

**FOIA s.42** – Qualified exemption: legal professional privilege

## ***Mr J Calland v IC & Financial Services Authority***

**EA/2007/0136**

**8<sup>th</sup> August 2008**

### **Cases:**

*AM & S ( Europe ) Limited v Commission of the European Communities* (1982) ECR 1575

*Akzo Nobel Chemicals and Acros Chemicals Limited v Commission of the European Communities* (CFI :T – 125/03 and T = 253/03 17<sup>th</sup> September 2007)

### **Facts**

The Appellant requested information relating to claims against him that the Financial Services Authority (FSA) had received as a result of pension schemes being mis-sold to clients. The FSA disclosed much information but withheld some information on the basis that it fell under the exemption in s.42 FOIA claiming that the public interest in maintaining the exemption outweighed the public interest in disclosure.

The IC upheld the FSA `s refusal and confirmed the exemptions relied on. He concluded that the FSA was right to conclude that the balance of the public interest lay in maintaining privilege where s.42 was engaged.

### **Findings**

The Tribunal held that the withheld documents for which LPP was claimed, were file notes made by FSA lawyers and communications, generally by e mail, between FSA investigators and lawyers or lawyers and other lawyers and therefore were privileged under s.42.

In relation to this finding, the Tribunal considered whether the privilege extended to communications with in – house lawyers or whether it was restricted to advice sought or obtained from independent external solicitors or barristers. The Appellant had argued that a European Court of Justice (ECJ) authority (presumably that of *Akzo Nobel Chemicals and Acros Chemicals Limited v Commission of the European Communities*) supported this view. However, the Tribunal pointed out that although the court followed the decision of *AM & S* which appeared to adopt a restrictive view of LPP as recognised in some member states, requiring that the lawyer be independent of the client seeking advice and not, therefore, employed by it, the reasons given for that restriction did not apply to employed solicitors or barristers here, since they remain in large measure subject to the same codes of conduct of their professional bodies as their independent counterparts and, in particular, owe the same duties to the court. Paragraph 9 of the *AM & S* judgment recognised the variations in scope of LPP in different member states. Moreover, both *AM & S* and *Akzo* were concerned with the interpretation of Article 14(3), not the requisite conditions for LPP in the domestic law of the UK. The Tribunal concluded that these authorities do not limit the general scope of LPP to communications with external, or independent lawyers. The Tribunal therefore rejected the Appellant`s argument.

**Conclusion**

The Tribunal dismissed the appeal.