



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)**

Appeal No: EA/2013/0189

ON APPEAL FROM:

**The Information Commissioner's Decision Notice No:
FS50488167**

Dated: 14th. August, 2013

Appellant: Gary Willetts
First Respondent: The Information Commissioner ("the ICO")
Second Respondent: Conwy County Borough Council

Before
David Farrer Q.C.
Judge
and
Andrew Whetnall
and
Michael Hake
Tribunal Members

Date of Decision: 18th. February, 2014

Representation:

This was a paper determination.

Subject matter:

FOIA S.42(1) - Whether requested information was subject to legal professional privilege.

EIR Reg. 12(5)(b) – Whether disclosure would adversely affect the course of justice.

Reported cases:

Waugh v British Railways Board [1980] A.C. 521,

Three Rivers D.C. v Bank of England (No.6) [2005] 1 A.C.610;

Re Highgrade Traders Ltd. [1984] BCLC 151.

Bellamy v ICO UKIT 2006 EA/2005/0023

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal dismisses the appeal.

Dated this 18th day of February, 2014

David Farrer Q.C.

Judge

[Signed on original]

REASONS FOR DECISION

The Background

- 1 The Victoria Pier stands at the centre of the promenade in Colwyn Bay. It is a key feature in a major project to regenerate the waterfront and the local economy. It was until recently in private ownership, fell into serious disrepair and, by about 2008, represented a threat to public safety.
- 2 In July, 2008, the second respondent (“Conwy”) obtained a bankruptcy order against the owner arising from unpaid business rates. Conwy thereafter served on his trustee in bankruptcy a number of notices to repair the pier, as a dangerous structure. It prepared schemes for the refurbishment of the pier as part of the wider project for restoration of the waterfront. It remained in dispute with the now- bankrupt owner, a dispute as to title which it was unable to settle.
- 3 In August 2011 the Trustee disclaimed the pier as an onerous asset and it reverted to the Crown Estate, which, in March, 2012, sold it to the Welsh Government. In April, 2012, the Welsh Government conveyed it without charge to Conwy.
- 4 In 2012 the former owner and his mother (who claimed an interest in the pier) initiated separate proceedings against Conwy in Cardiff County Court, he seeking an order that title to the pier should vest in him. His claim was dismissed at a hearing on 17th. August, 2012 but he later obtained permission to appeal to

the High Court. . His mother`s claim also failed on 12th. November, 2012. She also appealed. Both appeals were listed on 17th. April, 2013. His appeal succeeded to the extent that a fresh trial was ordered.

5 In September, 2012, on counsel`s advice, Conwy commissioned two valuations of the pier (“the reports”), one from the Valuation Office Agency and one from Lambert Smith Hampton. When it did so, the hearing of the owner`s claim at Cardiff County Court had already taken place but his mother`s was pending and there was evidently the possibility, perhaps the likelihood, of appeals.

The request for information

6 The appellant is a local resident and council tax payer. He evidently took a keen interest in the litigation described above, assisting the owner and possibly his mother in the presentation of his/their cases. That neither strengthens nor weakens his claim for disclosure of the information that he requested.

7 On 18th. December, 2012 he requested copies of all orders to carry out work on the pier placed in or after March, 2012 and all invoices for such work rendered during that period. Conwy complied promptly with his request. On 3rd. January, 2013 he made a further request for invoices including those relating to the reports. They were also provided.

8 On 17th. January, 2013, he made a formal request pursuant to FOIA for “full” copies of the reports. That request gives rise to this appeal.

9 On 12th. February, 2013 Conwy responded, refusing this request on the ground

that the reports were obtained in the course of current legal proceedings so that it was entitled to invoke the exemption provided by s. 42 of FOIA. The refusal implied the possibility of disclosure at some later date. An internal review, conducted by a Qualified Persons Group, confirmed that stance, asserting further that the public interest favoured non – disclosure

The Complaint to the ICO

- 10 On 3rd. March, 2013 the Appellant complained to the ICO. His primary case was that the valuations were not privileged because (i) they were commissioned after the county court determination of the owner`s claim; (ii) there was an earlier current valuation available and (iii) the ownership, not the value of the pier, was the issue before the court.
- 11 By his Decision Notice the ICO determined that litigation privilege attached to the valuations and that the strong in – built public interest in upholding such privilege was not outweighed by any counter factor in this case.

The Appeal to the Tribunal

- 12 The Appellant submitted grounds of appeal dated 27th. August, 2013 and a Reply to the ICO`s Response dated 31st. October, 2013. In essence he relies on the three points identified in paragraph 10. He contends that all relevant evidence in the owner`s action had been placed before the court on 17th. August 2013 (the county court hearing date) and that no further evidence could be admitted. He asserts that the value of the pier is not in issue and that the

valuations may have been obtained for a separate unrelated purpose. If privilege attaches to the reports there is an overriding public interest in disclosure.

Our Decision

- 14 The first relevant question, not raised by any party, is whether FOIA S.42 governs this appeal. In our judgment, the applicable provision is regulation 12(5)(b) of EIR 2004. Having regard to regulation 2(1)(f), it seems clear that the reports were environmental information relating to “the state of . . . built structures inasmuch as they may be affected by the state of the elements of the environment referred to in (a)” – that is to say air, atmosphere, water etc..
- 15 If that is right, we must ask ourselves, pursuant to regulation 12(5)(b), whether disclosure “would adversely affect . . . the course of justice”. That raises the same question as would require determination under FOIA : are these reports legally privileged ?
- 15 The starting point for a review of the law on this topic is *Waugh v British Railways Board [1980] A.C. 521*, in which the different categories of privilege were identified. Legal professional privilege is of two kinds. The first is legal advice privilege, which attaches to communications between lawyer and client where advice is sought and tendered. That species is not involved here because the reports were prepared for Conwy by a third party and contain no element of legal advice whatever.

16 If they are privileged, it must be because they attract “litigation privilege” as further defined by Lord Carswell in *Three Rivers D.C. v Bank of England (No.6) [2005] 1 A.C.610* at paragraph 102 : -

“ . . . *communications between parties or their solicitors and third parties for the purpose of obtaining information or advice in connection with existing or contemplated litigation are privileged, but only when the following conditions are satisfied: (a) litigation must be in progress or in contemplation; (b) the communications must have been made for the sole or dominant purpose of conducting that litigation; (c) the litigation must be adversarial, not investigative or inquisitorial.*”

Condition (c) is undeniably satisfied here.

17 Information which is obtained for the purpose of deciding whether to initiate or continue with litigation may satisfy that test - *Re Highgrade Traders Ltd. [1984] BCLC 151*. To confine such privilege to material intended to be used in evidence is to state the principle too narrowly. Oliver L.J. stated as follows at page 174 of the report of that case –

“ *(the trial judge) seems here, as I read the judgment, at this point to have been of the opinion that Waugh`s case established that it was only if the documents were brought into existence for the dominant purpose of actually being used as evidence in the anticipated proceedings that privilege could attach and that the purpose of taking advice as to whether or not to litigate . . . was some separate purpose which did not qualify for privilege. That, in my judgment, is to confine litigation privilege within too narrow bounds . . .*”

18 Applying these principles to the present appeal, it is clear that litigation was in progress at the material dates. The appellant says indeed that the reports were obtained too late, when the factual issues in the owner`s case had been resolved and no further evidence would be admitted on appeal. That analysis ignores the

scope of litigation privilege which clearly extends to communications with third parties obtained when a further first – instance hearing was pending (that involving mother`s case) and an appeal from the decision in the owner`s case was undoubtedly contemplated, notwithstanding permission to appeal had not been given when the reports were commissioned and obtained in September or October, 2012.

19 The appellant`s argument that the value of the pier was not an issue in the litigation is beside the point. The reports were obviously not obtained with a view to their use as evidence in the litigation. It is far more likely that the advice tendered by counsel was linked to a decision as to whether it was worth pursuing this litigation in the light of the value of the property in question. Be that as it may, *Highgrade Traders* makes clear that material obtained for the dominant purpose of litigation qualifies for privilege, regardless of any intention to use it in evidence. Whether counsel`s advice was right or wrong would not affect the purpose for which the reports were obtained.

20 Were the reports obtained for the “sole or dominant purpose” of conducting this litigation? We are satisfied from the dates of commissioning and the absence of any other pressing need for such reports that they were. The reference in the terms of engagement of the Lambert Smith Hampton report to it being required for “internal purposes” strengthens that conclusion. It seems likely that “sole” rather than “dominant” is the relevant description.

21 We conclude that the reports were privileged.

22 As to the balance of public interests, the following interests favour disclosure –

- (i) The fundamental interest in transparency, reflected in the EIR presumption in favour of disclosure (regulation 12(2));
- (ii) The interest in ensuring that public funds are wisely spent ;
- (iii) The concern that issues affecting a notable local building should be publicised to the greatest practicable extent.

23 The dominant public interest favouring withholding this information is the interest in preserving legal professional privilege in principle, which has been repeatedly recognised in decisions of the Tribunal – see e.g., *Bellamy v ICO UKIT 2006 EA/2005/0023*. That general interest is specifically supported here by the fact that the relevant litigation was very much alive in January, 2013 when the material request was made. There is nothing in the facts of this appeal to weaken the force of those considerations.

Conclusion

24 We therefore dismiss this appeal.

25 Our decision is unanimous.

David Farrer Q.C.

Tribunal Judge

18th. February, 2014