IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL (INFORMATION RIGHTS)
UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

Appeal No. EA/2011/0212
EA/2011/0213
EA/2011/0247
EA/2011/0250
EA/2011/0251
EA/2011/0252

BETWEEN:

ANDREW BOUSFIELD

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

COUNTY DURHAM AND DARLINGTON NHS FOUNDATION TRUST
ST GEORGE'S HEALTH CARE NHS TRUST
HEART OF ENGLAND NHS FOUNDATION TRUST
SOMERSET PARTNERSHIP NHS FOUNDATION TRUST
SOUTH TEES HOSPITALS NHS TRUST
UNIVERSITY HOSPITALS OF LEICESTER NHS TRUST

Second Respondents

DECIDED ON THE PAPERS: 28 MAY 2012

BEFORE

DAVID MARKS QC
(Tribunal Judge)

DAVE SIVERS
HENRY FITZHUGH
(Lay Members)

Cases Authorities and Statutes referred to:

Bousfield v IC (EA/2009/0113)
Waugh v IC (EA/2008/0038)
Common Services Agency v Scottish Information Commissioner [2008] UKHL 47

Beckles v IC (EA/2011/0073 & 0074)

Freedom of Information Act 2000 ss40 & 43; Data Protection Act 1998 ss1(1), 27(1) & 33A

Decision

The Tribunal unanimously dismisses the Appellant's Appeals in all six of the above appeals.

General

1. This judgment deals with six separate appeals brought by the same Appellant. They involve similar types of requests and the overall background to each of the said appeals is generally the same. The public authorities concerned in each appeal are, however, all different. For this last reason alone there will be separate sections within this judgment in relation to each appeal.

The Law

2. Section 40 of the Freedom of Information Act 2000 (FOIA) provides as follows:

"Personal information

(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.

(2) Any information to which a request for information relates is also exempt information if -

(a) it constitutes personal data which do not fall within sub section (1), and

(b) either the first or the second condition below is satisfied.

(3) The first condition is -

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene -

(i) any of the data protection principles, or

(ii) section 10 of that Act (the right to prevent processing likely to cause damage or distress), and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) to the Data Protection Act 1998 ... were disregarded.

(4) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).

(5) The duty to confirm or deny -

(a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of sub section (1), and

(b) does not arise in relation to other information if or to the extent that either -

(i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or

(ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed)."

3. The data protection principles are those set out in Part I of Schedule 1 to the 1998 Act (the DPA) which is in turn subject to Part II of that Schedule and section 27(1) of the DPA. Personal data under FOIA has the same meaning as that attributed to that term in section 1(1) of the DPA. In the Tribunal's judgment there is no issue as to the true meaning and extent of that term in these appeals.

4. Section 43(3) of FOIA provides that the duty to confirm or deny does not arise if or to the extent that, compliance with section 1(1)(a) would or would be likely to prejudice the interests mentioned in sub section (2) of that section, namely commercial interests being the exemption referred to within the body and scope of section 43 of FOIA.

Appeal 2011/2012

5. The Appellant made a request for copies of all compromise agreements entered into by the Respondent public authority in that case (County Durham) with doctors and the reasons why County Durham entered into those agreements. As with the other appeals which are considered here the request related to the preceding period of 10 years. County Durham refused to confirm or deny whether the information was held under section 40(5) as well as section 43(3) of FOIA.

6. The express terms of the request were as follows being contained in an exchange dated 5 February 2010:

"Please provide copies of all compromise agreements you have entered into with doctors of any grade. Please also provide a list of exploratory or illustratory [sic] issues covered by the compromise agreements (ie the reasons the compromise agreements were entered into)"

7. On about 5 March 2010 County Durham formally responded refusing to confirm or deny whether or not it held the information requested. That response was upheld by County Durham after an internal review.

8. As can be seen from the statutory provisions which have been recited above not only is personal data for individuals other than an applicant excluded but a public authority is effectively excluded from complying with the duty to consider a formal reply to a request if compliance with that duty would contravene any of the data protection principles.

9. By a Decision Notice dated 24 August 2011 the Information Commissioner (the Commissioner) upheld the decision of County Durham. The Commissioner found that personal data was involved and that compromise agreements would constitute such data of the employee to whom the agreement might relate. He therefore considered that the proper approach was first to consider whether or not in responding to the request County Durham would have been excluded from the duty imposed by section 1(1)(a) of FOIA. In line with the provisions of section 40(5)(b)(i) the Commissioner in turn considered whether or not confirming or denying whether the requested information was held would contravene any of the data protection principles.

10. The first data protection principle states in part that:

"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 is met ..."

Schedule 2 need not be set out in full. It sets out the conditions relevant for the purposes of the first data protection principle. It consists of 6 paragraphs. The first concerns the giving of consent. The second deals with when processing is necessary for the performance of the contract. The third concerns the case when processing is necessary for compliance with any legal obligation to which the data controller is subject other than an obligation imposed by a contract. The fourth concerns the requirement for processing an order to protect the vital interests of the data subject. The fifth concerns the processing of personal data as that relates to the

administration of justice and other related matters. The sixth is material and provides as follows, namely:

"6(1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

(2) The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied."

11. The Commissioner went on to say that in considering whether or not confirming or denying whether the requested information would contravene the first data protection principle he took into account the reasonable expectations of any relevant data subjects, and whether it would cause damage or distress as well as the legitimate interests of the public at large.

12. He therefore found at paragraph 18 that on considering the submissions put in by County Durham he was satisfied that in the context and background of this particular request any relevant data subjects would have had a reasonable expectation of privacy and would not expect the trust in question to confirm or deny this information was held. County Durham's submissions were set out in a confidential annex attached to the Decision Notice. In dealing with distress and damage the Commissioner noted the content of the submissions put in. He went on to say that although the public had a legitimate interest in knowing whether County Durham had entered into any agreement, in all the circumstances, confirming or denying whether the requested information was held would breach the first data protection principle and therefore any response provided would have contravened or would contravene the fairness element within the first data protection principle.

13. In due course the Appellant lodged a notice of appeal. The grounds of appeal are in effect set out in a letter sent by him to the Tribunal dated 19 September 2011. In it he refers to the fact that similar requests had been made to the one presently under consideration. He rightly pointed out that the defence of many trusts "vary in detail but most focus on section 40 (Data Protection Act defence)". He added the following, namely:

"The Tribunal should familiarise itself with Health Service Circular 1999/198, passed after the Bristol Heart scandal, that made clear that health trusts should prohibit gagging clauses in compromise agreements. This followed on from several high

profile scandals where doctors had known of patient harm and deaths but had been prevented from speaking up.

Many trusts are now concluding compromise agreements which breach this Circular entirely - of the trusts that responded with some information 95% of compromise agreements contained "gagging" clauses. After breaching the Circular, the trusts are then attempting to rely on the Data Protection Act who claim that these doctors would be "distressed" if their identities were revealed. I have not seen any evidence produced by any trusts on purported "distress" and the Commissioner seems to have made its [sic] decisions on closed evidence. This does not inspire confidence.

Indeed, I am intent [sic] to file evidence showing that many doctors (including high profile surgeons and physicians featured in Private Eye) would be happy for their identity to be disclosed. I also intend to file evidence from the Public Accounts Committee on obtaining data on these compromise agreements from the Treasury, and the need for transparency."

14. The Commissioner filed a response dated 17 October 2011. In it the Commissioner first noted that the letter above referred to of 19 September 2011 demonstrated that the Appellant did not dispute the fact that the compromise agreements generally constitute the personal data of the employee concerned, as already observed above. The issue was whether the first data protection principle had been contravened, the Appellant having raised the applicability of no other principle. This in turn meant that the Commissioner had to take into account the reasonable expectations of any relevant data subject and in particular whether it would cause damage and distress at the time referred to. This too appeared clearly to be conceded to be a relevant consideration on the part of the Appellant. The Commissioner referred to his findings as alluded to in the Decision Notice to the effect that he was correct to conclude that confirming or denying whether the requested information was held might cause damage or distress to a data subject. To go further would mean disclosing the content of the confidential annex referred to.

15. County Durham itself then filed a response dated 10 February 2012. It referred to the Circular which the Appellant had referred to in his letter. County Durham also noted that at the end of the letter of the 19 September 2011 in a passage which is not recited in this judgment, the Appellant in fact listed five pieces of information he had asked for from various trusts. County Durham rightly pointed out that the scope of the information in that list was different from the information requested in the requesting forming the basis of the Commissioner's Decision Notice. The Tribunal notes this but will deal with the request as addressed by the Commissioner's Decision Notice. County Durham then went on to say that in considering whether what it called third party personal information exemptions were engaged under the DPA, a public

authority would consider whether the sixth condition (recited in terms above) applied so that there would be no breach of the Schedule 2 element of the first data protection principle were disclosure made. The sixth condition applies only to non sensitive personal information, eg financial payments. It does not apply to a disclosure of sensitive personal information such as information regarding sexual life, the commission or alleged commission of offences, racial or ethnic origins or mental or physical health or related condition.

16. County Durham then went on to point out that were the Appellant correct in his submission that an NHS trust were effectively seeking to cover up "silencing payments" by using so called gagging clauses then it accepted that there would be what it called "a huge public interest in disclosure of the information sought" principally for reasons of patient safety.

17. County Durham contended that the Circular referred to applies to confidentiality clauses in compromises of what are called Public Interest Disclosure Act 1998 (PIDA) claims alone with any employee, not just doctors, but not to compromises of any other claims. This will be reverted to below.

18. On that basis County Durham claimed that were NHS trusts using legitimate confidentiality clauses to protect their employees' expectations of privacy to compromise non Public Interest Disclosure Act claims then the request would (according to the response of County Durham) amount to a demand for access to part of the personnel files of third party individuals and thereby be unwarranted under the sixth condition by reason of prejudice to the rights and freedoms or legitimate interests of individual employees. Insofar as distress was an aspect of mental health or of a mental condition then again the same would, it was contended, be sensitive personal data and the sixth condition would not cover any disclosure on that ground.

19. In due course the Appellant provided evidence in the form of three witness statements from doctors and a fourth from Stephen Barclay MP. The three medical practitioners were a Dr Kim Holt working as a paediatrician in Harringey [sic]. Dr Holt says that she was offered £120,000 to leave and sign a gagging clause which would have prevented what was alleged as the manager's "wrong doing" from ever seeing the light of day. The second witness statement is from a Dr Phil Hammond. He is a general practitioner as well as a journalist concentrating on disclosing matters relating to what he calls "NHS whistle blowers". He claims that use of a gagging clause is "counter to DH guidance and technically not enforceable "under the Public Interest Disclosure Act adding however that few whistle blowers had "the strength and legal resources to risk breaching it and so their legitimate safety concerns are never made public and there is no evidence that they have been addressed." He adds that his belief is that many doctors who have previously been silenced "would welcome the

opportunity of openness and it might ensure action is taken on long standing safety problems." The third witness statement takes the form of a letter from Dr Sarah Wollaston MP who is a Member of Parliament for Totnes. She is also a general practitioner. One of the concerns of the Health Select Committee on which she serves is the use of gagging clauses she claims in exit agreements for hospital doctors. She claims these are "apparently contrary to" the Circular referred to "but the practice does seem fairly common".

20. Finally, the statement of Stephen Barclay MP dated 7 March 2012 takes the form of a appended statement or report headed "The failures of public interest disclosure: how whistle blowing is covered up in the NHS". With respect to Mr Barclay and to the Appellant the Tribunal does not feel it is necessary or appropriate to recite the contents of this in any detail save to say that the statement put in by Mr Barclay again stresses the problems caused by the use of gagging clauses particularly in a health context. However, at paragraph 11 of this appended statement or report to Mr Barclay's covering letter and/or note the following passage appears, namely:

"The Health Service Circular from 1999 expressly prohibits "gagging" clauses in contracts of employment, and compromise agreements which seek to prevent the disclosure of information in the public interest [reference is here made to HSC 1999/198 and the Public Interest Disclosure Act 1998]. However, later guidance, published in a 2004 Health Service Circular states: "it is not contrary to the Department of Health's policy for confidentiality clauses to be contained in severance agreements" [reference is here made to another Circular HSC 2004/001: Use of confidentiality and claw back clauses in connection with termination of the contract of employment], In this way the NHS is still regularly including such clauses into compromise agreements of whistle blowers - Foundation Trusts made 105 such pay offs in 2010/11 and it is estimated that 90 contained a gagging clause."

21. In his written submissions to the Tribunal with regard to the appeal the Commissioner in effect repeated matters set out in its earlier formal response. He did, however, add matters concerning the PIDA.

22. PIDA inserts various provisions into the Employment Rights Act 1996 (ERA) for protection of those who have been called above and are now commonly referred to as whistleblowers. In more formal terms PIDA contains provisions about so called "protected disclosures". These are defined by virtue of ERA section 43A as being qualifying disclosures (see section 43B) made in accordance with any of sections 43C to 43H. No employee can be dismissed or subject to any detriment on the grounds of making a protected disclosure. See generally ERA sections 47B and 103B. Section 43J provides that any clause in an agreement seeking to prevent an employee or ex employee from making a protected disclosure is void.

23. The Tribunal entirely accepts the contention made by the Commissioner which is self-evident that this Tribunal has no jurisdiction to decide whether any of the provisions in any compromise agreement that might be entered into by any NHS trust is or could be void under section 43J of the ERA as inserted by PIDA. Indeed this proposition was wholly accepted by another Tribunal with regard to compromise agreements held by a relevant NHS Trust in Bousfield v Information Commissioner and Liverpool Women's Hospital NHS Foundation Trust (EA/2009/0113). That case concerned a similar request for information by the same appellant.

24. The Commissioner therefore contended that, just as the Tribunal in this case has to decide on the facts of this case such issues as to whether and if so to what extent either gagging clauses are in use and/or in any event whether distress would be caused with regard to the requests presently the subject of a decision notice under appeal, so too this Tribunal is bound to determine on the facts of this particular case whether the Commissioner was correct to conclude that County Durham was in turn correct to refuse or to confirm or deny whether the information was held under section 40(5) of FOIA.

25. County Durham too has lodged formal written submissions with regard to the appeal. Apart from repeating to a large extent its earlier written contentions it points out that in the Commissioner's relevant Guidance on the duty to confirm or deny a suitable example is given relevant to the facts and issues in dispute in the present case. The illustration given is that of a request about any information which the hospital held about the heart condition of an individual. In such a case the Guidance suggests it would be "unlikely that the hospital would release any information from the medical record". It is also "likely that it would decline to confirm or deny withholding information about the patient's heart condition unless this is information which is already in the public domain". County Durham points out that the same could be said in response under FOIA to the Appellant's request to NHS Trusts of the type and nature made in the present case. A compromise agreement by definition contains personal and confidential information about an individual employee. Knowledge of its existence and contents would be "highly restricted" and only "rarely" would any information about the fact or subject matter of the compromise already be in the public domain. Reference is made to the well known case of Common Services Agency v Scottish Information Commissioner [2008] UKHL 47 referred to in the earlier Tribunal decision in Bousfield v Information Commissioner supra as to what County Durham calls "the continued primacy of the DPA, notwithstanding the passage and implementation of [FOIA]".

26. County Durham then went on to state that certain decisions under FOIA have allowed certain information to be disclosed which would normally be considered personal, eg financial information although in one such case there was no compromise agreement.

27. Among County Durham's written submissions the following passage appears, namely:

"Compromise agreements consist of highly private and confidential information about employees and their disputes with employers. Their private and confidential nature is an essential element of what makes them an effective alternative to costly litigation. To abolish confidentiality clauses from compromise agreements altogether as suggested by the Appellant's witness, Stephen Barclay MP [would destroy that alternative]. The Tribunal is not the proper vehicle for debate on the Appellant's public interest arguments and he has not demonstrated grounds in his notice of appeal that would give statutory justification under the DPA for disclosure of the information requested under [FOIA] without breaching the first data protection principle".

28. The Commissioner as well as Country Durham both filed closed written submissions but the Tribunal has not thought it appropriate or material to address these in any form of closed judgment accompanying this open judgment. There are, however, a number of general points that emerge even from the closed written submissions which in the Tribunal's judgment are appropriately the subject of observation and comment even in an open judgment. These comments are made without reference to the facts and circumstances underlying the precise position maintained by County Durham in this particular appeal. First it is not uncommon in compromise agreements for there to be a confidentiality clause of some sort to the effect that the parties agreed that the details of the agreement in the circumstances leading to a termination of employment remain confidential. This is almost self evident but would clearly weigh in the balance when considering to what extent, if any, an individual would have a reasonable expectation of privacy. Second, and on the perhaps self evident basis that there are likely to be only a few instances of compromise agreements or at least a relatively modest number against the back drop of the total workforce within and employed by the type of the public authority here involved, there is always the chance that other members of staff within the public authority would be able to identify the individual or the individuals involved should even limited disclosure of the information sought be made, eg as to the amount paid. However, in cases where very few, or perhaps just one, compromise agreement of the type requested in the present appeal have or has been entered into then even the revelation of that mere fact of that character might be enough for someone with sufficient relevant knowledge as to the circumstances concerning the employee's activities to be able speculate

with some degree of assurance about the identity of the individual concerned or even in certain circumstances to deduce with relative certainty as to who the individual was thereby causing the individual or individuals in question to suffer from suitable distress of the type claimed by the public authority in a case such as the present. From this it follows in the Tribunal's view that even redaction of an individual's name might in certain circumstances cause there to be a risk of the sort set out in the previous sentence to be present.

29. In addition the Tribunal takes the view that once an identity is known or at least speculated upon then the matters which are discussed in the earlier Tribunal decision in Bousfield v IC supra come to be relevant. Speculation often encourages or creates the occasion for possible and unsolicited approaches from the media and others who may have an interest in ascertaining the recent circumstances behind a particular agreement or set of agreements that have been entered into and the circumstances leading to such agreements in the case or cases in question.

30. The fact remains that as pointed out above each case must be judged on its merits.

Appeal 2011/2013

31. The request in this appeal is in the same terms as was made in relation to appeal 2011/2012. It too is dated 5 February 2010. The Trust in question, namely St George's, provided a response that was undated and refused to provide the requested information relying in particular on the exemptions in section 36, section 40(2) and section 41 of FOIA.

32. The Appellant requested an internal review following which St George's upheld its original decision.

33. During the course of the Commissioner's investigation prompted by the Appellant three compromise agreements were provided but redactions were made under section 40(2) of FOIA. In his Decision Notice the Commissioner therefore considered whether or not St George's was correct to make the redactions under section 40(2). In his further exchanges with St George's the Commissioner was duly informed that the wrong internal review response had been sent by St George's. St George's went on to explain that the result of the internal review had actually been to confirm that three compromise agreements have been held relevant to the scope of the request and as indicated above they could be provided with redactions.

34. The Decision Notice is dated 24 August 2011. In it after reciting the terms of section 40(2) and section 40(3)(a)(i) the Commissioner indicated that the withheld information

included the names and the parties in the compromise agreements, the dates of those agreements and other information such as job titles, employment dates or the reasons as to why the agreements had been entered into. In addition appendices attached to the compromise agreements including documents such as agreed references or similar matters were also withheld. The Commissioner pointed out that this all constituted information relating to living individuals who could be identified from the information were it to be disclosed. In particular, dates, job titles and the reasons for entering into the agreements together with the documents referred to in the appendices could assist those with local knowledge to link the redacted or withheld information with an individual or set of individuals.

35. The Commissioner relied upon and drew attention to section 40(3)(a)(i) and the related reference to the data protection principles. The Commissioner mentioned the possible contravention of the first data protection principle. He weighed the likely expectation of the data subject coupled with the effect disclosure would have, against the legitimate public interest and concluded that the redactions were legitimate. He drew specific attention to his own Awareness Guidance dealing with section 40 and personal information already alluded to with regard to the preceding appeal to the effect that public authorities should take into account the potential harm or distress that might be caused by disclosure.

36. As in the case of the preceding appeal, the grounds of appeal find expression in the letter of 19 September 2011. The Commissioner's formal response is dated 17 October 2011. Again the Commissioner drew attention to the fact that there was no dispute with the overall conclusion that the withheld information constituted personal data. Again as in the previous appeal the Commissioner drew attention to the fact that there appears to be no dispute with the conclusions reached by the Commissioner that the data subjects in question would not have expected the withheld information to be disclosed. He also drew attention to the fact that there appeared to be an acceptance to some degree by the Appellant that the legitimate public interest had been met to a degree by the disclosure of a number of compromise agreements and the sums paid despite the redactions effected to the agreements. The other points reflect observations which the Commissioner had made with regard to the earlier appeal.

37. In its formal response St George's reiterated the fact that disclosure to the public could cause distress to the data subjects in a number of ways, some of which have been alluded to with regard to the previous appeal, eg through potential media attention as well as the potential impact on current and/or future employment prospects.

38. The Tribunal has, of course, seen the agreements in question. It is entirely satisfied that irrespective of the fact that the Appellant's claim that there is a legitimate public interest in NHS Trusts entering into compromise agreements with staff which might contain so called gagging clauses none of the agreements in the present case contain such clauses. Indeed there is formal evidence on the part of St George's confirming the fact that the agreements contain no gagging clauses preventing individuals from raising concerns they might have about patient safety. Reference is made by the Commissioner in his final written submissions to another Tribunal decision, namely Waugh v Information Commissioner and Doncaster College (EA/2008/0038). In that case the Tribunal upheld a refusal to disclose information relating to the dismissal of the Principal of the said college and specifically drew attention to the fact at paragraph 40 that even in the public sector compromise agreements can be expected to be afforded a degree of privacy "where there is no evidence of wrong doing or criminal activity." The Commissioner pointed out that the redacted information clearly constitutes the personal data of the doctors in question but that any general public interest in the use of compromise agreements would be met in the present case by the disclosure made to date and would not be in any way furthered by releasing the information redacted.

39. In its final written submissions St George's revisits the points made previously by it as well as by the Commissioner. It formally confirms that none of the agreements involving St George's relate to issues relating to patient safety or mismanagement within the NHS. The Appellant relies on the same evidence referred to in connection with the prior appeal. The other parties not unnaturally responded by saying that such evidence would not go and does not go to the issue of consent on the part of the doctor or doctors whose agreement or agreements have in this case been referred to.

Appeal 2011/2047

40. The Appellant's request in this case is also dated 5 February 2010. It is in the same terms as those in the previous appeals. The public authority in this case, ie Heart of England, contended that it held the information requested but that it was exempt from disclosure under section 40(2)(iii) of FOIA. It confirmed that it considered the information to be the personal data of a living individual and that disclosure even in redacted form would breach the first data protection principle. It considered that the information was likely to reveal the identity of the individual even if obvious details such as names were removed.

41. Consequent upon an internal review by Heart of England, it stated that it held one relevant compromise agreement, but again reconfirmed that it considered that release of any part of the agreement would make the individual easily identifiable.

42. The Commissioner's Decision Notice is dated 26 September 2011. The Commissioner found not unnaturally that personal data was involved and that in considering whether disclosure of the compromise agreement would be unfair within the meaning and scope of the first data protection principle, he took the following four factors into account, namely first, whether the requested information was sensitive personal data, second the consequences of disclosure, third the data subject's reasonable expectations of what would happen to his or her or their personal data, and finally the balance between the rights and freedoms of the data subject and the legitimate interests of the public.

43. The Commissioner went on to say that any consideration relating to fairness meant that he had also to determine whether the requested information could be defined as sensitive under the DPA. Mention of this has already been made above with regard to Section 2 of the DPA and its definition of sensitive personal data.

44. Heart of England had said that harm could occur if the compromise agreement or a list of reasons as to why it was entered into was or were released into the public domain. At paragraph 19 of his Notice, the Commissioner noted that it was reasonable to assume that there would be colleagues or acquaintances of the individual who over the past 10 years, ie the timeframe in question, would have been aware of disputes with Heart of England. Reference is made to another Tribunal decision, namely Beckles v Information Commissioner (EA/2011/0073 and 0074) in which the Tribunal there stressed that disclosure was to the public and that identifiable meant identifiable to any third party who might relate the released information to his or her knowledge and experience. Furthermore, the second element of the requested information, ie the list of reasons, if disclosed would have served to further narrow down the field of search and consequently made identification all the more likely. The Decision Notice also stressed that the individual concerned had not given consent as to disclosure; Heart of England had contacted the individual who had confirmed that the information should not be released.

45. The Commissioner went on to find that even though the public had a legitimate interest in knowing how much money a public body was spending on compromise agreements, coupled with the requirements of transparency and accountability, a balance had to be struck between those interests and a duty to respect an employee's right to privacy. Here, however, there was only one agreement and one individual. In the circumstances, the expectations of confidentiality outweighed any public interest in transparency and accountability. Reference was again made to the earlier decision of Bousfield v IC supra and the arguments there canvassed and dealt with by the Tribunal in that case were adopted within the present Decision Notice.

Reference was also made to the decision in Waugh v IC supra. In the circumstances, the Commissioner upheld Heart of England's decision.

46. The Notice of Appeal again as filed by the Appellant has as its grounds those set out in the Appellant's letter of 19 September 2011. In the Commissioner's initial response dated 22 November 2011, the Commissioner again stressed the four elements which went into the analysis in considering fairness referred to above within the Decision Notice. In particular, in his response, the Commissioner stressed that it was a doctor's reasonable expectation in entering into a compromise agreement that the same would remain confidential and that such an agreement was "an essentially private and confidential matter between employer and employee" coupled with the expectation on the part of the individual that essentially private information concerning the terms and circumstances surrounding departure from an NHS Trust would remain confidential.

47. By letter dated 17 February 2012, Heart of England expressed its essential desire to remain neutral but in its further submissions with regard to the appeal dated 23 April 2012, Heart of England in effect adopted the contentions made by the Commissioner, particularly in the Decision Notice, and stressed that disclosure may well cause the counterparty in this particular case "considerable distress".

48. In his final written submissions, the Commissioner again addresses the particular contention made by the Appellant that insofar as any agreement contained gagging clauses, such agreements should be released adding in his letter to the Tribunal on 27 November 2011 "such that illegal agreements can be uncovered and the public interest in patient safety served".

49. The Commissioner contends that in such circumstances although there may well be a general legitimate public interest on that issue, the question again for the Tribunal was whether there was a legitimate public interest in the specifically withheld information on the facts of the particular case. There could be no assumption according to the Commissioner that any such clause was relevant to the present case. In any event, as the Commissioner points out, this Tribunal has no jurisdiction to decide whether any of the provisions in any compromise agreement that may be held by any Trust, whether this one or some other Trust, are void under section 43J or ERA as inserted by PIDA, the same reflecting the finding of the Tribunal in the earlier decision of Bousfield v IC supra.

Appeal 2011/0250

50. In this appeal, the Appellant makes a similar request to that in the previous appeals. It too is dated 5 February 2010. The Appellant was formally informed by the relevant

Trust, ie Somerset, that it held one agreement which fell under the scope of the request. Somerset also explained that it considered the requested information to be exempt from disclosure under section 40(2) of FOIA. In his Decision Notice dated 17 October 2011 the Commissioner in effect repeated the facts and matters which had been set out with regard to the Decision Notice in Appeal 2011/0247. In the present case, the individual concerned had not given consent for the full unredacted agreement to be made public. In the circumstances, redactions had occurred with regard to the name and the relevant date.

51. In the Decision Notice, much the same facts and matters were considered and discussed by the Commissioner as in the preceding appeal and the Decision Notice in that case. In addition, Somerset had contacted the solicitor of the individual and asked if the information could be disclosed. Again, the individual confirmed the information should not be released.

52. The Grounds of Appeal again find expression in the Appellant's letter dated 19 September 2011. The Commissioner's formal response is dated 22 November 2011. In effect the response mirrors that of the response filed by the Commissioner in relation to the preceding appeal.

53. The Trust in question, ie Somerset, itself filed a written response dated 10 February 2012. In effect, it echoed the contentions made by the Commissioner.

54. The Tribunal pauses here to note a letter sent by Somerset to the Commissioner dated 24 September 2010. At page 2 of the said letter, Somerset expressly pointed out that it was "clear that this is not a case where by (sic) the Trust seeks to deny disclosure in order to protect itself form (sic) an allegation that it has used a compromise agreement to pay off a doctor rather than go through employment procedures." The letter went on to say that Somerset itself would be "more than happy to disclose the agreement". However, as pointed out above, the individual concerned and that individual's legal representatives had said that they could not agree to disclosure. In further exchanges between Somerset and the Commissioner, the Trust in question pointed out that the area served by it was "very small with a population of around 500,000 people". Accordingly, it said that there "specific circumstances in this doctor's case which would render [the doctor] easy to identify …"

55. Pausing here, the Tribunal has no reason to question the contention made by Somerset. Indeed, it has seen the compromise agreement in question and it is quite clear that there is no gagging clause present, or alluded to within that agreement. Indeed, the Commissioner in his final written submissions yet again makes the point that whether or not the compromise agreement did contain anything akin to a gagging

clause, this Tribunal simply had no jurisdiction to decide whether any of the provisions that might be held by the Trust were void under section 43J of the ERA, a point made in relation to the preceding appeal.

Appeal 2011/0251

56. This appeal again arises out of a request in similar terms to those in the earlier appeals. The request is dated 5 February 2010. The trust in question, namely, South Tees, responded on 5 March 2010. It stated that it held very few compromise agreements and considered that even if it redacted the names and dates of any agreements, the employees concerned would be identifiable. It therefore contended that the information requested was exempt from disclosure under section 40(2) of FOIA.

57. Following upon an internal review, South Tees maintained the same position, claiming that the damage or distress caused by disclosure of the requested information would be unwarranted.

58. The Decision Notice is dated 5 October 2011. In it, the Commissioner again refers to notions of unfairness and the possible contravention of the requirements of the first data protection principle. He again listed the four factors which he took into account with regard to the prior two appeals, namely, whether the requested information was sensitive personal data, what the consequence of disclosure were, what the reasonable expectations of the subject would be as to what would happen to their data and finally, the balance between the rights and freedoms of the data subject and the legitimate interests of the public. South Tees had claimed that the individual or individuals concerned had not given consent for the agreements to be publicised. The said agreement or agreements had, it was claimed, an explicit confidentiality clause which led to a reasonable expectation on the part of the employee or employees concerned that privacy would be respected. As to the alleged presence of gagging clauses, the Commissioner stated that there was “no assumption” that any such clause was relevant in the present case. Ultimately, the decision was that the individual’s or individuals’ rights for privacy outweighed the public’s legitimate interest in transparency and accountability in this particular case. Reliance was, as in the previous Decision Notices, placed in particular on the earlier Tribunal decisions in Bousfield v IC supra and Waugh v IC supra.

59. The Grounds of Appeal again find expression in the Appellant’s letter dated 19 September 2011. The initial response by the Commissioner is dated 22 November 2011. In effect, the Commissioner repeats the findings and determinations made in the Decision Notice. The formal response by South Tees itself stresses in particular the likely distress which might be caused should identification result or take place with

particular stress being placed on the likelihood of adverse media attention causing even greater distress.

60. In the final written submissions submitted by the Commissioner, attention was drawn to a further letter sent by the Appellant dated 27 November 2011. The Commissioner pointed out that though the letter did not contain any new grounds of appeal, it repeated the Appellant's request that the nature of the likely distress to doctors be set out. The Commissioner felt unable to go any further in terms of details without the risk of revealing the disputed information.

Appeal 2011/0252

61. This appeal concerns the same request as in those of the other appeals considered in this judgment. The request in this appeal was again made by email dated 5 February 2010. The relevant Trust, ie, Leicester, responded informing the Appellant that it held some of the information requested but considered the information to be exempt under sections 40(2), 41, 42 and 43 of FOIA. On an internal review taking place, Leicester then contended that it no longer wished to apply sections 41, 42 and 43 but upheld its application of section 40(2). This was on the basis as in previous appeals that the requested information related to the identity of an individual who had a reasonable expectation of non-disclosure.

62. In the Decision Notice dated 6 October 2011, the Commissioner again went through the same criteria as in the three previous appeals which are considered in this judgment. He eventually endorsed the determination of Leicester that Leicester had been correct in refusing to provide the Appellant with any compromise agreement or the list of reasons as to why it was entered into, even with names and dates redacted. Consent had not been given and there was a clear expectation that such personal data might result in identification of all individuals concerned.

63. The Notice of Appeal was accompanied by grounds set out in the letter already referred to, namely, that of 19 September 2011. By a formal response dated 22 November 2011, the Commissioner in effect reiterated the matters which he had addressed and which and been the bases for the determinations in the Decision Notice.

64. Leicester agreed with the Commissioner that disclosing the disputed information would identify the individual or individuals concerned and would cause such individual or individuals suitable harm or distress being contrary to their wishes. Consent was said to have been refused.

65. In his final written submissions relating to the appeal, the Commissioner in effect repeated the contentions he had made with regard to the preceding appeal, namely, Appeal No 2011/0251. Consequently, with regard to the specific allegation dealing with the gagging clauses made by the Appellant, the Commissioner submitted that whether or not the compromise agreement or agreements in question contained such clauses, this Tribunal has no jurisdiction to decide whether any of the provisions would be void under the relevant statutory provisions. In its written submissions upon the appeal, Leicester submitted that any disclosure would reveal information regarding the termination of the doctor's or doctors' employment inextricably linked to those individuals' personal life or lives and thereby amount to an unwarranted invasion of privacy. The same contentions again formally reconfirmed that the doctor or doctors who is or were the subject of the disputed information had not consented to disclosure, a factor which the Tribunal in the earlier case of Bousfield v IC supra had attached weight to. The same response also confirmed that "as is commonplace" explicit confidentiality clauses within the agreement or agreements sought were present, and in the circumstances, Leicester as the relevant trust had a duty to respect its employees' reasonable and express expectations of privacy. Leicester also added that it considered that the seniority of the individual or individuals concerned whose personal data was being sought was also factored to be considered when considering reasonable expectation and invited the Tribunal to take this factor into specific account.

The Appellant's contentions

66. In undated written submissions provided to the Tribunal on or about 23 April 2012, the Appellant sets out his principal contentions.

67. He refers in this document which is entitled "Requester's Skeleton Argument" to a suggestion previously made in exchanges with the Tribunal that the question of gagging clauses is not material to the appeals. Without in anyway diminishing the importance of the issue as stressed by the Appellant in his exchanges with the Tribunal and the Commissioner together with the Respondents, the fact remains that the use of gagging clauses, and their unwelcome consequences in certain cases, simply does not feature in relation to the Appellant's requests in these appeals. Therefore, in accordance with observations made earlier in this judgment, any issue regarding a gagging clause is not in any case, in the Tribunal's firm judgment, a relevant consideration. This same point has been made by the Commissioner himself, as well as by the Respondents in relation to each of these appeals in various ways.

68. In the following passages of this same document provided by the Appellant, the Appellant deals with the legal position, referring in particular to both the PIDA and the ERA as well as the relevant Health Service circular to which reference has been made above.

69. At paragraph 12, the Appellant refutes the contention or argument that disclosure of the compromise agreements which are sought in these appeals "constitutes personal data". The Tribunal, with great respect, finds this difficult to follow. As pointed out on more than one occasion in relation to these appeals, the Appellant, at least until this point, in his submissions appears to have conceded freely and frankly that the content of the compromise agreements do constitute such data and enough has been said about this already.

70. In paragraph 13, the Appellant says that it "will be clear to any doctor under a compromise agreement that central government approval is required". Again, the Tribunal with respect fails to understand this. There is certainly no evidence before the Tribunal that central government approval is required in any way whatsoever when it comes to the compromise agreements which are in issue in these appeals whereby employment is ended on the part of the employee on the one hand and the same is acceded to on terms by the relevant health authority.

71. Much the same observation is made by the Appellant in paragraph 16 of this document. He claims that "the money paid under the agreement cannot reasonably cause distress as it is approved by central government." Again, with the greatest respect the Tribunal fails to understand this statement. Not only is there no evidence that central government has any role to play by giving approval or otherwise, but in addition the key issue involving distress is whether and if so to what extent disclosure of the agreement would cause distress in the way claimed by the Respondents should disclosure be granted pursuant to the Appellant's requests. In particular, the Tribunal refutes any suggestion that it is making in the context of this judgment any form of "categoric judgment" as claimed by the Appellant that doctors would somehow suffer distress. Any observations to this effect are made on the basis of the contentions made supported by evidence on the part of the relevant Trusts in this case. Such evidence is not based on any form of supposition or assumption made or conceived by the Tribunal itself. In addition, the Appellant claims that "distress is a vague and catch-all concept". Admittedly, the term "distress" is acceptable to a number of meanings, but enough has been said in the case of each of the above appeals to show that the kind of distress which would be suffered by any individuals concerned in these appeals would take the form of specific forms of distress either related to emotional distress or stress related to undue media attention or some other form of stress, eg the stress related to an impaired ability to carry out in any future

employment their professional duties properly and responsibly, free of any undue pressure. In any event, as the Tribunal has indicated on more than one occasion above, there is sufficient justification for properly inferring that some material degree of stress would be suffered or at least could be anticipated if only by dint of the confidentiality clauses which find expression in all those compromise agreements which do actually feature in the above appeals.

72. At paragraph 18, the Appellant again claims that the "aims of a compromise agreement is [sic] to prevent that information from going "up the chain" to embarrass management." The Tribunal, with respect, refutes this contention. It may well be that in cases other than those considered in these appeals that such is the result. However, the Tribunal is entirely satisfied that in the present appeals, such is not the case. For those reasons, the Tribunal with respect is not minded to afford the Appellant further permission to file further evidence at this late stage.

Conclusions

73. The Tribunal is entirely satisfied for the reasons set out above and advanced in each case by the Commissioner and the relevant Trusts with regard to each of the above appeals that these appeals should be dismissed. It endorses those submissions coupled with the other observations which have been made by the Tribunal itself and which find expression earlier in this judgment. It is entirely sympathetic to the overall concern that the Appellant feels with regard to the apparently increasing prevalence of gagging clauses but does not find that issue or concern in any way material to the matters which the Tribunal in fact has had to consider.

Signed
David Marks QC
Tribunal Judge

Dated: 11 July 2012

IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL (INFORMATION RIGHTS)
UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

Appeal No. EA/2011/0212
EA/2011/0213
EA/2011/0247
EA/2011/0250
EA/2011/0251
EA/2011/0252

BETWEEN:

ANDREW BOUSFIELD

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

COUNTY DURHAM AND DARLINGTON NHS FOUNDATION TRUST
ST GEORGE'S HEALTH CARE NHS TRUST
HEART OF ENGLAND NHS FOUNDATION TRUST
SOMERSET PARTNERSHIP NHS FOUNDATION TRUST
SOUTH TEES HOSPITALS NHS TRUST
UNIVERSITY HOSPITALS OF LEICESTER NHS TRUST

Second Respondents

RULING ON THE PAPERS BY TRIBUNAL JUDGE DAVID MARKS QC

DECISION

The Tribunal acting by a single Judge dismisses the Appellant's application for permission to appeal and for a review or setting aside of the full Tribunal's earlier promulgated decision dated 11 July 2011.

Reasons

Background

1. By its decision promulgated and dated 11 July 2011, the Tribunal unanimously dismissed six appeals previously made against six Decision Notices of the Information Commissioner (the Commissioner). As the Tribunal expressly states in its decision, all such appeals involved similar types of requests and the overall background to each of the appeals was in general the same. There is no further need to make any additional reference to the decision save to say that, in general terms, it dealt with a selection of similar requests made by the Applicant to six different public authorities being all NHS Trusts for sight of all compromise agreements entered into between those Trusts and medical doctors and other practitioners formerly employed by those Trusts. In addition, the Appellant sought in all cases what he called a list of "exploratory or illustratory (sic) issues" relating to such agreements in effect seeking the reasons as to why any such compromise agreements were entered into.

2. The public authority each refused to release the information sought, principally in reliance on section 40 of the Freedom of Information Act 2000 (FOIA). At the core of the Appellant's appeals was his contention that the compromise agreements he sought disclosure of did in fact, or at least were likely to, contain so-called gagging clauses and that public interest generally dictated that such a practice and thereby all relevant compromise agreements be made suitably public. In the circumstances, he claimed that what he called appropriate data protection exemptions did not apply.

3. As can be seen from the Tribunal's decision, the appeals were determined on the papers alone. That proceeding was adopted in the wake of a ruling dated 19 April 2012 made by the single Tribunal Judge as to the appropriate mode of trial. In that ruling there were detailed reasons stated as to why it was appropriate to take that course. The principal ground for adopting that course and making such a ruling was that the question of gagging clauses was not in any way material to the appeals. No appeal was made against that ruling by the Appellant.

4. In his written submissions put in in relation to the six appeals, the Appellant continued to contend that the Commissioner and the other Respondents, not to mention the Tribunal, were under a "fundamental misunderstanding of matters that were in effect relevant to the appeals as a whole". As the Tribunal's final decision also makes clear, the Appellant had submitted suitable written evidence in an effort to impress that point on the Tribunal in relation to the final appeals. In his written submissions the Appellant continued to contend that he did not accept contrary to the Tribunal's final determination that the disclosure of the compromise agreements sought to be disclosed constituted personal data.

5. The Commissioner, in his written submissions on the appeal, contended that the question for the Tribunal on the appeals was whether, on the facts of each particular case, the Commissioner had been correct to conclude that the relevant public authority had been correct in refusing to confirm or deny that the requested information was held under section 40 and, in particular, under section 40(5) of FOIA. According to the Commissioner and as endorsed by the Tribunal, of particular importance was the likelihood of harm and distress that would be caused to any and all relevant data subjects by disclosure.

Events in the wake of the Decision

6. Very soon after 11 July 2012, the Appellant contacted the Tribunal, again, taking issue with the fact that the decision had been reached by the full Tribunal on the papers alone. Despite the earlier April ruling of the Tribunal of the single Tribunal Judge, he maintained that the Tribunal had fallen into error by failing to hold an oral hearing. In particular, he maintained in effect by hearing the case "in secret on the papers", the same was not, as he put it, a "judicious use of money or time".

7. In a separate email to the Tribunal Judge, and copied to the Tribunal, he claimed that the terms of the 19 April ruling which stated that the question of a suitable mode of hearing would subsequently be considered by a full Panel, meant, according to him, that he was entitled to revisit the question as to the proper mode of hearing and make a further application to call his witnesses to show that compromise agreements which might contain arrangements for payment to former employees, in the present context, also contained gagging clauses which in turn required Treasury or ministerial approval.

8. The Tribunal then formally contacted the Appellant informing him that he could either apply to the Tribunal to set aside its earlier decision on a ground of procedural irregularity under Rule 41 of the Tribunal Procedure (First Tier Tribunal) (GRC) Rules 2009, or apply for permission to appeal. In a further exchange dated 7 August 2012

with the Tribunal, and therefore within the requisite 28 day period, the Appellant formally contended that he intended to pursue both courses.

The responses from the Commissioner and from the public authorities

9. In his formal response to the Appellant's twin applications, and pursuant to the Tribunal's further directions, the Commissioner filed a short, formal response. The Commissioner began by citing rule 32(1) of the above Rules which states that:

"… the Tribunal must hold a hearing before making a decision which disposes of proceedings unless –

(a) each party has consented to the matter being determined without a hearing; and

(b) the Tribunal is satisfied that it can properly determine the issues without a hearing."

10. The Commissioner accepted that in the event that a party did not consent to a matter being determined without a hearing, the Tribunal had to hold an oral hearing. However, the Commissioner went on to maintain that it was nonetheless appropriate and proportionate in accordance with the overriding objective set out in rule 2 of the Rules (which need not be further set out here) for the Tribunal to have determined the appeals on the papers alone.

11. Reference was also made to rule 41 of the Rules which deals with the setting aside of a decision, otherwise disposing of proceedings, which provides as follows, namely:

"(1) The Tribunal may set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision or the relevant part of it, if –

(a) the Tribunal considers that it is in the interests of justice to do so; and
(b) one or more of the conditions in paragraph (2) are satisfied."

12. The said conditions are set out in rule 41(2) and include the following, namely:

"… (c) a party, or a party's representative, was not present at a hearing related to the proceedings; or

(d) there has been some other procedural irregularity in the proceedings."

13. In the circumstances, the Commissioner contended that, in his belief and in the present case, it would not be in the interests of justice to set aside the full Tribunal's decision as it was likely that the Tribunal would not, in all the appeals, reach a different conclusion to any oral hearing.

14. In written submissions submitted on behalf of the Somerset Partnership NHS Trust, it was submitted that, in the present case, there were no procedural issues and that none of the conditions set out in rule 41(2) were material. Express reference was then made to the earlier decision and ruling of 19 April 2012. The same Trust then pointed out that even though the Appellant had previously himself pointed out that as a press reporter, he does, or did "not have the time to deal with the numerous emails" that were exchanged in the case (being a quote from his email of 13 July 2012 to the Tribunal and to the single Tribunal Judge) it was to be expected that he should at least be able to deal with the reasonable correspondence relating to his own appeals. The fact that he did not review key correspondence connected with the appeals was not therefore a procedural issue necessitating correction, and it was therefore not in the interest of justice that the full Tribunal's decision be set aside on that basis.

15. In relation to the Appellant's application to seek permission to appeal, the same Trust pointed out that no legal basis for any such appeal had been set out and that, in the circumstances, that application should be dismissed. It was not a proper basis of appeal to contend simply that the Tribunal had failed to consider properly or at all the compromise agreement procedure, or alleged procedures, and the attendant role of central government.

16. The St. George's Health NHS Trust also submitted independent written submissions. It also relied on the earlier decision of 19 April and pointed out that the Tribunal had in fact gone on to say in terms that for all the reasons set out in that ruling:

> "… the present direction is that all the Appeals listed above will be dealt with by way of paper hearing alone. The parties, of course, have general permission to apply on proper notice being given with regard to this direction and ruling and indeed any other matter regarding the further progress of these Appeals."

17. It also endorsed the previous Trust's submission regarding the failure to set out any proper grounds of appeal.

18. A third Trust, namely, the Heart of England Trust also endorsed the Commissioner's contentions as to the overriding objective. It also drew attention to rule 5 of the Rules which deals with case management powers. Rule 5(1) provides in terms that subject to any enactment, the Tribunal may regulate its own procedure, and Rule 5(3)(g) again confirms in terms that the Tribunal without restricting the general powers set out in rule 5(1) may "decide the form of any hearing". Again, by way of echoing the Commissioner's contentions, the same Trust maintained that it would not be in the interests of justice to set aside the earlier main decision in the light and context of rule 41(1)(a) and rule 41(2)(d).

19. A further Trust, namely the University Hospitals of Leicester Trust also endorsed and supported the Commissioner's contentions.

Conclusions

20. The Tribunal, acting by a single Judge, is entirely satisfied that there are no grounds for setting aside the principal Tribunal decision. Although it is true that rule 32 mandates the Tribunal to hold an oral hearing, if one party has not otherwise consented, the decision not to do so was made with specific reasons given in the 19 April ruling. No appeal was lodged against that ruling. Even if that ruling were said properly to constitute a procedural irregularity or even if the manner in which the appeals were finally determined could be said to constitute such an irregularity, the Tribunal can only set aside its decision if in addition to the presence of any such irregularity, it also considers that it is in the interests of justice to do so.

21. The Tribunal accepts the Commissioner's contentions as endorsed by the relevant public authorities that it cannot be said in the present case that it would be in the interests of justice to set the substantive decision aside. Nothing raised by the Appellant since promulgation of the decision in any way adds to the contentions he had made prior to the full Tribunal's consideration of the appeal. The full Tribunal was entirely satisfied that none of the issues raised by the Appellant had any material bearing on the real issues in the appeal and, in particular, was satisfied that there was no need to hold anything other than a paper hearing.

22. In any event, the Tribunal acting by a single Judge takes the view that it is, at the very least, distinctly questionable that the ruling of 19 April can be properly characterised as a procedural irregularity. It was a considered decision as to the proper mode of hearing which was an appealable order of this Tribunal. It is significant that one of the other grounds stipulated to justify setting aside is the fact that a party or a party's representative was not present at the hearing. However, that would not appear to address a case such as here where the Tribunal had already ruled on the precise mode of hearing. The formulation of rule 41 therefore suggests that the absence of a party is to be viewed in a different light to a set of circumstances in which a procedural irregularity can be said to have taken place.

23. The Tribunal is also satisfied, both as a general principle and in the light of what is said in the preceding paragraph, that the Tribunal, albeit acting by a single Judge was entitled to address the mode of hearing as a case management matter in the light of rule 5(1) and in particular rule 5(3)(g). Rule 5(1) refers to the fact that the regulation by the Tribunal of its own procedure is subject to "any other enactment". In this Tribunal's view, this leads to the conclusion that the quoted expression is wide

enough to allow for the proper and unqualified operation of rule 41 and the need to take into account the interests of justice.

24. As for the application seeking permission to appeal, the Tribunal is also entirely satisfied that no proper legal grounds of appeal have been articulated which, of necessity mean that that application must be dismissed.

Signed
David Marks QC
Tribunal Judge

Dated: 25 September 2012