FOIA s.44 – Absolute exemption: prohibitions on disclosure

HRA Art 6 – Right to a fair trial

HRA Art 8 – Right to a private and family life

Financial Services Authority v IC

EA/2007/0093 and 0100
October 2008

Cases:

Real Estates Opportunities Limited v Aberdeen Asset Management Jersey Limited [2007] 2 All ER 791

Slann v IC [2006] UKIT EA_2005_0019

Melton Medes Limited v SIB [1995] Ch 137

R v Enfield London Borough Council and Secretary of State for Health ex parte J [2002] EWHC 432 (Admin)

Bluck v IC [2007] UKIT EA_2006_0090

Facts

This case involved a preliminary issue in two consolidated appeals (named Appeal 93 and Appeal 100) by the Financial Services Authority (FSA) against two Decision Notices of the IC.

There were two separate information requests. The first related to names and identities of certain firms involved in the provision of endowment mortgages which carried on business subject to FSA supervision. The second related to the names and identities of certain firms who had been the subject of a so-called mystery shopping exercise. The requests were refused on the grounds of s.44 FOIA when read together with the relevant provisions on confidentiality of the Financial Services Markets Act 2000 (FSMA).

The IC held in both cases that s.44 did not apply. In Appeal 93 this was because the IC held that there was no statutory provision in place attracting the operation of s.44 as the companies had ‘voluntarily’ agreed to compensate their clients. He also rejected the contention that Articles 6 and 8 of the European Convention on Human Rights would be breached if the information was disclosed as the companies would retain the right to appeal. In Appeal 100, the IC held 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 and directed that there should be disclosure of the names of firms selected by the FSA for mystery shopping as well as the names of the firms further investigated, but not those chosen by the mystery shoppers themselves.

Findings
All the parties in the Tribunal agreed at that stage that if the determination of the preliminary issue was resolved in favour of the FSA the appeal could be disposed of expeditiously without the need to investigate a number of other separate grounds which the FSA had raised in connection with the two appeals.

Appeal 93

The Tribunal looked into the issue of the true meaning and ambit of the phrase 'inappropriate charges'. The Tribunal found that there could be no real doubt about the meaning of the request. As was pointed out in the IC's submissions, 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 agreed 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".

The Tribunal was presented with a general proposition put forward by the FSA in that it was said that section 348 will not prohibit the disclosure of matters of opinion or evaluation reached by the FSA in relation to a firm only if such disclosure will not implicitly disclose confidential information received from those firms. The Tribunal found that the request did not on any view seek "confidential information" "received" by the FSA. Insofar as the analysis carried out by the FSA constituted a "possible" deduction from information it received the Tribunal adopted Lightman J's conclusions in the *Melton Medes* case that "any hint as to that information implicit in [the] question was quite insufficient to constitute disclosure."

The crux of the problem with regard to this proposition in the Tribunal's judgment involved a proper analysis of the work carried out by the FSA in the light of the particular circumstances in Appeal 93. The FSA contended before the Tribunal that consideration must be given to what it called the effect of the disclosure of the information in the context of information which had already been disclosed by the FSA and the IC.

The Tribunal disagreed with this contention and its implications. 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 Tribunal referred to the case of *Slann* in that it would have been possible in that case to effect a trail leading back to the confidential information which was in issue. That trail was extremely clear. However, they held that in the present case the firms did not provide the information which was in reality being sought. Moreover, the information trail referred to which existed in the *Slann* case could not be said to apply to the facts of the present case. Moreover, they stated 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 rejected 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.

In its written submissions the FSA claimed that disclosure of the firms' names would lead to disclosure not only of the existence of a warranty claim or alternatively one based on misrepresentation but also to the revelation of the fact that each firm in question had agreed with the FSA to effect some form of compensation or a similar means of redress. The Tribunal commented that whether or not the ambit of the request was broad enough to encompass a request as to which firms had paid compensation or effected a similar means of redress, the fact remains that the arrival of that conclusion or similar conclusion was one which was a necessary by-product or result of the analysis carried out by the FSA, after receipt of the information. In the Tribunal's judgment this approach was vindicated by the words of s.348 FSMA themselves which talk of information being "received by the primary recipient" The information here requested by the requestor cannot in any way be said to have been "received" by the FSA. The Tribunal, therefore, accepted the IC's contentions that no "trail" as is similar to the trail illustrated by the *Slann* decision was applicable in the present case.

Yet another contention made by the FSA refuted a suggestion made by the IC that it, ie the FSA, was now relying on information having been provided under some form of agreement with the firms. The Tribunal agreed with the IC that insofar as there was any form of agreement between the FSA and the firms or any firm the same information cannot in any way be said to have been at any stage "received" by the FSA.

The Tribunal rejected the FSA's claim

<u>Appeal 100</u>

The Tribunal endorsed the IC's conclusion that insofar as the names were selected by the FSA it could not possibly be contended that the names were "received" by the FSA.

The sole ground put forward by the FSA was that disclosure of the information sought coupled with the related Press Release would enable readers to draw conclusions about the activities of the named firms. They argued that revealing the names sought against the background of the press release would be a contravention of s.348 FSMA. Particular regard was paid in that respect to s.348(4)(b), since there would be anonymised information released in the first instance following by revelation of the firms' names at a later stage which would "complete the jigsaw". The Tribunal rejected this contention and accepted the IC's argument that s.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. The Tribunal held that s.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. In addition the Tribunal accepted that it would not be possible to identify from the names

of all the firms mystery shopped which firms had been identified as failing in any particular respect.

The Tribunal rejected the FSA's claim.

Sections 205 and following of FSMA

The FSA claimed that in Appeal 93 disclosure of a firm's name would entail disclosure of what in effect would be a finding that the firm has used "inappropriate charges" and has been held liable to compensate customers. For this purpose the Tribunal was prepared to assume that this last fact would necessarily be inferred. In such circumstances the FSA contended that the necessary safeguards as to due process will have been ignored. The same argument is put forward with regard to Appeal 100.

The Tribunal rejected these contentions and upheld the IC's findings for the following reasons. First, the FSA could not point to any specific breach of the detailed provisions of s.205 and following. It merely asserted that disclosure would be "tantamount" or "equivalent" to publication. Secondly, the FSA's submissions spoke in terms of "public censure". The legislation refers to a number of very specific types of notice. It was simply not clear what level or type of notice was being addressed by the use of that phrase which is not a phrase that appears within the text of the legislation itself other than by way of heading. Third, the FSA was in effect elevating s.205 and following as well as ss.387 to 388 inclusive to some form of prohibition upon disclosure. In the Tribunal's judgment it is simply not possible to construe those provisions in that way. Moreover, even if s.391 did contain the prohibition on the publication of the "notices" it had no application to the entirely different processes contained in and prescribed by FOIA.

With regard to the attempt by the FSA to elevate the processes prescribed by ss.205 and s.387 etc to a form of prohibition note was taken of the phrase in s.44 "prohibition by or under any enactment". On any basis as the IC submitted such an enactment must be clear. By way of support for the proposition that a clear wording is required to constitute a proper statutory prohibition of the type envisaged by s.44 the IC cited *R v Enfield London Borough Council* where Elias J stated that cases where a prohibition could arise "by necessary implication" in circumstances stopping short of a clear and express legislative provision "would be very rare". The Tribunal noted that s.44 itself is unequivocal in stressing that the relevant prohibition must be "under an enactment". Although s.391(1) of FSMA contains a prohibition on the publication of a warning or decision notice the Tribunal accepted the IC's submission that this prohibition had no application to the disclosure of information where no such notice or notices have been issued. Moreover, they held that contrary to the clear wording of s.348, s.205 contains merely a discretionary power which is vested in the FSA.

The FSA relied on an agreement or series of agreements which apparently had been reached with the firms that no enforcement action would ensue coupled with an assurance that no publicity would take place. The Tribunal again agreed with the IC that even if this constituted some form of waiver this stopped well short of contracting out of the obligations expressly provided for by FOIA. They further held that the findings with regard to the preliminary issue had no bearing whatsoever on other

exemptions which were or may have been relied on by the FSA in connection with both Appeals.

The Tribunal rejected any reliance by the FSA on the possible applicability of ss.205 and following of FSMA as well as s.391 of the same Act.

European Convention on Human Rights

The Tribunal found that nothing in the disclosure of the information requested could be said to be a determination of any civil rights or liabilities of or concerning criminal charges against the firms for the purposes of either or both of the said Articles. The firms' informal arrangements struck with the FSA constituted a voluntary choice on the part of those firms. They did not reserve their Article 6 and/or Article 8 rights. The Tribunal therefore entirely endorsed the approach taken in the Decision Notice in Appeal 93 to the effect that nothing in the disclosure of the information requested or with regard to any informal settlement arrangement was in any sense dispositive of any human rights or other analogous rights. Moreover the Tribunal noted that they had already found in *Bluck* that Article 8 does not constitute or reflect any form of prohibition for the purposes of s.44 of FOIA. If such were to constitute an erroneous conclusion the Tribunal held that they would find any Article 8 infringement in Appeal 93 duly proportionate and justified.

Conclusion

The Tribunal determined the preliminary issue in favour of the IC.