Hugh Craddock

v

The Information Commissioner

in the Upper Tribunal

Appellant's supplementary skeleton (*Surrey Searches*)

A. Introduction

A.1. This is a skeleton supplementary to the appellant's first skeleton, dated 7 June 2024.

A.2. On 28 June, Richard Smith J, sitting in the Business and Property Court of the Chancery Division, handed down judgment in *Surrey Searches Ltd and Others, and Others v Northumbrian Water Ltd and Others* [2024] EWHC 1643 (Ch).

A.3. The claimants are property-search companies which seek recovery of fees paid to the defendants, being water and sewerage utilities, for information needed to complete property-search form CON29DW (Drainage and Water Enquiry). The claimants made multiple 'requests for information in a particular form or format (*viz* a search report)' [504]. The search information is contended to be environmental information, subject to disclosure under the Environmental Information Regulations 2004 (EIRs) either without charge, or at a charge regulated by r.8 (whereas the claimants had paid fees to obtain the information). The judgment addresses, *inter alia*, whether the defendants would have been entitled to refuse disclosure of the search information relying on r.6(1)(b).

A.4. In brief, the judgment, so far as is relevant, is almost entirely against the appellant.

A.5. Judgment in the stage 1 trial was handed down after submission of the appellant's response to the Commissioner and skeleton argument dated 7 June 2024. This supplementary skeleton has been prepared by the appellant in order to address the issues arising, and to give notice to the Commissioner of those issues. It does not intentionally repeat any matter addressed in the first skeleton.

B. *Surrey Searches* as precedent

B.1. Given that the judgment is almost entirely against the appellant, the question arises as to the extent to which the judgment is binding on the Upper Tribunal.

B.2. The Upper Tribunal is a superior court of record.[1] It is statutorily given, in the discharge of many of its adjudicative functions,[2]

> the same powers, rights, privileges and authority as the High Court[.]

B.3. Therefore the High Court and the Upper Tribunal are courts of co-ordinate jurisdiction. Normally, a High Court judge should follow an earlier High Court decision unless the earlier decision was obviously wrong. As the Upper Tribunal and High Court have co-ordinate jurisdiction, this principle would *prima facie* apply as between them too. However, in certain circumstances the Upper Tribunal is not bound by decisions of the High Court. The situation is explained in *Jacobs*,[3]

> A decision of the High Court will be followed by the Upper Tribunal as a matter of comity. Normally, it would be followed unless the tribunal was convinced that the judgment was wrong. However, within its specialist jurisdictions, the Upper Tribunal 'may in a proper case feel less inhibited in revisiting issues decided even at High Court level, if there is good reason to do so'… .

B.4. The relationship between the High Court and Upper Tribunal is further discussed in the *RB* case (referred to in fn.1) at [40–47].

B.5. In summary, the Upper Tribunal will normally follow a decision of the High Court but may depart from it if convinced that the decision was wrong, or, in a case within the Upper Tribunal's specialist jurisdiction, if there is good reason to do so.

C. Summary of judgment in *Surrey Searches* in relation to r.6(1)(b)

C.1. Among the six issues to be determined at the stage 1 trial were [17]:

1 Tribunals, Courts and Enforcement Act 2007, s.3(5), and *Secretary of State for Justice v RB* [2010] UKUT 454 (AAC) (judgment given by Lord Justice Carnwath SPT (as he then was) and HH Judge Phillip Sycamore CP (FTT(HESC))), [2011] MHLR 37 at [43]).

2 Tribunals, Courts and Enforcement Act 2007, s. 25(1)(a) and (2), and *R (Evans) v Attorney General* [2015] UKSC 21, [2015] AC 1787 at [2] and [16]).

3 *Tribunal Practice and Procedure*, 5th edition, para.13.78, citing *Secretary of State for Justice v RB* [2010] UKUT 454 (AAC) at [41].

- issue 3.1, ‘was the information responsive to a CON29DW:— (a) publicly available in the same or different format and easily accessible for the purpose of Reg 6(1)?’
- issue 4, ‘could any of the requests for a CON29DW be refused under the EIR as being manifestly unreasonable within the meaning of Reg 12(4)(b)?’

C.2. By the time the judge reaches issue 4 (manifestly unreasonable requests), the judge finds [749] that there are various considerations in play,

> including, for example, burden and impact on the recipient of the requests, the requester's motive and purpose in making them and the balance of the public interest.

C.3. The judge finds he does not need to decide issue 4 at stage I, without prejudice to relevance at a later stage.

C.4. In the appellant’s submission, this leaves the judge’s findings on issue 3.1 contextually influenced by his declining to rule on issue 4.

C.5. The extent of the resource burden placed on the defendant utilities imposed by a requirement to supply data in electronic form in response to frequent requests from property-search companies is predicated on whether such requests (*i.e*. the stream of requests by an individual company) would be manifestly unreasonable for the purposes of r.12(4)(b) (*i.e*. issue 4). If they are, then the utilities do not need to deal with the requests (save to refuse them).

C.6. Having declined to decide that question at stage 1, it is unsurprising if the judge were concerned about the utilities’ potential exposure to such requests, the resource burden it would place upon them, and sympathetic to an alternative mechanism to moderate the impact of the requests — *viz*, r.6(1)(b).

C.7. It is suggested that this is perhaps the one conceivable scenario where insistence on the requester’s attendance at the public authority’s premises to view data online might be less resource-intensive for a public authority than supplying the requested data electronically — although even here, it is suggested that the underlying motivating factor for the utilities is a desire to minimise lost fees which each utility might otherwise earn by itself responding to the questions on the search form.

D. *Surrey Searches* and the r.4(1) duty

D.1. The judge dismisses [511] the relevance of the r.4(1) duty (progressive dissemination of environmental information) because:

> the minimum information indicated [r.4(4)] is qualitatively miles apart in terms of its policy importance compared to that with which this case is concerned.

D.2. The appellant acknowledges that r.4(1) does not directly impose any duty on Kent County Council (KCC) in relation to the original request for the tithe information, but suggests that r.4, consistent with the Convention, imposes a duty on all public authorities to 'progressively make [environmental] information available to the public by electronic means which are easily accessible'. The duty is not fulfilled, and does not fall away, simply because the 'minimum information' requirement is satisfied, but is intended to be a continuing obligation in relation to all environmental information held.

D.3. Twenty years after the EIRs, and 26 years after the Convention was ratified, one would expect that duty to continue to have effect. Whereas the 'minimum information' requirement in r.4(4) is merely what was required to be achieved in the early days of implementation (or, indeed, at commencement).

E. *Surrey Searches* and 'publicly available'

E.1. The judge is referred [519] by the defendants to the requirements on the utilities under the Water Industry Act 1991 (ss.196–199) to make certain information available to the public. The judge agrees that,

> such information is capable, again in principle, of meeting the requirements of Reg 6(1)(b)… .

E.2. The judge finds [520] that,

> publicly available does not mean having completely unfettered public access and that information may qualify as such even if some registration process, permission or physical attendance for inspection purposes might be required.. Moreover, information may be publicly available if it is available in hard copy, by e-mail request, on-line or on a computer terminal to be viewed in situ.

E.3. The judge's finding is not easily reconciled with the fundamental operation of the EIRs: all environmental information is available in one or more of these forms — indeed, an email request is all that is required to trigger the requirements of the EIRs.

E.4. In the appellant's submission, information cannot for the purposes of r.6(1)(b) be 'publicly available' merely because it is notionally available to the public on request, for that is the requirement in relation to all environmental information (other than that which may be lawfully withheld).

E.5. The appellant submits that the judge has fallen into the same error as the FTT: the bar for 'publicly available' is set so low that it adds nothing to the provision in r.6(1)(b). This is plain from the following words at [520]:

> I reject the Claimants' related suggestion that information available 'on request' is 'by definition' not publicly available.

E.6. Yet all environmental information is available on request, therefore (on on the judge's analysis) it is 'publicly available' — and if so, the requirement in r.6(1)(b) that the information be 'publicly available' is circular and therefore otiose.

F. *Surrey Searches* and 'easily accessible'

F.1. The claimants argued [505] that the search information was not 'easily accessible' owing to, among other things, [505.e.] 'the format in which information was provided on the PAC,[4] including the extent to which information on the PAC could be printed out, and the form in which the information was displayed'. This appears to be the only claimed impediment which could be said to relate to the potential use of the search information, as opposed to viewing it.

F.2. The judge has regard to the defendants' citation of the Information Commissioner's (IC) decision in *Northumbrian Water*[5] [509], in which the IC reiterates his view [509, at 25] that:

4 Public-access computer: a computer installed at the utility's premises, typically in the foyer or nearby, by which members of the public (including property-search companies' staff) can have access to information held by the utility, including information which is not published online.

5 Referring to IC–120111–X0Q5

> The EIR do not concern the right to re-use the environmental information or the ease with which that can be done. They only concern the right of access to the information in the first place.

F.3. Much [524–525] of the relevant part of the judgment [522–529] focuses on the ease of travel to the public authority's premises, which adopts a line of reasoning not pursued by the appellant (see first skeleton at [E.3–E.4]).

F.4. Ironically, the court's attention is drawn [526] to the IC's decision notice under appeal in this case.[6]

F.5. The defendants argue [527]:

> that Tribunal and ICO decisions indicate that ease of accessibility is not concerned with the applicant's ability to 'harvest' or re-use the information concerned.

and rely on two decisions of the first-tier tribunal and one of the IC in support of their contention [527].

G. Surrey Searches: findings in relation to r.3(1)(b)

G.1. The judge adopts the position [528] that:

> whether the information…was already publicly available and easily accessible to the Claimants will turn upon the facts of the case.

G.2. But in broad terms, where information was made available to the claimants via a PAC, the judge concludes [529] that the claimants' criticism of arrangements:

> were, generally, either of a relatively minor nature, not implicating ease of accessibility,

or amounted to suggestions as to how arrangements could be improved for their own benefit.

G.3. The judge examines [530–723] the circumstances in relation to various questions derived from the search form and asked of the various defendant utilities, and finds (in

6 The decision of the first-tier tribunal in this case was handed down after the hearing in *Surrey Searches*, but before the decision in that case was handed down.

general) that the information sought was publicly available, usually because it was available on a website or via a PAC, notwithstanding alleged shortcomings (such as a shortage of PAC bookings, PAC IT problems, obscurely-publicised website pages, and difficulties in extracting the requirement information from websites).

G.4. During the pandemic, the utilities substituted for the closed PACs by providing information directly (such as by emailed maps) in response to requests. These arrangements too were found to satisfy the r.6(1)(b) test.

G.5. The judge dismisses any concerns about the ease with which the information may be captured and taken away for further use (see F.2 above). It is notable that one utility (Thames Water) is recorded [689] as 'not permitting photography' of information displayed at its PAC. The judge observes [552] that the claimants':

> complaints about lack of printing facilities and restrictions on PAC photography…appeared to be directed to the re-use of the information sought, rather than ease of access thereto.

As these complaints also surface in relation to other utilities [569, 591, 615, 696, 709], it may be inferred that such restrictions are widespread.

H. Conclusion

H.1. The appellant hesitates to question the judgment of Richard Smith J in a case which has engaged 11 barristers, including five King's Counsel, in a hearing which lasted over one month (and that for the purposes of stage 1 only).

H.2. In his judgment, the judge has relatively little to say about the interpretation of r.6(1)(b). At [37–44], the judge recites the background to, and approach to interpretation of, the EIRs, noting at [42] that:

> the EIR falls to be interpreted in accordance with the language and objectives of the Directive and the Directive, in turn, with those of the Convention.

H.3. But we are informed [44] that:

> The Claimants also relied to the same end on orthodox principles of statutory interpretation… .

H.4. Notwithstanding what is cited at [41][7]:

> The starting point is that the EIR must be interpreted, as far as possible, in the light of the wording and the purpose of the Directive, which itself gives effect to international obligations arising under the Aarhus Convention[,]

there is no suggestion in the judgment that either the claimants or the defendants sought to rely on the meaning or intention of the equivalent provisions to r.6(1)(b) in the Directive or the Convention, in order to understand its meaning in the EIRs. On the contrary, both parties appear to rely heavily on the guidance and previous decisions of the IC and decisions of the first-tier tribunal, applying 'orthodox principles of statutory interpretation'.[8]

H.5. Where the judge does consider the Convention guidance [523], he appears to misunderstand it. He states:

> the Convention Implementation Guide provides (at [81]) that "[t]o be effective, "publicly available" means that the information is easily accessible to the member of the public requesting the information. Accordingly, although a government published book may be publicly available in a library, "[i]nforming an applicant about the existence of a single copy of a book in a library 200 kilometres from his or her residence would probably not be a satisfactory response".

The appellant agrees (see [D.33] of first skeleton).

H.6. But, the judge continues [523]:

> EI[9] must be "effectively accessible", meaning that "the established information systems should go beyond simply making the information available to the public. Records, databases and documents may be considered effectively accessible when, for example, the public can easily search within them for specific pieces of information, or when the public has easy access through convenient office hours, locations, equipment such as copy machines, etc. … As well as being physically accessible, "effectively accessible" requires that

7 Cited from *DBEIS* v *Information Commissioner & Henney* [2017] EWCA Civ 844, at [14].

8 See for example, [513–514, 518, 524, 526, 527]

9 *i.e*. environmental information

> information should be available in a format, language and level of technical detail that the public can effectively access" (at [101]).

H.7. As a quotation from the Convention guide, the judge's remarks are unexceptionable. But the quotation is from guidance on art.5(2) of the Convention, which imposes a general duty on a contracting Party state to ensure 'that environmental information is *effectively* accessible'. Neither art.5(2), nor the guidance on this provision, has any direct bearing on the meaning of 'easily accessible' in r.3(1)(b). The question of whether information is 'effectively accessible' or 'easily accessible' forms no part of the test corresponding to r.3(1)(b) in art.4(1)(b)(i) of the Convention.[10] It is correct that the Convention requires environmental information (generally) to be effectively accessible, and that this will include mechanisms by which (*per* the Convention guide), 'the public has easy access through convenient office hours, locations, equipment such as copy machines, etc.' Mechanisms such as making information available for inspection at public authorities' offices which are open during 'convenient office hours' and at convenient locations are entirely appropriate to the objectives of the Convention. But art 4(1)(b)(i) imposes a more demanding test — that the public authority can rely on prior disclosure in an alternative form or format only if the information is 'already publicly available' in another form.

H.8. The judge thus relies (at least to some extent) on Convention guidance about the meaning of words — 'effectively accessible' — which are used in a different context for a different purpose in the Convention, which are not used in r.6(1)(b), and where the words actually used — 'easily accessible' — are not derived from the Convention at all.[11]

H.9. It is suggested that the judge may well have been influenced in finding [520] that, 'information may be publicly available if it is available in hard copy, by e-mail request, on-line or on a computer terminal to be viewed in situ' by mistaken reliance on the Convention guide which commends, 'easy access [to environmental information] through convenient office hours, locations, equipment such as copy machines, etc.'

H.10. The claimants contended that the relevant information was not 'easily accessible' to them due to various suggested restrictions, set out in the judgment at [505, paras.a–g]. Save perhaps for para.e ('the format in which information was provided on the PAC, including the extent to which information on the PAC could be printed out, and the form in

10 See [E.33] of first skeleton, noting there the erroneous reference to art.4(1)(b)(ii).

11 The words 'easily accessible' are used in the Convention only in art.5(3): see [E.30] of the first skeleton.

which the information was displayed'), the appellant submits that these claimed restrictions are not relevant to the question of whether the information is 'easily accessible', because they are predicated on an assumption that viewing the information on a PAC renders the information 'publicly available'. As will be clear from the appellant's first skeleton, it is submitted that PAC-based disclosure does not have that effect. If the appellant's approach is correct, then the claimants' concerns about the restrictions (save para.e, as applied say to a website) are irrelevant.

H.11. Accordingly, the appellant submits that, in relation to the interpretation of r.6(1)(b), so far as the judge in *Surrey Searches* applied a test which requires no more than that information which is disclosed at a PAC is 'publicly available', and that the information so disclosed is 'easily accessible', he was mistaken to do so, that he erred having misunderstood the Convention guidance, and that the Upper Tribunal should, in the light of its specialist jurisdiction, and if it thinks the outcome merited following all submissions, be open to the possibility of reaching a contrary finding in this appeal.

Hugh Craddock
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