



Neutral Citation Number: [2023] EWHC 27 (KB)

Case No: QB-2022-002325

**IN THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 11/01/2023

**Before:**

**MRS JUSTICE FARBEY**

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**Between:**

**Derek Moss**

**Claimant**

**- and -**

**(1) Royal Borough of Kingston-upon-Thames**

**Defendant**

**(2) Information Commissioner**

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**Mr Moss appeared in person (attending remotely)**

**Philip Coppel KC and John Fitzsimons (instructed by South London Legal Partnership) for  
the **First Respondent****

**The Second Respondent did not appear and was not represented**

Hearing dates: 17<sup>th</sup> October 2022

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**Approved Judgment**

This judgment was handed down at 12.00 noon on Wednesday 11 January 2023 by Mrs Justice Farbey to the parties or their representatives in person and by release to the National Archives.

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**MRS JUSTICE FARBEY**

## **Mrs Justice Farbey:**

### **Introduction**

1. By a written decision and reasons promulgated on 1 April 2022, the First-tier Tribunal (General Regulatory Chamber) (“FTT”) certified an offence by the Royal Borough of Kingston-Upon-Thames (“Kingston”). That offence was described as:

“the failure...to comply with the terms of the [FTT’s] decision in EA/2016/0250, dated 20 March 2017.”

2. The FTT’s decision in case EA/2016/0250 was that Kingston was required to provide advice and assistance to reformulate a request made by Mr Derek Moss under the Freedom of Information Act 2000 (“FOIA”) that would generate an answer falling within the statutory appropriate limit. It was not in dispute that the limit was £450 of Kingston’s resources (regarded as 18 hours of the public authority’s time). The FTT directed that the advice and assistance should be provided within 30 working days. It is not in dispute that Kingston failed to comply with the FTT’s direction.
3. As a result of the FTT’s certification, the case was transferred to the High Court which at that time had statutory jurisdiction to conduct contempt proceedings. Subsequent legislation has transferred the contempt jurisdiction to the Upper Tribunal (“UT”); but it was not in dispute before me that the provisions in force at the date of the FTT’s certification apply to the present proceedings.
4. The key provision in force, which falls for interpretation, was para 8 of Schedule 6 to the Data Protection Act 1998 which was given effect by section 48(5) of that Act (hereafter “the 1998 Act”). Para 8 to Schedule 6 has two sub-paragraphs which deal - respectively - with the power of the FTT to certify an offence and the power of the High Court to deal with the certified offence:

“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.”

5. It is an unusual feature of the proceedings that this is probably the first and last case to come before the High Court by this route. Other newer cases have been or will be considered by the UT under the subsequent legislation (section 61 of the Freedom of Information Act 2000 as substituted by the Data Protection Act 2018 Schedule 19(1) para 60).

6. By way of evidence, I was provided with a Hearing Bundle containing documents produced by Mr Moss and Kingston. Mr Moss supplied a Supplementary Bundle. I heard oral evidence from Ms Rhian Allen, the Information Governance and Records Manager & Data Protection Officer within Kingston. She relied on her witness statement dated 13 July 2021 on which she had relied when giving evidence in the certification proceedings before the FTT.
7. I heard oral submissions from Mr Moss in person and from Mr Philip Coppel KC (with Mr John Fitzsimons) on behalf of Kingston. The Information Commissioner (the second respondent) played no part in the proceedings.

### **Preliminary issues**

#### *Application for my recusal*

8. At the start of the hearing, Mr Moss renewed his application (which I had previously refused on the papers) that I should recuse myself on grounds of apparent bias. By order of 22 July 2022, I had directed that the hearing in the present case should take place directly before the hearing in *Rotherham Metropolitan Borough Council v Liam Harron and Information Commissioner; Liam Harron v Rotherham Metropolitan Borough Council and Information Commissioner* (UA-2021-000404-GIRF & UA-2022-00032-GIRF) which was pending in the UT (Administrative Appeals Chamber) (“UTAAC”) under the newer legislation. By written application dated 31 July 2022, Mr Moss had applied to the UTAAC for non-party disclosure of the written submissions of the parties in the *Harron* case. I determined and refused that application in my capacity as the then President of the UTAAC with conduct of the *Harron* case.
9. In his written grounds of renewal, Mr Moss submitted that I was biased because, in my written reasons for refusing his application for disclosure in *Harron*, I had said that “Mr Moss will be given everything that he needs to know about the case against him” by Kingston’s barristers. The context of that comment should be noted. Mr Fitzsimons appeared for Rotherham Metropolitan Borough Council in the *Harron* proceedings and was therefore due to appear in front of me in that case too.
10. In refusing Mr Moss’s disclosure application, I observed (among other things):
  - “5. On or around 14 September 2022, Counsel for Kingston in the High Court proceedings served (as directed by me) written submissions on (i) the issues that Kingston would like the court to decide and (ii) Kingston’s response to the issues that Mr Moss would like the High Court to determine. The purpose of the court directing that sort of written submission at that stage (as opposed to later down the line) was to ensure that Mr Moss would know how Kingston intended to put its case. He does not need documents from another case to know the issues in his case. Any barrister who is in both cases has duties to the High Court to ensure that all (and only) relevant matters are drawn to the High Court’s attention. There is no reason to suppose that that professional duty will not be fulfilled. That means that Mr Moss will be given everything that he needs to know about the case against him. There is no need for cross-service of written submissions.”

11. Mr Moss submitted that, by referring in these remarks to “the case against him” I had prejudged one of the issues that he wished to raise before me, namely whether or not he should be treated as an applicant presenting a case to the court with Kingston presenting a case against him. I explained to Mr Moss that “the case against him” meant the arguments that Kingston would make which were opposing his own arguments. Having heard this explanation, Mr Moss withdrew this aspect of his application.
12. Mr Moss nevertheless submitted that I was wrong and biased to have said in refusing his application in *Harron* that there was no reason to suppose that, in the absence of non-party disclosure to him, counsel for Kingston would not fulfil their professional duty to draw all relevant matters to the court’s attention. By way of support for this submission, he criticised the conduct of Mr Coppel and Mr Fitzsimons in the FTT certification proceedings.
13. Mr Moss failed to persuade me, however, of a single instance in which either Mr Coppel or Mr Fitzsimons has at any stage acted unprofessionally or unethically. Mr Moss’s allegations were intemperate and lacked any substance. He is no more entitled than a party represented by counsel to make unfounded allegations against those appearing on the opposite side. Mr Moss having advanced no proper reason why I should not hear the case, I announced my decision at the hearing that his renewed application for my recusal was refused.

*Application to strike out Ms Rhian Allen’s witness statement*

14. Mr Moss applied for the witness statement of Ms Allen dated 31 July 2021 to be struck out on the grounds that it failed to comply with the “rules, practice directions and authorities by which the admissibility of a witness statement in the civil courts must be determined.” He submitted that, contrary to CPR 32PD para 18.2, Ms Allen’s witness statement did not indicate which of the statements in it were made from her own knowledge and which were matters of information or belief; nor did it indicate the source of any matters of information or belief. By her own admission, Ms Allen had no personal knowledge of what did or did not happen for the very long period before her involvement in the case. He submitted that the absence of any indication of how she came to know what had happened meant that her evidence was in large part conjecture or inadmissible opinion evidence. Mr Moss relied on CPR 32PD para 25.1 which gives the court a discretion to refuse to admit a witness statement as evidence where it does not comply with the requirements of CPR 32PD. He submitted that the defects in Ms Allen’s statement should cause me to strike out the statement in its entirety (*Rock Nominees Ltd v RCO (Holdings) PLC* [2003] EWHC 936 (Ch), paras 80-81; *Consolidated Contractors International Company SAL v Masri* [2011] EWCA Civ 21, paras 32-33; *JD Wetherspoon PLC v Harris* [2013] EWHC 1088 (Ch), paras 33-390).
15. In my judgment, on any fair reading of the statement, Ms Allen relied on her own knowledge, inquiries with colleagues and Kingston’s files. She does not name all of the colleagues she consulted and does not name all the files she searched but Mr Moss identified no actual prejudice arising from any lacunae. If he had wished to obtain further details of anything in the witness statement or if he had wished to probe Ms Allen’s account of events (whether to support his own submissions or to rebut Ms Allen), he would have known from her statement which department within Kingston to contact. In my judgment, Ms Allen adequately states the source of her knowledge for

the purposes of the issues which I must decide. As Mr Coppel submitted, Mr Moss was free to cross-examine Ms Allen on what she knew about the case at any particular time. Nor am I persuaded that Ms Allen's statement consists of conjecture or inadmissible opinion evidence. As I announced at the hearing, I refused to strike out her statement which would have been a disproportionate and unjust step to take.

### **Factual background**

16. The factual background is largely contained in the documents but was to some degree supplemented by Ms Allen who adopted her witness statement dated 13 July 2021 and who was cross-examined by Mr Moss. It was not in dispute that I should apply the criminal standard of proof. Applying that standard, the facts are as follows.

#### *Mr Moss's FOIA request*

17. The documents demonstrate that Mr Moss has a strong interest in the provision of council housing in Kingston. In order to promote public interest in Kingston's housing policies, he has operated a website called Defend Council Housing which has provided information to (among others) the Kingston Independent Residents Group and the Cambridge Road Estate Residents Association. Some of the information which Mr Moss wished to provide on his website was relevant to a ballot in February 2020, in which affected residents could vote. The information that Mr Moss wanted to publicise on his website was at least to that extent time critical.
18. Mr Moss took an interest in the Cambridge Road Estate regeneration programme. On 16 February 2016, he made a request to Kingston under section 1 of FOIA for information about the programme. He asked for information which may be categorised in four parts:
- “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 [**Part 1**].
  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 and the work they have been, or are expected to be, instructed to do [**Part 2**].
  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, any plans or 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 [**Part 3**].
  4. Details of the ‘stakeholders’ in the regeneration programme [**Part 4**].”

In summary, Parts 1 and 2 requested information about the appointment of Renaisi and BNP Paribas as consultants to the regeneration programme; Part 3 concerned the Affordable Homes Working Group; Part 4 concerned stakeholders in the programme.

19. On 9 March 2016, Kingston confirmed that it held information relating to the regeneration consultants (Parts 1 and 2) and Affordable Homes Working Group (Part 3). It refused to provide the information, relying on the cost of compliance under section 12(1) of FOIA. As the FTT noted in its 2017 decision, it was not apparent from Kingston's response whether it held information related to Part 4.
20. Mr Moss was not satisfied and requested an internal review. On 13 July 2016, Kingston provided Mr Moss with the results of that review. Kingston provided Mr Moss with electronic links to material it had published online relating to information on the Renaisi and BNP Paribas contracts and material related to Part 3 of his request. Mr Moss found that the links did not work.

*The Information Commissioner's decision*

21. Mr Moss took the matter to the Information Commissioner. He made clear that he was willing to narrow the request, omitting Part 3 regarding the Affordable Homes Working Group.
22. In a decision notice of 21 September 2016, the Commissioner accepted Kingston's estimate that compliance with Part 1 would take nearly 122 hours and that Part 2 would take nearly 21 hours to answer. The Commissioner was satisfied that compliance with the request would exceed the appropriate cost of compliance.
23. The Commissioner considered whether Kingston had met its duty to provide Mr Moss with advice and assistance, under section 16(1) of the Act, by helping him to refine his request so that it would fall within the cost limit or by explaining why this would not be possible. The Commissioner decided:

“In this case, the Commissioner acknowledges that the Council had attempted to assist with the request by providing links to the relevant documents which are published on its website. The Commissioner notes that the complainant had experienced difficulties with accessing the links and subsequently the Council informed the complainant that the ‘*Renaisi and BNP Paribas contracts*’ are no longer available to view online. However, the Council explained its reasons for this and it guided the complainant to the relevant website links to information relating to parts of his request.

25. The Commissioner also acknowledges that the Council suggested to the complainant that he may wish to make a fresh and refined request for information which would fall within the appropriate 18 hour time limit. Therefore, the Council complied with its obligations under section 16 of the FOIA.”

*The FTT appeal*

24. Mr Moss appealed to the FTT against the Commissioner's decision. The Commissioner was made the respondent to the appeal. By letter dated 24 November 2016, the FTT sent Kingston a copy of the grounds of appeal in order to enable Kingston to decide whether it wished to be joined as a party.
25. By written submissions dated 30 November 2016, the Commissioner filed her Response to the appeal. The Commissioner indicated that she intended to oppose the appeal in relation to section 12 of FOIA (cost) but that she had reviewed her position in relation to Kingston's compliance with section 16 (advice and assistance). The Commissioner's response stated in relation to section 16:

“46. In its response to the request, the Council did attempt to assist by providing links to information relating to the contracts for Renaisi and BNP Paribas. The Commissioner notes that the Appellant experienced difficulties with assessing the links. Subsequently the Council informed the Appellant that the contracts were no longer available to view online. The Council explained its reasons for this, namely that the system that the contracts are stored in has a default setting for removing them from the public once they have ended.

47. The Appellant argues in his grounds of appeal that copies should have nevertheless been sent by post or email in response to his request. Upon further consideration, if the information in the contracts fell within the scope of the request and if this information could have been provided by the Council within the appropriate limit either by email or post, by failing to do so, the Commissioner considers that this may be a breach of the Council's duty under section 16.”

26. In light of her change of position, the Commissioner applied for Kingston to be joined as a party to the appeal so that Kingston could be heard on this aspect of the case. The Commissioner summarised her position as follows:

“58. In light of the above, the Commissioner invites the Tribunal to dismiss the Appeal relating to the Commissioner's decision regarding section 12. In light of reviewing her position regarding compliance with section 16, the Commissioner would invite the Tribunal to issue a direction joining the Council as Second Respondent to the appeal.”

27. For reasons which are not clear, the FTT did not at that stage seek any representations from Kingston or from Mr Moss on the Commissioner's application to join Kingston to the appeal. In written case management directions made by a FTT Registrar on 6 December 2016, the Commissioner's application was dismissed in short terms. The Registrar held:

“I am not persuaded that there is a need for the Tribunal to force ...Kingston to join, in absence from [sic] an application by them; the Tribunal is able to come to a fair and just decision with submissions from the current parties, including any documents provided to the Information Commissioner's Office by... Kingston in the course of the investigation.”

28. The Registrar stated that the FTT would send Kingston a copy of the Commissioner's Response so that Kingston could "make an informed decision" whether to apply to join the appeal. Mr Moss was directed to send any reply to the Commissioner's Response by 9 January 2016.
29. By letter dated 6 December 2016, the Registrar sent Kingston a copy of the Commissioner's Response and stated:

"You will see from the response that the Information Commissioner's Office suggests that you should be joined to the appeal as a party as her position regarding *section 16* has changed. I am not persuaded that the Tribunal needs to join you in order to make a fair and just decision in the appeal; however it is only fair that you receive a copy of the Information Commissioner's response so you can make an informed decision about applying to join as a party."

The letter went on to "suggest" that Kingston make any application by 23 December 2016.

30. By written submissions dated 6 January 2017, Mr Moss replied to the Commissioner's Response. It is not necessary to set out his submissions on the substance of the appeal. On the question of Kingston being joined as a party, he stated:

"30. The Commissioner argues that, given the change in her position on this point, the Council should be joined as a party to this appeal. The Appellant submits that as the Council attempted to provide links to the contracts, has said it has a legal duty to publish them and the cost of providing copies by e-mail would be insignificant (and not much more by post), it is unlikely that it will be able to offer any valid justification for withholding said contracts."

On no reading of this passage did Mr Moss apply for Kingston to be joined as a party or seek to elevate the question of Kingston joining the proceedings for decision by a FTT Judge.

31. By email dated 6 February 2017, a solicitor within the Information Commissioner's Office, Mr Richard Bailey, asked Kingston to confirm whether it intended to apply to become a party. Mr Bailey sought information from Kingston designed to assist the Commissioner and the FTT in the event that Kingston did not seek to be a party. In relation to section 16 of the Act, Mr Bailey asked Kingston whether it could have provided copies of the contracts for Renaisi and BNP Paribas by post or email.
32. By telephone on 15 February 2017, Mr Bailey chased Mr Phillip Furby (who as a Team Leader in Risk and Assurance was the relevant official at Kingston). Mr Furby told Mr Bailey that he was considering making an application to the FTT that Kingston be joined as a party. Mr Bailey expressed the Commissioner's concern that Part 4 of the request had not been addressed by Kingston and asked whether Kingston could have provided the contracts within the appropriate cost limit. By email dated 24 February 2017, Mr Bailey chased Mr Furby again about these matters.



33. On 6 March 2017, Mr Furby telephoned Mr Bailey. He said that he was content to disclose the contracts and would try to do so “tomorrow morning.” Mr Bailey said that there was no bar to Kingston making disclosure and setting out its position in writing. Mr Bailey would then ask the FTT to consider Kingston’s written position.
34. By email to Mr Bailey dated 8 March 2017, Mr Furby set out Kingston’s position. The email stated that Kingston would send Mr Moss the contracts, as requested. It set out Kingston’s views on the scope of section 16 and stated that the Council’s practice in cases raising section 16 was to “enter a constructive dialogue with the requester in an effort to meet the request. The aim is to provide information and communication is very often the best way to do this.” By email dated 9 March 2017, Mr Bailey confirmed to Mr Furby that he had forwarded Mr Furby’s email to the FTT.
35. The FTT heard the appeal on 9 March 2017. Mr Moss appeared in person by telephone. The Commissioner did not appear and relied on her written submissions. The FTT was willing to consider the email from Mr Furby which had been rapidly placed before it.

*The appeal decision*

36. By written decision dated 20 March 2017, the FTT allowed Mr Moss’s appeal in part. It held that Kingston had justifiably relied on section 12 but had failed to comply with section 16. As regards Part 4, it had failed to comply with section 1(1)(a) of FOIA. The FTT dealt with Mr Furby’s email in the following terms:

“19. 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 via the Commissioner containing representations from it. Additionally, the formatting as it appeared in the email made part of it difficult to follow. 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.

b) As regards section 16, ‘in similar circumstances the Council will enter a constructive dialogue with the requester in an effort to meet the request. The aim is to provide information and communication is very often the best way to do this.

c) The Council referred to Part 4, and implicit in their response was that it held information related to Part 4. It further stated that as part of the evaluation of the use of Section 12, all four elements of the request was assessed, and that the times were aggregated for all of the request elements.”

37. The FTT directed Kingston to:

“provide advice and assistance to enable a reformulation of the request that falls within the appropriate [cost] limit. This must include provision of Part 4 and be done within 30 working days.”

38. By email dated 22 March 2017, the FTT served the decision on Mr Moss and on the Commissioner. As Kingston was not a party, the FTT did not serve the decision on Kingston as it would have been obliged to do if Kingston were a party: Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, r. 38(2).

*Kingston's non-compliance*

39. By email dated 23 March 2017, Mr Bailey sent the decision to Mr Furby, drawing attention to what Kingston was required to do. He asked Mr Furby to let him know when Kingston had taken the required action. On 4 May 2017, Mr Bailey chased Mr Furby for a response.
40. Meanwhile, on 27 April 2017, Mr Furby telephoned Mr Moss. A transcript of a recording of the telephone call shows that, among other things, Mr Furby told Mr Moss that Kingston was “working on” the FTT decision. He said: “The elements that the tribunal has ruled on we are working on dealing with those...As per the tribunal’s requirement, we’ll give you the information requested within the context of the request.” Mr Moss said: “Well, the order was that you do [sic] in 30 days, and you haven’t done that.” Mr Furby replied: “Has it been 30 days?”. Mr Moss responded: “Yes.”

*Contempt proceedings*

41. By application dated 28 February 2018 and filed by email on the same day, Mr Moss applied to the FTT for a contempt order on the grounds that Kingston had not provided advice and assistance as directed by the FTT. By email from a FTT administrator dated 1 March 2018, the FTT refused to admit the application on the grounds that the power to enforce FTT orders lay with the Commissioner. The administrator forwarded the application to the Commissioner.
42. By letter to the FTT dated 12 March 2018, Mr Bailey submitted that the breach of a decision of the FTT which substitutes the decision of the Commissioner following an appeal is to be treated in the same way as the breach of a court order. The FTT had the power to certify an offence to the High Court under para 8 of Schedule 6 to the 1998 Act. Mr Moss was correct to make his application to the FTT.
43. By letter dated 13 March 2018, the Registrar declined to admit Mr Moss’s application in short terms. By written representations dated 25 March 2018, Mr Moss applied to the FTT to use its powers to certify an offence.
44. By a written decision dated 8 June 2018, the Registrar held that the FTT did not have jurisdiction to consider Mr Moss’s applications dated 28 February and 25 March 2018. The Commissioner applied for reconsideration by a judge. By a decision dated 29 June 2018, the Chamber President agreed with the Registrar, declined jurisdiction and struck out Mr Moss’s applications. By written decision dated 31 July 2018, the Chamber President granted the Commissioner’s application for permission to appeal to the UTAAC.
45. From the date of Mr Moss’s initial application for a contempt order (28 February 2018) to the grant of permission to appeal (31 July 2018), Kingston was not served with any

of the applications or decisions. Neither Mr Moss nor the Commissioner sought to join Kingston as a party.

*Appeal to the UTAAC*

46. When proceedings in the UTAAC commenced, the Commissioner was the appellant and Mr Moss was the respondent. By email to the UTAAC dated 30 November 2018, Kingston's Head of Customer Experience applied for Kingston to be joined as a party. The email informed the UTAAC that Mr Furby was no longer employed by Kingston and that Kingston would be "happy to resolve this matter without the need for further legal action."
47. On 5 March 2019, UT Judge Mitchell granted Kingston's application to be joined as a party: Kingston became the second respondent. Judge Mitchell made case management directions so that Kingston could take part in the appeal. Kingston proceeded to breach Judge Mitchell's directions. Far from taking steps to resolve the matter without the need for further legal action, it did nothing. The UTAAC chased Kingston on 28 August and 25 September 2019. By email to the UTAAC dated 25 October 2019, a lawyer within the South London Legal Partnership ("SLLP" - a shared legal service for Kingston and four other London boroughs) wrote as follows:

"We acknowledge that we the Council are in breach of the [UTAAC] directions, and we have explained...that the Council did not intend to participate in the appeal. In accordance with procedure rule 7.2(d) we invite the [UTAAC] to direct that the Council not be permitted to take part in the proceedings. As we have explained, this appeal is between the ICO and the FTT, and the Council has no view on the arguments raised in the appeal."
48. In my judgment, Kingston's response demonstrates a breach of the overriding objective as set out in the Tribunal Procedure (Upper Tribunal Rules) 2008, r. 2. The overriding objective includes avoiding delay (r. 2(2)(e)). The parties (which by that time included Kingston) must "help the Upper Tribunal to further the overriding objective" (r. 2(2)(a)). By breaching directions and then failing to respond in a timely way to the UTAAC's attempts to chase it, Kingston breached its duty to help the UTAAC to avoid delay.
49. Nothing in SLLP's email admitted or apologised for the failure to comply with the FTT's decision, which was the sole impetus for the commencement of the UTAAC proceedings. Nor did the email make any attempt to resolve the UTAAC proceedings by offering to provide advice and assistance under section 16. By written directions dated 1 November 2019, Judge Mitchell barred Kingston from taking further part in the proceedings.
50. Following an oral hearing at which Mr Moss and the Commissioner were represented by counsel, UT Judge Jacobs held that the FTT had no jurisdiction to deal with Mr Moss's application for a contempt order (i.e. the application of 28 February 2018) but did have jurisdiction to deal with his application for certification of an offence (i.e. the application of 25 March 2018). He directed that the proceedings on the latter application be restored: *Information Commissioner v Moss & Royal Borough of Kingston Upon Thames* [2020] UKUT 174 (AAC).

*Appeal to the Court of Appeal*

51. By written submissions dated 30 June 2019, the Lord Chancellor applied to be joined as a party and sought permission to appeal to the Court of Appeal. Judge Jacobs granted those applications on 13 August 2020. The Lord Chancellor withdrew the appeal by letter to the Court of Appeal dated 29 October 2020.

*The restoration of proceedings in the FTT*

52. By email dated 31 October 2020, Mr Moss applied to the FTT to certify an offence against the Commissioner as well as Kingston. Following the FTT's enquiries with Mr Moss as to whether he wished to pursue it, Mr Moss applied to withdraw his 25 March 2018 application against Kingston. By a written decision of the Registrar dated 5 January 2021, the FTT consented to the withdrawal. Mr Moss reflected and on 10 January 2021 applied for the 25 March 2018 application against Kingston to be restored. In decisions dated 20 January 2021, the Registrar dismissed the new application as being out of time and reinstated the application of 25 March 2018.
53. Further, protracted interim applications, rulings and case management directions followed. They are convoluted and I do not need to set them out in detail.
54. By written submissions dated 1 March 2021, drafted by previous counsel, Kingston set out its Response to the 25 March 2018 application. In that Response, Kingston offered a full and unreserved apology to the FTT, to Mr Moss and to the Commissioner. The response indicated that Kingston had on 1 March taken the following steps to comply with Parts 1-4 of Mr Moss's request, including further information about Part 3, which Mr Moss had indicated that he did not pursue:

“a. re Parts 1 and 2...: the council submits that it has been seeking, in its recent steps in relation to disclosure, to identify and release ‘core material’ in relation to Parts 1 and 2 as quickly as possible. The letter to the Appellant of 1<sup>st</sup> March 2021... has disclosed to the following to the Appellant:

(i) the contracts (setting out the substance of the contractors' obligations; redacted for certain third-party data under FOIA, sections 40(2) and (3A));

(ii) summaries of the contract details held on its register (ie as in the links relating to Parts 1 and 2); and,

(iii) the procurement award reports (explaining the reasons for the appointments). Certain third-party personal data, and details concerning unsuccessful third-party bidders (or third parties which did not bid), have been redacted, under FOIA, ss 40(2) and (3A), and s 43(2) respectively; the council having concluded in relation to the latter, in all the circumstances of the case, that the public interest in maintaining the exemption outweighed the public interest in disclosing the information). The council has also sought to explore with the Appellant whether he may wish to reformulate, or update, his request; and has outlined categorisations of the relevant information held for that purpose;

b. re Part 3 of the request. Minutes of the Council meeting of 15 December 2015 and Report dated 3 February 2016 to the Council's Growth Committee concerning the establishment of the Affordable Homes Working Group, have been disclosed to the Appellant.

c. re Part 4 of the request...: the request was for 'details' of the 'stakeholders' to the regeneration scheme. The council has confirmed to the Appellant that it does not hold a list of the stakeholders involved but has described the categories comprising them. The council has indicated that it is willing to discuss with the Appellant, if desired, whether the information sought in this part of the request goes beyond the description which has been supplied; and if so, whether any further 'details or other information might be available within the FOI cost limit. Alternatively, it has raised whether a reformulation of that part of the request would enable the council to respond more fully to it.

d. As already indicated, in relation to its duties to advise and assist generally, above, the council has indicated that it is willing to discuss a reformulation of the remainder of the request, if desired by the Appellant, or an updated version, if preferred, against broad categorisations of the information available. Alternatively, it has invited the Appellant to indicate any priorities within his enquiries, if they have not been covered by the disclosures to be made, within the cost limit. The council is willing to respond with further advice and assistance, in response to any such suggestions, if it is reasonably able to do so."

55. In his reply to Kingston's Response, Mr Moss took issue with (among other things) Kingston's account of some of those steps.

### **The FTT's certification**

56. On 20 January 2022, the FTT (Upper Tribunal Judge O'Connor, Tribunal Member Rosalind Tatam and Tribunal Member Matthews) heard Mr Moss's application for the certification of an offence. Mr Moss was represented by Mr Guy Vassall-Adams KC acting pro bono; Kingston was represented by Mr Coppel and Mr Fitzsimons; the Commissioner did not appear and was not represented. The FTT heard oral evidence from Ms Allen.
57. Before the FTT, as before me, Kingston accepted that it did not comply with the FTT's decision.
58. On 1 April 2022, the FTT promulgated its decision. The FTT held that its function under para 8(1) of Schedule 6 to the 1998 Act was to consider whether a contempt was proved to the criminal standard and, if so, whether discretion should be exercised so as to certify the contempt to the High Court. It held that Kingston was aware of the appeal before the FTT and could have applied to join as a party, including (although it is perhaps a moot legal point) after promulgation of the appeal decision with a view to seeking permission to appeal. Kingston's reliance on its status as a non-party was no bar to the FTT finding a contempt of court. Kingston had been "served" with the FTT's decision by the Commissioner and was aware of the FTT's directions. It was not reasonable to draw an inference that Mr 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 fell within the appropriate cost limit, or that Mr Furby accidentally or unintentionally failed to provide the information in Part 4 of the request of 16 February 2016. The acts and omissions of Mr Furby attached to Kingston. If the tribunal proceedings were proceedings before a court, Kingston's failure to comply with the FTT's decision would constitute a contempt of court. That offence should be certified.

59. Mr Moss had also alleged in the certification proceedings that Kingston gave an undertaking to the FTT that it would provide him with the Renaisi or BNP Paribas contracts. The FTT refused to certify Kingston's failure to provide Mr Moss with the contracts on the grounds that it was not satisfied to the criminal standard that Kingston had given an undertaking. Mr Moss sought to appeal that aspect of the FTT's decision to the UTAAC, but the appeal is not before me. On 29 July 2022, following the transfer of proceedings to the High Court, I refused Mr Moss's application to stay these proceedings pending the resolution of that appeal. I need say no more about it.

### **Ms Allen's evidence**

60. In her witness statement and oral evidence, Ms Allen said that, in her present role, she has responsibility for managing Kingston's FOIA and data protection Team. She has held this role since 1 September 2019 having previously worked for Kingston as a Digital & IT Project Support Officer (Information Security). She knew nothing about the case until 25 January 2021 when she received a copy of case management directions from the FTT. None of her colleagues had any knowledge of the case. She was unable to locate any information about the case in Kingston's files.
61. When Ms Allen reviewed the FTT's original decision, it became apparent to her that the requirement in the decision to provide advice to Mr Moss under section 16 of FOIA had not been met. On 10 February 2021, she sought to identify the documents originally requested by Mr Moss. The relevant documents were located and sent to him on 1 March 2021 together with the section 16 advice and an apology.
62. Ms Allen explained that Mr Furby was subject to a disciplinary investigation in relation to a number of allegations including an allegation of failing to respond to FOIA requests. Following an internal reorganisation, Mr Furby was made redundant and left Kingston's employment on 14 May 2018. It follows that Mr Furby was in post at the expiry of the 30-day time limit for compliance with the FTT's directions and for a considerable time thereafter. Mr Furby's line manager left Kingston on 31 May 2018.
63. Ms Allen expressed her understanding that, when traced by SLLP, Mr Furby and Mr Bassent said that they were unable to recollect matters. A keyword search of their archived email accounts shed no further light on matters owing to the limited number of emails.
64. Ms Allen's witness statement goes on to say:
- “Since November 2020, the Council has introduced new FOI Procedures in order to improve the processing and follow-up of FOI and DPA requests. FOI has high importance placed on it by the senior leadership team and our performance in responding to requests on time since the

new process was implemented falls well within the expectations of the ICO...

I regret that the Council has failed to deal with this historic matter in a timely manner, and repeat the sincere apology contained in the letter of 1st March 2021, on behalf of the Council and its Chief Executive. Since this matter came to my attention in January 2021, the Council has sought to fully comply with the original request, provide the s.16 FOIA advice and to offer its sincere regrets for the Council's administrative failings in this regard. The Council's new procedures introduced in November 2020 should ensure that this never happens again. Once again, on behalf of the Council, I apologise to the Tribunal, to the Information Commissioner and to Mr Moss."

65. In cross-examination, Mr Moss sought to challenge Ms Allen's credibility and reliability by reference to documents in the Supplementary Bundle which related to other dealings between him and Kingston including a separate and different request for information under section 1 of FOIA. That request for information had generated proceedings in the FTT including an application (ref: EJ/2021/0015) brought by Mr Moss for the certification of an offence on the grounds that Kingston had lied to the Commissioner which had caused the FTT to be misled. Ms Allen supplied the FTT with a witness statement dated 15 February 2022 for the certification hearing and gave oral evidence to the FTT (Recorder Stephen Cragg QC as he then was; Tribunal Member Marion Saunders; Tribunal Member Aimée Gaston). By a written decision dated 6 September 2022, the FTT refused to certify an offence.
66. Mr Moss put to Ms Allen in cross-examination that some of the documentation filed in EJ/2021/0015 was inconsistent with passages of her witness statement relating to her involvement with the request for information in that case, such that she had lied to the FTT from which it could be inferred that she was now lying to this court or was at least an unreliable witness. I did not regard this convoluted line of questioning as instructive or as advancing Mr Moss's case before me. I am satisfied that Ms Allen told the truth in her witness statement and in her oral evidence to me.
67. Mr Moss also put to Ms Allen that other elements of other litigation in relation to his obtaining information from Kingston was inconsistent with her evidence that problems with handling FOIA requests of the kind he experienced were historic only. I am not concerned with Mr Moss's other litigation which may not reflect the general picture of Kingston's FOI procedures. Nevertheless, the documents relating to the information request before me – in the Hearing Bundle – show large periods of time in which Kingston did very little to progress Mr Moss's request (whether administratively or in the FTT and UT) even after Mr Furby left Kingston's employment and Ms Allen came into her new role.

## **Legal framework**

### *Requests for information under FOIA*

68. Part I of FOIA sets down a scheme for access to information held by public authorities. Section 1(1) of FOIA confers a general right of access to the extent that 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 or her.

69. There are exemptions. By virtue of section 12 of FOIA, a public authority is not obliged to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit. This exemption means that a public authority need not comply with a request for information if the cost of complying would be too high. As I have mentioned, the appropriate limit was £450.

70. Section 16 of FOIA bestows a duty on public authorities to provide advice and assistance to requestors:

“(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.

(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case.”

71. The Commissioner’s Code of Practice placed before me (4 July 2018) includes guidance about how the Commissioner expects public authorities to provide advice and assistance to requestors where the authority has invoked the section 12 exemption on cost:

“2.10 Where it is estimated the cost of answering a request would exceed the ‘cost limit’ beyond which the public authority is not required to answer a request (and the authority is not prepared to answer it), public authorities should provide applicants with advice and assistance to help them reframe or refocus their request with a view to bringing it within the costs limit.”

72. Any person may apply to the Commissioner for a decision on whether his or her request for information has been dealt with in accordance with the requirements of Part 1 of the Act (section 50(1) of FOIA). The Commissioner may (under section 51) investigate the public authority’s compliance. In cases in which the Commissioner has decided that there has been non-compliance, the Commissioner will serve notice of that decision on the requestor and on the public authority (section 50(3)(b)). The decision notice must specify the steps which must be taken by the public authority and the period within which they must be taken (section 50(4)).

73. Where a decision notice has been served, the requestor or the public authority may appeal to the FTT (section 57). The FTT’s jurisdiction is contained in section 58:

“(1) If on an appeal under section 57 the Tribunal considers—

(a) that the notice against which the appeal is brought is not in accordance with the law, or



(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.”

74. I pause here to note that, in the present case, the FTT substituted a decision notice for that of the Commissioner under section 58(1) by requiring Kingston to take specified steps within a specified time period. Continuing with the legal framework, there is an onward right of appeal to the UT on a point of law, with the permission of the FTT or the UT (section 11 of the Tribunals, Courts and Enforcement Act 2007).
75. There is no power to compel a public authority to comply with a substituted decision notice. By virtue of para 8 of Schedule 6 to the 1998 Act, there is a power to punish for not doing so, although that power may operate as an incentive to comply (*Information Commissioner v Moss and Royal Borough of Kingston Upon Thames* [2020] UKUT 174 (AAC), para 1). Even if a public authority was not a party before the FTT when it made a substituted decision, the decision notice is binding by virtue of its terms (which impose a duty on the authority) and its status as a decision notice under FOIA, albeit a substituted one (*Information Commissioner v Moss and Royal Borough of Kingston Upon Thames* [2020] UKUT 174 (AAC), para 25).

*The court’s statutory jurisdiction*

76. In proceedings under para 8(2) of Schedule 6 to the 1998 Act, the High Court, having inquired into the matter, may deal with the person charged with a contempt offence “in any manner in which it could deal with him if he had committed the like offence in relation to the court.” In my judgment, the language of para 8(2) casts light on the statutory purpose of moving contempt proceedings out of the tribunal and into the High Court. The function of the High Court is to apply the law of contempt to tribunal contemnors (or alleged contemnors) as it applies to court contemnors (or alleged contemnors).
77. It is not difficult to discern Parliament’s intention in promoting a uniformity of approach as between tribunal and court contemnors. The serious consequences of a finding of contempt (which may include committal to prison) mean that the outcome of contempt proceedings should not depend on whether their origin lies in the tribunals or the courts. The public interest which the law of contempt seeks to uphold – adherence to orders made by judges – is as much a foundation of the administration of justice in tribunals as it is in courts. The High Court is therefore empowered to apply the law of contempt to tribunal contemnors in the same manner as in the courts: the law of contempt arising from tribunal proceedings should march in time with the law in the courts.
78. Put another way: when the proceedings move from the FTT to the High Court, they shed their characteristics as tribunal proceedings and become court proceedings. High Court judges sit from time to time in the Upper Tribunal but in these proceedings, I am

exercising only the jurisdiction of the High Court. The adoption of a sort of hybrid approach – in which I would select some elements of tribunal law and procedures and mix them with elements of High Court law and procedures - is a recipe for complexity and muddle which Parliament would not have intended.

*The law relating to contempt of court*

79. The principle that proceedings for contempt of court are intended to uphold the authority of the court and to make certain that its orders are obeyed is longstanding (for a recent restatement, see *JS (by her litigation friend KS) v Cardiff City Council* [2022] EWHC 707 (Admin), para 55). A person who breaches a court order, whether interim or final, in civil proceedings may be found to have committed a civil contempt.

80. A person who instigates contempt proceedings does not assume the function of a private prosecutor. In *Guildford BC v Smith* (The Times 15 October 1993) (cited in *Navigator Equities Limited v Deripaska* [2021] EWCA Civ 1799, para 80), Russell LJ stated:

“In my judgment, an application for committal for civil contempt has more than one purpose. Its object may be to coerce a contemnor into a course of action or coerce a contemnor to desist from a course of action. That is not a feature of a private criminal prosecution. The application for committal in respect of civil contempt also normally has as its object the protection of the plaintiff. That too plays no part in a private prosecution. It may also have, however, in common with a private prosecution, the need to punish. It is in my view a misunderstanding of the true position of an application to commit for contempt in civil proceedings to equate it, as the learned judge did, with a private prosecution.”

81. The key principles which I must apply in considering whether Kingston has committed a contempt were helpfully summarised by Rose J (as she then was) in *JSC Mezhdunarodniy Promyshlennyi Bank v Pugachev* [2016] EWHC 192 (Ch), paras 41 and 43:

“41...In *JSC BTA Bank v Ereshchenko* [2013] EWCA Civ 829 the Court of Appeal was considering allegations that Mr Ereshchenko had lied in written evidence he provided to the court. The Court of Appeal upheld the decision of Vos J (as he then was) in dismissing the application for committal. Vos J set out the principles to be applied in paragraph 132 of his judgment. So far as relevant to the present application these were as follows:

i) the burden of proving the contempt that it alleges lies on the Bank. Insofar as Mr Pugachev raises a positive defence, he carries an evidential burden which he must discharge before the burden is returned to the Bank.

ii) the criminal standard of proof applies, so that the Bank's case must be proved beyond reasonable doubt – or so that the court is sure. In case the meaning of this formulation were unclear, Phipson on Evidence (17<sup>th</sup> edition, 2009 at paragraph 6.51) cites the Privy Council in *Walters v. R*

[1969] 2 A.C. 26 as indicating that ‘[a] reasonable doubt is that quality or kind of doubt which when you are dealing with matters of importance in your own affairs you allow to influence you one way or another’.

iii) The court needs to exercise care when it is asked to draw inferences in order to prove contempt. The law in this respect is summarised in a passage in the judgment of Teare J in *JSC BTA Bank v. Ablyazov* [2012] EWHC 237 (Comm). 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. Where a contempt application is brought on the basis of almost entirely secondary evidence, the court should be particularly careful to ensure that any conclusion that a respondent is guilty is based upon cogent and reliable evidence from which a single inference of guilt, and only that inference, can be drawn.

...

43. As regards the mental element, Mr Smith drew my attention to the relevant passage in McGrath Commercial Fraud in Civil Practice (2nd edn). That emphasises that contempt of court is, in general, a strict liability offence. Provided that the alleged contemnor intended to carry out the conduct, which was prohibited, it is no answer to say that there was no direct intention to disobey the order. The court is not interested in examining the motive or intent behind the actions of an individual breaching the terms of an injunction.”

82. I have also considered the general propositions of law in relation to civil contempt set out in the *Navigator* case, para 82. Those propositions were recited by the FTT in its certification decision, and I do not repeat them in full. The court in the *Navigator* case observed that it is generally no defence that the order disobeyed should not have been made or accepted (para 82(v)). For breach of an order to be established, it must be shown that the terms of the order are clear and unambiguous; that the respondent had proper notice; and that the breach is clear by reference to the terms of the order (para 82(ix)).
83. In relation to the mental element, the court held (para 82(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.”
84. Mr Coppel relied on this passage (both in writing and orally) in submitting that a contempt had not been established in the present case because it was not proved that anyone within Kingston deliberately intended to omit to provide the assistance in

question or omit to provide a response to Part 4 of the request. Mr Moss did not ask me to take a different approach. The test of a deliberate intention to commit an omission may not readily capture gross inefficiency. Nevertheless, in the absence of submissions to the contrary, and on the basis that the Court of Appeal was in this part of its judgment expressly setting down an exposition of the law, it is the test that I will adopt.

85. Matters such as late compliance, apology or explanation for default fall to be considered in the context of penalty, if a public authority has been found to have committed a contempt of court (*JS*, para 53).

### **The issues**

86. Mr Moss raised five issues:

- (1) Is the FTT, rather than Mr Moss, the applicant in these proceedings?
- (2) Are the FTT's procedures for enforcing its decision and dealing with contempt compatible with article 6 of the European Convention on Human Rights ("the Convention")?
- (3) Can Kingston use the High Court proceedings to challenge or appeal the findings of the FTT?
- (4) What is the appropriate penalty for the offence of contempt?
- (5) What is the appropriate sum of damages that Kingston should pay to Mr Moss for breaching his rights under article 6 and article 10 of the Convention?

87. It is convenient to deal with those issues in turn.

### **Issue 1: Is the FTT, rather than Mr Moss, the applicant in these proceedings?**

#### *The parties' submissions*

88. Mr Moss submitted that he is not a prosecutor; nor should he be treated as an applicant making a contempt application. The proceedings consist of a request from, or application by, the FTT to the High Court to consider the punishment of Kingston. The proceedings have for that purpose been transferred to the High Court without application from him.
89. Mr Moss submitted that the FTT has brought the proceedings into the High Court in the same way that the Commissioner could bring proceedings under her own powers of enforcement for breach of her decision notices in section 54 of FOIA which makes similar provision for certification by the Commissioner and inquiry by the court. In section 54 proceedings, the court would not name Mr Moss as the applicant and would not hold him responsible for the proceedings which the Commissioner had brought by certifying an offence. Mr Moss relied on the observation of Judge Jacobs at para 20 of *Information Commissioner v Moss and Royal Borough of Kingston Upon Thames* [2020] UKUT 174 (AAC) that para 8 of Schedule 6 to the 1998 Act "effectively gives the same power as the Commissioner has under section 54(1) to send a case to the High Court."

90. Mr Moss submitted that, at the time when he had asked the FTT to certify an offence, there was no procedure for making an application. Procedural provision for applications to certify an offence came into effect at a later time: Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, r. 7A as added by the Tribunal Procedure (Amendment) Rules 2019, r. 3(3) (June 3, 2019). There was nothing in the relevant statutory provisions that required him to make an application before the FTT could exercise its powers.
91. Mr Coppel submitted that the court has no power to direct the FTT to be the applicant in these proceedings. As such, this is not a question that the court has jurisdiction to consider. Mr Moss is confusing a certification with an application to certify.

### *Discussion*

92. The nature of the present proceedings as court proceedings is relevant to Mr Moss's submission that he is neither a prosecutor nor an applicant pursuing a contempt application. I agree that he is not to be treated as a private prosecutor (*Guildford BC v Smith*, above). It does not follow that he is not an applicant pursuing an application. Irrespective of the Commissioner's position under section 54 of FOIA, the FTT's jurisdiction was exhausted when it had exercised its power to certify an offence to this court. The FTT is and never has been an applicant to be joined as a party to the High Court proceedings.
93. It is often said and observed that tribunals exercise an approach which is more inquisitorial than the courts. Even if (which I do not accept) the FTT acted in some form of inquisitorial manner in certifying an offence, this court does not have the same inquisitorial role and is not bound to take any action for or on behalf of the FTT. By accepting the papers from the FTT, the court accepted jurisdiction to inquire into the matter under para 8 of Schedule 6 to the 2018 Act. The mere acceptance of jurisdiction does not amount to taking any action for the FTT. Nor is the acceptance of jurisdiction the same as or analogous to the court proceeding of its own motion against the defendant in contempt proceedings in the way envisaged by CPR r. 81.6 (in its current version).
94. The court in its inquiry is entitled to consider and deal with the evidence and submissions placed before it by the parties: no more and no less. Mr Moss is in no different position to a party which has obtained a court order and brings a contempt application arising from its breach. As a matter both of fact and of law, these proceedings have continued because Mr Moss has pursued them and not because the FTT or this court owes him or anyone else a duty to progress them. To the extent that Mr Moss relies on any comparison with section 54 proceedings drawn in *Information Commissioner v Moss and Royal Borough of Kingston Upon Thames* [2020] UKUT 174 (AAC), I do not accept that Judge Jacobs held that the FTT has a role in the High Court. I do not accept that anything said by Judge Jacobs binds or should impel me to hold that it does.
95. In short, the FTT has no function in these High Court proceedings and the court is entitled to deal with the case that Mr Moss has chosen to advance against Kingston. As to nomenclature, I see no reason why he should not be called an applicant since the term "applicant" would properly reflect his role.

**Issue 2: Are the FTT's procedures for enforcing its decision and dealing with contempt compatible with article 6 of the Convention?**

96. Mr Moss made clear before me that he did not pursue Issue 2. He made no submissions on it. There is no need for me to deal with this Issue and I shall not do so.

**Issue 3: Can Kingston use these High Court proceedings to challenge or appeal the findings of the FTT?**

*The parties' submissions*

97. Mr Moss submitted that I was not permitted to reopen the FTT's findings or conclusion that a contempt had been proved. Having been offered the opportunity to apply to be joined as a party and failed to take it, Kingston should not be permitted to undermine or avoid the outcome of the FTT appeal and the requirement to comply with the substituted decision. Having chosen not to appeal either the FTT's appeal decision or its certification decision, Kingston could not now use the proceedings before me as an opportunity to argue that those decisions were wrong. It could not ask this court to disregard or overturn the findings which previous tribunals had made, relying on their particular expertise and having considered the evidence and arguments. In seeking to do so, Kingston had ignored the fundamental principle that tribunal orders as much as court orders must be complied with, unless overturned on appeal or otherwise discharged (*R (Majera) v Secretary of State for the Home Department* [2021] UKSC 46, [2022] A.C. 461, paras 44-56). Any other approach would breach Mr Moss's fair trial rights under article 6 of the Convention.

98. Mr Coppel submitted that on the proper interpretation of the relevant statutory provisions, the High Court starts its inquiry with a blank canvas. The certification decision was simply the gateway that vested jurisdiction in the High Court "to inquire into the matter." There is no limit as to what the court inquires into, save that it be into "the matter." The jurisdiction of the High Court was not to be read down into the supervisory role suggested by Mr Moss.

*Discussion*

99. Schedule 6 para 8 is not happily drafted. I have however reached the conclusion that Mr Coppel's submissions are to be preferred.

100. On one reading, the FTT must decide for itself whether the breach of an order "would constitute" a contempt. If satisfied that a contempt has been committed, it may certify the offence of contempt to the High Court. The FTT is the specialist tribunal entrusted by Parliament to take independent decisions on appeals under FOIA. As a specialist tribunal, it may be in a better position than the High Court to decide whether a public authority is in breach of the advice and assistance provisions of the Act. It may be in a better position than the High Court to decide whether one of its own orders has been breached. I do not however accept that the FTT is in a better position than the High Court to determine whether an act or omission amounts to contempt of court. The High Court has longstanding constitutional responsibility for ensuring that the orders of courts and tribunals are respected and for administering the law of contempt of court. The FTT does not have the same expertise.

101. The High Court is empowered to “inquire into the matter.” Nothing in the statutory language suggests that the court is limited to a review of the FTT’s decision in the sense that is used to describe the supervisory jurisdiction of the High Court in judicial review proceedings. The court will undertake an inquiry by hearing witnesses and by hearing any statement that may be offered in defence. The court exercises its own statutory power of inquiry which is a power to hear evidence and make findings of fact.
102. Nothing in the statutory language suggests that the court is limited to hearing evidence or making factual findings in relation to sanction (whether punishment or mitigation) which would be the logical outcome of Mr Moss’s submissions. The court must hear evidence for and against the person “charged with the offence” and must hear any statement “in defence”. This statutory language implies that the inquiry may (should the judge decide) be wider than the taking of evidence about sanction. If Parliament had intended that the High Court consider sanction alone, it would have said so.
103. I accept that a court which inquires into whether a person’s acts or omissions constitute a contempt may duplicate at least some part of the FTT certification proceedings. By way of example, Ms Allen relied before me on a witness statement relied on in the FTT. However, the court’s duty is to apply the provisions of the statute. The likelihood of duplication (whether as regards evidence called in two different forums or some overlap in the applicable legal principles) must be balanced against the absence of language in the statute that would confine the High Court to matters of sanction.
104. There are sound reasons of legal policy for the absence of constraint on the High Court’s inquiry. It would be unusual and surprising for an inferior tribunal to bind a superior court of record in the conclusions it may reach in an inquiry. In order to be condign, the punishment for a contempt must be appropriate and proportionate to the facts of the offence. Mr Moss’s interpretation would mean that a High Court Judge could impose a sanction for a contempt even if he or she disagreed with an inferior tribunal’s factual findings and even if those findings were wrong. In my judgment, Parliament could not have intended such an outcome. The better reading of the statutory provisions is that Parliament would not have intended the High Court to punish a person for an offence proved on the basis of facts found not by the High Court but by another tribunal.
105. Moreover, as I have indicated, the putative contemnor comes before the High Court as a “person charged” and may offer a “defence.” This language suggests that the “offence” that is certified by the FTT is the offence to be charged in the High Court and not an offence that has already been proved. Before the High Court may inquire into the charge, the FTT must consider whether the act or omission of the putative contemnor “would constitute contempt of court.” In my judgment, when read in context, those words do not refer to an act or omission proved as a contempt in the Tribunal but to the kind of act or omission that may permissibly form the subject matter of a certification to the court. The act or omission must be of a kind that is capable of constituting a contempt in the courts i.e. the Tribunal cannot certify acts or omissions that fall outside the scope of the general law of contempt as applied in the courts.
106. The certification has – in effect - the same function as a charge in criminal proceedings: it enables the putative contemnor to know the case against him. Once certified, the High Court has a broad power of inquiry. The FTT’s consideration of whether an act or omission would constitute contempt of court is designed to ensure consistency

between courts and tribunals as regards the conduct that may be punished for contempt. The language of the statute does not in my judgment bestow a jurisdiction that is uneasily divided between a tribunal which decides liability and the High Court which decides sanction. The High Court has the power to determine whether a person is in contempt and, if so, the extent of any punishment.

107. I reject the submission that Kingston ought to have appealed one or both of the FTT's decisions. Kingston does not maintain that the FTT's substituted decision was unlawful or that it should be overturned: it accepts the FTT's decision and the breach. It does not maintain that the subsequent certification was unlawful or that it should be overturned. This court must consider and apply a provision of primary legislation. Kingston asks the court to adhere to its statutory powers and jurisdiction. It is entitled to ask the court to do this (and can expect the court to do so) even in the absence of some previous appeal.
108. Nor do I understand how any issue under article 6 of the Convention may or does arise. I am not persuaded of any unfairness in my interpretation of the legislation or the procedures adopted under it.

*Application of the law to the present case*

109. I have concluded that the function of the High Court is to apply the law of contempt to tribunal proceedings in a manner in which the law would be applied to court contemnors. I agree with Mr Coppel that the application of the law of contempt includes the application of the case law. If the case law about contempt of court does not indicate that a person should be held in contempt in court proceedings, there would need to be some compelling reason why similar conduct in tribunal proceedings should result in a finding of contempt. I am not persuaded that any such compelling reason exists in this case.
110. I agree with Mr Coppel that it is highly material that Kingston was not a party before the FTT when it made the substituted decision requiring Kingston to comply with section 16 within 30 days. I am prepared to accept for present purposes that, as Judge Jacobs held, a decision of the FTT, including a substituted decision, has the same "substantive significance" as a court order (*Information Commissioner v Moss and Royal Borough of Kingston Upon Thames* [2020] UKUT 174 (AAC), para 22). The general rule in the courts (so it seems to me) is that a mandatory order requiring a person to undertake some form of action must be addressed to a party to the proceedings.
111. There are exceptions. Mr Coppel's skeleton argument cites freezing orders and search and seizure orders, both of which can and do operate against non-parties, but which provide detailed procedural protections (including liberty to apply and cross-undertakings) that ameliorate their non-participation. I was not, however, provided with any authority - and no proposition of law was drawn to my attention to suggest - that an identifiable person who could be joined as a party ought to be subjected to the court's contempt jurisdiction when the same court has previously refused to bring the person within its jurisdiction by refusing to join it as a party.
112. In its certification decision, the FTT held (at para 40) that "[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" and that this "general rule applies equally to



non-parties to proceedings as it does to parties.” The FTT cites no authority for the proposition that parties and non-parties have an “equal” status in the law of contempt. The proposition strikes me as unprincipled.

113. The UTAAC in *Information Commissioner v Moss and Royal Borough of Kingston Upon Thames* [2020] UKUT 174 (AAC), para 25, held that “the power to punish for contempt is not limited to someone who was a party to the proceedings.” In reaching this conclusion, the UTAAC relied on CPR r. 70.4 which permits a judgment or order against a non-party to be enforced against that person by the same methods as if he were a party. The specific rule about contempt is not CPR Part 70 but CPR Part 81 with its strict and mandatory procedural safeguards (see for example CPR r. 81.4(2)(d), (e) and (g) in the current version).
114. The court in the *Navigator* case (para 79) recognised the need for a “high standard of procedural fairness.” The court reiterated the need for fairness at para 132:

“There can be no doubt that the making of an application for civil contempt is a significant step which carries potentially very serious consequences for a respondent, including the loss of liberty. As already indicated and set out above [at para 79], there must be a correspondingly high standard of fairness.”
115. Despite the serious consequences of the exercise of a contempt jurisdiction, neither the FTT nor the UTAAC appear to have considered the extent to which treating non-parties as contemptuous may raise questions of fairness and natural justice.
116. The Commissioner had applied for Kingston to be joined as a party to the FTT appeal, drawing attention in her application to the fact that she had reviewed her position on the section 16 issue and now considered that Kingston may have breached its section 16 duty. The FTT considered and determined the Commissioner’s application without hearing or seeking written representations from either Kingston or Mr Moss, albeit that each was given a retrospective opportunity to comment. The FTT concluded that the appeal could be determined fairly and justly without Kingston being joined as a party.
117. In expressing my concern about treating Kingston as a contemnor, I cannot improve on the eloquence of Atkin LJ in *Jacobson v Frachon* (1927) 138 LT, 386, 392 (cited in *Cameron v Liverpool Victoria Insurance Co Ltd (Motor Insurers’ Bureau intervening)* [2019] UKSC 6, [2019] 1 WLR 1471, para 17, per Lord Sumption) who elucidated the principles of natural justice as follows:

“Those principles seem to me to involve this, first of all that the court being a court of competent jurisdiction, has given notice to the litigant that they are about to proceed to determine the rights between him and the other litigant; the other is that having given him that notice, it does afford him an opportunity of substantially presenting his case before the court.”
118. I regard it as illogical and unjust for a tribunal to refuse to join a public authority as a party to a FOIA appeal but, after the appeal has been heard, to treat the public authority in the same way as a party who has been afforded an opportunity to present its case before the tribunal.

119. There is no evidence before me that the FTT gave Kingston notice of the hearing, or that it provided any of the case papers, or that it gave Kingston any opportunity to present its case before taking an adverse decision. I do not accept that the Commissioner's encouragement to Kingston to join the proceedings and to submit its views to the FTT was any proper substitute for the FTT's duty to apply the principles of natural justice.
120. In the certification decision, the FTT emphasised that Kingston was aware of the appeal and that it could have applied to become a party at any point. But the issue is not whether Kingston made a forensic error in refraining from joining the FTT appeal as a party: that is not the impetus for contempt proceedings. Mr Moss made no application to join Kingston as a party and so had only an insecure basis for directing forensic fire against Kingston as opposed to the Commissioner. Kingston remained a non-party.
121. As a non-party, Kingston was not served with the FTT's decision but was sent a copy by the Commissioner. The FTT's decision that Kingston must provide section 16 advice says nothing about how Kingston was to be served with the decision or informed of that requirement. It was happenstance that Mr Bailey was able and willing to forward a copy of the decision shortly after it was promulgated.
122. Confirmation of lawful service is a procedural requirement of a contempt application in the courts (CPR r. 81.2(c)-(d) in the current version). I agree with Mr Coppel that service of a mandatory order is generally a hallmark or indication of its legal status as something that must be obeyed (*Husson v Husson* [1962] 1 WLR 1434, 1435). The courts have been willing to proceed to enforce a mandatory order having dispensed with service. By way of example, Mr Coppel drew my attention to *Davy International Ltd v Tazzyman* [1997] 1 WLR 1256 in which the court considered the situation of a party that had deliberately refused to comply with a mandatory order made in his presence. I heard no submission which would persuade me that the pendulum has swung so far that simple knowledge of an order is always sufficient for contempt.
123. In the absence of any case management directions about service of its decision on Kingston, I do not know how the FTT expected Kingston to learn of the outcome of the appeal or of the steps that it was required to take within 30 days. At that critical stage, the FTT failed to exercise any power in order to ensure that Kingston could or would read its decision. I do not accept that promulgation of FTT decisions may rest with the Commissioner or that her Office should be treated as having "served" the FTT's decision in the present case. The authority of tribunal orders – which the certification scheme is intended to promote – is not advanced by ad hoc sending of decisions without judicial oversight.
124. I have a great deal of sympathy for Mr Moss who had his rights under section 16 of FOIA breached. However, I can discern no support in the case law to persuade me that, if the FTT appeal had been "proceedings before a court having power to commit for contempt", non-compliance by Kingston as a non-party would have constituted a contempt of court.
125. Further and in any event, I am not satisfied to the criminal standard that Kingston's failure to comply with the FTT's order was intentional. There is little documentary evidence about how Kingston came to breach the FTT's directions and Ms Allen

frankly admitted that she was unable to locate anyone in Kingston who knew how such a situation had come about.

126. Expressions of disapprobation about Kingston's filing system, record-keeping or staff blunders do not alter the burden and standard of proof which must be satisfied. They do not change the circumstantial nature of the case that must be proved. It must be demonstrated to the criminal standard that Mr Furby – or someone else at Kingston – “deliberately intended to commit the act or omission in question” (*Navigator*, para 82(vii), above) by way of establishing a “single inference of guilt” (*JSC Mezhdunarodniy Promyshlenni Bank v Pugachev*, para 43, above).
127. On the basis of the evidence that I have read and heard, I am not able to reach a single inference of guilt. The evidence is as consistent with disorganisation and the failure to operate a competent FOI department as it is with an intention to omit to provide section 16 advice and assistance. In this respect, I have reached a different factual conclusion to the FTT. I am not however reviewing the FTT's decision but conducting an inquiry for myself. I do not regard the alleged contempt as proved.
128. Although it is not necessary for me to make findings on the matter, I was less impressed with Mr Coppel's argument that the absence of a penal notice on the FTT's decision should weigh against a finding of contempt. A reasonable and competent public authority should know from the scheme of FOIA that tribunals may substitute decisions and should know that tribunals do not as a matter of procedure or practice attach penal notices to decisions. That does not alter their force. I would not hold that it is necessary for the FTT to attach a penal notice to a substituted decision to enable the court to deal with a public authority as a contemnor in the context of para 8 of Schedule 6 to the 1998 Act (see by analogy *JS*, para 56).

**Issue 4: What is the appropriate penalty for the offence of contempt as found and certified by the FTT?**

129. As it would not be appropriate to treat Kingston as a contemnor, the issue of penalty does not arise. I have considered whether I should nevertheless give some general guidance about penalty for the benefit of future cases. I have decided that the general approach to penalty is better left for the UT to consider in a concrete case which turns on it.

**Issue 5: What is the appropriate sum of damages that Kingston should pay to Mr Moss for breaching his rights under articles 6 and 10 of the ECHR?**

130. Mr Moss sought £15,440 for breach of his rights under article 6 and article 10 of the Convention. He relied on *R (Bemboa) v London Borough of Southwark* [2002] EWHC 153 (Admin), para 56, where Munby J observed that “it would seem in principle there might in an appropriate case be a right to claim damages in accordance with sections 7 and 8 of the 1998 Act for breach of section 6(1) of the Act.” The case before Munby J concerned proceedings for contempt against a public authority. However, it is clear from the judgment that this remark was made not in the context of the application for contempt before him but in the context of the possibility of future proceedings for financial relief. As the judgment makes clear, Munby J heard no argument on the point and the Court of Appeal in *Navigator* has now confirmed that contempt proceedings are not intended as a means of securing civil compensation.

131. If Mr Moss had wished to bring a claim for damages under the Human Rights Act, he should have made a separate claim. He has not done so. The question of damages is therefore not before me and no award of damages will be made.

### **Conclusion**

132. Having (i) inquired into the matter; (ii) heard the single witness who was produced; (iii) heard Kingston's defence advanced through that witness and through leading and junior counsel; and (iv) heard generally from both parties under para 8 of Schedule 6 to the 1998 Act, I refuse to exercise my discretion to deal with Kingston as if it had committed the offence of contempt of court.

### **Final observations**

133. I have set out above that Judge Jacobs in *Information Commissioner v Moss and Royal Borough of Kingston Upon Thames* [2020] UKUT 174 (AAC) referred to the contempt provisions of the 1998 Act as providing "an incentive to comply." I agree. There is nothing in the ample provisions of the FTT's and (on any appeal concerning certification) the UT's respective Procedure Rules which would prevent a tribunal from actively case managing FOIA compliance without the need for a full certification hearing with the associated expenditure of the FTT's and parties' resources. FOIA is an Act about disclosing information to people who request it. Appeal rights to the independent tribunal promote the purposes of the Act. The FTT and (on any appeal) the UTAAC could profitably give consideration to active case management designed to achieve compliance at an early stage after an application for certification has been made. Lengthy litigation, such as occurred in the present proceedings, undermines rather than assists the overriding objective of tribunal procedures and may inhibit the expeditious provision of information and the objectives of FOIA.
134. I shall hear the parties on consequential matters.