ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50531987

Dated: **4th August, 2014**

Appeal No. EA/2014/0216

Appellant: **Mark Knight ("MK")**

First Respondent: **The Information Commissioner ("the ICO")**

Second Respondent: **Newbury Town Council ("NTC")**

Before

David Farrer Q.C.

Judge

and

Roger Creedon

and

Michael Jones

Tribunal Members

Date of Decision: 4th. April, 2015

The Appeal was decided on written submissions.

Subject matter:

Regulation 12(5)(b) of the Environmental Information Regulations, 2004 ("the EIR") .

Whether disclosure of the requested information would have an adverse effect on the course of justice.

Reported cases :

GW v ICO, LGO and Sandwell MBC [2014] UKUT 0130 (AAC).

Three Rivers DC v The Bank of England (Disclosure) No. 4 [2005] 1 AC 610.

Waugh v British Railways Board [1980] AC 521.

West London Pipeline and Storage v Total UK [2008] 2 CLC 258.

Neilson v Laugharne [1981] QB 736.

***Tchenguiz and others v Serious Fraud Office [2013] EWHC 2297* (QB).**

Re Highgrade Traders Ltd. ([1984] BCLC 151.

Price Waterhouse v BCCI Holdings (Luxembourg) SA [1992] BCLC 583.

DCLG v ICO and Robinson [2012] UKUT 103 (AAC) [2012] 2 Info LR 43.

***Reg v Derby Magistrates Court, Ex p.* B, [1996] AC 487.**

Abbreviations: **FOIA - The Freedom of Information Act, 2000.**

EIR - The Environmental Information Regulations, 2004.

UT - The Upper Tribunal

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal finds that, in respect of the two hydrogeological reports which were the only elements of the request in issue in this appeal, the exception provided by EIR Reg. 12(5)(b) was not engaged and, if it had been engaged, the public interest would have favoured disclosure.

It therefore allows the appeal and orders that the reports together with the Closed Annex to this Decision be disclosed within 28 days of the publication of this Decision.

Dated this 4th day of April, 2015

David Farrer Q.C.
Judge
[Signed on original]

REASONS FOR DECISION

The Background

1 Victoria Park is leased by NTC from West Berkshire District Council. From about May, 2010 signs of apparent ground disturbance were observed; a sump used for watering the bowling green dried up; cracks appeared in paths. walls and around elsewhere. In 2009 the builders Costain plc. began a development, The Parkway, to the West of the park, which involved the excavation of an underground garage pursuant to a discharge consent from the Environment Agency. Rainfall levels were relatively low in 2009 and 2010 in the Newbury area.

2. NTC instructed hydrogeological consultants, URS, who issued a final report in January, 2011 and an updating addendum in April, 2012. Costain provided data for the purpose of those reports which were the subject of a confidentiality agreement.

3. NTC has not relied on the exception provided by EIR Reg. 12(5)(e) to absolve it from the duty to disclose those data. It has adduced no evidence that such confidentiality was provided by national or community law nor that

there was a legitimate economic interest to protect. The presumption in favour of disclosure enacted in Reg. 12(2) applies. Consequently, the Tribunal has not considered the application of that exception nor the public interest factors associated with disclosure of such data. In those circumstances it makes no finding as to MK's submission that such data related to information on emissions for the purposes of Reg. 12(9) so that the exception otherwise provided by Reg. 12(5)(e) was not available.

4. On counsel's advice, further reports were subsequently obtained, dealing with causation and quantum of damage.

5. The subsidence in the park and its origins were matters of considerable local interest and concern, as demonstrated by a large attendance at a council meeting at which the issues were discussed with Costain.

6. No legal proceedings have been commenced but negotiations have taken place with Costain.

The Request

7. On 13th. December, 2013 MK requested information from NTC as follows -

> "*Please will you let me have the following information relating to the reported subsidence damage to Victoria Park:*

1 *The original hydrogeological report.*

2 *The follow - up hydrogeological report.*

3 *The report you commissioned on the damage and cost of repair.*

4 *Any additional report you commissioned into the cause of the reported cracking and subsidence and its associated damage.*

5 *Any contract or memorandum that imposes a duty of confidentiality in relation to any of the information in those reports provided by third parties."*

8. NTC responded on 6th. January, 2014. It confirmed that it held the requested information but refused to disclose any of the five categories of document. It relied on the exemption provided by FOIA s.41 (information provided in confidence) in respect of the two hydrogeological reports and, so the ICO understood, the Confidentiality Agreement and on the s.42 exemption (legal professional privilege) as regards items 3 and 4.

9. MK addressed a very detailed request to NTC for an internal review on 15th. January, 2014 and followed it up with a further argued supplement following a refusal from NTC. The principal topic of debate was whether FOIA or the EIR was the governing legislation. Since that is no longer an issue in this appeal, it is unnecessary to relate the arguments on either side. NTC stood by its decision and its argument. MK complained to the ICO on 21st. February, 2014.

The Complaint and the Decision Notice ("the DN").

10. Having investigated the issues, the ICO rightly decided that the first four requests fell under the EIR. He ruled that the exception under Reg. 12(5)(b) was engaged and that the public interest favoured withholding the information. He ruled that request 5 was not environmental information but was governed by FOIA. He adjudged that the evidence did not justify reliance by the Council on the s.41 exemption. His decision on requests 1 - 4 largely depended on his findings that all those reports, including the two hydrogeological reports, were subject to litigation privilege, one of the two classes of legal professional privilege. Disclosure would have an adverse effect on the course of justice. He therefore upheld NTC's refusal to disclose the reports referred to in 1 - 4 but ordered disclosure of the Confidentiality Agreement. That, of course, is a different matter from ordering disclosure of information to which such an agreement applies.

The appeal

11. MK appealed against the DN findings as to the two hydrogeological reports. He accepted that litigation privilege attached to the two subsequent reports on damage and causation (3 and 4) and that, as to them, the DN ruling was correct. This appeal therefore is concerned with the questions whether the exception in Regulation 12(5) (b) is engaged as regards the hydrogeological reports and, if it is, whether it is proved that the public interest is better served by withholding the reports, account taken of the presumption in favour of disclosure enacted in Reg. 12(2).

12. The Tribunal observes that the letter of 22nd. July, 2014 ("the July letter") in which NTC's solicitors set out its case to the ICO was very substantially re-

dacted in the Open Bundle ("the OB") with the approval of the Registrar. Parts of it were rendered largely incomprehensible. The number and alleged nature of the reports were suppressed, despite the fact that they had been openly referred to in correspondence between MK and NTC and two of them formed the subject matter of the appeal. The highly tendentious use for the first time in this letter to the ICO of the term "liability reports" to identify the subject matter of this appeal was withheld from MK. The fact that its adoption as a label for the hydrogeological reports has no value whatever for the decision as to their purpose does not alter our view that MK should have been aware of it. This Decision refers to other questionable redactions below. It is not obvious to the Panel that any editing of the July letter in the OB version was required by the need to protect the allegedly privileged content of the two reports. To that extent, we respectfully differ from the Registrar. In the event, we do not believe that any prejudice to the integrity of this appeal has occurred.

13. The reports themselves were redacted in the Closed Bundle apparently to conceal statistics supplied to NTC by Costain which were subject to the Confidentiality Agreement. That is not, save in the most exceptional circumstances, a legitimate reason for withholding them from the Tribunal. If such editing is proposed, a direction must be sought from the Registrar. It will require the most stringent justification. In this appeal, such editing did not significantly impede the Tribunal in reaching its decision but it was quite unwarranted.

The Issues

14 It is now common ground that the requested information is "environmental information" and that the relevant provision is EIR Reg.

12(5)(b), which, so far as material, provides -

> *"For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect-*
>
> - - -
>
> *(b) the course of justice - - - "*

Whether the exception in Reg. 12(5) (b) was engaged was effectively determined in the DN by the answer to the question : did the reports enjoy litigation privilege ? However, unlike FOIA s. 42, this exception is not expressly or by necessary implication limited to privileged information, whether legal advice privilege or, as here, litigation privilege. In *GW v ICO, LGO and Sandwell MBC [2014] UKUT 0130 (AAC)* ("GW") the UT made clear that, whilst the fact that information is privileged may generally be a weighty consideration when considering the engagement of Reg. 12(5)(b) para.43,

> *" . . there is no room for an absolute rule that disclosure of legally privileged information will necessarily adversely affect the course of justice."*

A further careful assessment of possible prejudice in the particular case is

required.

15. Having conducted a preliminary examination of the issues, the Tribunal therefore invited and received further submissions of law and, from NTC, closed submissions on the facts, dealing with the possibility of the exception being engaged even if the reports were not privileged.

16. The issues for determination, as to each report, are -

(i) Is it privileged?

(ii) If so, would its disclosure have an adverse effect on the course of justice, having regard both to general considerations and matters specific to this case ?

(iii) If it would, does the balance of public interest require that it be protected from disclosure?

(iv) If it is not privileged, would its disclosure nevertheless have an adverse effect on the course of justice in any litigation or related negotiation that may take place in relation to a claim by NTC for compensation for damage caused by subsidence?

(v) As question 3.

17. The submissions made by the parties are expressly or implicitly summarised in our reasons for the decision that we have reached.

Our Reasons

18. The distinction between litigation privilege and legal advice privilege, blurred at times in the quite recent past, is very clearly set out in the speech of Lord Scott in *Three Rivers DC v The Bank of England (Disclosure) No. 4 [2005] 1 AC 610* from para. 10. As already indicated, this appeal is concerned only with litigation privilege ("LPP"), attaching, say the ICO and NTC, to both reports. Neither involves a communication between lawyer and client. Both contain expert analysis and opinion, using the term "expert" in a general sense rather than with the limited meaning employed in CPR Part 35(2)(1)

> *"(1) A reference to an 'expert' in this Part is a reference to a person who has been instructed to give or prepare expert evidence for the purpose of proceedings."*

Whether they are "expert evidence" in that sense depends on the answer to the first question.

19. A report, like any other document, attracts LPP only if the dominant purpose of its creation was use in current or contemplated litigation, see *Waugh v British Railways Board [1980] AC 521.* The DN, having identified the two distinct categories of privilege at para. 32 then proceeded to misstate the nature of LPP, relating it to "the sole or dominant purpose of obtaining legal advice". Whilst it may involve the subsequent provision of legal ad-

vice, the critical question is whether its dominant purpose was use in litigation. The DN (para. 34) states simply that the ICO has read the reports and concludes that the dominant purpose test is satisfied. The ICO's Response suggests that, in deciding that the reports attracted LPP, he scarcely looked further than NTC's confirmation that the purpose or at least the dominant purpose of the reports was use in litigation. That is, however, merely a factor in the determination.

20. It is for the party asserting privilege, here NTC, to establish that the information is privileged - see *West London Pipeline and Storage v Total UK [2008] 2 CLC 258, para. 50.* The evidence adduced by that party must be sufficiently specific to enable the court or tribunal to analyse the purpose for which the document was created. It should refer to contemporary documents such as, here, perhaps, the solicitors' instructions to the consultants, provided that privilege is not breached - *West London Pipeline and Storage v Total UK supra.*. In this jurisdiction that can be achieved by a direction under Rule 14(2) of the 2009 Rules. The "dominant purpose" test imposes "a relatively high threshold" of proof on the party raising privilege - *Tchenguiz and others v Serious Fraud Office [2013] EWHC 2297* (QB) at para. 55.

21. NTC points out that it instructed solicitors in July, 2010 in order to obtain legal advice on the proposed defendant's liability for the damage to its property and that the reports were commissioned after advice had been obtained. *"The expert reports obtained were always intended by (NTC) to form the basis for any claim and to operate as its expert evidence in any proceedings"* - NTC Response para. 17. It *"therefore confirms that the dominant purpose of obtaining the expert evidence which forms the basis of (the) information request was to pursue a claim against the Proposed Defen-*

dant" - ibid para. 18. That Response appears to treat a "confirmation" by NTC of the dominant purpose as effectively decisive. The reports are indeed prominently labelled "Legally privileged", though there is no indication as to when that label was attached to them. The test, however, is an objective one and, as indicated above, a simple assertion of privilege does not take the matter very far - see *Neilson v Laugharne [1981] QB 736 at 745* per Lord Denning MR. It is necessary to examine such of the relevant surrounding circumstances as are known to the Tribunal, including the reports and documents recording what NTC or its solicitors said about their purpose and to have regard to the principles cited in paragraph 17.

22. Solicitors had been instructed when the first report of January, 2011 was commissioned. That is probably a necessary but certainly not a sufficient condition for the existence of LPP. No doubt, the possibility of a claim, perhaps litigation was present in the minds of the relevant officers and members of NTC , with Costain as a candidate for the role of defendant.

23. However, it is apparent that in July, 2010 NTC did not know whether the subsidence was the result of excavation and dewatering or of unusually low rainfall over a prolonged period or possibly some other cause(s). It was quite possible that a hydrogeological report would reveal that the problem was purely climatic. Moreover, the surface cracking was continuing, facilities were deteriorating and NTC urgently needed advice as to how the ground disturbance could best be stabilised and damage then be made good. It seems therefore that there were three possible purposes for such a report. To ascribe to the report the dominant purpose of use in litigation, when no clear evidence as to the physical cause(s), hence as to fault on anybody's part existed, seems premature. It is hard to follow the above - quoted claim (see para.18

above) that the reports "*were always intended by (NTC) to form the basis for any claim and to operate as its expert evidence in any proceedings"*, given that it could not know, when commissioning, what the upshot of the first report would be.

24. There will be cases where it is unrealistic for a court or tribunal pedantically to identify multiple purposes where common sense dictates that there is only one. Such a case was *Re Highgrade Traders Ltd. ([1984] BCLC 151.* , a case in which insurers had obtained reports on a fire suspected to have been started for the purpose of an insurance fraud. Oliver L.J. asked at 173:

> *'What, then, was the purpose of the reports? The learned judge found a duality of purpose because, he said, the insurers wanted not only to obtain the advice of their solicitors, but also wanted to ascertain the cause of the fire. Now, for my part, I find these two quite inseparable. The insurers were not seeking the cause of the fire as a matter of academic interest in spontaneous combustion. Their purpose in instigating the inquiries can only be determined by asking why they needed to find out the cause of the fire. And the only reason that can be ascribed to them is that of ascertaining whether, as they suspected, it had been fraudulently started by the insured. It was entirely clear that, if the claim was persisted in and if it was resisted, litigation would inevitably follow.'*

25. That analysis may be contrasted with that of Millett J. in *Price Waterhouse v BCCI Holdings (Luxembourg) SA [1992] BCLC 583,* when, considering the purposes of liquidators' reports, he observed -

> *"In the present case it was necessary to determine the extent to which the problem loans were recoverable, in order to establish BCCI's financial position and to decide whether recovery proceedings should be taken. But the two purposes*

were quite independent of each other. There was nothing of merely academic interest in the former; it was of vital concern not only to BCCI, but also to the controlling shareholders, the auditors, and the regulatory authorities. I am satisfied that this was the dominant purpose of the investigation, and was quite independent of the possible need to take recovery proceedings, and that accordingly the documents in question do not attract legal professional privilege."

26. Of course, each case depends on its own specific facts and both the above authorities involve findings of fact which do not bind our decision in any way. Nevertheless, it is important that the Tribunal should be alert to the possibility of different factual interpretations of the objectives of reports obtained at the outset of inquiries.

27. Even if, in this case as in *Highgrade Traders,* it were right to treat discovery of the cause(s) of the subsidence and establishment of third party liability as inseparable purposes, the present reports had, on any view, two independent purposes, one of which was to assess how the ground disturbance might be halted or mitigated, a matter of great importance to NTC and the local community, since it involved the restoration of important facilities such as a high quality bowling green and the football pitch. Minutes of the Community Services Committee ("the CSC") bear witness to the continuing concern with this aspect of the problem at meetings later in 2010.

28. The Tribunal's assessment is, however, that investigation of the cause of the subsidence was, in this case, a separate purpose from consideration of any claim which its result might indicate. In contrast to *Highgrade Traders*, the party authorising the report had no knowledge or firmly - rooted suspicion as to what had caused the problem. The evidence available suggests that it approached the investigation with an open mind.

29. The purposes of the later reports (Request 3 and 4) are clearly distinct; they were obtained about a year later on the advice of counsel instructed to advise NTC on possible litigation.

30. The Tribunal read both the hydrogeological reports. Their introduction and subsequent content (especially in the January, 2011 report) give some indications as to the purpose(s) for which they were created. The Tribunal's specific conclusions on this aspect of the evidence are set out in the Closed Annex to this Decision. The content of the reports does not support the claim that they are privileged.

31. A bizarre and self - contradictory statement at p.4 of the July letter was redacted in the OB version. It reads -

> "*The sole purpose of the report was to assess liability in terms of the damage at Victoria Park <u>and to consider what may have caused this.</u>*"
>
> [The Tribunal's emphasis]

The underlined words are at odds with NTC's case.

32. Contrary to NTC's submission, contemporary Committee minutes and press releases are pertinent to this issue in so far as they demonstrate how NTC was approaching the subsidence problem from July to December, 2013.

33. The minute relating to Agenda item 22 of the CSC meeting on 26th. July, 2010 entitled "Victoria Park Water Levels" is, in our judgement, an important piece of evidence. The damage to the Park was described and demonstrated with photographs for the Councillors. The project manager from Costain reviewed its research and expressed the view that the problems arose from an exceptionally dry year. The Committee then resolved that -

"An independent survey is carried out to establish the cause of the damage to Victoria Park."

The press release repeated the substance of what had taken place. This was the authority to obtain the first report.

34. It may be significant that Costain provided data under the Confidential Agreement for the purposes of the hydrogeological reports. This seems entirely consistent with a report, of which the dominant purpose was to identify why there had been a fall in water levels but surprising if it was to initiate an action against Costain.

35. Indeed, it is very hard to understand how a report dependent on the provision of data by a prospective defendant subject to a confidentiality agreement precluding publication of those data could have been intended for use in litigation at all, let alone litigation against the beneficiary of the agreement.

36. NTC's Press Release dated 20th. December, 2010 and headed "Victoria Park Update" reported that *"Following concerns relating to subsidence and lack of water in the park, a hydrogeological survey has been executed to establish the cause."* Its focus was the timing of corrective work and the restoration of facilities (specifically, here, the football pitch).

37. At the CSC meeting of 28th. March, 2011, two months after NTC had received the first report, the Chairperson was asked by a member of the public when the results of the survey would be placed in the public domain. The reply was :

"The press will be fully briefed and the survey's findings will be made public once the details and the possible solutions have been discussed with the various other organisations involved in solving the problems in Victoria Park. At this stage it is very difficult to put a timescale on it."

Again, the implication seems to be that a major purpose of the survey was identification of measures needed to restore the park. More striking, however, is the absence of any indication that the survey might not be publicised because it was a privileged document designed for use in litigation. If that were its dominant purpose at that time, it was to be expected that NTC's solicitors, instructed eight months earlier, would have alerted the Chairperson to the need to resist demands for publication and provided him with the LPP justification.

38. NTC's initial response to the Request dated 6th. January, 2014, over the

signature of its Chief Executive, is also curious, if the dominant purpose of the reports was as asserted. The only exemption relied on was FOIA s.41 - information provided in confidence. In the next paragraph of the response NTC dealt with the two later reports on quantum and causation, relying on LPP, clearly quite correctly. If the dominant purpose of the first two reports was likewise use in litigation, the Tribunal finds it odd that, with LPP clearly in mind, it did not rely on it in respect of them too. In most cases, belated reliance on an exception is of no consequence; either it is engaged or it is not. Where the test is the intentions of the public authority at the date of obtaining the information, however, a failure to cite s.42 or Reg. 12(5)(b), as the case may be, when the information is first requested, may be more significant.

39. The second report dated April, 2012 is simply an updating supplement necessitated by the acknowledged need to monitor developments and continue recording data. There is no evidence of any fresh mandate to the consultant to examine the data for any new or separate purpose. This is borne out by the terms of the agenda for the CSC meeting of 20th. November, 2010 following the commissioning of the second report -

"- - - *further funds have been allocated to extend the report*".

The Tribunal attributes to it the same purposes and the same priorities as to the first report.

40. The Tribunal is not persuaded that the dominant purpose - as distinct from a purpose - of either report was to use it in litigation. Indeed the evidence tends to indicate that the dominant purposes were discovery of the cause and mitigation of the effects. It does not accept therefore that either report was privileged.

41. Given that finding, questions (ii) and (iii) in paragraph 16 do not demand answers. Nevertheless, the Tribunal has reached conclusions on those questions, if LPP had attached to them, but they can be set out more conveniently at a later stage in this Decision.

42. Given that the first two reports are not privileged, would their disclosure in early 2014 have had an adverse effect on this particular course of justice, which means for present purposes, NTC's right to a fair trial of any claim for damages arising from the subsidence damage to Victoria Park. A fair trial includes the freedom to negotiate a fair settlement of such a claim unburdened by disclosure of potentially damaging material which weakens a litigant's bargaining position and which is not required by the rules governing disclosure in the relevant jurisdiction.

43. NTC has not commenced an action against Costain or any other party, so far as the Tribunal is aware. It states in its responses that negotiations with Costain have taken place and continue. The issue for the Tribunal is whether disclosure of the reports when requested would, more probably than not, have had some adverse effect on NTC's bargaining position or, if litigation ensues, the presentation of its case (see *DCLG v IC and Robinson [2012] UKUT 103*

(AAC); [2012] 2 Info LR 43 at 54). It is likely that the answer would be the same if the material date were today.

44. CPR Rule 31.6, so far as material, provides -

"Standard disclosure requires a party to disclose only–

(a) the documents on which he relies; and
(b) the documents which –
(i) adversely affect his own case;
(ii) adversely affect another party's case; or
(iii) support another party's case;
- - - "

45. The Tribunal is prepared to approach disclosure under the CPR on the footing that NTC would not be obliged to disclose these reports in the course of litigation because they do not fall within R.31.6 (b) (i) or (iii). If, on the other hand, NTC concluded that they adversely affected its case or supported that of a defendant, then it would be obliged to disclose and, subject to pro-portionality issues (see Rule 31(3)) which could scarcely arise here, permit inspection. Such an obligation would seriously weaken any argument as to prejudice to the presentation of its case.

46. Yet if the reports are neither adverse to NTC's case nor supportive of a defendant's case, it is difficult to see how disclosure can harm NTC. If there is a particular fact or matter of which disclosure would damage NTC, then NTC should have but has not identified it, if need be in a closed submission. As Judge Turnbull said at para. 53 of "GW",

"It is in my judgment for the public authority to identify and establish any adverse effect on the course of justice on which it relies."

47. NTC, as would be expected, has obtained further expert reports in addition to the two referred to at points (iii) and (iv) of the Request. The Tribunal has not seen them but can surmise that they may raise fresh questions or examine specific issues more closely or with more data than were available in the requested reports. They undoubtedly remain privileged documents. If they support NTC's case, they will be disclosed and relied on. The Tribunal does not understand the submission that NTC would be "tied to" the first two reports, either in negotiation or at trial. Disclosure would be the result of an order of the Tribunal, not part of the standard procedure under Part 31. NTC's case would be the case advanced in the reports on which it then relied and then disclosed whether or not they used data first disclosed in the two hydrogeological reports. That a party's case develops, broadens, narrows or even changes in the course of a series of complex expert reports is common enough. Contrary to NTC's assertion in the July letter, NTC would not be bound by the findings or conclusions of the two reports. They were not disclosed in the proceedings and, if they had been, NTC would be free to argue its case on the reports that superseded them.

48. NTC made closed submissions as to prejudice. Some of them are referred to in this Decision because there is no good reason to conceal the submission or the Tribunal's view of it. Some are considered in the Closed Annex, although it is far from clear that they should have been closed material. The ICO made no comment on them. The Tribunal was able to assess their weight without further assistance. They do not alter its view on the issue of adverse effect on the course of justice.

49. As noted above, NTC has failed to point to any specific feature of the reports which, if disclosed would prejudice its position. We observe that Costain is likely to have a fairly full picture of the data on which the reports are based, since some are generally accessible and others were supplied by Costain. To suppose that Costain has a general impression of what the reports are likely to contain is hardly a wild conjecture.

50. In closed submissions NTC argued that a requirement to disclose the two reports would expose it to a claim for damages for a breach of the Confidentiality agreement. How such a submission can be made consistently with the assertion that they -

> *"were prepared for the sole purpose of providing expert evidence in support of our client's case against (Costain)."*

is not easy to follow. In any case the point is without substance. First, it is far from clear that this would amount to an adverse effect on the course of justice. Secondly and more fundamentally, disclosure would be in compliance with an order of the Tribunal, hence no contractual liability could arise. The contract would be frustrated.

51. If there were an arguable claim for reliance on an exception that exception would probably be provided by Reg. 12(5)(f), which deals with adverse effect on -

> "(f) the interests of the person who provided the information where that person -
>
> (i) was not under, and could not have been put under any legal obligation to supply it to that or any other public authority;
>
> (ii) did not supply it in circumstances such that that or any other

public authority is entitled apart from these regulations to disclose it; and

(iii) has not consented to its disclosure;

1.52. On the evidence before us those three conditions are met but there is no evidence that disclosure of the relevant figures at the date of the Request, three years after those figures had been provided would have had an adverse effect on Costain's interests. Moreover, this exception was not expressly invoked by NTC even in its closed submission. Due to the wholly inappropriate introduction of such an argument in a closed submission, despite the lack of sensitivity of any information involved, MK was given no opportunity to answer such a claim, inadequately formulated as it was. The Tribunal's invitation to make fresh submissions was limited to the issue whether Reg. 12(5)(b) was engaged even if the reports were not privileged. Yet NTC, without seeking any direction permitting further submissions, launched unrelated and unforeseen arguments raising quite distinct issues. The Tribunal does not consider that Reg.12 (5) (f) is engaged but would not have allowed such a fresh exception to be introduced through a closed submission in any event.

53. The Tribunal's view is that Reg. 12(5) (e) is not engaged in respect of this information because confidentiality was not provided by law and no legitimate economic interest is identified. The other objections relating to injustice listed in paragraph 52 also apply.

54. The Tribunal concludes, taking account of the above factors and those discussed in the Closed Annex, that NTC has failed to show that disclosure of

the two reports would have an adverse effect on its conduct of any claim(s) for damages in respect of the subsidence damage to Victoria Park.

The public interest

55. The Tribunal deals quite briefly with the issues of (i) any adverse effect on the course of justice and (ii) the balance of public interests, in the event that its findings (a) as to LPP and (b) as to the absence of an adverse effect proved to be wrong.

56. If the reports attract LPP, that is a matter to be given weight in determining whether disclosure would have an adverse effect on justice generally by weakening confidence in the inviolability of LPP. It is arguable that overriding litigation privilege, where, as here, it attaches to a document prepared by a third party for the purpose of litigation may be less significant than overriding legal advice privilege because, although it exposes material obtained for the purposes of a trial, it does not undermine the confidentiality of lawyer - client exchanges.

57. Echoing the principle enunciated by Lord Taylor C.J. in *Reg v Derby Magistrates Court, Ex p.* B, [1996] AC 487, at p.507D, Judge Turnbull observed in *GW* at 42 -

> *"What particularly matters for present purposes is in my judgment that the rationale for the doctrine and its absolute nature is established as being the need for the client to be able to obtain legal advice on a full and frank basis."*

The disclosure of a privileged expert report may not, in most cases, betray that need.

58. In this case the Tribunal does not attach as great significance to the general interest in preserving the doctrine. As to prejudice specific to this case, if there is any such, it is slight, for the reasons already cited. As noted already, NTC has failed to point to any specific element in the reports, disclosure of which would be unfair. That could have been achieved discreetly, if need be, via Rule 14(2).

59. Given furthermore the presumption of disclosure in Reg. 12(2), the public interest in withholding the reports is far from strong.

60. On the other hand, there is a clear specific public interest in disclosing these important reports to the local community which has paid for them (through the Council Tax) and is understandably concerned as to why an important recreational facility and some adjoining properties have been severely damaged and what can be done to put things right.

61. If, therefore, LPP did attach to these reports and/or there would be some adverse effect from disclosure, that effect, whether or not it included some element of damage to the general doctrine of LPP, would be slight so that, in the circumstances of this case, the public interest in disclosure of the requested information would clearly outweigh any public interest based on any adverse effect on the course of justice.

62. We therefore allow this appeal.

63. Our decision is unanimous.

David Farrer Q.C.

Tribunal Judge

4th. April, 2015

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Michael Jones

Tribunal Members

Date of Decision: 4th April, 2015

Closed Annex

14. The purposes of this annex are -

(i) to identify the intrinsic features of the first and second hydrogeological reports which may be relevant to the submission that their dominant purpose, when created, was use in litigation.
(ii) to address arguments raised in closed submissions by NTC as to possible prejudice to the course of justice in other possible litigation against unidentified potential defendants.

It is questionable whether these latter arguments were properly advanced as closed material but the Tribunal does not intend to require that they be disclosed as open submissions, given its findings as to their validity.

15. As to (i), NTC has not provided the instructions from its solicitors to URS for the first report, which were not privileged and might have been illuminating.

16. The most significant parts of the first report are likely to be the "Introduction" and "Scope of Work" sections. The Introduction refers to the changes observed, the various suggestions made as to the cause or causes of the disturbance and the public interest aroused. It concludes with this paragraph-

"The purpose of this study is to determine whether the disturbances observed during 2010 can be explained by natural processes or whether any other

influences may be contributing to the observed effects".

17. The "Scope of Work" lists four aims of the study, recording effects in the Park, obtaining information on geology and groundwater levels, analysing rainfall, groundwater levels and river flows and understanding Costain's methods of dewatering and phasing of development . For this, URS was dependent on data provided by Costain under the Confidential Agreement and appearing at p.11 and possibly in other blank areas of the Tribunal's copies of the first report. The implications of that arrangement for litigation privilege are referred to at paragraph 35 of the Decision.

18. This section concludes -

"It (the report) describes the effects seen within in the summer of 2010; presents a site conceptual hydrogeological model; discusses factors which may be influencing groundwater levels; and provides recommendations for future monitoring".

19. The body of the report faithfully fulfils that summary. Paragraph 5.4 at p.41 concludes with the finding -

"This lack of mitigation along (the) side nearest the Park, plus the fact that abstractions are large, in the order of (redacted) make this the most likely explanation for the majority (sic) of the lowering of groundwater levels and the ground disturbance seen within Victoria Park during 2010"

20. The second report describes itself as an addendum to the first report providing *" a factual update on the hydrological situation"*. It repeats the finding cited in the last paragraph. There is no hint of further instructions or a further purpose.

25. Having regard to the title, introduction, scope and content of the reports, the Tribunal firmly rejects the bold claim made at p.4 of the July letter that *"the sole purpose of the liability reports is to prove our client's claim for damages and not to implement policies or cost benefit analyses."*
Nobody would suppose that NTC had in mind either of the latter Objectives when obtaining these reports; the obvious alternative purposes were the discovery of the cause of the damage and the answer to the questions
when and how the damage might be made good.

26. So the intrinsic evidence as to the purpose of the reports seriously weakens NTC's case as to LPP.

27. Disclosure of these reports will not embarrass or weaken NTC in its negotiations or conduct of litigation with Costain, since the overall findings of these reports tend to support the claim that Costain's dewatering activity without adequate mitigation caused or contributed to the ground disturbance in Victoria Park. The tribunal has indicated in the Decision why it rejects NTC's contention that disclosure will "tie it" to the findings of the two reports. Disclosure would be the result of an order of the Tribunal, not part of the standard procedure under Part 31. It is incorrect to suggest (July letter p.6) that disclosure as a result of this appeal would amount to disclosure under Part 31, hence drive NTC to adopt them in subsequent litigation.

Other potential defendants

29. As to the submission on the impact of disclosure on possible litigation against other parties, NTC provides no details of any such claims nor the stage that they have reached. The claim that disclosure would have an adverse effect on a course or courses of justice which are not identified nor substantially described and of which no indication has been given to MK is not launched from very firm ground.

30. Quite apart from those weaknesses, the argument again relies on the "tying NTC down" point already rejected. The fact, if it is a fact, that the two hydrogeological reports did not support further claims against other contractors does not impair NTC's ability to instruct further experts to demonstrate, if they can, that others caused or contributed to the ground disturbance. Nor, so far as is apparent, do they undermine NTC's unspecified potential claims against other possible defendants. The initial reports into causation were not intended, on any view, to investigate every possible third party liability. According to NTC (July letter p.2 and elsewhere), their sole purpose was to support a claim against Costain. Moreover, the Tribunal does not know what additional evidence may have been available to experts instructed later, nor even, as to the authors of the latest reports, what their expertise may be. On the evidence before us there is no basis for saying that disclosure would, on a balance of probabilities, have an adverse effect on the course of justice in respect of possible future claims by NTC against unidentified defendants.

31. If, on the other hand, contrary to our finding, they do support the case for any unidentified future defendant, they will be disclosable by virtue of CPR Rule 31.6(b) (i) and/or (iii).

32. The Tribunal sees no justification for editing a reference to "various potential defendants" from p.6 of the July letter or from this closed annex, if it is made public. It would be remarkable if Costain were still unaware of the possible existence of other defendants or third parties.

David Farrer Q.C.

Tribunal Judge

4th April, 2015