



Tribunals Service
Information Tribunal

Appeal under section 57 of Freedom of Information Act 2000

Information Tribunal Appeal Number: EA/2008/0091
Information Commissioner's Ref: FS50181641

Determined on papers
On 24 March 2009

Decision Promulgated
On 27 March 2009

BEFORE

CHAIRMAN

MURRAY SHANKS

and

LAY MEMBERS

PAUL TAYLOR AND IVAN WILSON

Between

ROB WAUGH

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

**COMMISSIONERS FOR HM
REVENUE AND CUSTOMS**

Additional Party

Subject areas covered:

Prohibitions on disclosure s.44

Tribunal's determination

The Tribunal upholds the decision notice dated 22 October 2008 and dismisses the appeal.

Reasons for Determination

Background

1. On 4 May 2007 Leeds United Association Football Club Ltd (Leeds United) went into administration. The administrators prepared proposals for a creditors' voluntary arrangement (CVA) which were approved by a majority of creditors at a meeting on 4 June 2007. On 3 July 2007 the Commissioners for HM for Revenue and Customs (HMRC), who were themselves creditors of Leeds United, filed an application in the High Court against the administrators challenging the CVA; the purpose of the application as recorded in a press statement made by HMRC was "to seek a better outcome for the taxpayer from the administration of Leeds United".
2. There was a hearing on 6 July 2007 at which directions were given. At that stage HMRC had filed and served on the administrators the application notice, a witness statement in support and two skeleton arguments. There was no direct evidence about the nature of the hearing but we take judicial notice that such a hearing would normally take place in chambers (see rule 7.6(1) of the Insolvency Rules 1996). Shortly after the hearing the administrators aborted the original CVA and HMRC's application became irrelevant and in due course it was withdrawn without further consideration by the court.

3. On 16 July 2007 Rob Waugh of the Yorkshire Post made an application to HH Judge Behrens for permission to inspect the court file pursuant to rule 7.31(4) of the Insolvency Rules 1986 which provides that “any person may, by special leave of the court, inspect the court file”. The application was refused, the judge remarking that at that stage HMRC’s application was still live and may be compromised or never come to trial and that it would be open to Mr Waugh to make a further application at a later stage.
4. Having failed to obtain the information he wanted by inspecting the court file, on 26 July 2007 Mr Waugh made a request under the Freedom of Information Act 2000 addressed to HMRC seeking “...the information HMRC holds in relation to the civil action against [the administrators], specifically the information formally served into the court”. HMRC refused that request relying on section 44(1)(a) of the 2000 Act read with section 23(1) of the Commissioners for Revenue and Customs Act 2005 which they said prohibited the disclosure to him of that information. In a decision notice dated 22 October 2008 the Information Commissioner upheld the HMRC’s refusal.
5. Mr Waugh appealed to this Tribunal against that decision. We have determined the appeal on the papers without an oral hearing, having been provided with written submissions and some additional factual material including (on a confidential basis) copies of the documents filed at court by HMRC.

Relevant statutory provisions

6. Sections 1 and 2 of the 2000 Act provide:

1(1) Any person making a request for information to a public authority is entitled:

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him...

2(1) Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that where

...

(a) the provision confers absolute exemption...

section 1(1)(a) does not apply.

(2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that

(a) the information is exempt information by virtue of a provision conferring absolute exemption...

(3) For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption...

(h) section 44.

Section 44 is in these terms:

(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it

(a) is prohibited by or under any enactment

....

(2) The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1).

7. Section 23 of the 2005 Act provides as follows:

(1) Revenue and customs information relating to a person, the disclosure of which is prohibited by section 18(1), is exempt information by virtue of section 44(1)(a) of the Freedom of Information Act 2000 (c. 36) (prohibitions on disclosure) if its disclosure—

(a) would specify the identity of the person to whom the information relates, or

(b) would enable the identity of such a person to be deduced.

(2) Except as specified in subsection (1), information the disclosure of which is prohibited by section 18(1) is not exempt information for the purposes of section 44(1)(a) of the Freedom of Information Act 2000.

(3) In subsection (1) “revenue and customs information relating to a person” has the same meaning as in section 19.

And sections 18 and 19 provide:

18 (1) Revenue and Customs officials may not disclose information which is held by the Revenue and Customs in connection with a function of the Revenue and Customs.

(2) But subsection (1) does not apply to a disclosure—

...

(c) which is made for the purposes of civil proceedings (whether or not within the United Kingdom) relating to a matter in respect of which the Revenue and Customs have functions,

...

(e) which is made in pursuance of an order of a court,

...

(h) which is made with the consent of each person to whom the information relates.

19 (1) A person commits an offence if he contravenes section 18(1) ... by disclosing revenue and customs information relating to a person whose identity—

(a) is specified in the disclosure, or

(b) can be deduced from it.

(2) In subsection (1) “revenue and customs information relating to a person” means information about, acquired as a result of, or held in connection with the exercise of a function of the Revenue and Customs ... in respect of the person; but it does not include information about internal administrative arrangements of Her Majesty’s Revenue and Customs ...

The issues

8. On the face of it, these statutory provisions would certainly appear to have entitled HMRC to refuse Mr Waugh's request. The information requested was held by HMRC in connection with one of their functions ("seeking a better outcome for the taxpayer from the administration of Leeds United"); the information related to at least one person (Leeds United) whose identity was specified in the disclosure; and its disclosure to Mr Waugh under the 2000 Act would not have come within any of the provisions in section 18(2) of the 2005 Act which disapply section 18(1).
9. But Mr Waugh raised three main arguments against that conclusion:
 - (1) Section 18(1) of the 2005 Act would not have applied because the information requested had already been disclosed and/or section 18(1) had already been disapplied by section 18(2)(c);
 - (2) The "disclosure" would not have identified the person to whom the information related because HMRC had already identified that it related to Leeds United and the administrators;
 - (3) Section 18(2)(c) allowed the disclosure of information "about" relevant civil proceedings.

We consider these in turn.

Argument (1): section 18(1)

10. As we understand the first part of this argument, it is Mr Waugh's contention that, because the information requested had been put before the court by HMRC it had already been "disclosed" to the public so that supplying it to Mr Waugh pursuant to his request would not involve any disclosure at all (and could not therefore involve any disclosure prohibited by section 18(1)). Mr Waugh says, and we agree, that whether information is or has been "disclosed" is a question of fact. There is no doubt that the information he was requesting under the 2000 Act had already been disclosed to the court and to the administrators for the purposes of the civil proceedings brought by HMRC. But there is no evidence that it had been disclosed any further than that and it certainly had not been disclosed to Mr Waugh or he

would not have needed to ask for it. We have no doubt that if the information had been “communicated” to him pursuant to his request that would have amounted to a new disclosure for the purposes of section 18(1) of the 2005 Act.

11. The second part of the argument appears to rely on the premise that there can only be one disclosure under section 18 and that, once there has been a disclosure which is permitted under section 18(2) (here, under section 18(2)(c)), the prohibition in section 18(1) goes away. A quick glance at section 18(2) demonstrates that this construction of the section cannot be right; it cannot have been intended, for example, that if information was disclosed pursuant to a court order which prohibited its further disclosure by the recipient that information could thereafter be obtained by anyone from HMRC pursuant to a request under the 2000 Act. We are clear that there can be more than one disclosure of the same information for the purposes of section 18, and that one such disclosure could come within, and a later one not come within, section 18(2).

Argument (2): identity of person to whom information relates

12. Mr Waugh relies for the purposes of this argument on the fact that it was public knowledge that HMRC had brought court proceedings against the administrators relating to Leeds United and that HMRC had itself commented on the proceedings which, he would say, makes it “perverse” of HMRC to argue that disclosure of the information would specify the identity of the person to whom it relates. The fallacy in this argument it seems to us is that the information requested (namely that filed with the court) did not just consist of the fact that proceedings had been brought (which was already known to Mr Waugh and anyone else who was interested) but consisted of all the information put before the court by HMRC in support of those proceedings; that information (which was not known to Mr Waugh) by definition related to persons whose identity would have been specified in or deducible from its disclosure, namely Leeds United and the administrators, and was accordingly clearly covered by section 23 of the 2005 Act. The Tribunal would also observe, having seen the information, that in any event it also related to other natural and legal persons whose identity is specified or can be deduced.

Argument (3): section 18(2)(c)

13. Disclosure of the requested information to Mr Waugh under the 2000 Act clearly would not have been a disclosure “made *for the purposes of* civil proceedings” as required by section 18(2)(c). Mr Waugh effectively asks us to interpret the subsection as if it referred to the disclosure of “information *about* civil proceedings” brought by HMRC but we can see no basis for such an interpretation. In connection with this argument Mr Waugh also points out (no doubt rightly) that HMRC chose to bring the proceedings and that they knew that bringing the proceedings might lead to a public hearing which would have led in turn to the public reporting of the information; the short answer to this point is that, as things turned out, it did not. We therefore reject this argument as well as the other two advanced by Mr Waugh.

Other matters

14. The Tribunal raised of its own accord the possibility of reliance on the exemption at section 32 of the 2000 Act (“Court records etc”) and HMRC adopted the position that, if it was unsuccessful on section 44, the Tribunal should not order disclosure of the requested information without considering the application of that section. Given our conclusions on section 44 we prefer to say nothing more about section 32 or in particular the question whether it would have been open to HMRC to seek to rely on it at this late stage in the procedure.

15. At paras 51 to 58 of the decision notice the Commissioner expresses the view that HMRC would have been able to rely on section 44(2) of the 2000 Act to refuse to confirm or deny whether it held information coming within the terms of the request at all. Although it is not relevant to our determination of the appeal we should say that, on the facts of this case, we do not agree with the Commissioner about that. As we have already said it was clearly common knowledge at the time of Mr Waugh’s request (and certainly Mr Waugh knew) that HMRC had brought proceedings against the administrators and filed documents with the court in relation thereto containing information; to confirm that there was information of the description specified in Mr Waugh’s request would not therefore have involved any disclosure at all and would accordingly not have been prohibited by section 18(1) of

the 2005 Act and there would accordingly have been no basis for the application of section 44(2).

Conclusion

16. For the reasons set out above we have decided unanimously that the appeal should be dismissed.

Signed:

Murray Shanks
Deputy Chairman

Date: 27 March 2009