Appeal No.EA/2007/0043

IN THE INFORMATION TRIBUNAL

UNDER THE FREEDOM OF INFORMATION ACT, 2000

BETWEEN

JAMES KESSLER QC

Appellant

-and-

THE INFORMATION COMMISSIONER

Respondent

-and-

HER MAJESTY'S REVENUE AND CUSTOMS

Additional Party

APPELLANT'S WRITTEN SUBMISSION

References to page numbers refer to the Bundle of Documents compiled by the Respondent as directed by the Tribunal. References to tab numbers refer to the enclosed file of the Appellant's authorities.

The Basic Facts

1. This case arises out of the abolition of the "professional trustee residence rule" on 6 April 2007.

Under this rule, professional trustees of trusts created by foreign settlors were treated as not resident in the UK, with the consequence that disposals of the property of such trusts were not subject to UK capital gains tax[1].

2. The undisputed evidence before the Tribunal is that

    1. this rule was necessary to enable UK professional trustees to compete on a level playing field with professional trustees in other countries[2]; and

    2. its abolition puts UK professional trustees at a serious competitive disadvantage in the international market for the services of professional trustees and is driving investment business out of the UK[3].

3. The Additional Party, HMRC, claimed that the rule had to be abolished because they had been advised by the Dti that it was contrary to EC Rules on State Aids[4].

4. The Appellant sought disclosure of that advice under the Freedom of Information Act 2000[5] ("the Act"). HMRC and the Respondent, the IC, refused disclosure on the ground that it was covered by legal professional privilege and therefore exempt from disclosure under s.42 of the Act.

5. HMRC also invoked the exemption of material relating to the formulation of government policy in s.35 of the Act, but the IC did not resolve this point[6].

The Issues

6. The following issues arise:

    1. Whether a claim to legal professional privilege could be maintained for the Dti's advice and the letter requesting it, in relevant legal proceedings[7];

    2. Whether HMRC waived legal professional privilege by deploying the Dti's advice as the sole reason for abolishing the professional trustee residence rule[8];

    3. Whether the public interest in maintaining the exclusion of the duty of disclosure outweighs the public interest in disclosing the information[9];

    4. Whether the advice is exempted from disclosure under s.35 of the Act[10].

7. Issue (a) is raised by the Appellant's Supplementary Ground of Appeal[11], for which leave has been sought[12] under Rule 11 of the Information Tribunal's Rules[13]. The Appellant has provided the other parties with the full text of his submission on this issue[14], enabling them to respond to it in their written submissions, and the other parties have confirmed that they do not object to its admission into the proceedings. In these circumstances, it is respectfully submitted that leave should be

granted.

8. Disclosure cannot be resisted under s.42 of the Act if the Appellant succeeds on any of issues (a), (b) or (c). In this event, disclosure could still be resisted, at least in theory, under s.35 of the Act, which is addressed by issue (d). Although the IC did not resolve issue (d), it is respectfully submitted that the Tribunal can and should do so if it finds in favour of the Appellant on any of issues (a), (b) or (c).

9. Under s.58 of the Act, the Tribunal may make any notice which the IC could have made; this includes a notice resolving issue (d). The alternative course of remitting the case to the IC would be likely to result in significant delay as well as further expenditure of time and effort by all parties. Disclosure delayed is disclosure denied.

10. Furthermore, both the IC and HMRC have invited the Tribunal to consider the s.35 issue: see the IC's Reply §31[15] and HMRC's Reply §2[16].

The role of the Tribunal

11. Under s.58 of the Act, the Tribunal must decide the issues on their merits. In particular, the Tribunal is not restricted to reviewing whether the IC's assessment of the public interest balance was irrational. As the Tribunal said in ***Bellamy***[17]:

> "***If the Tribunal considers that the Commissioner was wrong in his judgment of the public interest balance in accordance with section 2(2)(b), it will overrule him. It merely needs to come to the conclusion that it takes a different view.***"

12. It is necessary to emphasise this point because the IC's Reply[18] appears to be based on the premise that the Appellant has to show that the IC's Decision was irrational. That premise is wrong in law.

Key features of this case

13. The following features of this case are, it is submitted, of particular importance:

    1. HMRC and the government have stated that the professional trustee residence rule was abolished solely because of the Dti's advice that it infringed EC state aid rules, contrary to the policy which they would otherwise have preferred[19].

    2. The abolition of the rule has caused and is causing significant damage to professional trustees in the UK and the removal of investment business to other countries[20].

    3. Without seeing the advice, it is not possible for persons concerned by this state of affairs to identify whether and how the advice is wrong, and to make effective representations to reconsider the abolition of the rule[21].

4. HMRC have represented that the Dti's advice was unequivocal[22]. If this is true, the advice is difficult to reconcile with the view of Christopher Vajda QC[23] and the retention of the same rule by the Irish Republic[24]; and there is a strong public interest in allowing interested parties to examine the advice to see if it is based on a fallacy or incorrect factual basis. If, on the other hand, these statements were not true (i.e. the advice was qualified), there is a strong public interest in disclosing it to restore candour and to enable interested parties to understand the significance and limits of the qualifications; and this may lead them to propose alternatives which may be compatible with the advice and with the legitimate business of professional trustees in the UK.

5. It appears from the evidence in this appeal that the advice sought by HMRC and given by the Dti did not in fact relate to the existing form of the professional trustee residence rule but rather to a proposed alternative form[25]. It is therefore possible that HMRC has made a fundamental error in supposing that this advice was applicable to the rule in its existing form. Improving the decision-making process by enabling the public to identify and correct errors such as these is one of the principal aims of the Act[26].

6. Apart from one contention which is incorrect on the facts[27], it is not suggested that disclosure of the Dti's advice will cause any specific detriment to the public interest relating to the subject-matter of this case. Instead, the IC and HMRC argue in essence that disclosure should be excluded in this case because it might discourage frank legal advice in other cases.

7. That approach is contrary, it is submitted, not only to the basic policy of the Act but also to a key principle of government policy on tax simplification. As the announcement accompanying the Pre-Budget Report of 9 October 2007[28] states:

> "***The Government commits to three principles of tax simplification … the Government will share its findings on the viability of tax simplifications with business"***

The Dti's advice apparently found that it was not viable to simplify the taxation of trusts by maintaining the professional trustee residence rule and extending it to income tax. Yet HMRC is refusing to share it with those carrying on business as professional trustees.

Documents and evidence

14. The Tribunal is invited to read the documents listed below; page references relate to the bundle prepared by the IC. Since the bundle is not in the most convenient order, the Tribunal may find it helpful to follow the order set out below.

    1. **HMRC Announcements and Papers**

        i. HMRC Discussion Paper 17/12/2002, p161, §67

        ii. HMRC Consultation Document 13/8/2004, p198, §4.24

iii. HMRC Feedback Paper 16/3/2005, p222, §30

iv. HMRC Announcement 16/3/2005, p287-8

v. HMRC Draft Explanatory Note 16/3/2005, p266, §34

vi. HMRC Announcement 22/3/2006, p300, first bullet

vii. HMRC Regulatory Impact Assessment 22/3/2006, p292, §15.19

2. **Appellant's requests to HMRC for disclosure and HMRC's responses, pp14-23**

3. **Proceedings before the IC**

   i. Appellant's application to the IC, pp0-5

   ii. HMRC letter to the IC, p37

   iii. IC's Decision, pp47-52

4. **Pleadings on appeal**

   i. Grounds of Appeal, pp60-61

   ii. IC's Response, pp94-109

   iii. HMRC's Response, pp142-3

   iv. Supplementary Ground of Appeal

5. **Evidence**

   i. Kessler (1), pp117-120

   ii. Opinion of Christopher Vajda QC, pp125-9

   iii. Ingham, pp131-4

   iv. Chamberlain, pp135-141

   v. Fearn, pp301-316

   vi. Hartnett, pp317-323

   vii. Kessler (2), pp324-327

15. The IC and HMRC have not sought to cross-examine any of the Appellant's witnesses. In these circumstances, the Tribunal is bound to accept their evidence unless it can be said to be incredible

(which, it is submitted, it cannot): see ***Markem v Zipher***[29] §§56-61.

16. The same point does not apply in reverse, since the Appellant sought an oral hearing at which witnesses could be cross-examined but was refused. The Appellant is entitled to criticise HMRC's evidence, in particular where it is contradicted by stated government policy.

Issue (a): Could a claim to legal professional privilege be maintained for the Dti's advice and the letter requesting it in relevant legal proceedings?

17. s.42 of the Act provides that

> "***Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information".***

18. The Act does not define the legal proceedings to which this provision refers. However, it must, it is submitted, refer to relevant legal proceedings. In particular, exemption from disclosure under the Act could not be justified on this ground if disclosure could be required in the very legal proceedings contemplated by the advice in issue.

19. s.42 is an exception to the basic principle of disclosure set out in s.1 of the Act. As such, it should be interpreted strictly and should not be extended beyond its specific object. Its object is identified in the White Paper[30] which preceded the Freedom of Information Bill in the following terms:

> "***Lastly, FOI should not disadvantage the government in litigation. For that reason, the Act will not cover legal advice obtained by the government from any source or any other advice within government which would normally be protected by legal professional privilege."***

20. The object of not disadvantaging the government in litigation does not apply where the advice is not protected in the very proceedings which it contemplates.

21. The proceedings contemplated by the Dti advice in this case are proceedings for enforcement by the European Commission of the rules on state aids in the Treaty of Rome. These rules are contained in section 2 of the "Rules on Competition"[31]. Section 1 of the "Rules on Competition" contains rules applying to undertakings.

22. The European Courts have consistently held, most recently in ***Akzo v Commission***[32] at §§165-183, that

> "***the protection accorded to LPP [legal professional privilege] under Community law, in the application of Regulation No 17, only applies to the extent that the lawyer is independent, that is to say, not bound to his client by a relationship of employment …. The requirement as to the position and status as an independent lawyer, which must be met by the legal adviser from whom the written communications which may be protected emanate, is based on a concept of the lawyer's role as collaborating in the administration of justice by the***

courts and as being required to provide, in full independence, and in the overriding interests of the administration of justice, such legal assistance as the client needs ….

"***It follows that the Court expressly excluded communications with in-house lawyers, that is, legal advisers bound to their clients by a relationship of employment, from protection under LPP." (Akzo §§166-7)***

23. ***Akzo*** and earlier authorities concerned proceedings against undertakings under section 1 of the "Rules on Competition" in the Treaty of Rome. However, it is submitted that the same rule applies in proceedings against states under section 2 of the "Rules on Competition". These proceedings are governed by Regulation 659/1999[33] which provides a generally similar procedural regime to that provided by Regulation 17[34] for proceedings under section 1 of the "Rules on Competition". In particular, art. 5 of Regulation 659/1999 contains a power to request information similar to art. 11 of Regulation and art. 24 of Regulation 659/1999 contains similar protection for "Professional Secrecy" as art. 20 of Regulation 17.

24. The advice in question was given by a lawyer employed by the Crown in the Dti[35]. He would not be regarded as an "independent lawyer" for the purpose of the criterion re-affirmed in ***Akzo***. It follows that a claim to legal professional privilege could not be maintained in the very proceedings contemplated by the Dti advice. In these circumstances, it is submitted that the exemption in s.42 of the Act does not apply.

Issue (b): Did HMRC waive legal professional privilege by deploying the Dti's advice as the sole reason for abolishing the professional trustee residence rule?

The facts

25. On publishing the draft of the Finance Bill 2006 on 22 March 2006, HMRC stated:

"***What has happened to the professional trustee measure in the residence test?***

"***As we explained when we published the draft legislation earlier in the year, there was a risk that the professional trustee measure would fall foul of the EU State aid rules. We have now consulted with the Department of Trade and Industry which has confirmed that it would indeed constitute a State aid. In view of this we have had to withdraw the measure.***"[36]

26. In the Parliamentary debate on the Bill, the Paymaster General (the Minister then responsible for the HMRC) stated:

"… ***the Department of Trade and Industry advised HMRC that the new test would constitute a state aid – it would have been unfair competition against professional trustees in other European states – and that there were no grounds on which the European Commission would have approved the measure as a state aid. Based on that advice the Department withdrew the proposals covering professional trustees and it would be inappropriate***

therefore to retain the existing capital gains tax rule …"[37]

27. Having thus deployed the Dti's advice to justify the abolition of the professional trustee residence rule, it is submitted that the government cannot now maintain any claim to legal professional privilege in the advice, even if (contrary to §§- above) it ever could.

The Law

28. There are two aspects to this issue:

    1. Whether legal professional privilege is waived by deploying the subject-matter in a public announcement to justify certain action;

    2. Whether legal professional privilege in the whole of the advice is waived by deploying the gist of it.

29. As to (a), confidentiality is a pre-condition for the existence of legal professional privilege: see ***Three Rivers v Bank of England***[38] at §24. It must follow that publication to the world at large waives legal professional privilege. This proposition was applied in the New Zealand cases, ***Chandris Lines v Wilson & Horton***[39], approved in ***Harbour Inn Seafoods v Switzerland General Insurance***[40], and adopted by this Tribunal in ***Kirkaldie***[41] at §26, citing the ***Chandris Lines*** case.

30. As to (b), it is well-established that deploying the gist of legal advice to justify a particular position waives privilege in the whole of it. Those who have been thus addressed are entitled to know the full story. As Mustill J put it in ***Nea Karteria Maritime v Atlantic and Great Lakes Steamship***[42]:

    "***... where a party is deploying in court material which would otherwise be privileged, the opposite party and the court must have an opportunity of satisfying themselves that what the party has chosen to release from privilege represents the whole of the material relevant to the issue in question. To allow an individual item to be plucked out of context would be to risk injustice through its real weight or meaning being misunderstood.***"

31. That case related to material deployed in litigation, but the principle is not confined to material so deployed. In ***AWB v Cole***[43], the Federal Court of Australia considered whether AWB had waived privilege in legal advice relating to its dealings under the UN Oil-For-Food Programme for Iraq. AWB had summarised the advice in its discussions with the Australian Government, the Independent Inquiry Committee of the UN ("IIC") and a Special Commission established by the Commonwealth of Australia ("the Commission"). The Court concluded at §178:

    "***Overall, I am satisfied that by means of these disclosures, AWB deployed the gist or substance of legal advice it had obtained. Moreover, I am satisfied that AWB made a conscious and voluntary decision to deploy this legal advice in its dealings with the Australian Government, the IIC and the Commission because it considered that it was in its commercial interests to do so. These actions are inconsistent with the maintenance of***

confidentiality in the legal advice. "

32. Similarly, in ***Chandris Lines v Wilson & Horton***[44] publication of the conclusion of a report in a newspaper article (quoted at p603 l.22 – 604 l.11) waived privilege in the whole report: see p611, ll.9-13). The Court concluded:

> "***The defendant advised the world it had the report. It disclosed part of its contents. Yet it still refuses to disclose the whole document. I consider in all the circumstances, supported by the law as shown in the Marlborough Hotel and Great Atlantic cases, that there has been a waiver of privilege."***

As mentioned above, this case was cited with approval by the Tribunal in ***Kirkaldie***[45].

33. In ***Dunlop Slazenger International v Joe Bloggs Sports***[46], the English Court of Appeal held that a party had waived privilege in communications between itself and its expert witness by summarising in an affidavit certain findings communicated to it by the expert. The relevant passage in the affidavit is set out at §7 of the Judgment of Waller LJ. Waller LJ concluded at §§11-12:

> "*… the authorities provide for a distinction between a reference to the effect of the document and reliance on the content. Mr Croxford suggests that this is a reference case and not a deployment case.*
>
> "***In my view, this is clearly a deployment case. This is a case in which, by the terms of those paragraphs, 13 and 14 in particular, of Miss Ahmed, Miss Ahmed was seeking to refer to the contents of the information that was being supplied by the expert to her in order to seek to persuade Gibbs J to make an order that the further evidence should be allowed to be put in."***

34. Thorpe LJ makes it clear at §18 that "effect" is not being used in the sense of "tenor", but in the sense of "consequence":

> "***In preparing her witness statements dated 21st and 28th May 2003, Miss Usmat Ahmed might have confined herself to a bare reference to a report from Delta Clinics as a result of which she took steps to prepare statements from additional witnesses and supplemental statements from existing witnesses. But, as paragraphs 13 and 14 of her first statement and paragraph 3 of her second statement demonstrate, she elected to state what may prove to be either the whole contents or the significant contents of the report."***

35. ***Chandris Lines*** and ***Dunlop Slazenger*** were followed by this Tribunal in ***Kirkaldie***[47]. After reviewing these and other authorities, the Tribunal affirmed that

> "***The test for waiver is whether the contents of the document in question are being relied on. A mere reference to a privileged document is not enough, but if the contents are quoted or summarised, there is waiver."***

36. It was contended in ***Kirkaldie*** that legal professional privilege had been waived by the following statement by a Councillor at a public session of a Local Council:

> "***The Council has taken legal advice on this matter and whether or not the introduction of the 11 night time arrivals constitutes a change of use requiring planning permission. The advice is that it may as a matter of fact and degree".***

37. The Tribunal found that

> "***the basis on which the advice had been sought and the main opinion given in that advice, were mentioned by Councillor Kirby at the public meeting" (§41)***

and concluded

> "***Applying the test set out in the Dunlop Slazenger International Ltd case referred to above, by providing a summary of the legal advice at a full Council meeting on 13 January 2005 followed by the recording of the disclosure in the minutes of the meeting, the Tribunal finds that the legal professional privilege exception had indeed been waived by TDC." (§42)***

The Tribunal accordingly ordered that the whole of the opinion must be disclosed.

38. In this case, HMRC and its Minister did not simply say that they had received advice from the Dti as a result of which they had decided to abolish the professional trustee residence rule - which would merely have been referring to the effect of the advice. Instead, they deployed at least part of the substance of the advice, publicly stating

> "***the Department of Trade and Industry advised HMRC that the new test would constitute a state aid – it would have been unfair competition against professional trustees in other European states – and that there were no grounds on which the European Commission would have approved the measure as a state aid"***[48]

39. In these circumstances, by the standards applied in the authorities cited above, privilege has clearly been waived in the whole of the advice and the letter requesting it.

The IC's decision

40. In §14 of his Decision[49], the IC said:

> "***The reference to consultation with the DTI in the announcement [of 22 March 2006] does not mention that legal advice on the point has been obtained from the DTI and it was the legal advice that concluded that the measure would amount to state aid. The reference is very general and is not sufficiently specific to amount to a waiver of legal professional privilege in respect of the request for legal advice and the advice provided."***

41. With due respect to the IC, the first sentence quoted above is specious. HMRC had specifically stated in the announcement[50] that the Dti had confirmed that the measure would constitute a State

aid. Although HMRC did not expressly characterise the confirmation which had been given by the Dti as "legal advice", it was by its nature legal advice. Furthermore, HMRC themselves accept that it is public knowledge that they sought and were given legal advice: see §4 of their Reply[51]. In any case, waiver of legal professional privilege does not depend on the person waiving it characterising the material as legal advice. Indeed, it is does not even depend on the material being legal advice, as the cases ***Chandris Lines***[52] and ***Dunlop Slazenger***[53] illustrate. What matters is whether part of the content of the material has been deployed by the person claiming privilege.

42. Nor is waiver avoided by the suggested generality of the reference, if (as here) what purports to be the primary conclusion of the advice has been deployed: see ***AWB v Cole***[54], ***Dunlop Slazenger International v Joe Bloggs Sports***[55] and ***Kirkaldie***[56] cited above. In any case, the statement of the sponsoring Minister (quoted by HMRC in their Reply and reproduced at § above) was significantly more specific and constituted a clear deployment purportedly of the gist of the advice to support the Government's position. The disclosure in this case is in fact considerably more specific than, for example, that in ***Kirkaldie*** which was held by this Tribunal to waive privilege in the full advice.

The Replies

43. The IC's Reply claims at §28(2)[57] that

> "***The announcement [of 22 March 2006] did not even arguably examine or confirm the nature of any legal advice which had been given by the DTI's solicitors directly to HMRC"***

44. With due respect to the pleader, the announcement clearly did purport to confirm the nature of advice given by the Dti to HMRC. That it did not examine the advice is the very mischief addressed by the rule that a partial disclosure is treated as a waiver of the whole - so that the real weight or meaning of the document is not misunderstood, as Mustill J put it in ***Nea Karteria***[58]. That the announcement did not explicitly characterise the advice as legal is specious and irrelevant, as explained in § above. That it did not specify that the advice had been given by the Dti's solicitors directly to HMRC is also irrelevant: what matters is that the gist was deployed to support HMRC's position.

45. The IC's Reply states at §28(3):

> "***There is plainly a distinction between: (a) a Government department publicly confirming that it has withdrawn a particular measure based on the views adopted by another Government Department about the legality of that measure and (b) a Government department praying in aid legal advice which it has received from another department's solicitors in the course of its public pronouncements"***

The pleader then claims that this case falls within (a) and not (b).

46. In fact this case falls within category (b). HMRC and its Minister went beyond saying that the measure had been withdrawn based on the views of the Dti. If that had been all, they might possibly

have avoided waiver on the basis that they did not deploy the content of the advice but merely stated its effect on HMRC (see the ***Dunlop*** case discussed in §§- above). However, HMRC and its Minister went further, by stating and deploying in support of their position what purported to be the conclusion of the advice, namely that the measure

> "***would constitute a state aid – it would have been unfair competition against professional trustees in other European states – and that there were no grounds on which the European Commission would have approved the measure as a state aid".***

47. HMRC likewise contend in their Reply[59]:

> "*… there is no basis for the contention that HMRC has ceased to be able to maintain a claim to legal professional privilege in respect of the information, by reason of the fact that it is public knowledge that HMRC sought legal advice and then acted in reliance on that advice. Neither of these matters affects the confidential nature of the disputed information."*

48. Again, if HMRC had merely said that they had sought legal advice and acted in reliance on it, they might have avoided waiving privilege. But in fact, they went beyond this, by deploying the purported conclusion of the advice in support of their position. They thereby destroyed the confidentiality of the conclusion and waived privilege in the remainder of the advice in accordance with the principle applied in the cases cited above.

49. In these circumstances, privilege in the whole advice has been waived and the exemption in s.42 of the Act cannot now apply even if it ever could.

Issue (c): Does the public interest in maintaining the exclusion of the duty of disclosure outweigh the public interest in disclosing the information?

The law

50. s.1(1) of the Act[60] lays down the basic principle:

> "*Any person making a request for information to a public authority is entitled … (b) … to have that information communicated to him."*

51. s.2(2) of the Act provides that

> "*In respect of any information which is exempt information …. section 1(1)(b) does not apply if or to the extent that … (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."*

52. The Act thus establishes a general duty of disclosure subject to exceptions in relation to certain types of information if in all the circumstances the public interest in maintaining the exemption outweighs the public interest in disclosing the information. It is apparent, it is submitted, from the scheme of the Act and the wording of these provisions that:

1. The burden rests on the authority resisting disclosure to show that the public interest in maintaining the exemption outweighs the public interest in disclosure.

2. This burden can only be discharged by reference to the circumstances of the particular case. The mere fact that the information falls within a particular class is not sufficient. Information must be disclosed except where there is an overriding need to keep the specific information in issue confidential.

53. If these propositions are not clear from the legislation, it is submitted that the ambiguity can and should be resolved by reference to the statements of the promoters of the Bill and relevant amendments of it in Parliament in accordance with the guidance in ***Pepper v Hart***[61].

54. ss.2(1) and 2(2) in their present form were introduced into the Act by amendments 2 and 4 moved by Lord Lester[62]. Speaking to these amendments, Lord Lester said:

> "***By creating a public right of access and then qualifying it with exceptions and limitations without a clear presumption in favour of public access, unless there is very good reason not to disclose the information, the Bill as it stands is seriously defective. …..***
>
> "***The purpose of these amendments is to remove that serious defect by writing into Clause 2 a clear presumption in favour of public disclosure. I shall explain our understanding of the purpose and effect of the amendments and hope that the Minister, as controller of the***