

FOIA s.42 – Qualified exemption: legal professional privilege

## ***James Kessler QC v IC & HM Commissioners for Revenue and Customs***

**EA/2007/0043**

**29<sup>th</sup> November 2007**

### **Cases:**

Kirkaldie v IC and Thanet District Council [2006] UKIT EA\_2006\_001

Bellamy v IC and The Secretary of State for Trade and Industry [2006] UKIT EA\_2005\_0023\_

### **Facts**

The Appellant is a QC, with a specialist practice in the taxation of trusts. The Finance Act of 2006 made some radical changes to this area; in particular removing what was known as the “professional trustee residence rule”. Under this “rule”, professional trustees were – in certain situations relating to trusts created by foreign settlors – treated as not resident in the United Kingdom, with the consequence that disposals of the property of the trusts were not subject to capital gains tax (“CGT”). Despite a lengthy consultation process on aspects of the changes envisaged under the Act, there was no specific consultation on this topic. When the provisions were abolished, HMRC indicated that this was because the Department of Trade and Industry had advised that to retain the rule would amount to a State aid. The Appellant sought a copy of that Advice. HMRC claimed it was exempt information under s.42 FOIA (legal professional privilege).

The IC decided that the exemption did apply and that the public interest in maintaining the exemption outweighed the public interest in disclosure.

### **Findings**

#### Was s.42 engaged?

The Tribunal found that the information requested fell within the category of material for which a claim for legal professional privilege could be maintained in legal proceedings. The Tribunal were not persuaded that they needed to identify any or all “relevant” proceedings in which a claim to legal professional privilege could be maintained. The Appellant’s interpretation on the application of s.42 FOIA would involve a series of hypothetical questions to try to identify any or all legal proceedings in which legal professional privilege might be asserted, followed by an analysis of the rules relating to the particular jurisdiction(s) identified.

#### Had legal professional privilege been waived?

The Tribunal did not find that legal professional privilege had been waived by references made at various points to the existence and conclusion of the advice from the DTI. The Tribunal preferred the argument advanced by HMRC that the rule that by relying upon part of a privileged document before a court the party doing so waives privilege in the whole document does not apply to partial disclosure of

privilege information outside the context of litigation. The Tribunal held that the facts of this case were different to those in the case of *Kirkaldie*.

### The Public Interest

The Tribunal held that although there would be powerful reasons for maintaining the exemption because of its very nature as a protection from disclosure, it is not an absolute exemption, and care should be taken not to accord it higher status. The Tribunal reiterated what has been said in other decisions within this jurisdiction that there will be occasions when the public interest in disclosure will outweigh the public interest in maintaining the exemption.

As to the application of that public interest balancing exercise, the Tribunal found that FOIA puts no onus on an applicant to show that the public interest in disclosure outweighed the public interest in maintaining the exemption and that the IC did not place any such burden on the Appellant.

The Tribunal was not concerned with the accuracy of the Advice obtained by HMRC or the damage that was said to have been caused to the professional trustee market in the UK.

The Tribunal identified a number of public interest factors in favour of disclosure and in favour of maintaining the exemption, some of which had not been raised before or considered by the IC. Some of these factors were given very little weight. The Tribunal held that although it would be wrong to argue that the decision in *Bellamy* effectively makes the exemption absolute, the public interest in maintaining the exemption for information protected by legal professional privilege must be given great weight.

Weighing all the factors of public interest, the Tribunal concluded that the public interest in favour of maintaining the exemption does outweigh the public interest in favour of disclosure at this time.

### **Conclusion**

The Tribunal upheld the IC's Decision

### **Observations**

Additionally, the Tribunal commented that the general public interest in accountability and transparency had been poorly served in relation to the decision taken regarding the "professional trustee residence rule" amounting to State aid. HMRC were encouraged to continue discussion on this topic and to provide fuller reasoning on why the Government reached the conclusions it reached on State aid with the Tribunal recognising the risk that a full statement of legal reasoning could trigger further argument that legal professional privilege had been waived. The Tribunal expressed the view that it would be an absurd and unfortunate outcome for public bodies to be inhibited from giving adequate reasons for decisions through fear of misplaced or unfortunate application of the law on waiver of legal professional privilege. There should be no incompatibility between respecting the confidentiality of legal advice given in the course of policy making, and clarity and fullness in the public and reasoned explanation of concluded views.