



**IN THE FIRST-TIER TRIBUNAL
[INFORMATION RIGHTS]
GENERAL REGULATORY CHAMBER**

Case No. Appeal No. EA/2012/0223

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50439866

Dated: 27th. September, 2012

Appellant: Adrian John Maiden ("AJM")

Respondent: The Information Commissioner ("the ICO")

Before
David Farrer Q.C.
Judge

and

Paul Taylor
and
Jean Nelson

Tribunal Members

Date of Decision: 15th December 2014

Representation : Mr. Maiden appeared in person

The ICO did not appear but submitted a written Response.

Subject matter:

(1) Environmental Information Regulations 2004 Reg.12(5)(b).

Whether the disclosure of legal advice received by a public authority relating to litigation would adversely affect the course of justice.

Authorities: *DCLG v ICO & W.R. [2012 UKUT 103 AAC]*
DBERR v O' Brien and ICO [2009] EWHC 164 (QB)

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal concludes that disclosure of the requested information would adversely affect the course of justice so that the exception relied on applied. It therefore dismisses the appeal.

Dated this 15th. day of December, 2014

David Farrer Q.C.
Judge
[Signed on original]

REASONS FOR DECISION

The Background

1. This appeal was remitted to the First Tier Tribunal by the Upper Tribunal because it had been struck out without a consideration of the requested information.
2. The Hunstanton Pier Company (“HPC”) was created by a private Act of Parliament of 1868. An earlier order provided for its creation and for the construction, maintenance and regulation of a pier at Hunstanton. In 1870 HPC entered into a lease for 999 years at an annual rent of £1 with the Le Strange Estate (“the lease”). The lease included a covenant to maintain the pier, approaches and roadway in good repair and condition (“the repairing covenant”).
3. In 1955 the Le Strange Estate conveyed the freehold of the land subject to the lease and an area called “the Green” to the predecessor of King’s Lynn and West Norfolk Borough Council (“the Council”). At the dates material to this appeal the Council therefore enjoyed the benefit of the repairing covenant. The conveyance further included a covenant by the Council to HPC not to trade or permit trading on certain of the conveyed land. The Council did not comply with that covenant.
4. In 1978 the greater part of the pier was destroyed in a storm. Following representations by the prospective purchaser of HPC, the Council resolved to allow HPC to remove the damaged part of the pier and to release it from the repairing covenant as regards the part of the pier which no longer existed. That resolution was not translated into a variation of the lease so that the repairing covenant remained effective. It seems that the Council provided a letter of comfort in accordance with the resolution.
5. In 2000 the remainder of the pier suffered further damage and the amusement arcade was destroyed by fire. The Council granted planning permission for a replacement amusement arcade and entered into a further lease with HPC to cater for some extension of the area that it would occupy. Local objectors, among them AJM, urged the Council to require the replacement of the pier. They also argued that the grant of planning permission, involving some encroachment on to the Green, contravened a covenant in the 1955 conveyance to the Council not to use the demised premises for any purpose other than the pier.

6. Subsequently, HPC needed a release from the repairing covenant, apparently in order to satisfy the requirements of its bank. It therefore asked the Council to agree a variation to the lease granting such a release.
7. On 5th. February, 2008, the Council's legal services manager, Mrs. Nicola Leader ("NL") presented a report to the Cabinet of the Council recommending that she be authorised to execute a deed of variation releasing HPC from the repairing covenant. However, a resolution was passed which contained the important qualification that she must first consult with the leader of the Council and members for the area as to whether it was in the Council's interests to do so. A petition was then presented to the Council demanding that the Council either enforce the repairing covenant to require the rebuilding of the pier or require HPC to vacate the amusement arcade on the Green. On 14th. July, 2008 the Cabinet affirmed its February resolution. By letter of that date NL, on behalf of the Council, told HPC that it did not intend to enter into a deed of release because that was not considered to be in its interests.
8. HPC issued an application for judicial review of that decision of 14th. July, 2008 on 9th. October, 2008. The Council resisted the claim and AJM applied to be joined as an interested party.
9. On 3rd. April, 2009 Nicol J. refused permission on the short ground that the dispute concerned private, not public rights, hence was not susceptible to judicial review. HPC applied to renew its application. On 15th. July, 2009 Blake J directed a renewal hearing and ordered that AJM be joined as an interested party as he had "a distinct perspective on the issues".
10. Subsequently, before any renewal hearing, HPC discontinued these proceedings following agreement with the Council on a deed of variation, releasing HPC from the repairing covenant.

The Request

11. On 18th. October, 2011 AJM addressed the following request to the Council-
 - (i) *I want to know if your legal services manager, Mrs. Nicola Leader, obtained an independent legal opinion, after 15th. July, 2009, on which she based her instructions to Knights solicitors*
 - (ii) *A copy of the instructions and other correspondence which must have passed between Mrs. Leader and Knight's solicitors, after the Honourable Mr. Justice Nicol had refused the application for permission to apply for judicial review on 3rd. April, 2009."*

13. In its response of 13th. January, 2012 the Council treated the request as governed by FOIA and refused it, relying on the exemption for legal professional privilege (“LPP”) provided for in s.42(1). The ICO found that the Council failed to comply with AJM’s request for an internal review. He complained to the ICO.

The Decision Notice

14. The ICO found that the request fell under the Environmental Information Regulations, 2004 (“the EIR”) and that the relevant exception was that provided for in Regulation 12(5)(b), namely, for present purposes, that - *“disclosure would adversely affect the course of justice”*

15. He concluded that the information requested in (ii) was privileged as it related to live litigation when created. The Council had done nothing to remove (waive) that privilege subsequently. He did not consider that the earlier history of other requests made to the Council by AJM which, as a differently constituted tribunal found, removed confidentiality from advice received by the Council , was relevant to the position here. He followed FTT decisions treating the course of public justice as relating to the concerns of the justice system generally, not confined to the course of particular current or prospective litigation. Having reviewed the public interest in disclosure, he decided that there was no sufficiently clear, compelling and specific reason to do so in this case.

16. Question (i) gave rise to no issue of privilege since it asked simply whether there was advice, not what it was. The answer was “No”. There was no advice fulfilling the very narrow terms of the request, as the Council acknowledged to AJM during the ICO’s investigation. We need say no more about (i) in this decision.

17. AJM appealed to the Tribunal.

The Appellant’s case

18. AJM did not accept that the requested material enjoyed LPP. He questioned whether future litigation was contemplated when the information was created, let alone by the time of his request. He relied on the decision in EA/2008/0013 , his previous appeal, as relevant to this appeal, since it demonstrated an earlier history of disclosure of such advice leading to the expectation of continuing disclosure.

19. However, his principal argument related to the public interest. He contended, in written submissions and oral argument, that the only possible reason why the Council (more specifically, NL) could be asserting the exception was that she was hiding the true reason for settling with HPC because it revealed incompetence or worse in her conduct of this dispute and her protection of local community interests. He submitted that the

Council's decision to settle, apparently immediately after the order to join AJM, indicated that the Council did not want the court to hear AJM's evidence. Having submitted initially that the revelation of wrongdoing within a public authority by disclosure of privileged material would justify the overriding of LPP (a proposition which has great force), he progressed to the bold contention that disclosure that the Council had merely "made a bad deal" on behalf of its electors ("a botched job") would be enough to outweigh the general case for protecting LPP material. He condemned as inexplicable NL's alleged volte face from her reports' recommendations to her letter of 14th. July, 2008 to HPC refusing the variation for no stated reason.

20. AJM made a further series of submissions as to the earlier history of disputes over the pier and the Council's and NL's asserted failings when dealing with these issues and the protests of concerned local groups anxious to see the pier restored and the Green free of development. We indicated at the hearing and repeat here that, whatever the strength of the arguments addressed or intended to be addressed to us as to the Council's stance in these matters, they do not assist the Tribunal to decide whether the relevant information should be disclosed.

The ICO's case

21. The ICO 's response added little to the DN and he made no fresh submission after the appeal was remitted to the FTT.

The Tribunal's reasons for its decision

22. The scope of the requested material

We were supplied with about 450 pages of material, presumably from the Council's file relating to dealings with its external solicitors concerning the litigation against HPC in 2008 - 9. It begins in April, 2008, very close to the date of Nicol J's refusal, so that the correspondence is within the time frame of paragraph (ii). We treat attachments/enclosures to letters as within scope. There are a few documents such as court orders that are already in the public domain and familiar to AJM and there are others that are not strictly "correspondence". However, the close links from one communication to the next argue against any attempt to dissect this bundle in order to separate correspondence from other material when considering disclosure. If AJM had been successful, we should have ordered disclosure of all that we saw.

FOIA or EIR ?

23. This material concerns discussions as to the repairing covenant and related litigation. Applying selected elements of the definition of "environmental information" contained in

EIR Reg. 2 , we agree with the ICO that this was information on an activity (negotiation and litigation) amounting to a measure (c) likely to affect elements - landscape and a coastal area (a natural site (see (a))). It was therefore environmental information to which EIR applied. So the presumption in favour of disclosure (Reg. 12(2)) follows.

Would disclosure adversely affect the course of justice ?

24. *DCLG v ICO & W.R. [2012] UKUT 103 AAC* endorsed a series of FTT decisions in applying a wider test than reference to the course of specific proceedings, initiated or contemplated. Reg. 12(5)(b) does not refer expressly to LPP but its preservation is recognised throughout developed legal systems as fundamental to the principle of fairness and to the proper working of the lawyer - client relationship. The client must be confident that what he tells his lawyer will remain confidential, if frank instructions and relevant advice are to be exchanged. Section 40(2) of FOIA and Regulation 12(5)(b) are almost unprecedented incursions into that principle. Advice in this case was tendered and received in the expectation that it would remain confidential. Some is very sensitive. We consider that disclosure of the requested material would have an adverse effect on the preservation of the course of justice in that general sense. We agree with AJM that litigation between the Council and HPC was not continuing or in contemplation at the date of the Request.

25. Here, having read the content of the file, we conclude that there are also specific reasons for finding that disclosure of these documents would have an adverse effect on the course of justice. They reveal very clearly the approach of both solicitor and client to this litigation and, arguably, reveal the strategy and tactics which solicitor might advise and client authorise in other matters. A similar approach may characterise the conduct of other litigation by this solicitor or this public authority. Those are matters which might be of interest to future opponents, possibly including HPC. It is not impossible that further disagreements may arise between the Council and HPC. Nothing revealed hitherto exposes to the public gaze the interplay of lawyer and client that would emerge from disclosure of the requested information.

26. For these reasons the Tribunal concludes that LPP attaches to that information and that, both generally and specifically, disclosure would adversely affect the course of justice

27. Nothing in the events following Nicol J's ruling gives rise to any question of waiver of privilege. Nevertheless, AJM refers to earlier requests to the Council on similar issues and cites the decision of the Tribunal in EA/2008/0013 in which the Council was joined as Additional Party. AJM succeeded in that appeal; the Tribunal ruled that the Council

had not been entitled to rely on Reg. 12(5)(b). However, it did so on the ground that the public interest lay in favour of disclosure, not that LPP had been waived. Furthermore, the reasons for reaching that conclusion were specific to the facts of that appeal. The Council had disclosed four previous advices on the same general subject matter; an assurance had been given that the advice in question would also be disclosed and it was disclosed to AJM before the hearing, which, said the Tribunal, amounted to evidence that the Council recognised where the public interest lay. The Tribunal itself emphasised that it was laying down no principle as to the effect of previous disclosures.

28. This Tribunal is satisfied that that decision has no bearing on its decisions as to either the engagement of the exception or the weighing of public interests in this appeal.

The balance of public interests

29. If the exception is engaged, it can be relied on only if the public interest is shown to lie in favour of withholding the information, taking proper account of the presumption of disclosure in Reg. 12(2). In addition to the presumption the public interest in disclosure includes, as always, where this exception is invoked

- (i) Transparency - public scrutiny of the administration of its affairs by elected members and officers;
- (ii) Public understanding of the issues affecting the life of the local community.
- (iii) The opportunity to check the quality of legal advice paid for by the community.

30. Additionally, in this case, says AJM, disclosure would reveal incompetence or even improper conduct in the Council, in particular on the part of NL.

31. He points to the unexplained decision of the Council to reject NL's recommendation to release HPC from the repairing covenant unconditionally and to do so only if some advantage to the Council could be obtained from HPC. He points to her prompt switch of position in accordance with that change of course.

32. More importantly in the context of his request, he relies on her involvement in settling the judicial review proceedings on terms releasing HPC from the repairing covenant when the Council had successfully resisted HPC's application for permission and Blake J. had ordered that AJM be joined as a party on the renewal hearing. That, he asserted, enabled him to give fresh evidence adverse to HPC's claim to quash the Council's decision of July, 2008, if the renewal hearing took place. The decision to settle silenced him. NL's conduct was inexplicable, save as a stratagem to hide the real reasons for discharging the repairing covenant.

33. We have read the extensive closed bundle with care. It neither reveals nor gives rise to any suspicion of impropriety or maladministration on the part of NL or any member of the Council. Whether the decision to settle with HPC was in the best interests of the community, whether it could have got a better deal is not a matter for us. Nor is the detailed history of AJM's dealings with the Council and related events eight to ten years earlier. Suffice it to say that, even without the information in the closed bundle, it is not difficult to work out why the Council settled and to identify perfectly legitimate reasons for doing so. In a brief closed annex we set out the reasons as they emerge from the closed bundle.
34. The Tribunal observes that NL was an officer of the Council. As such, she was bound, within the limits of propriety, to carry out policies determined by elected members, regardless of her personal opinion. The apparently unreasoned and fundamental amendment to her recommendation as to the repairing covenant which the cabinet adopted in February, 2008 and affirmed in July, 2008 may have been a source of concern, even embarrassment to her but it was her job to support it loyally and to communicate it to HPC.
35. The fact that NL was, throughout the relevant period, acting in close communication with external solicitors may be regarded as a further indication that she was not likely to be conducting this affair irrationally or disingenuously. We have seen the advice that the solicitors gave; it does not include anything remotely improper.
36. The tribunal accepts that the public interest would favour disclosure of LPP material if such disclosure showed misconduct by a senior officer, or indeed members of a local authority. We have indicated, however, that it would do nothing of the sort. AJM's specific argument as to the public interest therefore fails.
37. The public interest in withholding such privileged material is closely related to the arguments already reviewed as to the adverse effects on the course of justice. The unchanging significance of the public interest in protecting the principle of client confidentiality which is the justification for LPP weighs heavily in any case where the requester seeks disclosure of material as to which a public authority can assert privilege (see *DBERR v O' Brien and ICO [2009] EWHC 164 (QB)* at para. 48 et seq. which confirms earlier FTT decisions to this effect). In this case there are subsidiary specific factors supporting the withholding of this information (see paragraph 25 above). It is not in the public interest that a public authority or a firm of solicitors should be placed at a future disadvantage by potential opponents gaining unfair insights into legitimately confidential tactics.

38. In our judgement, the general need to protect LPP would of itself outweigh the public interest in disclosure of the privileged information here, account taken of the presumption. The additional specific factor referred to above simply tilts the scales further against disclosure.

Summary

39. For these reasons, amplified to a limited degree in the closed annex, we dismiss this appeal.

40. Our decision is unanimous.

David Farrer Q.C.

Tribunal Judge

15th. December, 2014