FIRST-TIER TRIBUNAL
(GENERAL REGULATORY CHAMBER)
INFORMATION RIGHTS

Appeal Reference: NJ/2018/0007
(previously EA/2016/0250)

Heard via the Cloud Video Platform
On 20 January 2022

UPON AN APPLICATION FOR CERTIFICATION TO THE HIGH COURT FOR CONTEMPT OF COURT

Before

UPPER TRIBUNAL JUDGE O'CONNOR
TRIBUNAL MEMBER ROSALIND TATAM
TRIBUNAL MEMBER MATTHEWS

Between

DEREK MOSS

Applicant

and

(1) ROYAL BOROUGH OF KINGSTON-UPON-THAMES
(2) THE INFORMATION COMMISSIONER

Respondents

Appearances:

Applicant:	Guy Vassall-Adams QC
First Respondent:	Philip Coppel QC and John Fitzsimons of Counsel
Second Respondent:	Did not appear and was not represented at the hearing

DECISION AND REASONS

DECISION AND CERTIFICATE: We certify an offence by the Royal Borough of Kingston-upon-Thames to the High Court – that offence being the failure by the Royal Borough of Kingston-upon-Thames to comply with the terms of the Tribunal's decision in EA/2016/0250, dated 20 March 2017.

REASONS

Preamble

1. This decision relates to an application made by Mr Moss as long ago as 25 March 2018. By his application, Mr Moss applied to the First-tier Tribunal for certification of an offence of contempt by the Royal Borough of Kingston upon Thames ("Kingston"), to the High Court. It is regrettable that over four years has elapsed since that application was made.

2. The hearing of the application was conducted remotely, without objection from the parties, using the Cloud Video Platform. Neither party raised a contention that the mode of hearing led to an inability to participate in the proceedings fully and effectively.

Background – A Summary

3. On 16 February 2016, Mr Moss made a request for information under the Freedom of Information Act 2000 ("FOIA") to Kingston, concerning Kingston's redevelopment plans for the Cambridge Road Estate ("the FOIA Request"). Kingston refused this request on 9 March 2016, relying on section 12 of FOIA. On the same day, Mr Moss sought an internal review of this decision. Kingston communicated the result of the internal review to Mr Moss on 13 July 2016, maintaining its position.

4. On 7 April 2016, during the period Kingston was giving consideration to Mr Moss' request for an internal review, Mr Moss made a complaint to the Information Commissioner ("ICO") under section 50 of FOIA. The ICO dismissed Mr Moss's complaint in a decision notice dated 21 September 2016, having been satisfied with Kingston's explanation as to why compliance with the FOIA request would exceed the relevant cost limit imposed by section 12 of FOIA. The ICO also considered that section 16 of FOIA had not been breached by Kingston in its dealings with Mr Moss.

5. Mr Moss appealed to the First-tier Tribunal against the ICO's decision notice. In a decision dated 20 March 2017, the First-tier Tribunal dismissed Mr Moss' appeal in relation to section 12 of FOIA but allowed his appeal in reliance on section 16 of FOIA ("the Tribunal's decision"). Mr Moss subsequently appealed those aspects of the First-tier Tribunal's decision in relation to which he had been unsuccessful, but that appeal was dismissed by the Upper Tribunal in a decision dated 30 July 2020 ([2020] UKUT 242 (AAC)). Kingston was not a party to the appeal before the First-tier Tribunal.

6. In the meantime, Mr Moss considered that Kingston has failed to comply with the First-tier Tribunal's decision. He asked the ICO to enforce that decision. The ICO concluded that whilst it could enforce an un-appealed or unchanged decision, a substituted decision notice issued by the First-tier Tribunal could not be enforced by the ICO. The ICO indicated to Mr Moss that the First-tier Tribunal should enforce its own decisions.

7. In a document dated 28 February 2018, Mr Moss applied to the First-tier Tribunal for an order that Kingston were in contempt of court as a consequence of its failure to comply with the Tribunal's decision. By a further application dated 25 March 2018, Mr Moss applied to the First-tier Tribunal to certify an offence of contempt of court as against both Kingston and the ICO.

8. The latter application in relation to Kingston was brought on two limbs: (i) that Kingston had failed to comply with the Tribunal's decision and (ii) that Kingston had failed to comply with an assurance it had given to the First-tier Tribunal in EA/2016/0250 that it would disclose specified documents to Mr Moss.

9. The application against the ICO was brought on the basis that the ICO had acted in contempt by refusing to enforce the Tribunal's decision. As is clear from what we say below, that application subsequently fell away as a consequence of a decision of the Upper Tribunal in the instant matter on 30 May 2020 ([2020] UKUT 174 (AAC)). Insofar as it is still necessary for us to do so, we formally dismiss the application made against the ICO.

10. The First-tier Tribunal's Registrar, acting with delegated judicial powers, struck out both the aforementioned applications on 8 June 2018, on the basis that the First-tier Tribunal had no jurisdiction to consider them. The (then) Chamber President (Judge McKenna) confirmed that decision on 29 June 2018.

11. The ICO appealed the Chamber President's decision to the Upper Tribunal and, by way of a decision dated 30 May 2020, it dismissed the appeal insofar as it related to Mr Moss' application of 18 February 2018 but allowed the appeal insofar as it related to Mr Moss' application for certification of 25 March 2018. In doing so, the Upper Tribunal concluded that the First-tier Tribunal has power to enforce its decisions pursuant to section 61 of FOIA and that the ICO does not have a duty to enforce such decisions. The Upper Tribunal consequently directed the First-tier Tribunal to consider Mr Moss' application for certification of 25 March 2018.

12. It is also relevant to observe that on 5 March 2019, upon its own application, Kingston was made a party to the proceedings before the Upper Tribunal. Kingston had previously been served with relevant papers in relation to the ICO's appeal against the Chamber President's decision, in late 2018. By way of an email of 25 October 2019, from the South London Legal Partnership (a shared legal service for Kingston and four other boroughs) to the Upper Tribunal, Kingston requested the Upper Tribunal to direct that it should not be permitted to take further part in the appeal, and in directions of 1 November 2019 the Upper Tribunal barred Kingston from further participating.

13. For completeness sake, we observe that following the Upper Tribunal's decision of 30 May 2020, the Lord Chancellor was given permission to intervene in the proceedings and was subsequently granted permission to appeal to the Court of Appeal, by way of a decision dated 13 August 2020. The Lord Chancellor later withdrew his appeal to the

Court of Appeal. This Tribunal has not been made privy to the reasons for such withdrawal, or the date thereof.

14. Following a number of procedural decisions, and written submissions from the parties, the matter came before Upper Tribunal Judge O'Connor for case management on 16 June 2021, at which time, having heard competing submissions, it was concluded that the following three issues were to be determined at the final hearing:

    A. Has Kingston been served with a copy of the decision endorsed with a "contempt" (i.e. penal) notice? If "no" does it matter?

    B. Is Kingston guilty of any act or omission in relation to proceedings before the Tribunal which, if those proceedings were proceedings before a court having power to commit for contempt, would constitute a contempt of court?

       The *"acts or omissions"* that the Tribunal will consider for the purpose of determining issue B are:

       (i) The alleged failure by Kingston to comply with the Tribunal's decision of 20 March 2017 in appeal EA/2016/0250;

       (ii) The alleged failure by Kingston to provide the applicant with *"the two contracts it had entered into with Renaisi or BNP Paribas"* – as referenced in paragraph 19(a) of the Tribunal's decision in EA/2016/0250**.**

    C. If Kingston is *"guilty of an act or omission in relation to proceedings before the Tribunal which, if those proceedings were proceedings before a court having power to commit for contempt, would constitute a contempt of court"*, should the Tribunal exercise its discretion to certify a contempt to the High Court

15. Mr Moss subsequently sought permission to appeal against these Directions, which was refused by the First-tier Tribunal in a decision of 13 July 2021.

16. By way of a notice of application dated 23 July 2021, Mr Moss made a further application to the First-tier Tribunal for certification of an offence of contempt by Kingston. By an order of 5 October 2021, Upper Tribunal Judge O'Connor directed that such application be determined on the same occasion as the instant matter. However, Mr Moss subsequently decided not pursue the latter application, and it was struck out by consent on 6 January 2022.

Role of the First-tier Tribunal in these proceedings

17. There is no dispute that section 61 of FOIA provides the jurisdictional basis for the First-tier Tribunal's consideration of the instant application. Kingston contends that a practical issue arises as a consequence of the fact that, by the operation of paragraphs 55 and 60 to Schedule 19 of the Data Protection Act 2018, section 61 of FOIA was substituted in its entirety on 25 May 2018 (see Data Protection Act 2018

(Commencement No 1 and Transitional and Saving Provisions) Regulations 2018 (SI 2018/625)).

18. In its skeleton argument Kingston avers that:

> "[30] …the net effect is:
>
> a. to the extent that the acts or omissions relied upon by Mr Moss pre-date 25 May 2018, the FTT's power to certify is found in paragraph 8 of the old Schedule 6; and
>
> b. to the extent that the acts or omissions relied upon by Mr Moss post-date 25 May 2018, the FTT's power to certify is found in the new FOIA s 61.
>
> [31] It does not matter that Mr Moss made his application before 25 May 2018: the FTT's power to certify is ambulatory. That said, it does mean that in relation to what was done before 25 May 2018, the FTT's power to certify would be to certify to the High Court, whereas in relation to what was done after 25 May 2018 the FTT's power to certify would be to certify to the Upper Tribunal. It therefore means that if the FTT does certify the offence, the inquiry into the matter would be carried out by different bodies according to the dates."

19. As we observed earlier in this decision, the jurisdictional foundation of the instant application has already been the subject of the proceedings before the Upper Tribunal. In reaching its decision (in [2020] UKUT 174) that the First-tier Tribunal has jurisdiction to determine the instant application, the Upper Tribunal concluded, at [16], that because Mr Moss' application to certify an offence of contempt preceded the 25 May 2018, the applicable legal framework was to be found in Schedule 6 to the Data Protection Act 1998. It further concluded that had such application been made by Mr Moss on or after 25 May 2018, the applicable legal framework would have been found in paragraph 60 of Schedule 19 to the Data Protection Act 2018 (as a consequence of an amendment to section 61 of FOIA). We consider ourselves bound by this conclusion as a matter of precedent. Consequently, even if we were to agree with Kingston's submissions and conclude that they were not consistent with the Upper Tribunal's ruling, we would nevertheless be bound to apply the ruling of the Upper Tribunal.

20. The practical significance of the aforementioned is that we must consider whether to certify a contempt to the High Court, whereas had the application by Mr Moss been made on or after 25 May 2018 we would have been required to consider whether to certify an offence of contempt to the Upper Tribunal. There is little or no other practical or legal consequence to the determination of this issue.

21. Consequently, the first port of call in our consideration of the Tribunal's role in determining the instant application must be section 61 of FOIA, as it read prior to being substituted by paragraph 60 of Schedule 19 to the Data Protection Act 2018:

> "**Appeal proceedings**

> The provisions of Schedule 6 to the Data Protection Act 1998 have effect (so far as applicable) in relation to appeals under this Part."

22. The relevant provision of Schedule 6 to the Data Protection Act 1998 ("the 1998 Act") was paragraph 8:

> *"Obstruction etc*
>
> 8(1) If any person is guilty of any act or omission in relation to proceedings before the Tribunal which, if those proceedings were proceedings before a court having power to commit for contempt, would constitute contempt of court, the Tribunal may certify the offence to the High Court or, in Scotland, the Court of Session.
>
> (2) Where an offence is so certified, the court may inquire into the matter and, after hearing any witness who may be produced against or on behalf of the person charged with the offence, and after hearing any statement that may be offered in defence, deal with him in any manner in which it could deal with him if he had committed the like offence in relation to the court."

23. By Paragraph 8(1) of Schedule 6 to the 1998 Act, the First-tier Tribunal has a discretion to certify an offence to the High Court, but only where it is satisfied that 'any person' has done something or failed to do something in relation to relevant proceedings before the Tribunal and, if the proceedings were proceedings before a court having power to commit for contempt, the act or omission would constitute contempt of court.

24. There is no mention in either section 61 of FOIA, or indeed elsewhere, as to the required standard of proof by which the allegation of contempt must be judged. In the ordinary course, given the seriousness of contempt proceedings, the standard of proof by which the contempt must be demonstrated is the criminal standard of beyond reasonable doubt: see for example, Arlidge, Eady & Smith on Contempt, 5th Edition, 12-50 onwards and [SC Mezhdunarodniy Promyshelnniy v Pugachev [2016] EWHC 92, at [41]. This is the standard that we apply to our considerations.

25. If a contempt is proven to the required standard, the Tribunal must then consider whether, in all the circumstances of the case, discretion should be exercised so as to certify the contempt to the High Court.

Applicable legal principles

26. A corporation or a limited liability company or a trade union can be fined for contempt, as opposed to the persons, such as councillors or directors or members of the executive committee, who actually make the decisions which give rise to the contempt: In re Cook and Others' Application (No 2) [1986] NI 283 per Hutton J. Kingston accept this to be so.

27. In Navigator Equities Limited v Deripaska [2021] EWCA Civ 1799, the Court of Appeal at [82] set out a helpful summary of general propositions of law in relation to civil

contempt, which it considered to be "*well-established*":

(i) The bringing of a committal application is an appropriate and legitimate means, not only of seeking enforcement of an order or undertaking, but also (or alternatively) of drawing to the court's attention a serious (rather than purely technical) contempt. Thus, a committal application can properly be brought in respect of past (and irremediable) breaches.

(ii) A committal application must be proportionate (by reference to the gravity of the conduct alleged) and brought for legitimate ends. It must not be pursued for improper collateral purpose.

(iii) Breach of an undertaking given to the court will be a contempt: an undertaking to the court represents a solemn commitment to the court and may be enforced by an order for committal. Breach of a court undertaking is always serious, because it undermines the administration of justice.

(iv) The meaning and effect of an undertaking are to be construed strictly, as with an injunction. It is appropriate to have regard to the background available to both parties at the time of the undertaking when construing its terms. There is a need to pay regard to the mischief sought to be prevented by the order or undertaking.

(v) It is generally no defence that the order disobeyed (or the undertaking breached) should not have been made or accepted.

(vi) Orders and undertakings must be complied with even if compliance is burdensome, inconvenient and expensive. If there is any obstacle to compliance, the proper course is to apply to have the order or undertaking set aside or varied.

(vii) In order to establish contempt, it need not be demonstrated that the contemnor intended to breach an order or undertaking and/or believed that the conduct in question constituted a breach. Rather it must be shown that the contemnor deliberately intended to commit the act or omission in question. Motive is irrelevant.

(viii) Contempt proceedings are not intended as a means of securing civil compensation.

(ix) For a breach of order or undertaking to be established, it must be shown that the terms of the order or undertaking are clear and unambiguous; that the respondent had proper notice; and that the breach is clear (by reference to the terms of the order or undertaking).

Discussion

28. The hearing of the instant application took place over a full day. We had before us a number of bundles, running in total to approximately 900 pages. We were also provided with detailed written skeleton arguments and a bundle of authorities, the latter totalling 1167 pages. In addition, we heard oral evidence from Rhian Allen, an Information Governance and Records Manager & Data Protection Officer for Kingston. We have taken account of all of the documentation and evidence before us, including that which is not specifically alluded to in this decision.

Issue A: Has Kingston been served with a copy of the decision endorsed with a "contempt" (i.e. penal) notice? If "no" does it matter?

29. There is no dispute that Kingston has not been served with a copy of the First-tier Tribunal's decision endorsed with a penal notice. However, Kingston accepts, and we agree, that this does not preclude the bringing of the application to certify for contempt, but rather it is a matter that is relevant to the issue of whether the Tribunal should exercise its discretion to certify in circumstances where a contempt has been found.

Issue B: Is Kingston guilty of any act or omission in relation to proceedings before the Tribunal which, if those proceedings were proceedings before a court having power to commit for contempt, would constitute a contempt of court?

30. As identified above, Mr Moss alleges that two separate acts or omissions by Kingston constitute contempt. We will consider these in turn.

Issue B(i) - Did Kingston fail to comply with the Tribunal's decision of 20 March 2017 in appeal EA/2016/0250.

31. On 16 February 2016, Mr Moss made a FOIA request to Kingston for information, concerning Kingston's redevelopment plans for the Cambridge Road Estate. That FOIA Request stated as follows:

> "I am writing to make a Freedom of Information request for the following information.
>
> 1. Any information held, including e-mails and other electronic records, printed or handwritten notes, relating to the selection and appointment of Renaisi as consultants for the regeneration programme and the work they have been, or are expected to be, instructed to do.
>
> 2. Any information held, including e-mails and other electronic records, printed or handwritten notes, relating to the selection and appointment of BNP Paribas as consultants for the regeneration programme they have been, or are expected to be, instructed to do.
>
> 3. Any information held, including e-mails and other electronic records, printed or handwritten notes, relating to the decision to set up an Affordable Homes Working Group, the remit and intended purpose of said group, and

> plans of decisions made as to what it is going to do, when it will be meeting and whether those meetings will be open to the public.
>
> 4. Details of the "stakeholders" in the regeneration programme."

32. In refusing the above request on 9 March 2016, Kingston relied on section 12 of FOIA i.e. that the cost of complying with the FOIA Request would exceed the prescribed limit. It was further said that:

> "The Council does hold information relating to the regeneration consultants and the Affordable Homes Working Group; however, it is not possible to accurately forecast the true numbers of hours associated with responding to the request in its entirety as it covers different departments across the Council. In addition, the information is held on an individual basis."

33. As we have already indicated above, the ICO concurred with Kingston's decision. The First-tier Tribunal also concurred with the decision insofar as it considered section 12 of FOIA but concluded that Kingston had failed to comply with section 16 of FOIA.

34. The relevant part of the First-tier Tribunal's decision states:

> **"D. Section 16**
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> 46. The Appellant submits that section 16 required it to have considered what information it might be provided within the costs limits and also sought to assist in refining his request.
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> 47. The parties refers us other decisions on this matter including the Upper Tribunal case in *Metropolitan Police v Information Commissioner & MacKenzie* [2014] UKUT 0479 (AAC)[6] which found that:
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> "*s.16 requires a public authority, whether before or after the request is made to suggest obvious alternative formulations of the request which will enable it to supply the core of the information sought within the cost limits. It is not required to exercise its imagination to proffer other possible solutions to the problem*". *(See Paragraph 17 of the MacKenzie case.)*
>
> 48. The Commissioner notes that the Council had provided links for the Appellant and advised "*It may be that having considered these documents you will be able to make a fresh and refined request for information which would fall within the prescribed 18 hour limit*". The Commissioner considered that the Council had acted reasonably in waiting for a response from the Appellant once the Appellant had time to consider the documents he was referred to before seeking to suggest a refined request itself.
>
> 49. The Appellant argues that this cannot satisfy the Council's duty to comply with section 16 given that the response to the request for an internal review was over 4 months and in such circumstances, it was *"unreasonable to expect me to start the whole process again".*

> 50. On this point we agree with the Appellant. The working links that the Council had referred the Appellant to only dealt with Part 3 of his request. The appeal before us only relates to Parts 1, 2 and 4. At that stage, (in July 2016), the Council had not provided any accessible information on those aspects of the request such that considering the links would not have enabled the Appellant to consider how to make a request falling within the cost limits.
>
> 51. It seems clear to us that there were obvious alternative formulations for enabling the Council to provide the core of information sought within the cost limits, and that the Council failed to suggest these or enter into any meaningful dialogue. The Appellant suggested such options at the hearing, including just providing information held by the lead officer; or as regard the contractual obligations but not the selection and appointment of the consultants; or key material held electronically. We have seen no reason why the core material could not have been provided if there had there been a constructive dialogue between the Council and Appellant. Of note, since we do not accept the Council's estimate for retrieving emails, if limiting the request to material held by staff members 1 of the BNP Paribas and Renaisi work, the total estimated time falls below the 18-hour limit.
>
> 52. The Appellant argues that the Council should have also provided details of the stakeholders (Part 4 of the request) within the appropriate limit as the cost of doing so 'would have been insignificant'. On this, we agree with the Appellant. Despite the Commissioner having asked the Council, the latter never provided a cost estimate related to Part 4 of the request. On that basis, we have no reason not to accept the Appellant's arguments that the burden is negligible, such that the material should have been provided within a suggested reformulation of the request.
>
> **Conclusion**
>
> 53. To conclude, we find that the Council justifiably relied on section 12, but in the circumstances, failed to comply with section 16. As regards Part 4, it also failed to comply with section 1(1)(a) FOIA. We do not consider Article 10 ECHR alters our decision.
>
> 54. The Council are now required to provide advice and assistance to enable a reformulation of the request that falls within the appropriate limit. This must include provision of Part 4 and be done within 30 working days."

35. Section 16 of FOIA reads:

> "(1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it."

36. It is submitted on behalf of Mr Moss that:

(i) Kingston has been aware of the First-tier Tribunal's decision since at least 23 March 2017.
(ii) The decision of the First-tier Tribunal is clear and unambiguous.
(iii) Kingston did not provide any section 16 advice and assistance to Mr Moss within 30 days of the date of the First-tier Tribunal's decision, as was required by that decision.
(iv) Kingston did not provide Mr Moss with a list of stakeholders (the part 4 information) within 30 days of the date of the First-tier Tribunal's decision, as was required by that decision.

37. In its skeleton argument, Kingston submits that:

(i) It was not a party to the appeal in the First-tier Tribunal, which is fatal to the contempt application. Noncompliance by a non-party with an order by the Tribunal concluding an appeal, does not constitute a contempt of court.
(ii) It has not been made a party to the contempt application in the First-tier Tribunal. The fact that the Upper Tribunal made Kingston a party to the appeal against the First-tier Tribunal's initial decision on the contempt application, is not relevant.
(iii) Although it accepts that the terms of the Tribunal's decision are clear and unambiguous and that it did not comply with the Tribunal's decision, this was unintentional and arose from a failure of communication rather than a deliberate act or omission. There was no deliberate intention to omit to provide the assistance required by the decision, nor was there a deliberate intention to omit to provide a response to Part 4 of the Request. Contempt cannot be established in the absence of intent

38. In his oral submissions Mr Coppel additionally submitted, on behalf of Kingston, that:

(i) The Tribunal must be satisfied that there was either *"knowing disobedience"* of the Tribunal's decision *"at a corporate level"* by Kingston, or systemic shortcomings. Kingston is not liable for the behaviour of individual rogue employees. There must have been an endorsement of the employees' behaviour by the corporate body that is Kingston. This cannot be demonstrated.
(ii) The 30 days within which Kingston was required to comply with the Tribunal's decision runs from September 2020 i.e. when the appeal proceedings before the Upper Tribunal were completed, and not from the date of the First-tier Tribunal's decision. It is nevertheless accepted that Kingston did not comply with the decision within 30 days of September 2020.

39. For the reasons which follow, we find that Kingston failed to comply with the decision of the First-tier Tribunal in the appeal refenced as EA/2016/0250, and that its failure constitutes a contempt of court.

40. We reject Kingston's submission that a consequence of it not being a party to the appeal before the First-tier Tribunal is that cannot commit a contempt of court by failing to comply with the Tribunal's decision. As a general matter, a failure to comply with an order of a Court or Tribunal is, it seems to us, always capable of being punishable by way of contempt. It maybe, as in the instant case, that it is not the Court or Tribunal whose order has been breached that can institute such punishment, but that does not detract from the underlying premise. That a breach of a Court or Tribunal order is capable of being punishable by a finding of contempt protects the important public interest in the administration of justice and the rule of law. The general rule applies equally to non-parties to proceedings as it does to parties.

41. Insofar as it is asserted that an order of this Tribunal made in proceedings brought pursuant to section 58 of FOIA (as in this case) is an exception to the general rule, we reject that contention. First, this very issue has been determined by the Upper Tribunal in the instant case, and we are bound by that decision. The Upper Tribunal concluded that the First-tier Tribunal has jurisdiction to enforce the decisions it makes on an appeal under section 58 of FOIA. The Upper Tribunal's conclusion was reached in the context of an appeal (this appeal) in which the public authority against whom enforcement was sought, was not a party to the appeal before the First-tier Tribunal.

42. In any event, we find the rationale found at [43] and [44] of Kingston's skeleton argument to be fundamentally misconceived. It is not in dispute that Kingston was aware of the appeal before First-tier Tribunal and that it could have applied to become a party at any point. This includes after promulgation of the Tribunal's decision, in order to seek permission to appeal and a suspension of the Tribunal's decision. It chose not to make any such application. The reliance by Kingston on the application of section 53(1)-(2) of FOIA is also misconceived for numerous reasons, but none more obvious than that there is no requirement therein for the Tribunal to undertake the service of a decision notice (or substituted decision notice). In the instant matter, the Information Commissioner served the Tribunal's decision (substituted decision notice) on Kingston, by email on 23 March 2017.

43. It is, also, difficult to understand Kingston's reliance on rule 38 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 ("the 2009 Rules"). Whilst Kingston's skeleton argument correctly identifies that rule 38 is couched in mandatory terms and that, as a consequence, the Tribunal must provide a copy of its decision to each party, there is no logical connection between this rule and the asserted requirement that it was mandatory for the Tribunal to serve a copy of its decision on Kingston, who were not a party to the proceedings.

44. We also reject Kingston's contention, if this is indeed the contention that is being proffered, that Kingston is not a party to the instant contempt proceedings and consequently it would be unprincipled for the Tribunal to make an order certifying a contempt to the High Court. Although Mr Moss did not name Kingston as a respondent in the heading to his application to the Tribunal of 25 March 2018, the substance of the application identified that it was being brought against Kingston and the ICO. It also clearly identified the basis upon which the application was being

brought against Kingston. The applications were of course subsequently struck out by the First-tier Tribunal for lack of jurisdiction and, as far as we can ascertain, the Tribunal did not make Kingston aware of the receipt of the applications prior to striking them out. However, upon Kingston's application of 5 March 2009, the Upper Tribunal made it a party to the appeal against the Chamber President's strike out decision. As we have previously identified, the Upper Tribunal set aside the Chamber President's decision and remitted the matter back to the First-tier Tribunal for the decision on the Mr Moss' application to be remade. I do not accept that upon remittal Kingston ceased to be a party in the proceedings, but even if this is so then both the Tribunal and Kingston continued to act as though Kingston were a party to the proceedings. Kingston has played a full part at every stage of the proceedings before the Tribunal, including being in attendance and making submissions at the case management hearing which identified the issues that the Tribunal would determine. Kingston has also referred to itself throughout these proceedings as the second respondent, including within its written Response to the application dated 1 March 2021, headed "*Response of the Second Respondent*", and in its skeleton argument for the hearing of 20 January 2022. In such circumstances we find that Kingston is a party to the instant application. In any event, even if Kingston is not a party to these proceedings, then we do not accept that it follows that we cannot certify a contempt against Kingston. As we have indicated above, it knows the case against it and has played a full part in these proceedings.

45. We finally turn to the substance of our consideration.

46. The applicable legal principles that can be drawn from the authorities in relation to construction of Court Orders and findings of contempt in relation to breach of an Order, are as follows:

    (i) The terms in which an Order was made are to be restrictively construed (see Federal Bank of the Middle East v Hadkinson [2000] 1 WLR 1695).
    (ii) The words of the Order are to be given their natural and ordinary meaning and are to be construed in their context, including their historical context and with regard to the object of the Order (Hadkinson) and the reasons given by the Court for making the Order at the time that it was made (Sans Souci Limited v VRL Services Limited [2013] UKPC 6).

47. It is not in dispute, and we conclude having applied the principles identified above, that the Tribunal's decision on the issue of what was required of Kingston and by when, is clear and unambiguous.

48. We find that Kingston became aware of the Tribunal's decision on 23 March 2017, when it was served by the ICO via email, on Phillip Furby. At that time, Phillip Furby was the Team Leader, Risk and Assurance, at Kingston. He was the person who had previously engaged with the ICO on behalf of Kingston. In the email of 23 March 2017, the ICO stated:

> "You will note that the Tribunal found that the Council correctly applied section 12. However, the Tribunal also concluded that the Council failed to comply with section 16 and directed that the Council is now required to provide advice and assistance, to include provision of part 4 within 30 working days. I would be grateful if you would confirm when this has been carried out."

49. Kingston accepts that it did not comply with the Tribunal's decision. In particular, at paragraph 4 of its Response to these proceedings, dated 1 March 2021, Kingston states that "*compliance with the disclosures required by the Tribunal, and the assistance required to be offered to the Appellant, did not take place…*". Furthermore, in her witness statement of 13 July 2021, Rhian Allen confirmed, at [5], that:

> "… following the review of the original Tribunal decision, it became apparent to me that the requirement in the Tribunal's decision in 2017 to provide advice to Mr Moss under s.16 FOIA 2000 had not been undertaken by officers employed at the time of the decision, and the outstanding failure to do so had not subsequently been identified by Council officers."

50. At this juncture it is necessary to identify the relevant factual background in more detail.

51. As we have found above, Phillip Furby was served with a copy of the ICO's decision by email on 23 March 2017. We have no evidence as to when he first viewed that email, but we find that on 27 April 2017 he telephoned Mr Moss to discuss a different FOIA request, and that during that telephone call the conversation turned to the Tribunal's decision and the steps that were being taken by Kingston to comply with it. A transcript of this telephone call has been obtained by Mr Moss and placed before us. On page 9 of the transcript the following is stated as having been said by Phillip Furby:

> "The elements that the tribunal has ruled on we are working on dealing with those. Part of the problem we have organisationally at the moment is that the very teams that some of the questions you posed to have actually, it's been disbanded and absorbed. So the people who were doing a lot of this stuff have actually gone. It's a case of trying to make sure that the people who are now in post, doing the role as was, we're pushing them and giving them as much help as we can to try and get the information together as best as they can, given the thing you've highlighted, which was have we managed this thing appropriately, in terms of the records? I'm not stalling on that, we will give you the answers. As per the tribunals requirement, we'll give you the information requested within the context of the request."

52. We further take note that during this same telephone conversation, Phillip Furby requested Mr Moss to identify the core information that he sought, so that emphasis could be placed on obtaining that information within the section 12 costs limit.

53. It is not in dispute that Kingston did not make any further contact with Mr Moss in relation to compliance with the Tribunal's decision until 1 March 2021, on which date

a letter was written to Mr Moss by the South London Legal Partnership, on behalf of Kingston.

54. We accept the evidence of Rhian Allen that Phillip Furby and his former line manager Andrew Bessant, left Kingston's employment in May 2018. Phillip Furby was subject to a disciplinary investigation in respect of allegations which included his failure to respond to FOIA requests. This process was not concluded prior to him leaving Kingston's employment. We also accept that Kingston have subsequently made contact with Phillip Furby and Andrew Bessant but they were *"unable to assist or recollect matters"*.

55. In its Response to the instant application, Kingston indicates that there is no record that the matter was allocated to another officer after Phillip Furby's departure. We accept this to be so. As we have already observed, Kingston was joined to these proceedings in the Upper Tribunal in November 2018, at which time the relevant documents were served on Kingston.

56. In oral evidence, Rhian Allen stated that consideration of FOIA requests was transferred to the Information Governance Team, which she leads, in November 2019. Prior to that, such requests were considered by the Customer Experience Team which had taken over consideration of such requests from Phillip Furby's team. The object of transferring consideration of FOIA requests to the Information Governance team was to improve the process and to ensure that there was a greater focus than was previously the case. This matter first came to Rhian Allen's attention on the 25 January 2021, when she received a copy of the Case Management Directions issued by the Tribunal. Upon checking with her FOI Team colleagues, none had any knowledge of the contempt application nor was she able to locate any information in Kingston's FOI files. Kingston's Monitoring Officer was also unaware of the matter. Having subsequently reviewed the Tribunal's decision of 20 March 2017, Rhian Allen undertook relevant investigations and provided a detailed response to Mr Moss on 1 March 2021, which incorporated an unreserved apology. We accept this evidence.

57. It is submitted on behalf of Kingston that despite there being an acceptance of its failure to comply with the Tribunal's decision, such failure does not constitute a contempt of court because it was entirely unintentional and arose from a failure of communication rather than any deliberate act or omission. Mr Coppel elucidated on this submission orally, contending that Kingston could not be liable for the behaviour of a 'rogue employee' or 'rotten apple', Phillip Furby, unless his behaviour was endorsed by the corporate entity that is Kingston, which was not the case.

58. It is to be recalled that the Court of Appeal in the Navigator case said, at [82(vii)] when summarising the well-established general propositions of law in relation to civil contempts, that:

> "In order to establish contempt, it need not be demonstrated that the contemnor intended to breach an order or undertaking and/or believed that the conduct in question constituted a breach. Rather it must be shown that

> the contemnor deliberately intended to commit the act or omission in question. Motive is irrelevant"

59. In *Arlidge, Eady and Smith on Contempt* (5th Edition at [12.94]) it is stated that the requirement that the contemnor's conduct be intentional or deliberate means that it should not be accidental. In Stancomb v Trowbridge Urban District Council [1910] 2 Ch 190 Warrington J, (approved by the House of Lords in Heatons Transport Ltd v TGWU [1973] AC 15 at 109), on an application for leave to issue a writ of sequestration which, under the then rules required "wilful disobedience" to an order, said:

> "In my judgment, if a person or a corporation is restrained by injunction from doing a particular act, that person or corporation commits a breach of the injunction, and is liable for process for contempt, if he or she does the act, and it is no answer to say that the act was not contumacious in the sense that, in doing it, there was no direct intention to disobey the order. I think the expression "wilfully" in Order XLII R.31, is intended to exclude only such casual or accidental and unintentional acts as are referred to in Fairclough v Manchester Ship Canal Co"

60. It is accepted by Kingston, and we find, that Kingston did not comply with the Tribunal's decision. In our conclusion, on the facts as we accept them to be, the overwhelming inference we draw is that Phillip Furby intentionally failed to provide advice and assistance to Mr Moss within 30 days of the Tribunal's decision so as to enable him to reformulate a request for information that falls within the appropriate cost limit, and that he intentionally failed to provide the information requested in Part 4 of the request of 16 February 2016.

61. In reaching this conclusion we have firmly in mind the words of warning of Mrs Justice Rose, as she then was, at [41(iii]) of her decision in JSC Mezhdunarodniy Promyshellnniy v Pugachev [2016] EWHC 192 that "*The court needs to exercise care when it is asked to draw inferences in order to prove contempt…. Circumstantial evidence can be relied on to establish guilt. It is however important to examine the evidence with care to see whether it reveals any other circumstances which are or may be of sufficient reliability and strength to weaken or destroy the Bank's case. If, after considering the evidence, the court concludes that there is more than one reasonable inference to be drawn and at least one of them is inconsistent with a finding of contempt, the claimants fail.*"

62. We have found that Phillip Furby was aware both of the Tribunal's decision, and what was required of Kingston as a consequence of that decision. He indicated as much in his telephone conversation with Mr Moss, and further indicated that he had put matters in train to ensure, albeit not within the timeframe required by the Tribunal, that the substance of the Tribunal's decision would be complied with, including by liaising with other teams within Kingston. We also observe that the ICO reminded Phillip Furby of the Tribunal's decision on 4 May 2017.

63. In our conclusion, in all the circumstances it is not reasonable to draw an inference that Phillip Furby accidentally or unintentionally failed to provide advice and assistance to Mr Moss so as to enable him to reformulate a request for information that falls within

the appropriate cost limit, or that Phillip Furby accidentally or unintentionally failed to provide the information requested in Part 4 of the request of 16 February 2016.

64. Do the actions of Phillip Furby attach to Kingston? We find beyond reasonable doubt that they do. In Director General of Fair Trading v Pioneer Concrete (UK) Ltd [1995] 1 AC 456, the Director General of Fair Trading (DGFT) appealed against the Court of Appeal's decision to allow an appeal from a decision of the Restrictive Practices Court that they were vicariously liable for the actions of their employees who entered into restrictive practices agreements contrary to section 35 of the Restrictive Trade Practices Act 1976 and in breach of injunctions obtained by DGFT. Their Lordship's House concluded that the Court of Appeal was wrong to find that, because the Respondents had prohibited their employees from acting in breach of the injunctions and had taken steps to ensure compliance, they were not liable for contempt of court. It was concluded that employees who acted on behalf of a company within the scope of their employment acted, in effect, as the company itself for the purposes of section 35 of the 1976 Act and, while the fact that employees had acted without authority would count as mitigation, it could not exempt the company from liability for contempt. The principle applies as equally to the actions or omissions of an employee of a local authority as it does to an employee of a company (see R (on the application of) Bempoa v London Borough of Southwark [2002] EWHC 153)

65. Phillip Furby's role within Kingston was, at least in part, to respond to FOIA requests and he was familiar with Mr Moss' request both as a consequence of having engaged with the ICO prior to the hearing before the Tribunal and having spoken with Mr Moss and thereafter. We find that at all times Phillip Furby was acting on behalf of Kingston and he remained in the employ of Kingston for approximately 14 months after the date of the Tribunal's decision. In all the circumstances, we conclude beyond reasonable doubt that the acts and omissions of Phillip Furby in dealing with Mr Moss and in failing to provide the required advice, assistance, and information, were the acts and omissions of Kingston for the purposes of the instant application.

66. Drawing the above strands together, we have found that the terms of the Tribunal's Decision were clear and unambiguous, that Kingston was aware of the terms of the Decision and, despite not being a party to the appeal, was bound by it. We have further found that the terms of the Tribunal's decision were not complied with and that the acts and omissions which led to noncompliance were intentional and those of Kingston.

67. There is an important public interest in protecting the administration of justice, and this includes the need for compliance with the orders of the Tribunal. The Tribunal has an interest, on behalf of the community at large, in ensuring that its orders are not disobeyed. In our conclusion, for the reasons given above, if these proceedings were proceedings before a court having power to commit for contempt, the failure by Kingston to comply with the Tribunal's Decision issued in EA/2016/0250 would constitute contempt of court.

Issue B(ii) The alleged failure by Kingston to provide the applicant with "the two contracts it had entered into with Renaisi or BNP Paribas" – as referenced in paragraph 19(a) of the Tribunal's decision in EA/2016/0250.

68. At paragraph 19 of its decision in EA/2016/0250, the Tribunal said as follows:

> "The Council did not seek to be joined as a party to this appeal. However, the panel and Appellant received an email in the morning of the hearing [of 9 March 2017] via the Commissioner containing representations from it. …Of note, the Council made three points which we welcomed clarification on:
>
> a) The Council conceded that it would send the Appellant the two contracts it had entered into with Renaisi and BNP Paribas. On that basis. We have not considered the matter further below…."

69. As indicated in the Tribunal's decision, the ICO sent the Tribunal an email on the morning of the hearing (timed at 08.32), which states as follows: "*The Commissioner has finally received a response from the public authority in relation to her further enquiry in this matter which is contained in the email below.*" The email chain includes an email from Phillip Furby to the ICO, sent at 17.26 on the 8 March 2017, which we have partially replicated below. This email was sent in response both to an earlier written request from the ICO to Phillip Furby requesting that Kingston "*clarify the position concerning part 4 of the request*" and a telephone call between the ICO and Phillip Furby of 6 March 2017. The email reads:

> "i) I have investigated the situation regarding the 2 requested contracts. It would appear that there is a default setting for contract visibility on the ProContract system. This means that once the contract has expired it ceases to be visible to the public and is archived. I have reviewed the email trail and am unable to satisfactorily answer the question of why the contracts were not supplied to Mr Moss as they were historic documents and were visible to anyone had they searched for them.
>
> The Council will send Mr Moss the contracts, as requested. …
>
> I hope this clarifies the Council's position …"

70. As we have alluded to above, subsequent to the Tribunal's decision there was a telephone conversation on 27 April 2017 between Phillip Furby and Mr Moss, which has been transcribed. In that conversation Phillip Furby once again agreed to provide Mr Moss with a copy of the contracts, subject to "*any commercial sensitivity*". He further confirmed that he had "*cued them up, so hopefully we can get that in short order*."

71. It is accepted that the Council did not provide Mr Moss with copies of the Renaisi or BNP Paribas contracts to until March 2021.

72. The dispute between the parties, and the issue that the Tribunal must determine, is whether Kingston gave an undertaking or made a promise to the Tribunal that it

would provide Mr Moss with the Renaisi and/or BNP Paribas contracts. We conclude that this has not been established beyond reasonable doubt.

73. Although not on all fours with the instant scenario, the Upper Tribunal's decision in R (on the application of MMK) v Secretary of State for the Home Department (consent orders – legal effect – enforcement) [2017] UKUT 00198, is illustrative of the caution that must be exercised when considering matters of contempt. In MMK a consent order was approved by the Upper Tribunal in which it was stated, *inter alia*, that the Secretary of State had agreed to make a new decision on the applicant's application within 3 months of receipt of further material from the applicant. In light, at least in part, of this promise by the Secretary of State, the Tribunal granted the applicant to withdraw his application for judicial review.

74. The Secretary of State failed to make a new decision within 3 months of the provision of further material, and the matter came back before the Upper Tribunal to consider, amongst other things, whether the Secretary of State's failure was punishable by way of contempt. The Upper Tribunal concluded that although the Secretary of State had agreed, in the recital to a consent order, to make a new decision within 3 months, the agreement was not an undertaking to the Tribunal. The President of the Upper Tribunal concluded, in particular, at [30] that: "*The correct analysis of the recitals is that they record the factual basis of the operative provisions of the order; they inform and illuminate such provisions; and they give expression to the parties' bona fide intentions.*"

75. It is submitted on behalf of Mr Moss that Kingston made a promise to the Tribunal through the ICO, knowing that this promise would be placed before the Tribunal and would influence its decision-making. We observe, however, that the email chain referred to above does not include a request by Kingston that its email, or any part of the email chain, be sent to the Tribunal, nor is there a written indication from the ICO to Kingston that it intended to forward Kingston's email to the Tribunal. We further observe that Kingston was not copied into the ICO's email to the Tribunal of 9 March 2017. Put simply, in our conclusion it cannot be said that Kingston gave an undertaking or promise to the Tribunal. The fact that the Tribunal relied upon the promise made by Kingston to the ICO, or even that Kingston may have reasonably believed that the Tribunal would have been notified of its promise to the ICO, does not turn a promise to the ICO into a promise or undertaking to the Tribunal. In addition, we note that the Tribunal did not order Kingston to provide the contracts to Mr Moss, as it could have done.

76. For the reasons given above, we refuse Mr Moss's application to certify a contempt of court for Kingston's breach of an undertaking given to the Tribunal.

Issue C: Should the Tribunal exercise its discretion to certify a contempt to the High Court?

77. The final issue we must consider is whether, given the findings made above, we should exercise our discretion to certify the offence to the High Court. In reaching our

conclusion on this issue, we have taken account of all the circumstances of the case, even if not specifically referred to herein.

78. We agree with Mr Vassall-Adams that it is relevant to our consideration that the *"purpose of the FOIA regime is to enhance transparency and accountability of public bodies by enabling members of the public to receive timely information on matters of public interest. In this context, information can swiftly become out of date or be rendered irrelevant if there is a significant passage of time between the request being made and the information being provided. It should be recalled that the starting point is that a public authority should provide information in response to a FOIA request promptly and within 20 days."*

79. We find the most significant feature in our consideration of whether to exercise discretion so as to certify the contempt to the High Court, is the considerable passage of time between the date on which Kingston was required by the Tribunal to comply with its decision i.e. 1 May 2017, and the date on which Kingston purports to have complied i.e. 1 March 2021. We use the term 'purports' in the preceding sentence because Mr Moss disputes Kingston's contention that the letter of 1 March 2021 complies with the Tribunal's decision. We heard no argument on this at the hearing and although we see some force in the submissions made at [42] of Mr Vassall-Adams' skeleton argument, we proceed to determine this application on the basis that the letter of 1 March 2021, does fulfil the obligations on Kingston imposed by the Tribunal's decision.

80. We accept that the delay in complying with the Tribunal's decision has been prejudicial to Mr Moss' rights under the FOIA regime. The information was sought by Mr Moss so that he could share it with other residents to facilitate public debate on a matter of public interest, i.e. the plans to demolish and redevelop the Cambridge Road Estate, and to assist residents to make informed decisions about whether to support or oppose those plans. Needless to say, the effluxion of time has significantly, if not totally, dissipated the use to which this information can be put.

81. Moving on, we reject Kingston's assertion that time for compliance with the Tribunal's Decision did not begin to run until Mr Moss' appeal to the Upper Tribunal was resolved in September 2020. First, the appeal before the Upper Tribunal did not relate to any matters that had a material bearing on the order made by the Tribunal requiring Kingston to carry out certain actions within 30 working days. The matters before the Upper Tribunal related to those aspects of the appeal upon which Mr Moss was not successful. Second, there is provision in the Procedure Rules for the suspension of the effect of decision of the First-tier Tribunal pending the outcome of an appeal to the Upper Tribunal. No order was made by either Tribunal to this effect. It would be remarkable if, in such circumstances, the effect of an appeal was to, in any event, suspend the effect of the First-tier Tribunal's decision. Finally, there is no evidence before us that Kingston had a belief it did not have to comply with the Tribunal's decision pending the resolution of Mr Moss' appeal to the Upper Tribunal.

82. In his submissions, Mr Coppel contended that Kingston has, since date of the Tribunal's decision, put in place a robust system to ensure that FOIA requests are dealt

with promptly. He also draws attention to the evidence that Phillip Furby was the subject to a disciplinary investigation for his failures in dealing with FOIA requests, prior to leaving Kingston in May 2018, and that there has been an unreserved apology to Mr Moss by Kingston for its failures. We have taken these matters into account in considering the exercise of our discretion.

83. We observe, however, the lack of any coherent explanation as to why the Tribunal's decision was not complied with much sooner than March 2021. Even if we were to assume that Phillip Furby was a 'rotten apple' – to repeat the phrase used by Mr Coppel during submissions, he was, at least according to the transcript of the conversation he had with Mr Moss in April 2017, working with other individuals within Kingston to ensure compliance. We also think it reasonable, given that in either late 2017 or early 2018 Phillip Furby was the subject of disciplinary investigation by Kingston for the way in which FOIA requests were being dealt with, that Kingston would have taken particular care at that time, and upon Phillip Furby's departure in May 2018, to identify all those matters under Phillip Furby's remit that required action. We have no evidence as to what steps were taken at this juncture or as to why the team that took over Phillip Furby's workload did not seek to comply with the Tribunal's decision.

84. In addition, we observe that someone within Kingston, or acting on Kingston's behalf, other than Phillip Furby and subsequent to Phillip Furby's departure, was aware of the Tribunal's decision because there was engagement with the Upper Tribunal in 2019 on the issue of enforcement of that decision. No material evidence has been tendered by Kingston seeking to explain why it did not comply with the Tribunal's decision at that juncture.

85. We accept that Rhian Allen's team took over consideration of FOIA matters in November 2019, and that the instant matter did not come to her attention until 25 January 2021. We also accept that she acted promptly once the failure to comply with the Tribunal's decision had come to her attention. There is, however, no explanation as to what efforts were made by Kingston in November 2019 or thereafter to ensure that all outstanding FOIA related matters were known to Rhian Allen's team nor, in particular, is there an explanation as to why her team was not informed of Mr Moss' matter given that a person acting on behalf of Kingston, and we assume with authority and instructions to do so, had that very month indicated to the Upper Tribunal that Kingston did not want to further engage in relation to the jurisdictional issue of enforcement of the Tribunal's decision.

86. Looking the circumstances of the case in the round, including but not limited to those matters referred to above and the fact that Kingston was not, albeit through choice, a party to the proceedings before the Tribunal, that the Tribunal's decision did not contain a penal notice, that Kingston have now complied in substance with the Tribunal's decision, we nevertheless conclude that discretion should be exercised to certify Kingston's contempt to the High Court. In reaching this conclusion we place significant weight on the length of time it took Kingston to comply with the Tribunal's decision, given the purpose of the FOIA regime.

87. As we have previously stated, the Tribunal has an interest in ensuring that there is compliance with its orders. Punishment of those who do not comply with its orders clearly furthers that interest. Were the High Court also to conclude that Kingston had acted in contempt, the nature of any punishment would be entirely a matter for that Court. However, even a public finding that Kingston breached the Tribunal's order, and imposition of no further punishment, would further the public interest in the administration of justice and is likely to cause others to be more diligent in their response to Decisions of this Tribunal.

Signed Date: 28 March 2022
M O'Connor
Upper Tribunal Judge O'Connor Promulgate Date 1st April 2022