

FOIA s.42 – Qualified exemption: legal professional privilege

## ***Mersey Tunnel Users Association v IC & Mersey Tunnel***

**EA/2007/0052**

**15<sup>th</sup> February 2008**

### **Cases:**

Kessler v IC & HM Commissioners for Revenue and Customs, [2007] UKIT EA\_2007\_0043

Kirkaldie v the IC & Thanet District Council [2006] UKIT EA\_2006\_0001

Bellamy v IC & the Secretary of State for Trade and Industry [2005] UKIT EA\_2005\_0023

Shipton v IC & National Assembly of Wales [2007] UKIT EA\_2006\_0028 (EA/2006/0028)

Kitchener v IC & Derby City Council [2006] UKIT EA\_2006\_0044

Gillingham v IC [2007] UKIT EA\_2007\_0028

Burgess v IC & Stafford Borough Council [2007] UKIT EA\_2006\_0091

### **Facts**

#### **Background**

The Appellants campaigned about the level of tolls for tunnel users and the uses to which that toll income is put by Merseytravel over the years. Over a period the income from the tunnels was insufficient to cover the operating costs and they operated at a loss. The deficit was made up by Merseytravel from a levy on the five district councils of Merseyside. A question arose over Merseytravel's powers to meet the losses made by Mersey tunnels between 1988 and 1992 by adding them to the levy on the district councils. It appeared that the power was restricted to repaying debts that had arisen in connection with the original construction of the tunnels, rather than meeting operating costs. Advice was received from a barrister. It was decided that the levy would be reduced to reflect any amount paid off in respect of the accumulated debt and interest.

After 1992, there were substantial increases in both traffic and tolls and the tunnels began to show an operating profit. Merseytravel began to repay the amount levied on the district councils. The repayments had been dealt with in Merseytravel's accounts in a number of ways: sometimes they were not been separately identified at all; in the 2005/06 accounts, the sum of £3.6 million was referred to as a levy repayment. The appeal stemmed from the Appellants' quest to find out what this levy repayment was, and why it had to be made.

#### **The Request for Information**

In 2005 the Appellants requested "to see all reports, agendas and minutes relating to the loan". Merseytravel supplied some information in response. However, the barrister's advice was withheld under ss.36 and 42 FOIA. They opined that the public interest in maintaining the exemptions outweighed the public interest in disclosure.

The IC held that s.42 was engaged, and found that the balance of public interest in maintaining the exemption did outweigh the public interest in disclosure, and therefore that Merseytravel were acting properly in withholding the information. In the light of that finding, the Commissioner did not go on to consider the application of s.36.

## **Findings**

### Could privilege be waived?

It became evident that the District Auditor had allowed the individual acting on behalf of the Appellants to be privy to advice received earlier than the subsequent disputed advice, but was prohibited from disclosing the information as it was confidential. However, the Tribunal rejected the argument that legal professional privilege had been waived because of this. They also held that disclosure under FOIA is disclosure, in effect, to the public; an entirely different matter to a restricted disclosure for the purposes of audit. The Tribunal also held that there was no right for this information to be communicated under s.1 as the authority no longer held the information.

With regard to the disputed advice, the Tribunal agreed with the Respondents' argument that the doctrine of partial waiver of legal professional privilege applied because the doctrine applies only to legal proceedings, of which none were contemplated here (see *Kessler* and *HM Commissioners for Revenue and Customs*). Also, they agreed that nothing could have been disclosed from the disputed advice due to the fact that it was received after a reply to the Appellants and that a subsequent letter to the Appellants only provided a brief summary of the conclusion of the disputed advice; not enough to justify losing privilege.

### Section 42

The Tribunal held that s.42 was indeed engaged. In addressing the public interest they took the following considerations into account with regard to the public interest in disclosure:

- Disclosure is necessary for transparency and accountability and democracy.
- The opinion has 'material' effects on the finances of the Tunnels, whether the toll increase was required or not and on the Mersey Tunnel Bill becoming law in 2004 despite wide opposition.

The Tribunal took the following considerations into account with regard to the public interest in maintaining the exemption:

- Parties should be free from fear that information they provide their legal advisors will be made public or that the advice itself will come into the public domain.

The Tribunal questioned whether a public official, concerned to see that his authority acted within the law and therefore seeking advice, would really be inhibited from spelling out the full picture for fear that publication might eventually ensue. They saw no evidence to that effect. Also they could not see that any professional lawyer would temper their advice for fear of later publication as it would be self-defeating.

The Tribunal rejected the argument that routine disclosure of legal advice would make public authorities reluctant to seek advice as it would damage their position as they

held that requests under FOIA can never be routine; the public interest test balance, with its inbuilt weight in favour of maintaining the exemption, must be struck in the particular circumstances of each case.

The Tribunal considered whether they could say that the doctrine of legal professional privilege has less “inbuilt weight” in some situations than others. They held that there do seem some situations where the human rights aspects of the doctrine are less striking, as in this case. The Tribunal considered it to be permissible to differentiate between the weight given to privilege in different contexts given that the balance must be struck “in all the circumstances of the case”, therefore a question of pure public administration, such as the one in this case, where no significant personal interests are involved is at the opposite end of the spectrum of importance to, for example, legal advice in a criminal or childcare case. The Tribunal accepted that public authorities are entitled to the protection of legal professional privilege on the same basis as natural persons but that if the issues addressed in the advice do not affect individuals significantly, there is less inbuilt weight attaching to the exemption.

The Tribunal held that considering the amounts of money involved and numbers of people affected, the passage of time, the absence of litigation, and crucially the lack of transparency in the authority’s actions and reasons, that the public interest in disclosing the information clearly outweighed the strong public interest in maintaining the exemption, which was all the stronger in this case because the opinion was still live. The Tribunal relied on the authority of *Bellamy* which stated that there is a ‘strong element of public interest inbuilt into the privilege itself’ and that ‘at least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest’. The Tribunal considered that the countervailing considerations adduced here were not equally strong; they were stronger.

## **Conclusion**

The Tribunal allowed the appeal and substituted the decision notice.