSA carried out a review of some sort in 2001. This would relate to ALL financial products sold between April 1990 and January 2005 (or later?)."

15. It is common ground that this request relates to Decision Tree 25. And it is also perfectly obvious – and, as it seems to me, a matter of some importance – that the information being sought relates exclusively to the box on the first line on the right side of the page, and *not* to the box on the second line. In other words, what is being sought is the names of the firms whose "own charges" were higher than those "used in setting the premium".

16. On 31 January 2005 the FSA replied, refusing to name the firms and justifying its refusal by reference to sections 31 and 43 of FOIA but not, it is to be noted, by reference at that stage to section 44. That came later, though nothing turns on this for present purposes.

17. On 16 February 2005 Mr Owen invited the FSA to revisit its decision. The FSA responded on 18 May 2005 to the effect that it stood by its original decision.

The factual background: the Lewis Appeal

18. On 24 May 2005 the FSA issued a Press Release, 'FSA work discovers consumers are not being properly advised on equity release', with an accompanying Briefing Note, 'Mystery shopping exercise'. These documents disclosed that the FSA, using an external mystery shopping agency, had carried out an exercise involving 42 mystery shops across 20 firms to find out how advisers were explaining equity release schemes to consumers and how they were explaining the advantages and disadvantages of releasing equity. The majority of the firms to be mystery shopped were chosen by the FSA; some, however, were chosen by the shoppers. The Press Release reported that more than 60 per cent of the mystery shoppers reported that their adviser had not explained the downsides of equity release. The Briefing Note identified a variety of failings on the part of advisers, one applying to no fewer than 95% of them and another to 83%. A second piece of work looked closely at the subsequent investment advice provided to customers of seven firms that the FSA described as active in this market. The Press Release reported that "in all of the seven firms looked at, advisers failed to explain the link between this type of borrowing and subsequent investments."

19. On 27 May 2005 Mr Lewis sent the FSA an email seeking, so far as is material for present purposes, "A list of the firms which were used for the mystery shopping exercise" and "The identities of the seven firms investigated on subsequent investment advice."

20. On 16 June 2005 the FSA replied, refusing to name the firms and justifying its refusal by reference to section 43 of FOIA but again, it is to be noted, not by reference at that stage to section 44.

21. On 27 September 2005 Mr Lewis asked the FSA to review its decision. The FSA responded on 8 November 2005 to the effect that it stood by its original decision.

The complaints to the Information Commissioner

22. In accordance with section 50 of FOIA Mr Owen and Mr Lewis were each entitled to apply to the Information Commissioner for a decision as to whether their request for information to the FSA had been dealt with in accordance with the requirements of FOIA.

23. Mr Owen applied to the Commissioner on 19 May 2005. The Commissioner issued his decision notice pursuant to section 50(3)(b) on 7 August 2007, specifying in accordance with section 50(4) that the FSA must within 35 days disclose the names of the relevant companies to Mr Owen.

24. Mr Lewis applied to the Commissioner on 13 November 2005. The Commissioner issued his decision notice pursuant to section 50(3)(b) on 16 August 2007, specifying in accordance with section 50(4) that the FSA must within 35 days disclose the names of the firms selected by the FSA for mystery shopping (but not the names of the firms selected by the shoppers) and disclose the names of the firms further investigated. The

Commissioner accepted that the names of those firms selected by the shoppers constituted information "received" by the FSA within the meaning of section 348 and were therefore not disclosable.

The appeal to the Tribunal

25. Section 57 of FOIA gives a right of appeal to the Tribunal. Section 58(1)(a) requires the Tribunal to allow the appeal or direct a substitute notice if the Commissioner's decision notice "is not in accordance with the law."

26. On 6 September 2007 the FSA appealed to the Tribunal against the Commissioner's decision notice of 7 August 2007. On 14 September 2007 the FSA appealed to the Tribunal against the Commissioner's decision notice of 16 August 2007. The two appeals were subsequently consolidated.

27. At a directions hearing on 24 October 2007 the parties and the Tribunal agreed that there should be a preliminary issue in both appeals, namely whether the FSA is and was entitled to withhold disclosure of the names and identities of certain firms involved in the provision of endowment mortgages as well as the names and identities of certain firms which had been the subject of the mystery shopping exercise pursuant to section 44 of FOIA when read together with section 348 of FSMA. The thinking behind this was the agreement of the parties that, if the preliminary issue was resolved in favour of the FSA, the appeals could be disposed of without the need to investigate the various other grounds relied upon by the FSA.

28. The hearing of the appeal before the Tribunal took place on 25-26 February 2008 and 22-23 July 2008. Its decision was promulgated on 13 October 2008. It dismissed both appeals, finding in favour of the Commissioner and upholding both of his decisions.

29. As will be appreciated, the matters which the Tribunal had to address were (a) in relation to the Owen Appeal whether, as the FSA contended, section 348 prohibited disclosure of the names of the firms which had used "inappropriate charges", that is, the names of the firms whose "own charges" were higher than those "used in setting the premium", and (b) in relation to the Lewis Appeal whether, as the FSA contended, section 348 prohibited disclosure of (i) the names of the firms selected by the FSA for the mystery shopping exercise and (ii) the names of the seven firms subsequently investigated by the FSA.

The appeal to the High Court

30. Section 59 of FOIA gives a right of appeal from the Tribunal to the High Court "on a point of law."

31. The FSA filed its appellant's notice on 7 November 2008. The appeal came on for hearing before me on 30 March 2009. The FSA was represented by Mr Charles Flint QC and Mr Jason Coppel, the Information Commissioner by Ms Jane Oldham. At the end of the hearing I reserved judgment, which I now hand down.

The primary issue

32. Mr Flint says that the point of law at the heart of this case is whether section 348 of FSMA prohibits the disclosure – what he calls "composite disclosure" – of information which, by itself, would not breach section 348 but which, when read in the context of a request for information and/or (his expression) other information already in the public domain or in the hands of the requester, would have the effect of disclosing information which has been "received" by the FSA in the course of exercising its statutory functions.

33. Mr Flint's fundamental proposition is that such disclosure is prohibited by section 348. The Tribunal, agreeing with the Commissioner, held that it is not.

The primary issue: the FSA's case

34. As set out in his written submissions to the Tribunal, Mr Flint's case is that the substance or effect of any disclosure must be affected by the *context* of the disclosure. The disclosure cannot be regarded in isolation but must be considered in the light of (a) the request which instigates the disclosure and (b) any other information which has already been disclosed (that is, as he elaborated in his oral submissions to me, disclosed to anyone, including but not limited to the public) which relates to the same matter or (as he put it in his written submissions to me) which is already in the hands of the requester.

35. Thus the proposition in its final, elaborated, form, though as Mr Flint conceded in his oral submissions to me, he did not have to go that far in order to succeed in his appeal.

36. Mr Flint supplemented his basic proposition with a number of more detailed submissions. I trust that he and Mr Coppel will not take it amiss if I focus on those which seem to me to be the most telling and important. He pointed out that section 348(4)(b) contemplates that anonymised information may be released but asserted that it would clearly be a contravention of section 348 for the FSA to release at the first stage anonymised information about a firm and then at a later stage to identify the firm. As he put it, the later disclosure must be considered in the light of the disclosure which has already taken place, for otherwise the purpose of section 348 – to preserve confidentiality – would be circumvented.

37. Coming closer to the facts underlying the Owen appeal, and illustrating his point that one must look not just at the information disclosed but also at the request for information giving rise to the disclosure issue, Mr Flint gave the example of the question 'which mortgage lender has made the highest provision for bad debt according to its returns to the FSA?', the answer to which is 'firm X'. As he correctly points out, the answer read in isolation – 'firm X' – does not disclose anything. Of its very nature, a name or list of names, as such, never does. But, he says, to disclose the name of the firm – 'firm X' – in answer to that question is to disclose that 'firm X has made the highest provision for bad debt according to its returns to the FSA', and that, he says, would plainly be "received" information, so disclosure in that manner of the name of firm X would, he says, be prohibited by section 348.

38. In support of his proposition that the relevant context includes not just the question being asked but also other information already in the pubic domain, Mr Flint gave the

example of the FSA publishing on Monday the statement that 'according to their returns to the FSA, UK-based mortgage lenders have a combined bad debt provision of £A, with the largest provision for any one firm being £B.' That information, although derived from information "received" by the FSA within the meaning of section 348, would not, he says, be "confidential information" the disclosure of which is prohibited by section 348, because it is anonymised and does not reveal the names of any of the firms. But suppose, he says, on the next day, Tuesday, the FSA is asked 'what is the name of the firm identified by the FSA as having the largest bad debt provision?' Section 348, he submits, would obviously prevent the FSA from disclosing that name, because to do so would disclose the "received" information that 'firm X has a bad debt provision of £B which is the largest of any UK-based mortgage lender.'

The primary issue: the Commissioner's case

39. Ms Oldham begins by observing that the FSA does not confine its argument to information which it has itself previously disclosed (though she submits that, even if it did, the argument would still be incorrect) but extends it to any other disclosure, by anyone, at any time, and by any means, of anything which "relates to" the "subject matter" of the proposed disclosure, and, yet further, to anything the requester already knows.

40. But, she submits, there is nothing in the language of section 348 which suggests that anything other than "the information itself, self-contained and self-referential" is to be considered. And this, she says, is unsurprising. For if the FSA's argument were correct, any person within the FSA considering whether he or she was able to disclose information without committing a criminal offence, would first have to be able to check whether there had ever been, in any context, and by any means, and by any person in the world, disclosure of other information such that, when taken together with the information he or she was considering disclosing, there would be disclosure of information relating to a firm's business or other affairs. And even this, as she points out, would not suffice, for in addition (as to information "already in the hands of the requester") that person would have to check – and how? – the sum total of relevant knowledge already held by the requester, however acquired.

The primary issue: the Tribunal's analysis

41. I have to say that, on this central issue, the process of the Tribunal's reasoning is not altogether easy to follow. In paragraph [56] it recorded one of the propositions put forward by the FSA as being that "in some cases the substance of any information disclosed will necessarily be affected by the context of the disclosure, eg if it could be linked to other information already disclosed", remarking in paragraph [57] of this and another proposition that they "do not in the Tribunal's view represent contentions which can be justifiably objected to." Yet when the Tribunal came to articulate its conclusion in paragraphs [61] and [72] it did so in rather different terms.

42. In the context of the Owen appeal the Tribunal at paragraph [61] said that:

> "there is nothing in FOIA which has regard to any link or possible relationship between any information which is the subject of potential disclosure and any information already in

> the public domain. To that extent, therefore, the Tribunal rejects the FSA's general contention that consideration must necessarily be given to the effect of disclosure of the names of the firms in the context of information which had already been disclosed."

43. In paragraph [72], the Tribunal, now in the context of the Lewis appeal, put the point more generally:

> "What was called in argument a "composite" approach took the form of a contention by the FSA that revealing the names sought against the background of the press release would be a contravention of section 348. Particular regard was paid in that respect to section 348(4)(b), since there would be anonymised information released in the first instance following [sic] by revelation of the firms' names at a later stage which would "complete the jigsaw". The Tribunal rejects this contention and accepts the Commissioner's argument that section 348(4)(b) refers to whether or not it is possible to ascertain from the disclosed information itself ("from it"), information relating to a particular party. Section 348(4)(b) does not refer to whether it is possible to ascertain from "it [the disclosure] taken with any information in the public domain" information relating to that particular person. To paraphrase the Commissioner's written submissions there is nothing in the language of section 348 which suggests that anything other than the information itself, self-contained and self-referential, is to be considered."

44. In other words, the Tribunal accepted the Commissioner's contention, treating the relevant inquiry as being confined to "the information itself, self-contained and self-referential" – in other words, the name or list of names – seemingly considered on its own, in isolation and divorced from any context, even, it would seem, the context supplied by the request to which it is referable.

45. Mr Flint's observation on this is sardonic. Section 348 would be emasculated if it were the case that it prohibited only the disclosure of information which, when read in isolation and without reference to its context, constituted "confidential information"; Parliament cannot possibly have intended such a result. Referring back to the second of his two examples, he says that section 348(4)(b) simply cannot be operated unless information later requested takes into account the anonymised information already disclosed. The Tribunal's conclusion, which would have the effect that section 348 is to be applied by reference only to the information disclosed on the Tuesday, and with no account being taken of what had been previously been disclosed on the Monday, runs contrary to common sense and undermines what he says are the very important policies which underpin section 348.

<u>The primary issue: discussion</u>

46. In my judgment the Tribunal was plainly wrong as a matter of law in taking a view of section 348 so narrow that it would, indeed, as Mr Flint submitted, both undermine the important public policies which underpin it and indeed emasculate it. With all

respect to the Tribunal and to Ms Oldham, it cannot be right – it is simply not sensible – to say that all one considers is "the information itself, self-contained and self-referential".

47. My starting point is two-fold: first, that, as Mr Flint correctly submitted, the substance or effect of any disclosure must necessarily and in the nature of things be affected by the *context* of the disclosure; second, that, as I have already remarked, of its very nature, a name or list of names, as such, does not disclose anything – standing on its own a name, even a very unusual or indeed unique name, means nothing and conveys nothing. The point is really, as Mr Flint says, a very simple one. If a tabloid newspaper publishes in enormous type the front-page headline 'World exclusive – it's ---', giving the name of a celebrity footballer, that of itself tells one nothing, beyond the fact that the newspaper wishes its readers to believe that it has a story justifying a front-page splash; only the context will enable the reader to see whether the story is defamatory or not, laudatory or condemnatory, whether the celebrity has been detected in some sordid excess or has been appointed the captain of the national team.

48. So one has to have regard to the context. Thus far I agree with Mr Flint. However, where I am minded to part company with his analysis is at the next step, where one has to consider what, for this purpose, the relevant context is.

49. Mr Flint, as we have seen, submits that the relevant context for the purposes of section 348 extends so far as to embrace not merely whatever is in the public domain but whatever is within the private knowledge of the requester. Now it *may* be that this is right – I am not to be taken as saying that it is not, though equally I am not to be taken as saying that it is – but I can well understand both the reluctance of the Commissioner and the refusal of the Tribunal to accept a proposition of such sweeping potential. Ms Oldham's attack, as I have summarised it above, is powerful and compelling. After all, in this era of the worldwide net, so easily accessible by such powerful search engines, the concept of the public domain is more elusive than it once was. And the idea that what is confidential for the purposes of section 348 could be determined by reference to the private knowledge of a solitary individual or small group of individuals is less than compelling – there is almost always someone sufficiently in the know to be able to found a 'jigsaw' identification on some small snippet of seemingly innocuous information whose inner significance passes unrecognised by almost everyone else.

50. These are not, however, matters which I need to explore any further in order to determine this appeal. Indeed, given their potentially wide-ranging significance in other situations with which I am not here concerned it seems to me highly undesirable that I should explore them any further. I can, and in the circumstances I think I should, proceed on a much narrower front.

51. As so often, the truth lies somewhere in between the starkly polarised positions generated by the adversarial process. If Ms Oldham is justified in asserting that Mr Flint's formulation is too widely drawn – and there is, as I have said much force in her attack – Mr Flint, in my judgment, is certainly justified in asserting that Ms Oldham's formulation is too narrowly drawn. In my judgment it is.

52. Although the appeal turns on the true meaning and effect of section 348 of FSMA one needs to bear in mind that the issue arises in the context of requests for information

under FOIA – specifically in the context of the questions to the FSA posed respectively by Mr Owen and Mr Lewis. And I have to say, with all respect to those who might think otherwise, that it seems to me perfectly obvious that the true substance, meaning, effect and significance of the answer to a question can only be ascertained by reference to the question to which it is the answer. So, whether his wider submission be right or wrong I agree with Mr Flint that one has to have regard to the *context* of the disclosure in question and that where the disclosure arises in response to some question or request, as here under FOIA, the relevant context extends, at the very least, and even if no further, to the underlying request or question. As he put it, the disclosure cannot be regarded in isolation but must be considered in the light of the request which instigates it.

53. So to construe the disclosure one has to refer back to and consider the underlying request or question. And if that itself refers to some other document then, in the same way, one has to refer back to and consider that other document – for how else can one properly understand the question let alone properly understand the answer?

54. It is convenient at this point in the analysis to return to the facts.

55. In the Owen appeal the relevant request was in the form of a very precise question: "How many and which providers used 'inappropriate charges' to set premiums as described in the FOS 'Decision Trees'?" The question itself refers to the Decision Trees, so in order to understand the true meaning and import of the question, and in due course the true meaning and import of the answer, one has to examine the Decision Trees. It is, as I have observed, common ground that the reference is in fact to Decision Tree 25, which, as noted, itself uses, and indeed defines for this purpose, the expression "inappropriate charges" – an expression which Mr Owen in his request appropriately put in quotation marks. So to understand Mr Owen's question one has, therefore, as it were, to 'read into' his question the definition of "inappropriate charges" to be found in Decision Tree 25. Thus construed Mr Owen's question comes to this: 'How many and which providers used 'inappropriate charges' to set premiums as described in the FOS 'Decision Trees', that is to say, having regard to the definition of 'inappropriate charges' in Decision Tree 25, how many and which providers' "own charges" were higher than those "used in setting the premium"?'

56. Now to repeat two points I have already made, Mr Owen's request was directed at the identity of those who had used "inappropriate charges" (the topic addressed in the box on the first line of Decision Tree 25) and *not* at the identity of those who, in the view of the FSA, were guilty, for example, of a material misrepresentation (the topic addressed in the box on the second line of Decision Tree 25). So he was not asking about anything to do with the views or opinions of the FSA. What he was asking about related to information which, in the nature of things, was known only to the relevant firm itself, and can therefore only have come to the knowledge of the FSA as a result of information supplied to it by the relevant firm (there being, as I have said, no suggestion that the FSA had any other source for this information).

57. In these circumstances, if in answer to Mr Owen's request the FSA had provided the number and the list of names as requested, it would have been identifying those firms which had used "inappropriate charges" – "information" within the meaning of section 348 which manifestly "relate[d] to the business" of those firms within the meaning of section 348(2)(a) and which equally, and this of course is the crucial link

in the argument, was available to be disclosed by the FSA to Mr Owen only because it had, within the meaning of section 348(2)(b), been "received" by the FSA. In other words, if in answer to Mr Owen's request the FSA had provided the number and the list of names as requested, it would have been disclosing information which was "confidential information" within the meaning of section 348.

58. Before passing on, there is one important conceptual point that needs to be emphasised. On this analysis the reason why it is legitimate – and, indeed, necessary – to have regard to Decision Tree 25 is *not* because it was in the public domain or known to Mr Owen (though no doubt it was both of those things); it is because it was referred to in Mr Owen's request. The distinction may appear over-subtle but is, in truth, vital. For it is the reason why, in the final analysis, Mr Flint is enabled to succeed in his appeal even though his fundamental proposition may be – I stress *may* be; I am not saying that it necessarily is – expressed in inappropriately wide terms.

59. The analysis in relation to the second issue in the Lewis appeal proceeds in precisely the same way and, in my judgment, to precisely the same conclusion. (The other issue in the Lewis appeal, arising out of Mr Lewis's request for "A list of the firms which were used for the mystery shopping exercise" is quite different and I deal with it below.) Mr Lewis, like Mr Owen, made a very precise request. He sought "The identities of the seven firms investigated on subsequent investment advice." Plainly, in order to understand this request, and likewise in order to understand any responses provided by the FSA, one has to refer back to the Press Release issued by the FSA three days earlier. But again, as in the Owen appeal, the justification for having regard to this document is not that it was in the public domain – though it undoubtedly was. The justification and the need to have regard to the Press Release is that, quite plainly, it was the document which underlay Mr Lewis's request.

60. As in the Owen appeal, so here. If in answer to Mr Lewis's request the FSA had provided the list of names as requested, it would have been identifying the seven firms which, having been "investigated on subsequent investment advice", had been found to be firms where "advisers failed to explain the link between this type of borrowing and subsequent investments" – "information" within the meaning of section 348 which manifestly "relate[d] to the business" of those seven firms within the meaning of section 348(2)(a) and which equally was available to be disclosed by the FSA to Mr Lewis only because it had, within the meaning of section 348(2)(b), been "received" by the FSA.

61. Against this background I turn to deal with the two appeals.

<u>The Owen appeal</u>

62. Mr Flint challenges the decision of the Tribunal on two quite separate grounds.

63. First, he says, the Tribunal misconstrued the scope of Mr Owen's request, misunderstood the reference to "inappropriate charges" and in consequence misdirected itself as to the true issues and erred in law. Mr Flint criticises a number of paragraphs in the Tribunal's decision. There is no need for me to go through them all in turn.

64. In paragraph [6] of its decision the Tribunal had correctly observed that:

> "it will have been seen that what Mr Owen wanted to identify was whether firms had used "inappropriate charges". His request made no mention of whether and to what extent such charges entailed any form of misrepresentation or breach of contractual warranty."

65. Yet by paragraph [61] the Tribunal had come to the conclusion that:

> "Mr Owen wanted to know which providers were "at fault" and hence his reference to the Decision Trees. The information sought related to the fact and degree of fault committed or arguably committed by the firms involved. The FSA carried out an elaborate exercise to assess the fact and extent of such default."

The first part of this, with all respect to the Tribunal is simply wrong. Mr Owen's request was directed not to the identity of firms that were "at fault" but to the identity of those who had used "inappropriate charges." The latter part – the nature of the exercise undertaken by the FSA – was correct but simply irrelevant for present purposes.

66. The error in the Tribunal's approach was compounded by what it said in paragraph [52] in relation to "inappropriate charges":

> "the FSA recognised that at least 3 elements were reflected by the phrase "inappropriate charges". First, it denoted the application by firms of standard charges as required by the relevant LAUTRO rules, second it implied a failure by such firms to take available measures to reflect the actual charges applied to the policies in question and third, it denoted a resultant misrepresentation and/or breach of contractual warranty. The Tribunal agrees that if another ingredient were involved or denoted by the phrase in question it would flow from the third element and would involve the act of compensation effected in favour of affected policyholders. The justification for the importation of this final element, if it be not already a necessary corollary of the third element, seems entirely justified by the context of the FSA's own grounds of appeal which expressly recognised that one of the facts that had by then "become publicly available" though only in an anonymous form was the fact that the 12 firms referred to "had voluntarily agreed to compensate their clients"."

67. It would seem that the Tribunal was persuaded to adopt this approach (see paragraph [51] of its decision) because of what it called "ambiguity, or at least a lack of precision" in Mr Owen's reference to "inappropriate charges" and (see paragraphs [52]-[53] of its decision) in part because of the way in which, as it understood it, the FSA itself had interpreted Mr Owen's request, in part because of the way in which the FSA had chosen to respond to it – giving Mr Owen information which he had not in fact requested – and in part because Mr Owen had himself at one stage sought from

the FSA "whatever information this review revealed." But in adopting this approach the Tribunal, in my judgment, fell into error.

68. In the first place, as Mr Flint points out, the correct starting point must be the request itself rather than the FSA's response to it – and the request, to repeat, was directed at the identity of firms which had used "inappropriate charges" as described in the Decision Tree. The response cannot be determinative, particularly where, as he says in this case, the FSA sought to give as full and helpful a response as possible without actually answering the request in full. Secondly, he says, and I agree, that there was in truth no ambiguity in the reference to "inappropriate charges".

69. Moreover, as he points out, if the FSA was entitled – obliged – to refuse to answer the narrow question initially posed by Mr Owen on the ground that the information requested was confidential, then that would equally justify a refusal to answer the wider question posed by Mr Owen, even assuming, which he disputed, that this was in fact the request, for any answer would, irreducibly, involve the 'naming of names' – the very thing that the FSA was not able to do. Given the logical structure in Decision Tree 25, to identify those firms which in the view of the FSA were guilty of, for example, misrepresentation would necessarily identify those firms as being firms which had used "inappropriate charges"; for, as Mr Flint correctly says, an essential stage of the FSA's analysis was the factual question of whether a firm had used charges when setting premiums which were lower than the charges which it actually applied, and that, to repeat, was information which, in the nature of things, had been, could only be, "received" from the firms themselves. In other words, identification of such firms would, by necessary implication, involve disclosure of the confidential information received from those firms by the FSA that they had used "inappropriate charges".

70. A similar approach also led the Tribunal (see paragraphs [56]-[68] of its decision) into what it referred to as "a proper analysis of the work carried out by the FSA", a consideration of what it referred to as the "elaborate exercise" carried out by the FSA to "assess the fact and extent" of the default by various providers, and the impact in this context of what Lightman J had said in the *Melton Medes* case. Whilst it may that the Tribunal was tempted down these paths by some of the submissions addressed to it, the fact is, in my judgment, that the Tribunal embarked upon what Mr Flint correctly called a lengthy, elaborate and unnecessary investigation of the process of analysis whereby the FSA reached its ultimate conclusions during the review.

71. In my judgment, the FSA succeeds on this first ground of appeal.

72. Mr Flint's second main ground of appeal, I have already dealt with. I agree with him that the Tribunal erred in law in treating the relevant inquiry as being confined to "the information itself, self-contained and self-referential". If the Tribunal had analysed the issue in the way in which I have described, and as in my judgment it should, then it would have arrived at the correct answer and, instead of dismissing the FSA's appeal, would have allowed it.

73. That said, and in fairness to the Tribunal, it needs to be borne in mind that the proposition which lay at the forefront of the way in which the case was presented to it by the FSA was, as I have said, couched in very different and much wider terms.

74. A subsidiary ground of complaint related to the Tribunal's conclusion (in paragraph [67] of its decision) that the fact that some firms had agreed to pay compensation to their clients and had paid compensation could not be "received" information. Mr Flint submits that it is elementary that the FSA had learned of the fact of the agreement and of the payment pursuant to that agreement from the firms in question and therefore in circumstances protected by section 348. He dismisses the Tribunal's reliance on *Derry City Council v Information Commissioner* (EA/2006/0014) on the basis that in the present case, unlike *Derry*, what was confidential was the *fact* of the agreement and not its detailed terms. The Tribunal was sceptical as to whether it needed to address this issue at all. I can well understand why, for its resolution was not, in my judgment, in any way determinative of the real matters in issue, either before the Tribunal or, indeed, before me. It is not, in my judgment, a matter that I need to resolve, though I am inclined to think that Mr Flint is probably correct in his attack on the Tribunal's decision on the point.

The Lewis appeal

75. In relation to the first limb of the Lewis appeal the Tribunal was, understandably as it seems to me, dismissive of the FSA's case. In paragraphs [69]-[70] of its decision it said:

> "Mr Lewis sought a list of the firms used for the mystery shopping exercise as well as a list of the firms investigated. As has been indicated above in his Decision Notice the Commissioner found that the names of the firms chosen by the FSA which were mystery shopped did not constitute "confidential information" as it had not been "received" by the FSA. Rather it represented a list of names selected by the FSA itself. The Commissioner also found that the names of the 7 firms selected by the FSA for further investigation was also not "received" information. The same was not true, however, of the firms selected by the mystery shoppers.
>
> The Tribunal has no hesitation in endorsing the Commissioner's conclusion that insofar as the names were selected by the FSA it cannot possibly be contended that the names were "received" by the FSA."

76. In relation to the identity of the firms involved in the mystery shopping exercise I can only agree. There is little to be added except to note that the distinction drawn by the Tribunal fits comfortably with the distinction drawn by Lightman J in the *Melton Medes* case between "information relating to the investigation or inquiries carried out by or on behalf of the [FSA]" into a person's business and "information relating to that person's business or affairs."

77. Mr Flint submitted that to identify the firms would reveal that the named firms had unwittingly participated in a mystery shopping exercise – true but so what? He suggested that this would in itself be information regarding the business of the firms received by the FSA from the market research company – an argument which seems to me to fly in the face of what Lightman J had said in the *Melton Medes* case. He further submitted that combined with the information to be found in the Press Release

and its attached Briefing Note identification of the firms would reveal that those firms might be included amongst the 95% of firms whose advisers had failed in one respect or the 83% of firms whose advisers had failed in another respect. That, he submitted, was information referable to particular firms. It was not. For given that, to take one example, only 95% of firms had failed in the particular respect identified, how could the fact of that failure be linked to any particular firm? How could it be said of any particular identified firm X whether X was within the 95% who had failed or the 5% who had not?

78. In my judgment, on this limb of the Lewis appeal the Tribunal was right and for the reasons it gave.

79. In relation to the second limb of the Lewis appeal, Mr Flint is on much stronger ground. The Tribunal continued in paragraph [71]:

> "The sole ground put forward by the FSA is that disclosure of the information sought coupled with the related Press Release set out above would enable readers to draw conclusions about the activities of the named firms."

The Tribunal rejected that argument. In my judgment it was wrong to do so.

80. So far as concerned the second group of seven firms, the Press Release had stated that "in all of the seven firms looked at, advisers failed to explain the link between this type of borrowing and subsequent investments." That, submits Mr Flint, was information collected by the FSA from the firms concerned during the course of its investigations which was lawfully published in the Press Release without breach of section 348 because the firms were not identified in the Press Release. But, he further submits, to identify the firms, as requested by Mr Lewis, would remove the protection of section 348(4)(b) and, taken in the context of what was said in the Press Release, involve a disclosure of confidential information. For the reasons I have already explained at some length I agree. Mr Flint is entitled to succeed on this limb of the Lewis appeal.

Conclusions

81. For these reasons the FSA succeeds on the Owen appeal and on the second limb of the Lewis appeal but fails on the first limb of the Lewis appeal.

82. I invite counsel to agree an appropriate form of order to give effect to my decision.