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Judgment: approved by the Court for handing down | *Delivered:* **10/12/2014**

(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

GEOFFREY JOHNSTON (ON BEHALF OF CONSCAPE LIMITED)

Applicant/Appellant;

-and-

THE DEPARTMENT FOR REGIONAL DEVELOPMENT (ROAD SERVICE)

First Respondent;

-and-

THE INFORMATION COMMISSIONER'S OFFICE

Second Respondent.

GILLEN LJ (delivering the judgment of the court)

Summary

[1] This is an appeal from the decision of Treacy J on 10 June 2006 refusing an application by Geoffrey Johnston ("the appellant") for leave to apply for judicial review of decisions made by the Department for Regional Development (Road Service) ("DRD") and the Information Commissioner's Office ("ICO") consequent on the provisions of the Freedom of Information Act 2000 ("FOIA") and the Environment Information Regulations 2004 ("EIR"). The application reflected the appellant's dissatisfaction with:

1. the outcome of his request for information made to the DRD in connection with the award of an environmental maintenance contract ("EMNI 2010") for which the appellant had submitted unsuccessful tenders; and

2. the failure of the ICO to bring proceedings against the DRD pursuant to the FOIA and EIR for an alleged offence of blocking or concealing records and information relevant to these contracts.

[2] Mr Johnston was a personal litigant and he brought the application on behalf of Conscape Ltd ("CL"), an environmental services company of which he is a director. Mr Sharpe appeared on behalf of the first respondent. The second respondent, having made written submissions, was not represented at this hearing. Mr Johnston and Mr Sharpe both furnished well-constructed skeleton arguments addressing the matters in issue.

Statutory background

The Freedom of Information Act 2000 ("FOIA")

[3] Where relevant, the FOIA provides at section 1:

> "**Access to information held by public authorities**
>
> (1) Any person making a request for information to a public authority is entitled –
>
> (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
>
> (b) if that is the case, to have that information communicated to him."

[4] Section 43 of the FOIA, where relevant, provides:

> "43.-(1) Information is exempt information if it constitutes a trade secret.
>
> (2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
>
> (3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2)."

[5] Section 50 of the FOIA provides where relevant:

> "50.-(1)Any person (in this section referred to as 'the complainant') may apply to the Commissioner for a decision whether, in any specified respect, a request

for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I."

[6] Section 57 of the FOIA provides, where relevant, as follows:

> "57.- (1) Where a decision notice has been served, the complainant or the public authority may appeal to the Tribunal against the notice."

[7] Section 77 of the FOIA, where relevant, provides:

> "77. **Offence of altering etc. records with intent to prevent disclosure.**
>
> (1) Where—
>
> (a) a request for information has been made to a public authority, and
>
> (b) under section 1 of this Act or section 7 of the Data Protection Act 1998, the applicant would have been entitled (subject to payment of any fee) to communication of any information in accordance with that section,
>
> any person to whom this subsection applies is guilty of an offence if he alters, defaces, blocks, erases, destroys or conceals any record held by the public authority, with the intention of preventing the disclosure by that authority of all, or any part, of the information to the communication of which the applicant would have been entitled.
>
> …..
>
> (3) A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 5 on the standard scale.
>
> (4) No proceedings for an offence under this section shall be instituted—
>
> (b) in Northern Ireland, except by the Commissioner or by or with the consent of the

Director of Public Prosecutions for Northern Ireland."

The Environment Information Regulations 2004 ("EIR")

[8] The EIR at regulation 3 provides, where relevant, as follows:

> "3(2) For the purposes of these Regulations, environmental information is held by a public authority if the information—
>
> (b) is held by another person on behalf of the authority."

[9] The EIR at regulation 12(5) where relevant provides as follows:

> "… a public authority may refuse to disclose information to the extent that its disclosure would adversely affect -
>
> (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest."

[10] Regulation 2 of the EIR provides, where relevant, as follows:

> "'Environmental information' has the same meaning as Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –
>
> (a) That state of elements of the environment such as … soil, land, landscape …"

[11] Regulation 19 of the EIR provides, where relevant, as follows:

> "19.-(1) Where –
>
> (a) A request for environmental information has been made to a public authority under Regulation 5; and
>
> (b) The applicant would have been entitled (subject to payment of any charge) to that information in accordance with that regulation,

any person to whom this paragraph applies is guilty of an offence if he alters, defaces, blocks, erases, destroys or conceals any record held by the public authority with the intention of preventing the disclosure by that authority of all, or any part of, the information to which the applicant would have been entitled."

The Magistrates' Courts (NI) Order 1981

[12] Where relevant, article 19 of this Order provides:

> *"Time within which complaint charging offence must be made to give jurisdiction.*
>
> 19.-(1) Where no period of limitation is provided for by any other enactment—
>
> (a) a magistrates' court shall not have jurisdiction to hear and determine a complaint charging the commission of a summary offence other than an offence which is also triable upon indictment unless the complaint was made within six months from the time when the offence was committed or ceased to continue."

The Tribunals Courts and Enforcement Act 2007,

[13] Where relevant, this Act provides at Section 15:

> "15. Upper Tribunal's 'judicial review' jurisdiction
>
> (1) The Upper Tribunal has power, in cases arising under the law of England and Wales or under the law …. of Northern Ireland, to grant the following kinds of relief—
>
> (a) a mandatory order;
>
> (b) a prohibiting order;
>
> (c) a quashing order;
>
> (d) a declaration;
>
> (e) an injunction."

The Order 53 application

[14] The applicant sought:

(i) Declaratory relief against DRD arising from its alleged concealment of information in respect to the applicant's request under the FOIA.

(ii) Declaratory relief and an order of mandamus requiring the ICO, pursuant to Section 77 of the FOIA and Regulation 19 of the EIR to take proceedings against DRD for an alleged offence of blocking or concealing records and information.

The amended grounds on which the application was brought

[15] The applicant relied on three grounds:

(i) Illegality and procedural impropriety in the decision to withhold information and/or provide false statements regarding the procurement of sub-contractors through the FOIA and/or EIR. For this the relief sought was a declaration "in regards as to the illegality and procedural impropriety of this act and omission". (hereinafter called" Ground 1")

(ii) Illegality and procedural impropriety in the decision to withhold information and/or provide false statements regarding the procurement of sub-contractors to a First Tier Tribunal under Section 57 FOIA by the DRD. The relief sought on this ground was a declaration "in regards as the illegality and procedural impropriety of this act and omission". (hereinafter called "Ground 2")

(iii) Procedural impropriety in the failure by the ICO to provide a remedy regarding the acts and omissions by the DRD in relation to the procurement of sub-contractors through the FOIA and the EIR. The relief sought on this ground was a declaration "in regards as to the procedural impropriety of this act and omission and thereafter a mandatory order instructing ICO to provide a remedy for the acts and omissions by the DRD". (hereinafter called "Ground 3")

Factual background

[16] CL held contracts awarded by the DRD between 2000-2010. In early 2010 it unsuccessfully competed for several environmental maintenance contracts for which it had submitted tenders. It had been initially successful in the competition but then qualified its tendered submission and was excluded from the tendering procedure.

[17] Following this, on 2 June 2010 CL sought information from the DRD in the following terms:

> "Term contracts for Environmental Maintenance 2010:
> EMNI Northern Division
>
> (1) Confirmation of all sub-contractors engaged by the Principal Contractor (Roads Safety Contracts Limited) in relation to this contract on grass cutting, weed control and gully cleaning operations for each section within the division."

[18] On 25 June 2010 the DRD responded advising that the information requested was not held.

[19] On 21 September 2010 CL requested an internal review of DRD's decision.

[20] On 1 July 2011 the DRD advised CL of the outcome of its internal review namely that it did not hold the information requested.

[21] CL complained to the ICO and, following an investigation, the Commissioner issued a decision notice under Section 50 of the FOIA concluding that the DRD did not hold the requested information which, in any event, was environmental information.

[22] CL appealed this decision to the First Tier Tribunal ("FTT"). On 12 June 2012 the FTT issued its decision allowing the appeal and directing the DRD to provide the information sought by CL or to demonstrate that it was exempt or not in the public interest to do so. The FTT determined that:

1. neither the Department nor the ICO had made adequate enquiries as to whether the contractor was holding the requested information on behalf of the DRD,

2. pursuant to the contract the DRD could have insisted on provision of the sub-contractors names and

3. since the contractor was required under the terms of the contract to seek approval of the sub-contractors from the DRD, the DRD could have received a list of the sub-contractors. No reasons had been provided as to why this could not have been done. Invoking Regulation 3(2)(b) of the EIR it held that the names of the sub-contractors were available to the DRD and there was no evidence that it was not in the public interest to disclose the names.

[23] Separately, on 17 August 2010, CL wrote to the DRD asking for information in the following terms:

> "Term contracts for Environmental Maintenance 2010-EMN1 Northern Division.
>
> (1) The name(s) of sub-contractors engaged in weed control operations in the sections ("request 1").
>
> (2) Confirmation of the number of weed control applications provided (as recorded by your office) in 2010 season to date ("request 2").
>
> (3) A copy of the measurement format as billed for first payment under the contract ("request 3")."

[24] On 16 September 2010 the DRD responded advising in respect of:

- request (1), that it did not have the information requested.
- request (2), that as this was a performance based specification, the number of weed control applications carried out in accordance with a contract was not formally recorded by the Department.
- request (3), that this document contained financial information and therefore could not be released under Section 43 of the FOIA as it could be prejudicial to commercial interests.

[25] CL sought an internal review of this decision. On 17 February 2011 the DRD responded advising that it did not hold the information requested at (1) and (2) and was silent on (3).

[26] CL complained to the ICO. An investigation followed, and the Commissioner issued a decision notice dated 5 December 2011 finding that the request should have been handled under the EIR rather than FOIA. The Commissioner did not include request (1) in the scope of its investigation having determined that the DRD had provided the requested information in November 2010. As regards request (2) the Commissioner was satisfied that the information was not held by the DRD. The Commissioner upheld the DRD's decision on request 3. The Commissioner considered that the exemption in Regulation 12(5)(e) of the EIR was engaged. The information could be described as the detail of how the contractor billed the Department and would include financial information specific to the contractor and which had formed part of the successful bid. The Commissioner was satisfied there was an obligation of confidence to protect the economic interests of the company. He then considered the public interest test, including that the financial rates were so specific to the contractor that their disclosure would be disproportionate and unwarranted.

[27] CL appealed these decisions to the FTT. The FTT provided a decision on 12 June 2012 in which it allowed the appeal in part. It held:

1. On request (1), whilst it was true that the information requested was ultimately provided, nonetheless it should have been provided at the outset.

2. On request (2), it disagreed with the Commissioner. It concluded that the information should have been held by the DRD and that it was contained within, inter alia, work sheets. The Tribunal observed:

> "The Tribunal is surprised that the DRD and the Commissioner say the information sought is not held and find that on the balance of probabilities the information sought was held by the DRD. … The Tribunal holds that the main contractor would hold this information on behalf of the public authority, the DRD as per Regulation 3(2)(b) of the EIR."

3. On request (3), the Tribunal accepted the reasoning of the Commissioner and refused the appeal.

[28] In wholly separate High Court proceedings initiated in 2011 by the appellant against the DRD and in the course of a disclosure application, the DRD discovered to the appellant minutes of a meeting of 31 March 2010 connected with the EMN1 2010 contract approvals process. On 25 September 2012 CL requested minutes of *all* meetings carried out under the EMN1 2010 contract and the DRD provided the minutes under cover of a letter dated 24 October 2012.

[29] These minutes and diary entry ("the documents") played an important role in the case and our determination of it. Consequently they require some measure of detailed recitation. In minutes of 31 March 2010, noting the attendance of the DRD and the Road Safety Contracts firm (the successful tenderer), it is recorded at paragraph 6:

> "Road Safety Contracts, depending on item quantities, may sub-contract a portion of the spraying work to John Ross Armstrong and a portion of the gully emptying work to Brian Sterling. Representatives have had previous experience of both these contractors and were content with this arrangement."

[30] A diary entry of May 2010 recorded, inter alia:

> "R.S. Contracts …. Ross Armstrong

…

(4) Brief discussion on timings and programmings of treatments."

[31] A minute of a review meeting on 15 April 2011 recording the attendance of the DRD and road safety contracts recorded at paragraph 6:

> "J McKinley thanked John Ross Armstrong for the fast treatment on Rathlin Island and that further work will be required this year to treat weeds growing on the road centre line …. Clive Robinson thanked John Ross Armstrong for pedestrian grass cutting on central median on Larne Road Link."

[32] It was the contention of Mr Johnston that these documents revealed the name of the sub-contractor Armstrong and had been deliberately concealed by the DRD until they emerged in the course of the disclosure exercise in separate proceedings. These documents were not available to the FTT which gave its decision on 12 June 2012.

[33] On 8 December 2012 CL forwarded these documents to the ICO requesting that they be considered along with all the information that the Commissioner had before him. It was the appellant's contention that both the ICO and the FTT had been misled by the withholding of this information.

[34] The Commissioner advised CL in April 2013 that it was "unable to re-examine the closed complaints".

[35] On 15 February 2013 the ICO's office wrote to the appellant advising that the DRD had applied for permission to the Upper Tribunal to appeal the FTT 's findings in the following terms:

> "I have been in contact with Mr David Crabbe of the DRD who informs me that he has sought permission from the Upper Tribunal to appeal the decisions of the First Tier Tribunal regarding the held/not held issue …"

[36] By correspondence of 15 March 2013 the ICO again wrote to CL, the following extract of which is relevant:

> "I have now heard from DRD that enquiries are being made by the Upper Tribunal with a view to granting permission to appeal the decision of the First Tier Tribunal. In the meantime, the decision of the

> First Tier Tribunal has been suspended. I cannot proceed with your complaint until Tribunal proceedings have concluded, therefore I am closing the file in the meantime and it will be re-opened if and when appropriate."

[37] It was not until the 28 November 2013 that the Upper Tribunal dismissed the Department's application for permission to appeal the FTT's decisions.

[38] On 3 January and 6 January 2014 CL wrote to the ICO and DRD asserting its view that judicial review would be appropriate to challenge the lawfulness of the DRD's actions. On 7 January 2014 the ICO replied noting the decision of the Upper Tribunal, the appellant's comments about judicial review and observing that as a preliminary step it had written to the DRD requesting it to reconsider the requests in light of the FTT's findings. Nothing of relevance occurred thereafter.

[39] The present application under Order 53 of the Rules of the Court of Judicature was served on 26 February 2014.

The judge's decision

[40] Treacy J refused leave for the following reasons:

(i) The applicant's case against the Information Commissioner was outside the six month limit.

(ii) The case against the DRD was unsustainable because there was no arguable case of concealment made out.

(iii) The declaration sought against the DRD would necessarily entail the imputation of criminal non-disclosure without the usual Article 6 guarantee of a criminal process. It would also involve circumventing the prosecutorial process contained within Section 77 of the FOIA.

(iv) The documentation grounding the allegation of concealment was disclosed in October 2012. These proceedings were issued well outside the three month time limit provided for in Order 53 Rule 4.

Discussion

Ground 3

[41] At the outset of the hearing this court brought to the attention of the parties the fact that Ground 3 prima facie clearly constituted a challenge to the decision by the ICO not to prosecute the DRD pursuant to the provisions of section 77 of the FOIA (see paragraph 7 of this judgment) or regulation 19 of the EIR (see paragraph

11 of this judgment) and, coupled with the claim for an order of mandamus to prosecute, it constituted a criminal cause or matter.

[42] In Amand v Home Secretary and Minister of Defence of Royal Netherlands Government [1943] AC 147 at 162 Lord Wright said:

> "The principle which I deduce from the authorities I have cited and other relevant authorities which I considered is that if the cause or matter is one which, if carried to its conclusion, might result in a conviction of the person charged and in a sentence of some punishment, such as imprisonment or fine, it is a 'criminal cause or matter'."

[See also Re Shuker and Others Application (2004) NI 367 (Div. Ct) at paragraph [37], Cuoghi v Governor of Brixton Prison [1997] 1 WLR 1346 and Re Montgomery's Application (unreported, 30 March 2007) QBD.]

[43] In a criminal cause or matter such as that in the circumstances posited, it seemed to this court inescapable that an appeal does not lie from the judgment of the High Court to the Court of Appeal (see s.35(2)(a) of the Judicature (Northern Ireland) Act 1978. An appeal to the Supreme Court lies from any decision of the High Court with leave of the High Court or the Supreme Court, provided that the High Court has certified that a point of general public importance is involved in the decision (see Judicature (Northern Ireland) Act, s.41; Sch.1). Accordingly this Court had no jurisdiction to determine ground 3 and the appellant, if he wishes to pursue the matter, must revert to Treacy J and seek leave. In these circumstances we refrain from comment either on his delay in seeking such leave or on the effect of article 19 of *The Magistrates' Courts (NI) Order 1981* (see paragraph 12 of this judgment) on such an application.

Grounds 1 and 2

[44] We have concluded that it is clear not only from the Order 53 application (see paragraph 15 of this judgment) and the skeleton argument of the appellant, but also from the submissions he made before this court, that Grounds 1 and 2 of this appeal were thinly veiled attempts to ensure the prosecution of the DRD because of the alleged concealment of information. The appellant's arguments were inextricably linked to the purpose of securing such a prosecution albeit it was in some manner dressed up as a civil matter.

[45] The amended grounds for the Order 53 application specifically pleaded illegality and the provision of false statements. The thrust of the submissions before us by Mr Johnston all revolved around a specific allegation of deliberate concealment by the DRD from the appellant, the ICO and the FTT of the information concerning subcontractors allegedly contained in the minutes of March 2010 and

April 2011 together with the diary entry of May 2010. That, if true, potentially amounted to a criminal cause or matter under the provisions of section 77 of the FOIA or regulation 19 of the EIR and accordingly this matter lies beyond the reach of this court which has no jurisdiction to hear it on the principles set out above in Amand and under the provisions already adumbrated of the Judicature (Northern Ireland) Act 1978. That in itself is sufficient to lead to a dismissal of the appeal by this court.

[46] In any event even if the applicant's case had been confined to seeking a declaration that the DRD had failed to comply with EIR regulations, that is a relief that already had been granted by virtue of the decision of the First Tier Tribunal. Of course no finding of concealment or criminal behaviour was found by the Tribunal because that had not been the subject of any evidence before it. That Tribunal had found that the DRD had been at fault in making insufficient enquiries about sub-contractors but had made no finding of concealment. Thus, absent the issue of a criminal finding or prosecution for concealment on the part of the DRD, any other relief sought by the appellant has already been obtained in light of the FTT finding. It is thus not appropriate to seek a similar finding by way of judicial review.

[47] We consider, however, that there is much to be said for the learned trial judge's finding that in any event there was no evidence of deliberate concealment on the face of these entries. Whether the John Ross Armstrong who was mentioned was named as an employee for the principal contractor or as an employee of the sub-contractor is not beyond plausible dispute from the entries themselves. Absent any further evidence on the matter, it is difficult to see where the learned trial judge could have found material at present to come to a different conclusion from that which he did.

[48] Finally, we observe in passing that the delay in the appellant bringing these proceedings by itself is unlikely to have persuaded this court to have refused leave given the various steps which he had taken once he obtained disclosure of the minutes and diary entries. He had perhaps understandably delayed pending the determination by the Upper Tribunal given that under s.15 of the Tribunals Courts and Enforcement Act 2007 the Upper Tribunal does have a 'judicial review' jurisdiction (albeit he must have been aware that it did not have before it the fresh material in the documents and had taken no step to address this or indeed challenge the FTT finding on the basis of fresh material). He may also have awaited the outcome of future progress reflected in the correspondence from the ICO (see paragraphs 35-38 of this judgment). Hence there may have been a plausible argument that judicial review was not an appropriate avenue to pursue until early 2014.

[49] In all the circumstances therefore we consider the appeal to this Court ill-conceived and dismiss it. We shall hear the parties on the issue of costs.