THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Upper Tribunal Case No. GIA/366/2012

PARTIES

Allan Wise (Appellant)

and

The Information Commissioner (First Respondent)

and

Blackpool City Council (Second Respondent)

APPEAL AGAINST A DECISION OF A TRIBUNAL

DECISION OF THE UPPER TRIBUNAL

JUDGE WIKELEY

DECISION BY THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The DECISION of the Upper Tribunal is to allow the appeal.

The decision of the First-tier Tribunal (General Regulatory Chamber) (Information Rights) dated 01 November 2011 under file reference EA/2011/0181, in relation to the Appellant's appeal against Decision Notice FS50358805, involves an error on a point of law. The First-tier Tribunal's decision is accordingly set aside. The case is remitted to be reheard by a different First-tier Tribunal, subject to the Directions below.

This decision is given under section 12(2)(a) and 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007.

DIRECTIONS

The following directions apply to the re-hearing:

(1) The re-hearing should be at an oral hearing;

(2) The new tribunal should be differently constituted from the First-tier Tribunal which made the ruling dated 01 November 2011.

These directions may be supplemented by later case management directions issued by a Tribunal Judge in the General Regulatory Chamber (Information Rights) of the First-tier Tribunal.

REASONS

An outline of the background to this appeal

1. There is a complex and at times hotly disputed context to this appeal. For present purposes it can be summarised as follows. Mr Wise has made at least two applications under the Freedom of Information Act 2000 (FOIA) to Blackpool City Council (BCC), the public authority. Both requests concerned information relating to thefts of overhead cable from the Blackpool tram system.

2. Request 1, made on 17 March 2010, asked for various information relating to these thefts of cabling. BCC stated that it did not hold the requested information. Mr Wise complained to the Information Commissioner, who issued a Decision Notice (FS50310644) ruling that on the balance of probabilities BCC did indeed not hold the requested information. Mr Wise then sought to appeal that Decision Notice to the First-tier Tribunal (FTT). His notice of appeal, which was more than five months late, was not admitted by the FTT. That FTT decision formed the subject matter of the appeal to the Upper Tribunal in GIA/1444/2012. I have dismissed that appeal for the reasons given in that decision.

3. Request 2, made on 25 August 2010, was a more specific inquiry, asking for a breakdown of the figure of £135,000 quoted in the press as the value of a series of thefts of tram cable. That request led to the Information Commissioner issuing another Decision Notice (FS50358805). The Commissioner found no breaches of the

Act and therefore did not require any steps to be taken. In this second Decision Notice, most of the analysis was devoted to the issue of whether the information was "held" by the public authority. The Commissioner concluded that there was no evidence "that would justify refusing to accept the council's position that it does not hold the information requested in this case" (at [22]). Mr Wise again lodged an appeal to the FTT. The Information Commissioner (ICO) made a detailed written submission opposing the appeal (but not making an application for a strike out). However, on reading the ICO's submission and Mr Wise's arguments, the Tribunal Judge formed the view that it was arguable that the case should be struck out as having no reasonable prospect of succeeding; representations were invited accordingly (Rule 8(3)(c) and (4) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (SI 2009/1976) ("the GRC Rules")). The FTT Tribunal Judge subsequently struck out the appeal. This ruling (EA/2011/0181) is the subject matter of the present appeal. I am allowing this appeal for the reasons that follow.

4. It is regrettable that there has been an undue delay in resolving this appeal. This was in part due to the Respondents misunderstanding my earlier directions in the matter, and latterly by the heavy caseload being experienced by the Upper Tribunal.

The parties' submissions to the Upper Tribunal

5. When giving Mr Wise permission to appeal, I made a number of observations about the principles governing the power to strike out appeals. The Information Commissioner has indicated that he does not wish to make any submissions as regards the FTT's decision to strike out the appeal. The public authority agreed with the ICO's position. Mr Wise has made a further detailed submission reiterating his previous points.

6. As a result, I have not had the benefit of any sustained argument on the points I made in my ruling giving permission to appeal. However, I am satisfied that they still hold good. They therefore form the basis of the reasons that follow.

The Upper Tribunal's analysis

The principles governing the application of rule 8(3)(c)

7. It is important to consider issues of first principle. It is well established in the ordinary courts that the historic justification for striking out a claim is that the proceedings are an abuse of process (see e.g. *Hunter v Chief Constable of West Midlands Police* [1982] AC 529 at 541B *per* Lord Diplock). On that basis, the power should only be exercised in plain and obvious cases (see *Lonrho PLC v Fayed* [1990] 2 QB 479 at 489F-G *per* Dillon LJ and 492G-H *per* Ralph Gibson LJ).

8. More recent rulings from the superior courts point to the need to look at the interests of justice as a whole (see e.g. *Swain v Hillman* [2011] 1 All ER 91). It is also well established that striking out is a draconian power of last resort: see *Biguzzi v Rank Leisure plc* [1999] 1 WLR 1926 at 1933B *per* Lord Woolf MR (where, admittedly, the issue was delay rather than lack of reasonable prospects) and also, in the Upper Tribunal, *AS v Buckinghamshire CC (SEN)* [2011] AACR 20 and [2010] UKUT 407 (AAC) at [14]. It is, moreover, plainly a decision which involves a balancing exercise and the exercise of a judicial discretion, taking into account in particular the requirements of Rule 2 of the GRC Rules.

9. So what then is meant by saying that "there is no reasonable prospect of the appellant's case, or part of it, succeeding" (within rule 8(3)(c))? The standard and authoritative commentary on tribunal procedure, by Judge Edward Jacobs (*Tribunal Practice and Procedure*, 2nd edn, 2011, at [12.39]), advises that this "is only

appropriate if the outcome of the case is, realistically and for practical purposes, clear and incontestable. *It is not usually appropriate if facts relevant to the ultimate outcome of the case are disputed*" (emphasis added).

10. Judge Jacobs cites as authority for this proposition the employment case of *Ezsias v North Glamorgan NHS Trust* [2007] EWC Civ 330; [2007] ICR 1126. There Maurice Kay LJ held as follows:

> "29. It seems to me that on any basis there is a crucial core of disputed facts in this case that is not susceptible to determination otherwise than by hearing and evaluating the evidence. It was an error of law for the Employment Tribunal to decide otherwise. In essence that is was Elias J held. I do not consider that he put an unwarranted gloss on the words "no reasonable prospect of success". It would only be in an exceptional case that an application to an Employment Tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the applicant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation. The present case does not approach that level."

11. Furthermore, in *JP v Standards Committee of Surrey County Council* [2011] UKUT 316 (AAC) Judge Jacobs held that there was "no significant difference in meaning between 'reasonable prospect of the appeal being successful' and 'realistic prospects of success'" (at [16]) and noted that, in a different context, the Court of Appeal has decided that 'no realistic prospect of success' can for practical purposes be taken to mean the same as 'clearly unfounded': *R (YH) v Secretary of State for the Home Department* [2010] 4 All ER 448 at [10].

The application of those principles in the present case

12. I am satisfied that the FTT erred in law in the approach it took to Rule 8(3)(c) in all the circumstances of this case.

13. The ICO's Response to the appeal ran to 8 pages. The submission writer considered Mr Wise's three grounds of appeal, one of which was that the Commissioner had been wrong to find that the requested information was not held by the public authority. It was pointed out that the test in that respect was whether information is held on the balance of probabilities rather than certainty, and that Mr Wise's argument that there is "no guarantee that there is no recorded information" was misconceived (ICO Response at [24]). More generally, it was argued that Mr Wise's various points were not addressed to the issue which the Commissioner had to determine (at [25]).

14. The Tribunal Judge in his ruling dated 1 November 2011 adopted the ICO's arguments as set out in the previous paragraph. Mr Wise, it was said, had misunderstood the ICO's functions and the FTT's powers (which may well be right). Moreover, the judge ruled, Mr Wise's representations were off the point – he had not addressed the points of concern but rather "restated his initial case in a more belligerent fashion". Mr Wise's submissions may well have been belligerent – but were they all off the point?

15. Mr Wise's written submissions are, with respect, not always easy to follow. They are written in long detailed and dense paragraphs which make it difficult always to ascertain the precise point being made. However, one matter at least was clear in

this case. In his submissions, Mr Wise had drawn attention to what he regarded as a fundamental contradiction between the terms of the two Decision Notices.

16. First, in the Decision Notice on Request 1, which related to the more general FOIA request for information about reports of thefts of tram cable, the value of such losses was said in passing to be £135,000, as reported by the local press. It was stated that this was "understood to be the estimated cost of replacement cable, extrapolated from invoices for smaller quantities of similar cable" (FS50310644 at [15]).

17. Second, in the subsequent Decision Notice on Request 2, the £135,000 figure was said to have been provided "verbally, on the spot" by a council employee to a reporter, based on the employee's experience and knowledge (DN FS50358805 at [13]). The Commissioner accepted that account as to how the figure of £135,000 had been calculated, i.e. by simply "working out in the head" (at [18]).

18. The account accepted in the second Decision Notice may or may not be accurate. If it was indeed calculated in that manner, and "on the hoof", then it is certainly difficult to see how the information could be "held" by the public authority. However, the finding in the Commissioner's previous Decision Notice in Request 1 (FS50310644) at least cast some doubt on that explanation. It is possible, I suppose, that the two statements are not in conflict. It may be that the statement in the first Decision Notice was simply a shorthand way of describing what was described in the second Decision Notice in a little more detail. However, undoubtedly one reading of the statement in the first Decision Notice is that it referred to documentary information held by the public authority.

19. As such, there was then plainly a contested issue of fact to be resolved and it is difficult to see how the appellant's case was one where there was simply "no reasonable prospect of the appeal being successful". It may not have been a strong case – whether or not that was so would depend on the outcome of the evidence being tested – but it was not a hopeless case. Rather, this was a case where there was, as Maurice Kay LJ put it, "a crucial core of disputed facts in this case that is not susceptible to determination otherwise than by hearing and evaluating the evidence".

Conclusion

20. I therefore conclude that this appeal must be allowed. The FTT's strike out ruling is set aside and the case is sent back to the FTT for hearing. A FTT judge will doubtless give directions for the hearing.

Signed on the original
on 14 January 2013

Nicholas Wikeley
Judge of the Upper Tribunal