

IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

BETWEEN:

MICHAEL BRUTON

Applicant

-and-

(1) THE INFORMATION COMMISSIONER
(2) THE DUCHY OF CORNWALL
(3) THE ATTORNEY GENERAL TO H.R.H. THE PRINCE OF WALES

Respondents

APPLICATION FOR PERMISSION TO APPEAL
on behalf of
THE SECOND & THIRD RESPONDENTS
and for a
STAY PENDING APPEAL

I. INTRODUCTION

1. This is a combined application on behalf of the Second and Third Respondents (“**the Duchy**” and “**the AG**” respectively) for permission to appeal and for a stay pending appeal in relation to the decision of the First-tier Tribunal (“**FTT**”) dated the 3rd November 2011 (“**the Decision**”).¹
2. The issue before the FTT was whether the Duchy is a ‘public authority’ within the meaning of regulation 2(2)(c) of the Environmental Information Regulations 2004 (“**EIR**”). It was common ground that the EIR must be construed consistently with Directive 2003/4/EC (“**the Directive**”) which must in turn be construed

¹ Since the Duchy is not a separate legal person in its own right, it ought not logically to be a party to the proceedings. However, the Duchy was named as a party. This application is made on behalf of the Duchy, as well as on behalf of the AG, without prejudice to the submission that the Duchy has no legal personality.

consistently with the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (“the Convention”).

II. APPLICATION FOR PERMISSION TO APPEAL

(1) The status of “the Duchy”

3. The first step in the analysis for the FTT was whether the Duchy is a “natural or legal person” within Article 2(2)(b) or (c) of the Convention. The FTT decided that it is: see §42-57. The AG submits that the FTT was wrong.
4. The AG’s submissions may be summarised as follows:
 - (1) It is apparent from its Charters that the Duchy is an inheritance of property akin to a strict settlement. It has no separate legal personality and there are no words of incorporation in its Charters.
 - (2) The FTT failed to identify the legal means by which it considered the Duchy to have been incorporated, and it failed to identify the nature of the legal personality with which it considered the Duchy to be clothed.
 - (3) Any corporation must have a member or members, whether it is a corporation sole or a corporation aggregate. The FTT failed to identify the members of the Duchy.
 - (4) The FTT relied on matters of perception, presentation, administrative convenience and informal descriptive language in support of its conclusion (Decision §43-49 and §57). In doing so, it fell into error: the status of the Duchy is a matter of legal analysis alone.
 - (5) The FTT relied on the fact that bank accounts may be opened in the name of the Duchy (Decision §48) without recognising the significance of the fact that such accounts are permissible only with express statutory authority. The inference the FTT ought to have drawn was that express statutory authority was

only necessary because the Duchy is not a separate legal person. If it had been a legal person in its own right, express statutory provision would not have been required to enable bank accounts to be opened in its name.

- (6) The FTT relied on certain other statutory language as tending to support its conclusion (Decision §50). It was wrong to do so. Properly understood, the language of the relevant enactments is referring to the property inherited by the Duke from time to time in right of the Duchy, and is not referring to the Duchy as a separate legal person.
 - (7) The FTT failed to give any weight to the fact that the only authoritative legal commentary to deal specifically with the issue, namely *Halsbury's Laws of England* (4th ed.), volume 12(1), §320, states in terms that the Duchy is not a separate legal person. The FTT mentioned this authority in §53 of its Decision without making any finding in relation to it, and hence without giving it any weight.
5. In the circumstances, the FTT was wrong to conclude that the Duchy has separate legal personality. The FTT ought to have concluded that the Duchy is not a legal person, and as such it cannot be a public authority within the meaning of regulation 2 of the EIR. On that ground alone, permission to appeal ought to be granted. It is an issue of wider significance for the Duchy estate as a whole, and the point has never previously been decided by any court or tribunal.

(2) Functions of public administration

6. The second stage in the FTT's Decision was to consider whether the Duchy performs 'functions of public administration' within the meaning of the EIR, as interpreted by the Upper Tribunal ("the UT") in *Smartsource Drainage & Water Reports Ltd v. Information Commissioner* [2011] 1 Info LR 1498 ("*Smartsource*"). The FTT decided that it does (Decision §58-104) by reference to its functions as the harbour authority in relation to St Mary's in the Isles of Scilly. The AG submits that the FTT was wrong (even assuming, contrary to his principal case, that the Duchy is a separate legal person).

7. The AG submits that the Duchy is not performing functions of public administration in relation to the harbour at St Mary's or otherwise.² Passing over the fact that it is the Duke, not the Duchy, which is the relevant harbour authority, the degree of statutory regulation to which the harbour authority is itself subject indicates that, although it is performing important functions which are of interest to the public, it is not performing functions of public administration. As the UT made clear in *Smartsource*, the question is not whether the functions are important or are matters of public interest, but whether they are matters of public administration. And as Lord Mance made clear in *YL v. Birmingham CC* [2008] 1 AC 95, at §116, the fact that a person is expressly subject to statutory regulation in the performance of public-facing functions (as is the case in relation to the harbour authority at St Mary's) indicates that he is not himself performing functions of public administration.
8. Further, the FTT appears to have directed itself, in §102(iv) of the decision, that the Aarhus Convention requires the Directive to be read so as to cover "*information requests relating to the EU environmental regime as a whole*". That direction was wrong in law. The provisions in relation to disclosure of environmental information in the Aarhus Convention and the Directive are carefully defined. They do not extend all to "information requests relating to the EU environmental regime" and there is no basis in law to interpret the Directive to encompass all such requests.

(3) The multi-factor approach

9. Alternatively, if (contrary to the AG's principal case) the functions performed in relation to the Harbour at St Mary's can properly be regarded as functions of public administration, the AG submits that those functions ought properly to be regarded as (i) ancillary to the principal functions of private estate management and/or (ii) *de minimis* in relation to that principal function. As such, the AG submits that the FTT ought to have concluded that the performance on such functions cannot lead to the conclusion that the Duchy as a whole is a public authority for the purposes of the EIR. The FTT's self-direction in §63 of its decision as to the meaning and effect of

² For the avoidance of doubt, the AG does not accept that the decision of the FTT accurately records in all respects the evidence which the FTT received and/or that the findings of the FTT in relation to the status, practices and/or legal obligations of the Duchy are each correct in law. The AG will develop submissions in this regard if and insofar as it is necessary to do so on any appeal.

§76 of the decision of the UT in *Smartsource* was wrong in law. Alternatively, to the extent that the FTT directed itself correctly as to the effect of §76 of the UT decision, *Smartsource* was wrongly decided.

(4) Hybrid public authority

10. Alternatively, the AG submits that the UT in *Smartsource* was wrong to conclude that the EIR do not permit a tribunal to treat a person as a hybrid public authority, *i.e.* as being a public authority in relation to some of its activities, but not others. The AG recognises that the FTT was bound by the decision of the UT in relation to this issue, but submits that *Smartsource* was wrong in this regard.
11. It is also understood that, although the decision in *Smartsource* has not been appealed in that case, the analysis and its outcome are now subject to further challenge in the separate case of *Fish Legal v. Information Commissioner & ors.* GIA/980/2011 & GIA 979/2022 in which the appellants are seeking a reference to the CJEU.

III. APPLICATION FOR A STAY PENDING APPEAL

12. The AG invites the FTT to suspend the effect of its decision under rule 5(3)(l) of the FTT Rules, so that the Duchy estate is not subject to the obligations of a public authority under the EIR and is not required to disclose any information to Mr Bruton pending the outcome of the appeal in this case, for the following reasons:
 - (1) If the appeal is successful, but in the meantime any information sought by the Applicant in this case has been disclosed, the value of the appeal would have been rendered entirely nugatory. For that reason alone, the FTT is invited to grant a stay.
 - (2) Given the standing of HRH The Prince of Wales, it can fairly be anticipated that a substantial number of requests will be made under the EIR in the period pending appeal. Already 10 requests have been received in the three weeks since the FTT's Decision in this case: each request contains multiple questions,

and in total these 10 requests contain some 46 questions. If all such requests received between the making of the Decision and the outcome of the appeal need to be complied with, and if the appeal is successful, then the value of such success will again have been very significantly diminished.

- (3) Furthermore, the Duchy estate has hitherto been managed as an entirely private undertaking and its records are not maintained in a manner designed for the ready extraction of environmental information with a view to public disclosure. In particular, personal data relating to HRH The Prince of Wales are embedded in its records. As such, it would require a very considerable amount of administrative reorganisation to comply with the requirements of the EIR. In this context, it will be recalled that a long period of implementation was allowed for the information rights legislation introduced under the Data Protection Acts, the Freedom of Information Act and the EIR. Since there has been no suggestion until now (least of all from DEFRA, which has departmental responsibility for the EIR) that the Duchy needs to comply with the EIR, the administrative burden would be substantial – and, if the appeal were successful, it would have been entirely fruitless. The witness statement of Keith Willis on behalf of the Duchy outlines the measures which it is anticipated would be necessary.
- (4) The cost of such administrative reorganisation would be very substantial. As noted above, the level of interest in the affairs of HRH The Prince of Wales is and will remain far greater than is the case *e.g.* for a local authority. As such, the number of likely requests will be high. Each request will need to be systematically reviewed. In addition, the Duchy will be required to consult carefully with third parties in respect of any information requested: it is likely that the release of third party data will have a greater impact on those individuals, given the attention that the ‘Royal link’ is likely to confer.
- (5) In assessing the administrative burden and cost of compliance, it should also be borne in mind that there is always a greater likelihood that any refusals to disclose information will be appealed in order to generate media interest.

- (6) Further, the proportion of the records held by the Duchy estate which relate to its statutory harbour function is minimal and the administrative steps described above relate almost entirely to reorganisation of the records in relation to the Duchy's core estate management functions. If the appeal succeeds even only to the extent that the Duchy is found to be a hybrid public authority, therefore, the administrative burden and cost of compliance will again have been fruitless.
- (7) Finally, if the question of hybrid public authorities is to be referred to the CJEU in the *Fish Legal* case, and since that issue may need to be determined before this appeal can be finally resolved, the period during which the Duchy estate will need to comply with the EIR may be considerable: accordingly, the administrative burden and cost outlined above will be magnified.

Jonathan Crow QC
Amy Rogers
25th November 2011