IN THE FIRST-TIER TRIBUNAL Case No. **Appeal No. EA/2013/0098**

GENERAL REGULATORY CHAMBER INFORMATION RIGHTS

ON APPEAL FROM Information Commissioner's Decision Notice No: FS50468587

Dated 30th April 2013

BETWEEN Mr Johnny Landau Appellant

And

The Information Commissioner Respondent

And

The Financial Conduct Authority Second Respondent

Determined on 20th November 2013 at Field House and

on 20th January 2014 at the Mayor's and City of London Court

Date of Decision 13th March 2014

Date of Promulgation 14th March 2014

BEFORE

Fiona Henderson (Judge)

Nigel Watson

And

Andrew Whetnall

Counsel for Mr Landau - Mr Richard Edwards

Counsel for FCA - Mr Jason Coppell QC

Counsel for Barclays bank on 20.11.13 Mr Anthony White QC (as an observer)

Subject matter: FOIA– s44 (Prohibited by an enactment - s348 FSMA)

Derry City Council v Information Commissioner DA/2006/0014

Department of Health v IC EA/2008/0018

Home Secretary v British Union for Abolition of Vivisection 2009 1WLR

Real Estate Opportunities v Aberdeen Asset Managers Jersey Ltd [2007] Bus LR 971

Re Galileo Group Ltd 1999 Ch 100

Decision: The Appeal is refused

REASONS FOR DECISION

Introduction

1. This appeal is against the Information Commissioner's Decision FS50468587, dated 30th April 2013 which concluded that the Financial Conduct Authority[1] had correctly applied s 44 (prohibition on disclosure) and s21 (information accessible by other means) of FOIA to the disputed information.

The Information Request

2. Towards the end of March 2012 the FCA decided that it should carry out a short review of sales of Interest Rate Hedging Products (IRHPs) for the purpose of managing interest rate fluctuations at 4 banks. During April and May a variety of information was requested and received from these banks relating to the sales of IRHPs to small business customers (including product literature and sales volumes data) and a sample of customer files from each bank. Having reviewed this information FCA identified a number of failings. Barclays, HSBC, Lloyds and RBS entered into an Agreement with FCA to carry out a review of past sales of IRHPs dating back to December 2001 and where appropriate to make redress payments to customers who met specific criteria. Following the execution of the Agreement detailed aspects of the implementation of the review were developed by the banks following a pilot scheme during which time they processed a limited number of cases.

[1] The request was originally addressed to the Financial Services Authority. They became the Financial Conduct Authority (FCA) on 1st April 2013, in order to avoid confusion they will be referred to as the FCA throughout this decision. References to the FCA should be considered where appropriate to be references to the FSA.

3. On 19th July 2012 Mr Landau wrote to the FCA asking for[2]: *"(1) A copy of the Agreement reached between the [FCA] and Barclays, HSBC, Lloyds and RBS in relation to the interest rate swaps compensation scheme;...* [3]

4. The FCA confirmed that it held the information but that it was exempt from disclosure under s44 FOIA by virtue of the prohibition contained in s348 of the Financial Services and Markets Act 2000 (FSMA).

The Appeal

5. Mr Landau appealed to the Commissioner[4] before whom the FCA also relied upon s43 (2) (commercial prejudice) and s21FOIA (a limited amount of information had already been published e.g. in press notice FSA/PH/071/2012).

6. Mr Landau appealed against the Commissioner's decision on the grounds (insofar as they relate to the s44 exemption) that the Commissioner was wrong to find that the information was received from the banks.

7. The FCA was joined by the Tribunal on 18th June 2013. The Commissioner chose to rely upon his decision notice and reply and did not participate further in proceedings. Counsel instructed by Barclays Bank Ltd (Barclays) attended the open parts of the hearing and the closed hearing when Mr Ho (a witness employed by Barclays) was giving evidence. This was in an observatory capacity, there was no application for joinder and no representations were made by Barclays.

Scope of the Appeal

8. Some information contained within the withheld material had been disclosed e.g. in press releases and on the websites of the banks concerned by the relevant date. The Tribunal has seen the withheld material including a document detailing the material already in the public domain and has heard closed evidence and is satisfied that this partial disclosure was made with the consent of the banks or pursuant to s348(4) FSMA but that further disclosure would be without their consent.

[2] Insofar as it is relevant to this determination.
[3] The FCA answered the rest of the request which is not the subject of this appeal.
[4] The decision to withhold the information was maintained upon internal review by the FCA at which time it was confirmed that the individual banks had been approached but did not consent to disclosure.

9. This decision does not concern itself with the information already disclosed at the relevant date as it falls outside of the scope of the appeal, as by the fact of its disclosure it was publicly available and falls within s21 FOIA (information publicly available).

10. A secondary argument was advanced by the parties as to whether the Agreement was exempt from disclosure under s43 FOIA, however, our decision on the s44 FOIA point rendered a decision on the s43 FOIA point unnecessary and it is not dealt with in this decision.

Prohibition under s348 FSMA

11. S348 FSMA provides as follows:

(1) Confidential information must not be disclosed by a primary recipient, or by any person obtaining the information directly or indirectly from a primary recipient, without the consent of—

(a) the person from whom the primary recipient obtained the information; and

(b) if different, the person to whom it relates.

(2) In this Part "confidential information" means information which—

(a) relates to the business or other affairs of any person;

(b) was received by the primary recipient for the purposes of, or in the discharge of, any functions of the Authority, the competent authority for the purposes of Part VI or the Secretary of State under any provision made by or under this Act; and

(c) is not prevented from being confidential information by subsection (4)

12. S348 FSMA prohibits the disclosure without consent of confidential information by a primary recipient. The question for the Tribunal is whether or not the Agreement is "confidential information" as defined in s348 FSMA. It is not in dispute between the parties that the information is confidential and it relates to the business or other affairs of any person (namely the banks named in the request), the only issue between the parties relating to s348 is therefore whether the withheld information could reasonably be said to be "received".

13. The Tribunal heard both open and closed evidence from Mr Peter Fox who was Manager of a team in the Conduct of Business Unit of the FCA which was

responsible for supervising Barclays at the relevant time and from Mr Keith Ho, a Managing Director at Barclays, the executive responsible for the implementation of their FCA review of sales of IRHPs. We have also had sight of the withheld information.

14. The Agreement was the culmination of an investigation carried out by the FCA and ultimately based on information received from the banks who had conducted reviews of their own files. Each Agreement is signed by the respective bank to signify that they consent to abide by the terms set out within the Agreement. Although the Tribunal was pointed to specific clauses where banks had refused to accept the FCA proposal and the Agreement was altered to reflect this, we do not consider that it would be feasible to undertake a clause by clause analysis of who drafted which clause. The Tribunal accepts that the basic structure of the Agreement was devised by the FCA, the banks had the opportunity to make observations and at times the draft was changed. The FCA "held the drafting pen". The Agreement was drafted and signed within a very brief timescale, 5 days. When the Agreement was signed this was not the end point as the scheme then had to be implemented and put into a form that could be applied to the public. A pilot scheme was undertaken by each bank which gave rise to some changes in the terms of the Agreement for example the "sophisticated customer test" although the framework was largely the same. The evidence of Mr Ho was that the document detailing the methodology for the implementation of the review by Barclays, agreed with the skilled person and the FCA, was considerably larger than the Agreement that constitutes the disputed information, running to well over 100 pages.

15. Mr Landau relies upon *Derry City Council v Information Commissioner DA/2006/0014* in support of his case[5]. This was a decision of the first tier tribunal and consequently is not binding upon this Tribunal. It was determined in the context of s41 FOIA (information provided in confidence) the wording of which relates to information "obtained" by the public authority. It held that generally, a written Agreement between the parties will not constitute information obtained by one party from another; although it envisaged exceptions in cases where there might be technical information provided by one party to the other.

[5] The same approach was also adopted in *Department of Health v IC EA/2008/0018* another first tier Tribunal case.

16. Mr Landau argues that the reasoning in that case is applicable here because there is no material difference in this context between "received" and "obtained" which he contends are used interchangeably within s348 FSMA. He argues that this case does not fit within the exception envisaged in *Derry* (technical information) as the Agreement did not adopt the banks' proposals (the FCA having created the first draft) neither does he agree that there is any embedded information arising out of the banks' Agreement to abide by the terms of the Agreement since this is contrary to the reasoning in *Derry*. He contends that this being a regulatory contract rather than a commercial contract does not distinguish *Derry* and it would be wrong to adopt a wide definition of what constitutes confidential information as it is out of keeping with FOIA and the FSMA's predecessor statutes[6]. He maintains that if it was Parliament's intention to apply to the prohibition to this type of Agreement they would have been explicit.

17. S44 FOIA provides for the prohibitions in other statutes as drafted to be upheld and is an absolute exemption with no recourse to the public interest test. *Home Secretary v British Union for Abolition of Vivisection 2009 1WLR* (paras 29-31) sets out the correct approach to construing a statutory bar in relation to s44 FOIA namely that it should be read in the context of its own Act and not that of FOIA. The Tribunal does not accept that a similarity in timing of the drafting of the 2 statutes is sufficient to impute identical construction between two separate statutes and to do so would be contrary to the reasoning in the *BUAV* case. The purpose of FOIA and FSMA is different and it is arguable that if the same intention were intended between s41FOIA and s348 FSMA it would have been explicit. Mr Landau further relies upon predecessor statutes to FSMA to argue that there is no basis to interpret s41 FOIA and s348 FSMA differently because e.g. *Banking Act 1987* s82 makes reference to obtaining information from a person who has received it.

18. We do not consider that this is the right approach. In *Real Estate Opportunities v Aberdeen Asset Managers Jersey Ltd [2007] Bus LR 971* at p980 B Arden LJ said:

> *"The interpretation of an Act of Parliament involves far more than a search for literal meaning or linguistic look-alikes. ... The Court must look more*

[6] E.g. s19 Banking Act 1979 and s179 Financial Services Act 1986, s82 Banking Act 1987 all of which use the word "obtain" or he argues "obtain" and "receive" indeterminately.

deeply into the statute in order to give effect to Parliament's intention as expressed in the language it has used... If there is a choice of meanings, it must apply the meaning of the words more consistent with that purpose..."

20. The Commissioner regarded s348 FSMA as applying a "*deliberately wide definition of what constitutes "confidential" information that cannot be disclosed. The definition of confidential in s348 of FSMA does not apply any restriction to when the information was "received" or whether it has been processed once already by the FCA and is being used for the second time*[7]*"*. We agree with this analysis, s348 FSMA contains a bespoke definition of confidential information whereas s41 FOIA relates to information the disclosure of which would be actionable as a breach of confidence. S348 is absolute, whereas there is room for some consideration of the public interest in s41 FOIA through the defences to an action for breach of confidence.

21. *Derry* relates to a different statutory provision in a different context. The Commissioner's submissions in that case were that it was not the purpose of s41 FOIA to protect the confidentiality of commercial contracts to which the public authority was a party. The Tribunal is satisfied that there is a difference between an Agreement in a regulatory context which is concerned with (the relationship between the public and the state) as opposed to a commercial context (the balance between competing commercial interests). A commercial contract is mutually settled on by the relevant parties, a regulatory Agreement represents the action the banks will take to deliver the FCA's regulatory objectives without the need for more formal procedures.

22. The FCA maintains that there are public policy reasons for arguing s348 FSMA should be interpreted differently from s41. Breach of s348 FSMA is a criminal offence, an indication of how seriously the preservation of confidentiality of information received by the FCA is taken. We accept this argument and also take into consideration the stated purpose of s348 and its predecessor statutes as set out in *Real Estate Opportunities Ltd v Aberdeen Asset Managers Jersey Ltd 2007 EWCA Civ 197* where it was held that there are "*strong reasons for restricting disclosure of*

[7] Decision Notice paragraph 19 agreeing with Commissioner's decision notice FS50218346.

information provided to a regulator". This case also approved the point made by Lightman J in *Re Galileo Group Ltd 1999 Ch 100* that:

> *"The maintenance of confidentiality as provided in section 82 is of vital importance to the discharge by the bank of its supervisory responsibilities under the 1987 Act. Confidentiality is vitally important to encourage the maximum free flow of information from supervised institutions and third parties whether such disclosure is obligatory or voluntary."*

23. Mr Landau argues that this Agreement is not information volunteered or extracted using powers of compulsion, neither is it a whistleblower or fact-finding exercise and as such this does not fall within the purpose of s348 FSMA which is intended to deal with information flowing genuinely from regulated institutions to FCA. However, we are satisfied that this is an Agreement entered into in a regulatory context and represents a voluntary acceptance of obligations by the banks as an alternative to the FCA using its formal powers to obtain redress.

24. Were the regulatory context of s348 FSMA not to be construed widely it could lead to the unfortunate consequence of discouraging parties from proceeding where possible by informal negotiation, giving the FCA no alternative to full investigation and sanction. From the evidence of Mr Fox we accept that the informal route is faster, more efficient, and in this case engineered an outcome more favourable to the public than could have been guaranteed under the formal sanction process[8] For example the banks agreed to provide redress to those customers with the most complex type of IRHPs who suffered loss without conducting an analysis into whether the bank actually contravened any of the FCA's regulatory requirements.

25. We accept the evidence of Mr Ho that confidentiality would be a factor in his bank agreeing to an informal process although we accept that there are other factors such as cost, speed, and the desire to avoid the negative publicity of an adverse finding or regulatory action. We also accept that without the guarantee of confidentiality even where the banks were prepared to embark on a proactive past business review, reviews could be made more difficult, resulting in more extensive discourse between

[8] As set out in paragraph 20 of Mr Fox's witness statement

the banks and the FCA by way of formal compulsion. Mr Ho did indicate that, depending upon the outcome, it would vary as to whether the formal route would be cheaper or more expensive for Barclays.

26. From this we are satisfied that the absence of confidentiality in Agreements such as this would be an inhibiting factor and would make the informal course less desirable, especially as confidentiality would be preserved in the formal route until, if the investigation so concludes, an adverse decision notice is issued. A reduction in informal resolution channels would mean a greater likelihood of private litigation or formal enforcement action both of which in our judgment would be likely to be more time consuming, less certain, and more expensive for the public or the FCA (if not the banks). This would undermine the policy intention of s348 FSMA.

27. Taking the above factors into account we are satisfied that construing s348(2) widely and within the context of the purposes of that Act, the withheld information is received information within the terms of s348(2) FSMA because it expressly refers to what the banks will do and tells the FCA what action the banks intend to take. We are satisfied that this assent to the terms of the Agreement amounts to embedded information. Information here is not just text that has found its way into an Agreement but text combined with an indication that this has been agreed to, the signature is part of the information and changes the nature of the Agreement (from a draft to an Agreement). The commitment by the bank cannot be generated by the FCA unless the bank adds something, namely its assent.

28. Additionally we accept that the Agreement arose out of an FCA investigation itself based upon a review of customer files by the banks. We are satisfied that the information received from the banks cannot be disentangled from the Agreement. Whilst it is not suggested that there is bank-specific technical data of the type envisaged in ***Derry*** (as it is accepted that the 4 banks entered into the Agreement upon the same terms), we are satisfied that the terms of the Agreement arise as a response to the failings identified during the FCA review and based upon information received from the banks. The receipt of this information informed the FCA as to which terms it felt were necessary to include in the Agreement and what shortfalls needed to be addressed. Whilst it is accepted that this is more relevant to the second part of the Agreement than the first we take into consideration the difficulties in redaction

identified in *Re Galileo Group Ltd 1999 Ch 100*[9] in concluding that this is applicable to the whole of the withheld material.

Conclusion

29. For the reasons set out above we are satisfied that this appeal should be refused and that the disputed information that has not already been disclosed was properly withheld pursuant to s44 FOIA.

Dated this 13th day of March 2014

Fiona Henderson
Tribunal Judge

[9] (at p114H-115C)