IN THE FIRST-TIER TRIBUNAL

GENERAL REGULATORY CHAMBER

(INFORMATION RIGHTS) **Case No.** EA/2010/0065

ON APPEAL FROM:
Information Commissioner
Decision Notice ref FS50246664
Dated 23 February 2010

Appellant: Paolo Standerwick

Respondent: Information Commissioner

Determined on papers

Date of telephone meeting: 20 July 2010

Date of decision: 27 July 2010

Before

HH Judge Shanks

Paul Taylor

Ivan Wilson

Subject areas covered:

Legal professional privilege s.42

Public interest test s.2

Cases referred to:

Bamber v Financial Ombudsman Service [2009] EWCA Civ 593

DBERR v O'Brien and Information Commissioner [2009] EWHC 164 (QB)

Kessler v Information Commissioner EA/2007/0043

Mersey Tunnel Users Association v Information Commissioner EA/2007/0052

Decision

For the reasons set out below the appeal is dismissed.

Reasons for Decision

Background facts

1. The Financial Ombudsman scheme was set up under the Financial Services and Markets Act 2000 to provide for the resolution of certain disputes between consumers and those providing financial services quickly and with the minimum of formality.[1] Under the scheme the Ombudsman had power to make financial awards in favour of the consumer.[2] By paragraph 13(1) of Schedule 17 to the Act it was provided that the Financial Services Authority had to make rules providing for time limits for complaints under the scheme and by paragraph 13(2) it was provided that such rules may provide that the Ombudsman could extend such time limits in specified circumstances. Under the rules made by the FSA in 2001 a complaint had to be presented within 6 years of the event complained of or, if later, within three years of the

[1] See section 225(1).
[2] See section 229.

date when the complainant became aware or should have become aware that he had cause for complaint; and there was provision that in exceptional circumstances these time limits could be overridden by the Ombudsman. There was, however, no "long-stop" provision analogous to the 15 years provided for in section 14A of the Limitation Act 1980 in relation to negligence claims.

2. This led to concern in the financial services industry and the matter was considered at a board meeting of the FSA held on 18 September 2003, though no change was made to the rules as a consequence. Paragraph 2 of a paper headed "Financial Ombudsman Service: 15 Year Rule" which was prepared for that meeting stated:

> **GCD [General Counsel's Division] advises that the way in which Schedule 17, paragraph 13, of the FMSA is framed suggests that Parliament intended the FSA to be able to set time limits which can differ from those in the Limitation Act.**

3. On 17 March 2008, Mr Standerwick, the Appellant in this case, who had been provided with a copy of the board paper under an earlier information request, made a request to the FSA under the Freedom of Information Act 2000 in the following terms:

> **Re the above attachment and under a new request please supply the advice which relate that GCD gave under section 2 above (sic)**

It is clear that the "attachment" referred to in Mr Standerwick's request was the board paper and that "section 2" was the paragraph we have set out above. Although the wording of the request is slightly obscure, as we understand it Mr Standerwick wished to see any written legal advice from the FSA's General Counsel's Division to the effect that Parliament intended the FSA to be able to set time limits under paragraph 13 of Schedule 17 which could differ from those provided for in the Limitation Act, including any arguments or reasoning in relation to that conclusion.

4. By a review letter dated 22 April 2009 the FSA confirmed that they held information coming within Mr Standerwick's request but stated that it was

covered by legal professional privilege and that the exemption at section 42 of the 2000 Act therefore applied to it and that the public interest balance favoured upholding the exemption; they therefore refused to supply the information to Mr Standerwick. Mr Standerwick applied to the Information Commissioner under section 50 of the 2000 Act and in a decision notice dated 23 February 2010 he upheld the FSA's decision. Mr Standerwick has appealed to this Tribunal against that decision notice.

The issue on the appeal

5. For the purposes of this appeal the Tribunal has been provided by the FSA on a "closed" basis with internal material relating to the 15 year long-stop issue from 2003 which includes advice coming within the terms of Mr Standerwick's request. That advice was clearly covered by legal professional privilege (as was clear from the very terms of the request and is not, as far as we are aware, disputed); the advice therefore clearly came within the exemption provided by section 42(1). The issue for the Tribunal is whether the Commissioner was correct to find that the public interest in maintaining that exemption outweighed the public interest in disclosing the advice in the circumstances of this case. We have considered that question afresh ourselves on the basis of all the material now before us, including in particular the points raised by Mr Standerwick in his grounds of appeal, and we set out our conclusions below. The relevant date for considering the competing public interests was April 2009.

Public interest in disclosure

6. Disclosure of the advice would undoubtedly have given the public some additional understanding of the operation of a public authority with significant responsibilities and of its decision-making process in relation to the 15 year long-stop issue, which would tend to foster transparency and accountability. Having seen the advice in question, however, we can say that it would have contributed to such understanding in a very modest way, adding very little to the contents of the board paper already provided to Mr Standerwick, which

itself focuses on the policy issues surrounding whether or not to introduce a 15 year long-stop rule.

7. In paragraph 22 of his decision notice the Commissioner referred to an earlier Tribunal case on section 42 (*Mersey Tunnel Users Association v Information Commissioner* EA/2007/0052), compared the numbers of people affected by the decisions of the public authorities in question in the two cases and stated: "This difference between this case and the Mersey tunnel case mean (sic) that the weight in favour of disclosure is not as significant as in the Mersey tunnel case." This finding led Mr Standerwick and the FSA to place a mass of complicated and conflicting evidence before the Tribunal designed to demonstrate how many people were in fact affected by the FSA's decision not to impose a 15 year long-stop. We do not feel able to resolve that issue of fact (if indeed it is capable of resolution in any sensible way) but, in any event, we do not think it is necessary or appropriate in this kind of case to resort to "counting heads" (or adding up money) in order to assess the weight of the public interest in the issue at stake. Rather we consider it is sufficient for us to find that the existence or non-existence of a 15 year long-stop would have a substantial affect on the financial interests of many financial services businesses (and therefore potentially their employees and shareholders and their dependents) on the one hand, and on those of consumers and their dependents on the other. That is obviously a factor which tends to increase the weight of the public interest in disclosure in this case.

8. Mr Standerwick says that there is here a "suspicion of misrepresentation or unlawful behaviour" on the part of the FSA. It is of course right there are circumstances where this is a factor which increases the weight of the public interest in disclosure in a legal professional privilege case. However, in this case, we have seen nothing which gives rise to such a suspicion. We can assure Mr Standerwick that the legal advice given by GCD accords with what is stated in paragraph 2 of the board paper; there is therefore no question of the advice itself being misrepresented. Mr Standerwick refers us to section 155 of the Financial Services and Markets Act 2000 which

provides detailed rules as to consultation if "the [FSA] proposes to make any rules"; the FSA point out, rightly in our view, that no obligation to consult arose in this case as the FSA resolved *not* to change the existing rules and was not therefore proposing "…to make any rules." Mr Standerwick also refers to The Financial Services and Markets Act 2000 (Transitional Provisions) (Ombudsman Scheme and Complaints Scheme) Order 2001 (SI 2001/2326) and to Art 6(1) of the ECHR and alleges that the FSA have contravened these provisions in relation to the 15 year long-stop issue. We do not feel qualified and do not think it necessary to resolve these points; it is sufficient to say that the FSA argue strongly that there is nothing in Mr Standerwick's points and we have no reason whatever to doubt their *bona fides*. We would have thought that the proper place to argue such esoteric points was the Administrative Court. Certainly there is no basis for alleging misrepresentation or unlawful behaviour of a type that would weigh in favour of disclosure in this case.

9. Overall, we conclude that, although the underlying issue about the 15 year long-stop was one of substantial public interest, the public interest in disclosure of the specific legal advice requested in this case was modest.

Public interest in maintaining exemption

10. Following a substantial body of jurisprudence on the point in the Information Tribunal, the High Court (in a decision which is binding on us) has stated:[3]

> **Section 42 cases are different simply because the in-built public interest in non-disclosure itself carries significant weight which will always have to be considered in the balancing exercise once it is established that legal professional privilege attaches to the document in question.**

We remind ourselves of that "in-built" public interest and the rationale behind it which is set out in the quotation from *Kessler v Information Commissioner* EA/2007/0043 at paragraph 19 of the Commissioner's decision notice (which we will not repeat here but which we regard as extremely helpful in considering the issues). Although, as we have indicated in paragraph 6

[3] Per Wyn Williams J in *DBERR v O'Brien and Information Commissioner* [2009] EWHC 164 (QB)

above, the actual content of the advice in this case is not of great interest, we consider that it is important that legal advice can be sought and given internally in an organisation like the FSA in a way that suits the organisation without undue fear of it being disclosed and minutely examined by the public.

11. Mr Standerwick relies on the passage of time (the relevant period would be between September 2003 and April 2009) as a factor weakening the public interest in maintaining the exemption. He is right to do so but in this case the factor is very substantially undermined by the fact that the 15 year long-stop issue was still live in April 2009: the Tribunal has seen the decision of the Court of Appeal in the case of *Bamber v Financial Ombudsman Service* [2009] EWCA Civ 593 dated 3 February 2009 where permission to apply for judicial review was refused to Mr Bamber (a financial advisor) but the court made clear that there were still issues outstanding on the merits in relation to the 15 year long-stop controversy.

12. Overall, we consider that although the weight of the public interest in maintaining the exemption in this case was not enormous, it was substantially greater than that in disclosure, taking account in particular the "in-built" public interest we have referred to.

Conclusion

13. Weighing the respective public interests and taking account of all the circumstances of the case and in particular the factors we have mentioned above, we have therefore concluded that the public interest in maintaining the section 42 exemption outweighed the public interest in disclosure of the advice. It follows that the Commissioner's decision notice was in accordance with the law and that the appeal must be dismissed.

14. Our decision is unanimous.

15. Under the relevant rules of procedure an appeal against this decision on a point of law may be submitted to the Upper Tribunal. A party wishing to appeal must make a written application to the Tribunal for permission to

appeal within 28 days of receipt of this decision. Such an application must identify the error or errors of law relied on and state the result the party is seeking. Relevant forms and guidance can found on the Tribunal's website at www.informationtribunal.gov.uk.

Signed:

HH Judge Shanks

Dated 27 July 2010