Tribunals Service

Information Tribunal

Information Tribunal Appeal Number: EA/2007/0043
Information Commissioner's Ref: FS50126996

Heard at Procession House, London, EC4
Decision Promulgated
On 29th October 2007

29 November 2007

BEFORE

DEPUTY CHAIRMAN

ANNABEL PILLING

AND

LAY MEMBERS

JENNI THOMPSON

AND

ANDREW WHETNALL

Between
JAMES KESSLER QC
Appellant

and

INFORMATION COMMISSIONER
Respondent

and

HM COMMISSIONERS FOR REVENUE AND CUSTOMS

Additional Party

Written Representation:

For the Appellant: Jonathan D.C.Turner
For the Respondent: Jane Oldham
For the Additional Party: Jonathan Swift

Decision

The Tribunal upholds the decision notice dated 10th April 2007 and dismisses the appeal. The Tribunal has come to the decision that the information sought by Mr Kessler is subject to legal professional privilege, which has not been waived by HM Commissioners for Revenue and Customs. The public interest in maintaining the exemption outweighs the public interest in favour of disclosure.

Reasons for Decision

Introduction

1. The central facts in this case relate to a decision taken by HM Revenue and Customs ("HMRC") and thereafter contained within the Finance Act 2006 which effectively abolished 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").

2. The disputed information sought by the Appellant comprises legal advice (and the instructions by which that legal advice was sought) sought and obtained by HMRC from the Department of Trade and Industry ("DTI") in relation to the proposed legislation affecting the position of "professional trustees".

Background

3. Prior to the Finance Act 2006, trusts were subject to different tax regimes in respect of income tax and capital gains tax. The difference between the separate treatments can be described in summary terms as follows:

   The **income tax regime** provided for the position of each trustee of a trust to be considered separately. If all trustees were UK resident for tax purposes the trust was treated as UK resident for income tax purposes, if none of the trustees were UK resident it was not treated as UK resident, except insofar as income was from a source in the UK. If some trustees were UK resident but others were not, the trust was not treated as resident in the UK for income tax purposes if the settlor (i.e. the person who created the trust) was neither resident nor domiciled in the UK at the time he provided funds for the trust.

   In the **capital gains tax regime** the trustees were treated as a single and continuous body of persons, and were to be treated as being resident in the UK and liable to capital

gains tax (in practice met from the assets of the trust) unless both the general administration of the trusts was ordinarily carried on outside the UK and a majority of the trustees were not resident or ordinarily resident in the UK. However, a "professional trustee" (i.e. a person whose business is the management of trusts and who is the trustee of a trust in that capacity) was not to be treated as resident in the UK if the trust property had been provided by a person who (when he provided the property) was not domiciled, resident or ordinarily resident in the UK.

4. Put simply, non-UK settlements were subject to income tax unless at least one trustee was non-UK resident, in which case they were liable to income tax only in relation to UK-source income. In relation to CGT, this would be charged on the capital gains of trusts if the trustees were resident in the UK. There was an exception, however, contained within section 69(2) of the Taxation of Chargeable Gains Act 1992, whereby trustees acting in the course of a business of managing trusts were treated as not resident in the UK in relation to a trust if the whole of the settled property was provided by a person who was not domiciled or resident in the UK. The exception is referred to as the "professional trustee residence rule". No such special residence rule applied to the income tax liability.

5. In 2003, the Chancellor announced plans to modernise and simplify the taxation of trusts.

6. We were referred to a succession of consultation papers, summaries of responses and draft clauses which dealt, alongside many other matters, with the "professional trustee residence rule". There does not seem to be any material disagreement on the following stages of consultation, which we list in summarised form:

> **December 2003:** discussion paper including suggestions concerning residence tests identifying several options.
>
> **April 2004:** Summary of responses to the discussion paper, suggesting that the idea of a single residence test applicable for income tax and CGT had been generally supported, but that no clear consensus had emerged on which approach to follow and no significant level of support for any of the three new approaches to residence tests that had been outlined.
>
> **August 2004:** a further consultation document referring back to the outcome of the December 2003 consultation and seeking views on further issues. For the "residence test" it was proposed that there should be a common definition of trust, based on the current inheritance tax definition; the CGT approach of treating trustees as a "single and continuing body of persons" should be adopted for income tax purposes; the settlor-interested and residence tests for income tax and CGT be harmonised and that the new residence test should be based on the existing income tax rules. It was indicated specifically that in relation to professional trustees, the proposal that the current CGT provisions for professional trustees should be applied to the new test was not being pursued.
>
> **March 2005:** summary of responses to the August 2004 consultation, inter-alia that "considerable concern" had been expressed at the proposal to drop the special provisions for a "professional trustee residence rule" that existed under the current CGT regime. Many respondents felt this would be damaging for the UK trusts industry and would promote the interests of professional trustee firms in other jurisdictions. It was noted that although larger UK firms would typically have agreements with overseas firms to provide non-resident professional trustees, this would not be the case for smaller firms.

March 2005: further consultation paper repeating that it was not intended to provide a special rule for professional trustees, but asking for more representations about why the existing income tax test might make it more difficult for professional trustees to attract trustee business to the UK, and for evidence that the income tax test has already deterred business.

January 2006: summary of responses to the March 2005 discussion paper, setting out the position relating to the proposed residence test and published alongside **a Draft version of the clauses of the Finance Bill.** In summary, while the residence provisions of the draft legislation were based on the application of the previous income tax approach to both income tax and CGT, new sections of the Tax and Chargeable Gains Act 1992 ("TCGA") at sections 69A-69F included provisions for a "professional trustee rule" similar to that which had previously existed in respect of CGT. However, the **Explanatory notes** to the draft clauses included the following passage:

> "The provisions contained in the proposed sections 69A to 69F of the TCGA may constitute a State aid, and HM Revenue and Customs are consulting with the Department of Trade and Industry about this. If the approval of the European Commission is required there is a possibility that those provisions may need to be amended or withdrawn."

March 2006: Regulatory Impact Assessment for Trust Modernisation contained the following paragraph:

> "We had also proposed to extend and modify the current professional trustee test, which applies for the purposes of chargeable gains and apply the modified test for purposes of both income tax and chargeable gains. However, we have been advised that this would constitute a State Aid, so this aspect of the Trust Modernisation proposals has been withdrawn."

March 2006: The Finance Bill was introduced without the "professional trustee rule" that had been included in the draft clauses published in January 2006, and with the explanation:

> "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."

The advice provided by the DTI comprises the disputed information in the present appeal.

<u>The request for information</u>

7. By letter dated 3rd April 2006, Mr Kessler requested that he was supplied a copy of the "DTI Guidance on State Aid and Professional Trustees" by HMRC under the Freedom of Information Act 2000 ("FOIA"). HMRC replied on 12th April 2006 refusing his request, claiming that the information requested fell within the exemption in section 42(1) of FOIA (legal professional privilege) and that in all the circumstances of the case the public interest in maintaining the exemption outweighed the public interest in disclosure. In describing the "more compelling factors that support the non-disclosure" of the information, reference is made to section 35 of FOIA (formulation of government policy) although it was not claimed that the information was exempt under that section.

8. Mr Kessler requested an internal review of this refusal by letter dated 10th May 2006. He confirmed that the information he sought was a copy of the advice HMRC received from the DTI specifically relating to the rules with the residence of professional trustees, rather than general guidance on what constitutes a State Aid.

9. HMRC responded by letter dated 16th June 2006 reaffirming the original decision, claiming that the information was subject to legal professional privilege falling within the exemption at section 42 of FOIA and that in all the circumstances of the case the public interest in maintaining the exemption outweighed the public interest in disclosure. At this stage, HMRC indicated that the "exemption at section 35(1)(a) of FOIA also supports the decision" not to release the information.

The complaint to the Information Commissioner

10. On 21st July 2006 Mr Kessler wrote to the Commissioner seeking a decision whether his request for information had been dealt with in accordance with Part I of FOIA. In particular he submitted that the HMRC decision to withhold the requested information did not accord with FOIA for the following reasons:

1. The requested information is not privileged and so does not fall within section 42 FOIA.

2. The requested information does not relate to the formation of government policy and so does not fall within section 35 FOIA.

3. Even if one or both of these exemptions did apply, the public interest in disclosure outweighs the public interest in maintaining the exemption, so the information should be disclosed.

11. He suggested that HMRC had elevated what was a qualified exemption from disclosure under FOIA into an absolute exemption by simply relying "upon the claim that the circumstances are within section 35 or 42".

12. There was a significant delay in the complaint being dealt with by the Commissioner. In a letter dated 20th November 2006, the Commissioner apologised for the delay in allocating a case worker to Mr Kessler's complaint and indicated that due to the number of cases outstanding "it is likely that we will be able to start work on your case in approximately 6-9 months." The Commissioner wrote to Mr Kessler again on 10th January 2007 explaining that there had been some changes in the organisation with the aim of improving case-handling procedures and that this matter had been allocated to one of the specialist central government teams. Mr Kessler was requested to confirm within 20 working days whether he still wished to pursue his complaint; he did so by letter dated 11th January 2007.

13. Rachael Cragg, Senior Complaints Officer at the Commissioner's office, wrote to Mr J Sharpe of HMRC by letter dated 29th January 2007 in relation to this and other unconnected complaints. She requested a copy of the information being withheld. HMRC replied by letter dated 27th February 2007 providing, in confidence, a copy of the advice from the DTI's legal director, Mr Stephen Hyett, produced around 20th February 2006 and a copy of the letter from Jane Halton from HMRC's solicitors' office which formed the request for the advice. A copy of the letter informing Mr Kessler of the outcome of the internal review was also provided.

14. The Commissioner issued a Decision Notice, dated 10th April 2007, which concluded that HMRC dealt with the request for information in accordance with FOIA.

15. The reasons for that decision can be summarised as follows:

1. The information requested is legal advice and is therefore covered by the exemption in section 42 of FOIA.

2. The public interest in maintaining the exemption outweighed the public interest in disclosure.

16. The Commissioner did not investigate the application of section 35 of FOIA in light of the decision reached in relation to section 42.

The appeal to the Tribunal

17. Mr Kessler appealed to the Tribunal on 3rd May 2007. He set out five grounds of appeal which can be summarised as follows:

1. HMRC had waived privilege in the advice by deploying it to justify the decision to abolish the professional trustee residence rule.

2. The public interest in disclosure was increased in the circumstances of this case by certain considerations which were then set out.

3. The public interest in "exempting the advice from disclosure" was diminished in the circumstances of this case by certain considerations which were then set out.

4. The Information Commissioner had failed to attach any or any sufficient weight to the matters set out in relation to (a), (b) and (c) and wrongly supposed that disclosure would discourage the timely provision of reliable advice.

5. The Information Commissioner wrongly approached the assessment on the basis that the onus lay on the Appellant to show that the public interest in disclosure outweighed the public interest in exempting the information from disclosure.

18. A supplementary ground of appeal was advanced on 15th October 2007:

6. A claim for legal professional privilege could not be maintained in relevant legal proceedings, namely proceedings to enforce EC state aid rules, since the advice was given by an employee of a government department.

19. The Tribunal joined HMRC as a party to the Appeal and all parties were represented at a Directions Hearing held on 16th July 2007. At that hearing, it was submitted on behalf of Mr Kessler that the matter should be dealt with by way of a full, oral hearing for two reasons:

1. So that (as yet unidentified) witnesses could be cross-examined on (as yet unprepared) witness statements.

2. So that the issues could be more effectively investigated and addressed, particularly in view of their public importance.

20. The Information Commissioner and HMRC indicated that the appeal should be determined without a hearing on the basis of written submissions from the parties and an agreed bundle of documents. It was submitted that the witnesses were not likely to give factual evidence that was disputed but rather opinion evidence. As all parties were represented by counsel, it was likely that written submissions would address properly and in detail all the relevant issues.

21. The Tribunal ruled under Rule 16 (2) of the Information Tribunal (Enforcement Appeals) Rules 2005 that this Appeal could properly be determined without a hearing.

22. The Tribunal was provided with a copy of Jane Halton's request for advice and a copy of the advice from Stephen Hyatt of the DTI. These were provided in confidence and not disclosed to Mr Kessler. At the Directions Hearing Mr Kessler had objected to this course of action and the Tribunal ruled, giving reasons dated 18th July 2007, that the disputed information should be provided to the Tribunal but withheld from Mr Kessler. At that stage leave was not given for "confidential" submissions to be made but the parties were at liberty to apply on notice to the other parties.

<u>The questions for the Tribunal</u>

23. The questions for the Tribunal to consider were well identified by the grounds of appeal and the supplementary ground of appeal. Put simply, the issues were

1. Whether section 42 of FOIA was engaged;

2. If so, whether legal professional privilege had been waived;

3. If not, had the Information Commissioner erred in his approach to section 42, and did the public interest in maintaining the exemption outweigh the public interest in disclosure.

The Powers of the Tribunal

24. The Tribunal's powers in relation to appeals under section 57 FOIA are set out in section 58 FOIA, as follows:

1. If on an appeal under section 57 the Tribunal considers-

1. that the notice against which the appeal is brought is not in accordance with the law, or

2. to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

2. On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

25. The starting point for the Tribunal is the Decision Notice of the Commissioner but the Tribunal also receives and hears evidence, which is not limited to the material that was before the Commissioner. The Tribunal, having considered the evidence (and it is not bound by strict rules of evidence) may make different findings of fact from the Commissioner and consider the Decision Notice is not in accordance with the law because of those different facts. Nevertheless, if the facts are not in dispute the Tribunal must consider whether FOIA has been applied correctly. In cases involving the public interest test in section 2(2)(b) a mixed question of law and fact is involved. If the facts are decided differently by the Tribunal, or the Tribunal comes to a different conclusion on the same facts that will involve a finding that the Decision Notice was not in accordance with the law.

26. The question of whether the exemption in section 42 FOIA is engaged, whether legal professional privilege had been waived and whether the consequential public interest test was applied properly are all questions of law based upon the analysis of the facts. This is not a case where the Commissioner was required to exercise his discretion.

Preliminary matters at the Hearing

27. There were three preliminary matters to be considered at the Hearing:

    1. Whether the Tribunal would read the copy of Jane Halton's request for advice and the copy of the advice from Stephen Hyatt of the DTI that had been provided in confidence;

    2. Whether the Tribunal would take into consideration "closed" submissions from the Additional Party; and

    3. Whether the Tribunal would take into consideration a written Reply from the Additional Party provided on the morning of the Hearing.

28. There were no submissions that the Tribunal should not read the copy of Jane Halton's request for advice and the copy of the advice from Stephen Hyatt of the DTI. It was clear from the submissions of all the parties that it was expected and necessary for us to do so. We therefore decided that we would read these documents and take them into consideration when reaching our decisions on the issues in this appeal.

29. The Additional Party had applied on 25th October 2007 for a direction that "closed" submissions should be considered by the Tribunal. This was made at short and late notice to the Appellant who provided detailed written objections the same day. We were of the opinion that the application both could and should have been made earlier. We decided that we would read the "closed" submissions and if there were any matters addressed therein that required further submissions from the Appellant we would be able to adjourn our decision. In fact, the "closed" submissions dealt with such discrete matters that we did not need to invite any further representations.

30. However, the Additional Party also provided a written Reply to the Tribunal on the morning of the Hearing. There had been no direction sought or given in relation to the service of Replies and there was no Reply from the Appellant or the Respondent. We decided to confine our consideration of the Reply to one area, the issue of waiver, as that ground of appeal had apparently been overlooked by the Additional Party in the preparation of the "open" submissions. Since the Hearing there has been a not inconsiderable amount of correspondence on the topic and, in fairness to all parties, we decided to consider any Reply any party wished to provide at that stage. The Appellant and the Additional Party have provided Replies since.

Legal submissions and analysis

31. We were provided with substantial bundles of authorities by the Appellant and the Additional Party. Many of these authorities deal with the nature of legal professional privilege. This is a fundamental element in the administration of justice, based on the need to obtain legal advice and assistance, and to ensure that all things reasonably necessary in the shape of communication to the legal advisers are protected from production or disclosure in order that legal advice may be obtained safely and sufficiently. The circumstances in which legal professional privilege can be claimed have been analysed fully in Three Rivers District Council and Others v Governor and Company of the Bank of England [2004] UKHL 48.

Was section 42 FOIA engaged?

32. The supplementary ground of appeal advanced by the Appellant on 15th October 2007 asserts that section 42 FOIA is not engaged because a claim to legal professional privilege could not be maintained in "relevant" legal proceedings, identified as proceedings to enforce EC state aid rules.

33. Section 42 FOIA is as follows:

> *1. 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.*

Section 2(2)deals with the effect of the exemptions under FOIA. The public authority need not comply with the duty to disclose under section 1 FOIA if *"in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information".*

34. .The Appellant submits that although FOIA does not provide a definition for the legal proceedings to which this provision refers, it must refer to relevant legal proceedings and those relevant legal proceedings could only be proceedings for enforcing state aid rules, as that is what is contemplated in the advice itself. It is further submitted that, in those proceedings, as the advice in question was provided by an "in-house" as opposed to "independent" lawyer, a claim for legal professional privilege could not be maintained.

35. The Respondent and the Additional Party each submit that this submission is misconceived. The Appellant's interpretation on the application of section 42 FOIA, it is said, 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.

36. The Tribunal considers that the meaning and effect of section 42 FOIA is clear and rejects the interpretation put forward by the Appellant. The only question for the Tribunal can be whether, in respect of the information requested, under English law a claim of legal professional privilege could be maintained (or whether under Scots law a claim of confidentiality could be maintained) in legal proceedings. If the answer is "yes", the information falls within the scope of section 42 FOIA and the qualified exemption is engaged. This question may be more difficult when the privilege is sought to be extended to material such as notes, memoranda and correspondence that relate to information sought by a legal adviser to enable the provision of legal advice.

37. The Tribunal has seen a copy of Jane Halton's request for advice and a copy of the advice from Stephen Hyatt of the DTI and is satisfied that they fall within the category of material for which a claim for legal professional privilege could be maintained in legal proceedings. Consequently the Tribunal is satisfied that section 42 FOIA is engaged.

Has legal professional privilege been waived?

38. There is no dispute that reference was made at various points to the existence and conclusion of the advice from the DTI. On publication of the Finance Bill 2006, HMRC stated:

> "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."

39. In the course of the Committee Stage debate on the Finance Bill 2006, the Paymaster General (the minister then responsible for HMRC) stated:

> "..those new rules [contained in the draft legislation] … were published with a strong health warning that they might be withdrawn if they were found to be a state aid..
>
> "Shortly after, 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…"

40. A large number of authorities have been cited and provided to us. What is clear from these authorities is that once a document is privileged it remains privileged until there has been a waiver. Waiver is an objective and not a subjective principle. The intention of a party is not the relevant issue, rather an objective analysis of what the party has actually done.

41. The Appellant submits that the statements by or on behalf of HMRC amounted to a "deployment" of the advice "to justify the abolition of the professional trustee residence

rule". It follows, he submits, that legal professional privilege had been waived. Particular reliance was placed on the approach taken by a differently constituted panel of this Tribunal in Kirkaldie v The Information Commissioner and Thanet District Council (EA/2006/001) in which it was decided that legal professional privilege had been waived by a statement of a Councillor at a public meeting that revealed the basis on which advice had been sought and the main opinion given in that advice.

42. The Respondent and the Additional Party both submit that this argument is misconceived.

43. In particular, the Additional Party submits that the authorities relied upon by the Appellant go no further than identifying the rule that applies where a party relies on privileged material in court, and that the decision is Kirkaldie is incorrect to the extent that it sought to apply the collateral waiver rule to a situation where legal advice had not been (partly) deployed in litigation. The Respondent agrees with this interpretation of the relevant authorities.

44. We have consider 44. ed both lines of argument, and prefer that advanced on behalf of the Additional Party and the Respondent. We do not consider it necessary to repeat the detailed submissions. We are satisfied 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 decision in Kirkaldie, supra, can be distinguished as it related to a very different factual scenario.

45. We are satisfied that HMRC has not waived legal professional privilege in this instance.

Was the public interest test properly applied?

46. As the information sought falls within the exemption at section 42 of FOIA (and as legal professional privilege has not been waived) it is necessary to carry out the public interest balancing exercise under section 2(2)(b) of FOIA, that is the public authority need not comply with the duty to disclose under section 1 FOIA if:

> "*in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information".*

47. The Appellant submits that the following propositions can be advanced from the scheme of FOIA and the wording of s1 and s2(2) of FOIA:

1. The burden rests on the public 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 case is not sufficient. Information must be disclosed except where there is an overriding need to keep the specific information in issue confidential.

48. The Appellant submits that if these propositions are not clear, then any ambiguity should be resolved by reference to parliamentary and other non-statutory materials, including the statements of the promoters of the Bill and relevant amendments of it in Parliament, in accordance with the guidance in Pepper v Hart [1993] AC 593.

49. We do not consider that there is ambiguity within the legislation relevant to this appeal. Any ambiguity that has arisen for the Appellant is, in our opinion, as a result of a misunderstanding arising from the Additional Party referring to there being no "presumption in favour of disclosure" in FOIA.

50. While FOIA does not include any general provision that there is a presumption in favour of the disclosure of information held by public authorities, the duty to disclose under section 1 (1)(a) may be displaced only by one of the statutory exemptions, either absolute or qualified. The duty under section 1(1)(a) may be displaced by one of the qualified exemptions only if the public interest in maintaining the exemption outweighs the public interest in disclosure of the information sought. If the competing interests are equally balanced, then the public authority, must disclose the information sought.

51. The Information Commissioner concluded that, in all the circumstances of this case, the public interest in maintaining the exemption outweighed the public interest in disclosure.

52. In the Decision Notice the Information Commissioner stated that he is "mindful that there is a strong element of public interest inherent in legal professional privilege which must be taken into account when considering the application of section 42". He notes the reasoning of a differently constituted panel of this Tribunal in Bellamy v The Information Commissioner and DTI (EA/2005/0023):

> "*As can be seen from the citation of the legal authorities regarding legal professional privilege, there is a strong element of public interest inbuilt into*

the privilege itself. At least equally strong countervailing considerations would need to be adduced to override the inbuilt public interest."

53. This was an early decision from this Tribunal on the exemption under section 42 of FOIA and it is clear from the approaches taken in subsequent decisions that although there will 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. There will be occasions when the public interest in disclosure will outweigh the public interest in maintaining the exemption.

54. We adopt what was said in Burgess v The Information Commissioner and Stafford Borough Council (EA/2006/0091) at paragraph 44;

> "*The Tribunal wants to make it clear that legal privilege is not an absolute [exemption] and furthermore, it is not enough in each case simply to assert that the Tribunal's previous decision in Bellamy effectively makes the [exemption] an absolute one: that is not correct."*

55. We agree with the Appellant's assertion that by making section 42 a qualified exemption subject to the public interest test in section 2(2)(b), Parliament clearly rejected the view expressed in some judgments that the public interest in obtaining legal advice in confidence automatically prevails over almost any other interest. By the enactment of FOIA, Parliament has done exactly what the House of Lords in R v Derby Magistrates Court, ex parte B [1995] 4 All ER 526, per Lord Taylor, said was required to change the absolute nature of legal privilege, it has added a public interest balancing exercise.

56. As to the application of that public interest balancing exercise, we again agree with the Appellant's assertion that FOIA puts no onus on an applicant to show that the public interest in disclosure outweighed the public interest in maintaining the exemption. The Additional Party points out that "there is no suggestion anywhere within the section that any legal burden of proof is applicable at all." The Information Commissioner did not, in our opinion, place any burden on the Appellant to show that the public interest lay in favour of disclosure.

57. The question of whether the public interest in maintaining the exemption outweighed the public interest in disclosing the information is therefore one to be addressed and determined by the Tribunal, based on all the relevant circumstances of the case and all the evidence before us. In answering this question, we have borne in mind previous decisions of this Tribunal and we consider the following to be principles of general application:

1. Information held by public authorities must be disclosed upon request unless FOIA provides for it to be withheld.

2. In the case of a qualified exemption, information may only be withheld if the public interest in maintaining the exemption outweighs the public interest in disclosure of the information. If the competing interests are equally balanced, then the public authority, must disclose the information.

3. There is no express provision under FOIA (in contrast to the Environmental Information Regulations 2004) that requires a public authority to apply a presumption in favour of disclosure.

4. There is an assumption built into FOIA that disclosure of information by public authorities on request is in the public interest in order to promote transparency and accountability in relation to the activities of public authorities. The strength of that interest and the strength of competing interests must be assessed on a case-by-case basis.

5. The passage of time since the creation of the information may have an important bearing on the balancing exercise. As a general rule, the public interest in maintaining an exemption diminishes over time.

6. In considering the public interest factors in favour of maintaining the exemption, the focus should be upon the public interests expressed explicitly or implicitly in the particular exemption provision at issue.

7. The public interest factors in favour of disclosure are not so restricted and can take into account the general public interests in the promotion of transparency, accountability, public understanding and involvement in the democratic process.

58. Although the test under section 2(2)(b) requires “all the circumstances of the case” to be considered, certain factors cannot be relevant for weighing in the public interest balance:

    1. The identity and motive of the applicant is irrelevant (except where the applicant is the subject of the information and where, as a result, the request becomes a request under the Data Protection Act 1998).

    2. The public interest test is concerned only with public interests and not private interests.

<u>Factors in favour of disclosure</u>

59. The Tribunal has been invited to consider the following factors as public interest factors in favour of disclosure:

    1. Furthering the understanding of and participation in the public debate of issues of the day, specifically an informed debate into the necessity of the measures.

2. Promoting accountability and transparency, obliging public authorities to explain the reasons for decisions taken and allowing the public to understand decisions made by public authorities.

3. Allowing individuals and companies to understand how decisions are reached by public authorities.

4. As the decision has now been taken, disclosure would not impair any current decision making process.

5. Obtaining the Advice did not involve the provision of confidential information.

6. Considerable damage has been and will continue to be caused to the UK professional trustee business.

7. It is impossible to lobby for change to the legislation without being provided with the Advice.

8. There is no suggestion that disclosure would disadvantage the government in any legal proceedings.

9. The Advice and legislation do not relate to tax avoidance.

10. The Advice was not required with any urgency.

11. The Government had made a specific promise to "share its findings on the viability of tax simplifications with business" in the Pre-Budget Report 2007.

12. HMRC relied on the existence and conclusion of the Advice as the sole justification of their decision to abolish the residence rule.

Factors in favour of maintaining the exemption

60. The Tribunal has been invited to consider the following factors as public interest factors in favour of maintaining the exemption:

1. There is a strong public interest in maintaining legal professional privilege. That is, to an individual or body seeking access to legal advice being able to communicate freely with legal advisors in confidence and being able to receive advice in confidence.

2. If legal advice were routinely disclosed, there would be disincentive to such advice being sought and/or as a disincentive to seeking advice on the basis of full and frank instructions.

3. If legal advice were routinely disclosed, caveats, qualifications or professional expressions of opinion might be given in advice which would therefore prevent free and frank correspondence between government and its legal advisers.

4. Legal advice in relation to policy matters should be obtained without the risk of that advice being prematurely disclosed.

5. It is important that legal advice includes a full assessment of all aspects of an issue, which may include arguments both for and against a conclusion, publication of this information may undermine public confidence in decision making and without comprehensive advice the quality of decision making would be reduced because it would not be fully informed and balanced.

6. There is a significant risk that the value placed on legal advice would be diminished if there is a lack of confidence that it had been provided without fear that it might be disclosed.

61. The exercise of considering the competing public interests is not one of simply adding up the number of factors on each side, but assessing how important each of the factors is. For example, great weight must be attached to the public interest in the accountability and transparency of public authorities and the decision making process.

Our analysis

62. In relation to accountability and transparency, the Appellant and the Additional Party each has a different view of the lengthy consultation described in the "Background" section above. The Additional Party concludes that over the period of the consultations the public interest in informed public debate, explanation of reasons for decisions, and allowing the public to understand decisions had been "well and properly served" by the consultation process.

63. The Appellant takes a different view. He sees the "abolition" of the "professional trustee residence rule" as a step which removed a measure that was necessary to enable UK professional trustees to compete on a level playing field with professional trustees in other countries, putting UK professional trustees at a serious competitive disadvantage in the international market for their services and driving investment business out of the UK. Despite the consultation, the removal of the measure happened suddenly and the reasons given were not adequate.

64. On the critical point, that is, the bearing of the State aid rules, the Appellant submits that there had been no opportunity for informed public debate of the legal reasoning behind the view the Government had reached.

65. The opportunity to submit responses on the interpretation of State aid rules contrasts with the extensive opportunities that consultees were given to respond to the reasoned account of options and decisions for the rationalisation of the taxation of trusts. It is not clear whether consultation was specifically invited on this point, although once the issue had been raised as a possibility it was open to the public and professional interest groups to respond accordingly. On most points detailed reasons and explanations were given and were ample. On the State aid point it was bald and substantially unexplained.

66. The Appellant submits that damage is being caused to the UK professional trustee business and without seeing the Advice it is not possible for persons concerned by the

abolition of the “professional trustee residence rule” to identify whether and how the Advice is wrong and to make effective representations to reconsider the decision.

67. The Appellant has provided an Opinion from Christopher Vajda QC, along with his own witness statements and those from other lawyers specialising in this area of tax law. He submits that there is a strong public interest in allowing the Advice to be examined to see if it based on a fallacy or incorrect factual basis, to establish whether the Advice was unequivocal, restore candour and enable interested parties to understand the significance and limits of any qualifications.

68. We need not form a view on whether the Advice was correct or not. The essence of the Appellant’s case for disclosure is that he and other specialists in the taxation of trusts and competition law have reached a different view on whether the treatment of CGT in respect of professional trustees constitutes a State aid; that the “residence rule” was abolished on the basis of the Advice from the DTI that the clauses which had been drafted and consulted on would constitute a State aid; and that 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.

69. We do not need to form a view on whether and to what extent there has been any actual damage caused to the interests of UK professional trustees. The witness statements by the Appellant, Judith Ingham and Emma Chamberlain describe the nature and likelihood of the damage caused to the interests of professional trustees following the legislation. Although they provide no statistical data to quantify the extent of this damage, it is not necessary for us to do more than note that persons of authority in relevant professions hold the views advanced on adverse impacts, and that the public interest is engaged when a change in legislation constitutes a potential threat to a business or businesses in the United Kingdom. There is no evidence before us to suggest that the statements about damage are false or exaggerated.

70. We conclude that the general public interest in accountability and transparency has been poorly served in relation to the decision taken regarding the “professional trustee residence rule” amounting to State aid. This was a small part of the lengthy consultation process and we would encourage HMRC to continue discussion on this topic. We conclude that a substantial public interest would be served by disclosure of fuller reasoning on why the Government reached the conclusions it reached on State aid.

71. We have already indicated that it is not necessary, nor part of our jurisdiction, to decide if the Advice was right or wrong. We accept what has been said by the Additional Party that the Appellant, or any other party, is able to challenge the decision or make representations for the decision to be reversed irrespective of the content of the Advice. It is not clear how the disclosure of the Advice itself, without actual change in the legislation, would materially improve the position for the professional trustee business in the UK.

72. In relation to the other factors put forward as factors in favour of disclosure, these are factors specific to this case and do not appear to have been raised before the Information Commissioner. We did not consider the following factors to bear much weight in favour of disclosure:

    1. That the Advice does not relate to tax avoidance.

    2. That there is no suggestion disclosure would disadvantage the Government in any legal proceedings.

3. Obtaining the Advice did not involve the provision of confidential information.

   (Although this is speculation and we do not comment on whether it is right or wrong, it seems to us that this may decrease the weight given to a factor in favour of maintaining the exemption in principle)

4. The promise from the government in Pre-Budget Report 2007 to "share its finding on the viability of tax simplifications with business.

5. That it was not obtained with any urgency.

   (Although the "professional trustee residence rule" had been in force for many years, it was clear that the rule was being revisited in the context of reforming the taxation of trusts.)

73. The Appellant submits that as the decision to abolish the "professional trustee residence rule" has now been taken, disclosure would not impair any decision making process. We agree with the general principle that where legal advice has served its purpose there may be a stronger public interest argument in favour of disclosure, particularly, if, in fact, no harm would be created. We do not consider however that to be the position here. While there is a suggestion in the witness statement of Elspeth Fearn of HMRC that disclosure would prejudice current discussions with STEP which the Appellant submits relates to a different point, having seen the Advice it is clear that it may be relevant to other issues.

74. The passage of time is one factor we identified above as being a factor in favour of disclosure, but we have concluded that it is not one that has much weight attached in this case bearing in mind the relatively recent decision and possible further developments.

75. The Appellant submits that as HMRC have already disclosed the existence, source and conclusion of the Advice when "deploying" it to justify the abolition of the "professional trustee residence rule." He suggests that if Government chooses to act on legal advice and publicly says that it is doing so, it must accept that disclosure of the Advice may well follow. The public interest, in our view, is met by the public authority revealing the source or level of advice and explaining why a particular decision was made.

76. While we have already indicated that we are clear that the exemption is qualified, and that it would be wrong to argue that the decision in Bellamy effectively makes it absolute, the public interest in maintaining the exemption for information protected by legal professional privilege must be given great weight.

77. A public authority should be able to obtain free and frank advice and be able to give full information to its legal advisers, including matters that would otherwise adversely affect the public authority's position.

78. We recognise that there is a strong public interest in favour of disclosure, but weighing all the factors of public interest, the Tribunal has concluded that the public interest in favour of maintaining the exemption does outweigh the public interest in favour of disclosure at this time.

Conclusion and remedy

79. The Tribunal dismisses the appeal for the reasons set out above. The Tribunal is satisfied that the information sought by Mr Kessler is subject to legal professional privilege, that privilege has not been waived and that the public interest in maintaining the exemption outweighs the public interest in disclosure.

80. In light of these findings, the Tribunal has not considered any arguments in relation to the applicability or not of section 35 FOIA.

81. The Tribunal considered that a substantial public interest would be served by disclosure of fuller reasoning on why the Government reached the conclusion in relation to State aid. It does not follow that the medium for such disclosure can only be disclosure of the Advice from the DTI. An alternative would be a prepared statement of reasons drawing on that advice and taking the analysis forward to show current conclusions in the light of any further consideration of the issue. A clear statement of current thinking (if conclusions have been reached) would perhaps be more useful than release of the historic document. We urge the Additional Party to produce an updated and fuller public statement of reasoning and conclusions on the State aid point. Among other things this might clarify whether the fundamental concern is fair competition between professional trustees in different member states, or fair competition between professional and non-professional trustees within the UK tax jurisdiction, or a matter of consistent treatment of trusts within the logic of that tax system. We recognise the risk that a full statement of legal reasoning could trigger further argument that legal professional privilege had been waived. Our view is 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. ”

82. Our decision is unanimous.

Annabel Pilling

Deputy Chairman Date 28th November 2007