NCN: [2022] UKFTT 00382 (GRC)

Case Reference: EA/2021/0297

First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Heard by Cloud Video Platform

Heard on: 17 June 2022
Decision given on: 21 October 2022

Before

TRIBUNAL JUDGE NEVILLE
TRIBUNAL MEMBER S SHAW
TRIBUNAL MEMBER P TAYLOR

Between

PHILIP SWIFT

Appellant

and

INFORMATION COMMISSIONER

First Respondent

and

NATIONAL HIGHWAYS
(formerly HIGHWAYS ENGLAND)

Second Respondent

Representation:
For the Appellant: The appellant in person
For the First Respondent: No attendance or representation
For the Second Respondent: Ms J Thelen, counsel

Decision: The appeal is dismissed.

REASONS

1. On 23 November 2020 Mr Swift submitted a request for information to Highways England under section 1 of the Freedom of Information Act 2000 ("FOIA"). On 22 December 2020 Highways England responded to say that it did not hold the requested information, a position it maintained following an internal review concluded on 25 January 2021. Dissatisfied, Mr Swift complained to the Commissioner on 25 January 2021. On 19 August 2021 Highways England changed

its name to National Highways. In a decision notice dated 15 September 2021[i] ("the decision notice") the Commissioner decided that, on the balance of probabilities, National Highways did not hold the requested information. Mr Swift appeals to the Tribunal.

Background

2. We begin by setting out the introduction given in the decision notice:

> 5. *To summarise and bring the situation up to date, the complainant appears to believe that [National Highways] is engaged in a fraud against the public in conspiracy with its service providers who are responsible for maintaining and repairing highways infrastructure – principally Kier Highways Ltd. To that end, the complainant considers that [National Highways] holds a set of rates relating to damage to crown property (DCP) for work done by Kier.*
>
> 6. *DCP is the process by which HE seeks to recover the costs of damage caused to the highways (usually via road traffic accidents) from the members of the public responsible for that damage.*
>
> 7. *Broadly, costs to the contractor of making repairs estimated in advance of repair to be £10,000 or more ("above-threshold repairs") are paid by [National Highways] which then seeks to recover the costs from third parties and their insurers. Recovery from third parties of the costs of repairs estimated at the outset to cost less than £10,000 ("below-threshold repairs") is the responsibility of the contractor which performs the repairs.*
>
> 8. *The complainant appears to contend that [National Highways] contractors charge third parties (and their insurers) higher rates with respect to below-threshold repairs than those same contractors charge [National Highways] with respect to above-threshold repairs and that this constitutes fraudulent 'over charging' of those third parties.*
>
> 9. *To that end, the complainant has submitted numerous requests to [National Highways] for information on 'DCP rates'. At the point of the current request the Commissioner and the FTT had found that [National Highways] did not hold a schedule of DCP rates as such rates did not exist. The Commissioner and FTT had also found that information on tendered contract rates that [National Highways] does hold is commercially sensitive and so exempt information under section 43(2) of the FOIA.*

3. Mr Swift might take issue with some of that introduction, but we consider it to serve as an appropriate background. The present appeal is one of at least a dozen brought by Mr Swift concerning the cost of damage to highways. Some relevant previous decisions on those appeals are as follows.

EA/2018/0104[ii]

4. National Highways' work is divided into different areas, and each can have a different contractor working to differing contractual arrangements. Mr Swift had requested information that included the rates put forward by contractors when tendering for the 'Asset Support Contract' ("ASC") in Area 10. The ASC concerns responsibility for the maintenance of the network over a period, as compared with DCP which concerns one-off incidents when repairs are necessary. The rates requested were estimated target prices for pre-planned work by the contractor. The Tribunal found that the information was commercially sensitive and exempt from disclosure under s.43 of FOIA.

5. In evidence on behalf of National Highways, its Head of Commercial Delivery for the South East of England Mr Patrick Carney made a reference to DCP rates. As part of its consideration the Tribunal had access to the tendered ASC rates as closed material. It confirmed that they were not DCP rates.

EA/2019/0119[iii]

6. Mr Swift requested the DCP rates to which Mr Carney had referred in the previous appeal, in relation to Area 3 – he referred to these as "defined costs" that had been agreed between Kier and National Highways and which "built up the invoices" submitted by the former to the latter. The Commissioner found that the information was not held.

7. On appeal, National Highways argued that Mr Swift had misunderstood the way in which the contracts operated. There were no "defined costs", and Mr Carney's reference to "DCP rates" was an unfortunate turn of phrase. The only rates were those tendered for the ASC, which were themselves for the purpose of building a target cost model for the contract overall. Mr Swift's arguments included that National Highways' evidence was false. The Tribunal decided otherwise, accepting National Highways' evidence to find that it held no DCP rates. Nor, it found, did Kier hold them on its behalf.

EA/2019/0390[iv]

8. Mr Swift again took some of the evidence given in the previous proceedings, and used it to found a request for information:

> *Damage to Crown Property a.k.a. DCP Rates for Areas 9 and 10 from inception of the current contact to the present date, being the schedule of costs referred to at paragraph 14 of the attached witness statement, confirmed under Oath by [named individual] at the First Tier Tribunal Information Rights appeal hearing on 21 November 2018 as not being commercially sensitive.*

9. In his appeal against the Commissioner's decision that the information was not held, Mr Swift said:

My request was for the price list (rates) contractors used to bill following their attendance upon and reinstatement of our highways. These incidents are typically collisions, spills and fires. I have long sought Damage to Crown Property (DCP) information; the schedule of rates used by Highways England contractors, when billing the Authority and drivers, fleets, hauliers or their insurers (Third Parties).

10. The Judge noted National Highways' case as being summarised thus:

> *The Appellant has fundamentally misunderstood the way these contracts operate; a price list of rates to be charged, agreed in advance simply does not exist in the way he seems to think.*

11. National Highways adduced oral evidence from no fewer than six witnesses: Patrick Carney, Head of Commercial Delivery; Liz Herridge, Director of Network Claims & Transformations; Greg Barnes, Commercial Director; David Ash, a quantity surveyor and Regional Commercial Manager; Paul Brown, Service Delivery Manager for Area 10; and Brian Read, National Head of Commercial Modelling and a senior departmental manager in the Procurement Directorate. Mr Read's evidence was also given on the basis that he had formerly been a Commercial Director at Balfour Beatty Mott MacDonald ("BBMM"), the contractor then looking after Area 10.

12. The appeal was allowed in respect of Area 9. Further information had been provided during the course of proceedings which the Judge found, contrary to the genuinely held view of National Highways, fell within the scope of the information request. Mr Swift had once again challenged the honesty of National Highways' witnesses. The Judge disagreed, finding that there had been no deliberate concealment:

> *41. I am aware that there is a long history to this matter, and that there is a degree to which the Appellant has been overzealous and almost obsessive in his pursuit of HE over the issue. I am also aware that the Appellant has made unfounded allegations of fraud and corruption which must be very wearing and unpleasant for HE and its staff.*
>
> *…*
>
> *47. Indeed, I would make a point of praising HE's witnesses for being open and forthcoming and there was not even a hint that there has been any attempt to hide anything from the Appellant. …*

13. The Judge accepted the evidence given by all witnesses as to Area 10, and by Mr Read that:

> *…there was no such "schedule of costs" as requested by the Appellant'. He also said that there were no "standard charges" at which BBMM charged HE for making such repairs.*

14. Mr Read also gave evidence about the way in which BBMM did charge for repairs.

EA/2021/0082[v]

15. Mr Swift picked up on part of Mr Read's evidence to make another information request, this time for:

> *…the above-threshold works held and used by BBMM when pricing DCP matters in Area 10. The schedule of rates was used in the ASC pre-04/2019 when the contract concluded. This is the schedule of DCP rates by which BBMM charge / charged [National Highways] where incident costs exceed £10,000, a schedule of rates that are apparently subsidised by the lump-sum payment.*

16. Mr Swift also relied on a judgment of His Honour Judge Godsmark KC in County Court claim no. C08YP765, handed down on 13 April 2018. It concerned the recoverability of damages arising from a road traffic accident. While the Claimant was Highways England, the Judge records that the claim was actually brought by BBMM pursuant to a contractual entitlement between the two. In issue was whether BBMM were entitled to charge industry recognised rates for labour and plant dayworks published by the Civil Engineering Contractors Association ("CECA"). Recording the threshold figure of £10,000, the Judge observed as follows:

> *15. BBMM argue that the CECA rates are the best way of calculating a repair cost on relatively small repairs such as the one in this case where the figure is less than £10,000. That figure is significant because BBMM do have agreed rates with Highways England for repairs where the total is over £10,000.*

17. Mr Swift put this forward as a judicial finding that the rates he sought did, in fact, exist. The Tribunal dismissed the appeal on the following basis:

> *108. We accept on the basis of Mr. Drysdale and Mr. Read's evidence that no schedule of DCP rates, agreed between the parties in advance of the charges being made, was held by NH.*
>
> *109. Mr. Swift argues that NH's interpretation of the scope of the request was too arrow, and that it would include the rates described by Brian Read in his evidence. Broadly this consists of certain averaged people and plant rates used by BBMM as the basis of their charges to NH carried out on a defined costs basis, including DCP work.*
>
> *110. We do not need to determine whether or not this information, held by BBMM, fell within the scope of the request, unless we find that it was held by NH or held by BBMM on behalf of NH.*
>
> *111. On the balance of probabilities we conclude that NH did not hold this information.*
>
> *112. Mr. Read's evidence was that:*
>
> > *112.1. BBMM used certain averaged people rates and plant rates as the basis of their charges to NH carried out on a defined costs basis, which included CP work.*

112.2. These were presented to NH in meetings on a regular basis, so that NH would verify that the costs that were being charged from time to time were correct.

112.3. A record of those rates applicable at the time was kept internally by the BMM finance department, and they could be obtained by BBMM afterwards by going to the records of each individual claim.

113. There was no positive evidence before us that NH held a copy of those rates at the time of its response to the request, nor was there any evidence of a business need to keep a copy of those rates even if they had been held by NH at the time of the meetings. Mr. Read's evidence was that NH only needed them to verify that the costs being charged from time to time were correct, so they only needed to look at 'the most recent batch coming up'.

114. On the evidence before us, despite the reference to 'agreed rates' in the judgment referred to as the 'Godsmark judgment' (p 1094 of the bundle, Case Number 08YP765), it is clear on the basis of Mr. Read's evidence that they are only 'agreed' to the extent that NH 'agreed them by virtue of the fact that they paid them'. Unlike the existence of a prior agreement, this limited level of 'agreement' does not increase the likelihood of HE holding a copy of such rates (as they do in relation to notional average people rates in Area 9 which were subject to prior agreement).

115. Taking all the above into account, even though the extent of the enquiries carried out by NH were limited, we conclude on the balance of probabilities that NH did not, at the relevant time, hold the information referred to by Brian Read in his statement.

116. We note that our findings are consistent with the findings in EA/2019/0390. The evidence given in that hearing by Patrick Carney, Paul Brown and Brian Read as that although in Area 9 there was an explicit agreement of average banded notional property rates, this did not operate in Area 10. The findings of the tribunal in that appeal at para 46 were as follows: 'The evidence was that there was nothing equivalent in use in Area 10. I am confident that if similar schedules to those provided by Mr. Ash had been available then HE would have made that clear in this appeal.'

117. Was the information nonetheless held by BBMM on behalf of NH? There is no evidence upon which we could reach the conclusion that the information described by Brian Read was held on behalf of NH. We have not been pointed to any contractual provision which provides that or has the effect that such information would be held by BBMM on behalf of NH. There is no other evidence before us that points to such a conclusion. The fact that BBMM used those rates to calculate the amounts that it charged NH is not sufficient in our view to found a conclusion that it was held on behalf of NH.

118. On this basis the appeal in EA/2021/0082 is dismissed.

18. It can be seen that the Tribunal made findings about both the information specifically requested and the "certain averaged people and plant rates used by BBMM as the basis of their charges to NH carried out on a defined costs basis", to address Mr Swift's argument that these also fell within the scope of his request.

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19. Mr Swift requested Cost Breakdown Documents ("CBDs") relating to 15 sub-threshold claims made by Kier in Area 9. These are produced in support of sub-threshold claims brought by Kier against third parties. National Highways argued that it played no part at all in such claims so did not hold the information, and nor could Kier be said to do so on its behalf. The Commissioner decided that if the requested information was held by Kier (and this had not yet been established), then it was held on behalf of National Highways. Kier was carrying out an outsourced service for National Highways so that the latter could meet its statutory obligation under the Highways Act 1980 to maintain certain highways at public expense. The requested information related directly to the provision of those services. National Highways was required to establish what information was held by Kier and issue a fresh decision on the request.

20. National Highways appealed that decision to the Tribunal, but as part of the process Kier volunteered the requested information in any event. National Highways therefore issued a fresh decision whereby it provided the information without making any concession as to the situation under FOIA. Its application to withdraw its appeal was granted by Judge Griffin in a decision dated 3 May 2022, against Mr Swift's objections.

The present request

21. On 23 November 2020 Mr Swift requested those 'averaged rates' described in the above paragraph. His request reads:

> *I understand the contractor had a schedule of rates, standard charges, albeit referred to under various names.*
>
> *The system adopted under the ASC was for BBMM to group together all the cost components, averaged them across the workforce and produce average rates for several different staff and labour grades. These averaged rates were then charged on an hourly basis against whatever cost code the operatives were working on. This was then termed the Defined Cost of labour.*
>
> *That is to say, the 'defined cost' was the product of a definition (setting out what could be claimed, what would make up the total) but that the rate was a specific figure.*
>
> ***I am seeking the averaged rates for Area 10 for the last 4 years BBMM was appointed.***
>
> *These are rates charged to Highways England for DCP works over £10,000. Below this threshold, BBMM engaged CECA.*

22. We have supplied emphasis to the sentence claimed by Mr Swift in his evidence to encapsulate his request.

23. National Highways claimed not to hold the information. In his Decision Notice of 15 September 2021, the Commissioner agreed. During the Commissioner's investigation Mr Swift confirmed that his request was based on the evidence of Mr Read in a witness statement dated 13 August 2020 for appeal EA/2019/0390.

The appeal

The grounds of appeal

24. While we have paid careful attention to everything said in the grounds of appeal, they can be briefly summarised as follows. First, Mr Swift argues the Commissioner had found similar rates in respect of Area 9 to be held by Kier on behalf of National Highways and logic dictated that Area 10 rates would likewise be held by BBMM in the same way; second, that HHJ Godsmark KC had found that there were agreed above-threshold rates; third, that a public statement by the CEO of National Highways had confirmed that costs could be requested from BBMM; and fourth, that Mr Read's previous evidence had confirmed that National Highways' finance department held the rates.

25. Both the Commissioner and National Highways have provided a Rule 23 Response. The Commissioner simply relies on the reasons given in the decision notice. We shall set out National Highways' Response later in these reasons.

26. On 5 April 2022 there was a hearing before Judge Griffin to decide procedural issues between the parties. Mr Swift had sought the disclosure of the closed material considered in appeal EA/2018/0104 into these proceedings pursuant to the Tribunal's Procedure Rules. He also sought to have a witness statement, made in these proceedings by Mr Carney, ruled inadmissible. Judge Griffin refused both applications, but as to the former did record that:

> *4. Counsel for National Highways has agreed to review the material referred to by Mr Swift that was included in the closed bundle in EA/2018/0104. An update on that review will be provided to the Tribunal (copied to the parties) within 28 days of the issue of these directions.*

27. National Highways wrote a letter on 3 May 2022 confirming that counsel had reviewed the closed material and none of it was relevant in the current proceedings. National Highways reiterated the difference between the way in which the material was described in the Tribunal's decision, and the information sought in the present appeal. It was also confirmed that National Highways only proposed to call Mr Carney to give oral evidence.

The hearing

28. The appeal was heard by means of the Cloud Video Platform. The Commissioner did not attend and was not represented. All participants attended by video, save for Mr Swift who connected by telephone. This is a matter of concern, given that Mr Swift proposed to both cross-examine witnesses and give evidence himself. During the pandemic, audio-only participation was often the only way in which appeals could be practicably heard. It is nonetheless generally inferior to video or in-person participation. We respectfully agree with the observations made by Dame Victoria Sharp in Gubarev & Anor v Orbis Business Intelligence Ltd & Anor [2020] EWHC 2167 at [50]-[52] as to the importance of the Tribunal observing and controlling the course of a hearing, as well as the behaviour of its participants. This is especially important in the case of evidence. The risk of unfairness must be even more acute when one side to a case can be seen and heard, and the other cannot.

29. We should make it clear that none of the above observations carry any criticism of Mr Swift in particular, and nor have they been applied to reduce the weight afforded to his evidence and submissions. In future however, the Tribunal will expect a party intending to connect without video to make an application for permission in advance. Such an application should give reasons why a video connection is impracticable, accompanied by evidence in support.

30. The documents were agreed as comprising an open bundle prepared by the commissioner, and a supplementary bundle, additional bundle and authorities bundle provided by National Highways. We also had the benefit of well-compiled skeleton arguments from Mr Swift and Ms Thelen.

31. Mr Swift adopted the contents of three witness statements, the first dated 16 March 2022 and the second and third both dated 3 May 2022. He has no direct knowledge of whether the information is held, and his witness statements are largely given over to introducing the exhibited documents, how they came about, and his submissions on them. We have taken careful account of what they say. Mr Carney adopted his witness statement of 11 March 2022 and was cross-examined at length. We do not rehearse either witness's evidence at length, and shall instead address the parts we consider relevant within our consideration of the issues. The parties made their closing submissions and our decision was reserved.

32. Four working days after the hearing, Mr Swift made unsolicited further submissions phrased as an 'Enquiry Request'. Properly understood, it is first a renewed application for disclosure of the closed material in EA/2018/0104, and second a request for:

> *"…an investigation of events to determine why the review was not conducted and why it appears the Tribunal and I have been misled, by omissions at least. …"*

33. No new arguments are made that have not already been rejected by Judge Griffin. The application is wholly without merit and we refuse it. Insofar as it makes additional submissions on Mr Carney's oral evidence, no permission was given for

these to be made and, in any event, they simply repeat points put forward at the hearing.

Legal Framework and Issues

34. The single question for the Tribunal is whether on the date of the decision notice, 15 September 2021, the information requested by Mr Swift was held by either National Highways or by BBMM on its behalf. The answer to this question will be a finding of fact, made on the evidence and to the standard of the balance of probabilities.

35. National Highways has argued that we should follow previous findings of fact made by the Tribunal unless there is evidence to justify doing otherwise. We agree that it is at least arguable that the present issue has already been the subject of a direct finding of fact in appeal EA/2021/0082, and perhaps also in appeal EA/2019/0390.

36. We are not aware of any direct authority on the treatment of such earlier findings of fact in FOIA appeals. In Thrasyvoulou v Secretary of State for the Environment [1990] 2 AC 273 the House of Lords held that the principle of *res judicata* – including issue estoppel – applied equally to public law proceedings. Lord Bridge held, at 281B:

> *In relation to adjudications subject to a comprehensive self-contained statutory code, the presumption, in my opinion, must be that where the statute has created a specific jurisdiction for the determination of any issue which establishes the existence of a legal right, the principle of res judicata applies to give finality to that determination unless an intention to exclude that principle can properly be inferred as a matter of construction of the relevant statutory provisions.*

37. The principle has been held not to apply in the fields of social security and immigration and asylum. In the latter context, the Court of Appeal in R. (Abidoye) v Secretary of State for the Home Department [2020] EWCA Civ 1425 at [43] recently held that Lord Bridge's remarks were a statement of general principle rather than a definitive rule. At [40], it approved earlier authority that the technical application of the principle of *res judicata* was ruled out by the requirement that issues of asylum and human rights be decided as they are at the date of decision, whether administrative or judicial. We consider that this is analogous to the obligation of this Tribunal to determine the lawfulness of the decision notice as at the date it was made. So the Tribunal in appeal EA/2021/0082 had to decide the issues before it as at 25 November 2019, the date of Highways England's response. We must decide the issues as at 22 December 2020, the date of the date of the present response. The date of the public authority's response was held to be the proper focus in Montague v ICO and DIT [2022] UKUT 104 (AAC) at [62] and [87], rather than the date of the decision notice, but we should record that in the present appeal it makes no difference which date is examined.

38. Yet while *res judicata* does not 'technically' apply in the field of immigration and asylum, nor is there *carte blanche* to relitigate issues. The correct approach is summarised by the Court of Appeal in The Secretary of State for the Home Department v BK (Afghanistan) [2019] EWCA Civ 1358 at [32]-[39]. The well-

established principle of administrative law that persons should be treated uniformly unless there is some valid reason to treat them differently, and the public interest in consistency of approach, has been held to provide a sufficient juridical basis to require a Tribunal to treat an earlier decision as an authoritative assessment of the issues at the time it was made, and the starting point for its own decision. If a party relies on facts that are not materially different from those put before, then the second Tribunal should regard the issues as settled by the first decision rather than allowing the matter to be relitigated. Nonetheless, the obligation of the Tribunal to independently decide each case on its own individual merits is preserved, and does not impose any unacceptable restrictions on the second Tribunal's ability to make the findings which it conscientiously believes to be right.

39. Even if *res judicata* does formally apply, we see no reason why the same fundamental principles set out above should not apply with at least equal strength in appeals under FOIA. Nothing in the legislative scheme suggests otherwise, and it cannot have been the intention of Parliament that a party be allowed to re-open settled factual issues without sufficient justification, with all the delay, expense and prejudice this would cause. Where a factual issue is simply re-argued on the same or very similar evidence, with no change of circumstances, and between the same parties, the Tribunal is entitled to take the issue as having already been decided.

The parties' respective cases

The scope of the request

40. In his evidence to the Tribunal, Mr Swift confirmed that his request was contained within the single sentence "I am seeking the averaged rates for Area 10 for the last 4 years BBMM was appointed" and that the phrase 'averaged rates' was important, because of the "semantic trap" set by National Highways. He explained how references to schedules, prices, lists and so on meant that no sooner did he get near the information he sought than the goalposts would be moved. He also described this as a game of smoke and mirrors. This was why there had been so many hearings. He had therefore kept the present information request deliberately simple, limited to the 'averaged rates' on which Mr Read had previously given evidence.

41. We agree with Mr Swift that the scope of his request is simply phrased, its target clearly identifiable, and any subsequent ambiguity in our own terminology should not be taken as us having lost sight of it. Mr Swift's skeleton argument first refers to Mr Read's witness statement of 13 August 2020 in appeal EA/2019/0390 at paragraph 18, which reads: (emphasis added)

> *18. The system therefore adopted under the ASC was for BBMM to group together all the cost components, average them across the workforce, and produce average rates for several different staff and labour grades. These* ***averaged rates*** *were then charged on an hourly basis against whatever cost code the operatives were working on. This was then termed the Defined Cost of Labour.*

Mr Swift has likewise provided a transcript of Mr Read's oral evidence at the hearing of that appeal on 2 March 2021, highlighting where Mr Read referred to 'average' rates. There are other references to these rates in the evidence. In an email dated 10 March 2021 Mr Swift also clarified that his request did not encompass the tendered ASC rates ruled exempt from disclosure in EA/2018/0104. National Highways does not seek to go behind Mr Read's evidence, so the scope of the request is not in dispute.

Whether the information is held by National Highways (or by BBMM on its behalf)

42. The evidence and submissions as to whether that information is held are not nearly so concise. The corpus of documentation grows with each appeal, the hearing bundles now totalling over 1,600 pages. The Tribunal is not obliged to deal with it all line-by-line, or to give detailed analysis of every argument made – see Independent Workers Union of Great Britain v The Mayor of London [2020] EWCA Civ 1046 at [43]. Indeed, this would be counter-productive in the wider context of Mr Swift's requests. Like the Sorcerer's Apprentice, we would simply add to the burden faced by the Tribunal on any future appeal. We instead set out those parts of the parties' cases that we have considered relevant in coming to our eventual conclusion.

National Highways

43. It is convenient to set out National Highways' position first, as set out in both its written arguments and in its evidence. Some facts already established in previous appeals were reiterated and clarified. The tendered ASC rates were in support of a priced estimate on the cost of the contract over a five year period, a criterion when awarding the contract. Those rates and the total cost was for 'Scheme Work', including maintenance, renewal, repairs, damage where no third party is at fault such as trees blown over by wind, and so on. The total cost was then the subject of a "pain/gain share" at the end of the contract, so if the contractor had charged less than the estimated total it would be rewarded with a percentage of that saving. If the total cost was more than the estimate then it would likewise be required to meet a percentage of that additional cost itself. In practice DCP work was not included in the pain/gain share due to its unpredictability and the difficulty of recovering the 'pain' element from third party insurers. The tendered rates were not used for billing over-threshold work but they were used for the initial assessment of whether work would cost more or less than £10,000, as (save where impracticable or in in cases of urgency) that decision was taken before the work commenced and its actual cost was fully known. DCP work was then billed on the costs-reimbursable basis already described above, rather than being restricted to the ASC rates.

44. National Highways contends that it therefore did not hold rates for above threshold work, whether in a schedule or otherwise. The payment mechanism and the expense types and uplifts that could be charged were agreed within the terms of the ASC, but the pound figures were not. They should be seen as compiled reimbursement figures rather than 'rates' as such.

45. National Highways refers to Mr Read's witness statement of 13 August 2020, upon which Mr Carney expanded during his oral evidence. National Highways paid

BBMM on a 'costs reimbursable' basis, contractually termed the 'Defined Cost'. If BBMM undertook a piece of above threshold work then it would keep a log of the costs it had incurred until a 'Scheme Final Account' could be completed and submitted to National Highways. Subcontractors and material were charged at cost, that being whatever cost BBMM had paid itself.

46. As to labour, Mr Read had explained that BBMM calculated the cost according to expenditure such as wages, expenses, training, holiday and sick pay, and so on. It would not be practicable to perform a precise calculation of the personal expenditure on every staff member for every hour worked on National Highways work, so BBMM instead grouped the expenses across its workforce to produce "averaged rates" for several different staff and labour grades. They would increase together with BBMM's own expenditure, for example when wages were increased following pay reviews. Use of BBMM's own plant was charged in the same way. Rather than the cost of plant and its maintenance being precisely identified on an individual basis, a figure would be calculated of the average cost to BBMM of particular plant. As an illustration, over the life of the contract a piece of equipment might require more maintenance each year as it aged. BBMM would simply produce an averaged figure.

47. To the above costs, BBMM added a 9.1% overhead to cover its business expenses such as telephones, computing, cleaning, catering and so on, and a 4% fee to cover items such as head office charges and overheads, corporation tax, legal costs, insurance and a profit element.

48. The significance of those figures not being approved in advance is put forward as being that they were never communicated to National Highways in such a way that they can be considered to hold any rates within the scope of the request. This is in contrast to the way in which the equivalent contract with Kier had worked in Area 9, where National Highways did hold some agreed notional people rates.

49. National Highways' interests were instead protected by way of audit. In this particular contract it had been intended that periodic audits would take place throughout the life of the contract, but instead an audit of the entire term was undertaken during the last six months. The rates were also presented to National Highways from time to time in meetings, but in appeal EA/2021/0082 the Tribunal had found that they had not been kept. We are also asked to follow the finding made in that appeal at [117] that BBMM did not hold the information on behalf of National Highways.

Mr Swift

50. Mr Swift reminds the Tribunal that his motivation for seeking the information is irrelevant. He warns against treating his requests as confined to rates that are agreed, or scheduled, or any other qualifier, and simply wants the rates to which Mr Read referred. He argues that the Tribunal in appeal EA/2021/0082 got this wrong, restricting his request to 'agreed' rates when that qualifier had actually been introduced by Mr Read. He also repeats his argument, rejected in that appeal, that rates presented to National Highways at meetings would have been kept. Mr Read's

evidence had, contrary to the Tribunal's findings, confirmed this. Mr Swift also takes issue with Mr Read's evidence on the frequency with which the average rates were changed by BBMM, providing data said to show that they would periodically change in mid-August.

51. We are asked to treat the findings in previous appeals with caution, National Highways having presented misleading evidence. Mr Carney had stated "for years" that the Area 9 Kier rates were not held, and had persuaded the Tribunal that this was true. Yet the rates had in fact been held since 2015, had been used on thousands of claims, and were available to National Highways simply on asking Kier. National Highways similarly misled the Tribunal, Mr Swift argues, when responding to the request for information underlying appeal EA/2021/0257. By the time it lodged its Notice of Appeal it had already ascertained that Kier would provide it with the information, yet had asked Kier not to do so. Not only did this mean that the grounds of appeal were misleading, National Highways further failed to disclose the availability of the information for several months. This damages its witnesses' credibility overall.

52. As to whether the requested information would be held by BBMM on behalf of National Highways, Mr Swift again points to the Commissioner's decision underlying appeal EA/2021/0257. This had been that CBDs produced by Kier in sub-threshold claims in Area 9 were held on behalf of National Highways. Mr Swift describes this as "similar ('lesser') information" than that currently requested" because the current information was only used to bill National Highways, whereas that held by Kier had been used to bill third parties. Mr Swift also questions why National Highways has not approached BBMM to request this information, given that it previously did so with Kier.

Our consideration

<u>The previous decisions</u>

53. We first consider the effect of the decisions made in appeals EA/2019/0390 and EA/2021/0082. In appeal EA/2019/0390, at [34-[35], Judge Cragg KC summarised Mr Read's evidence. This included the way in which BBMM recovered its costs from Highways England using costs-reimbursable methodology. At [46] the judge explicitly accepted the "oral and written evidence of Mr Read". That written evidence includes the use by BBMM of "averaged rates", but it is clear from Mr Read's statement that these are nothing more than the figures which are charged as part of the costs-reimbursable methodology. The explanation given at p.24 of the transcript of his oral evidence is particularly clear on how the figures might be calculated, and it is unfortunate that such evidence had to be repeated. More equivocal is the evidence on page 25 as to whether the rates were separately provided to National Highways. That is the oral evidence upon which Mr Swift subsequently relied in EA/2021/0082.

54. Mr Swift's case before the Tribunal in EA/2021/0082 directly referenced Mr Read's evidence, as the Tribunal confirms at [63]-[68]. At [109] the Tribunal records Mr

Swift's contention that his request included the rates described by Mr Read, a broader interpretation of the scope of his request than that of National Highways. The transcript of the evidence given by Mr Read shows comprehensive cross-examination on whether the rates were presented to Highways England and whether they would have been kept, for example at pp. 41 and 46. In its decision, from [109] onwards the Tribunal explicitly sets about deciding whether those rates were held. It found that they were not. This finding unambiguously includes the information that is the subject of the present appeal.

55. We therefore apply the principles set out above at [35]-[39] and take the matter as having been settled by the previous decision, unless departure from its conclusions is justified.

Assessment of the evidence

56. We were impressed by Mr Carney's evidence. He did his best to provide information in response to Mr Swift's questions, despite their occasional repetitiveness and circularity. We reject Mr Swift's criticism of National Highways' decision not to call any additional witnesses. Mr Carney had been thought to be most appropriate to attend, due to his knowledge of the previous appeals and because Mr Swift had accused him of previously misleading the Tribunal. In what was at least the third appeal on what he saw as the same issue, the balance came down against any further expense of time. We accept this, and draw no adverse inference against National Highways.

57. The suggestion to Mr Carney that he ought to have undertaken further investigation with National Highways' finance department in preparation for this appeal is also unrealistic. The investigation undertaken for appeal EA/2021/0082, as set out in the evidence and consideration so far, was before the Tribunal on that occasion. National Highways has performed an exhaustive investigation into whether it holds the rates. Mr Swift was clearly exasperated at Mr Carney's lack of personal knowledge on the way in which incoming bills from BBMM were dealt with in Area 10, but we again agree with Mr Carney that National Highways had brought a number of witness along to appeal EA/2019/0390 and EA/2021/0082, such as Mr Read and Mr Brown, who had answered all these questions already. This illustrates the importance in finality of litigation expressed above. Even so, Mr Carney was quick to provide additional detail when it was within his knowledge. This reflects positively on both the reliability we can place on Mr Carney's evidence and the reliability of his evidence in previous appeals.

58. Mr Carney was questioned at length about the 'lump sum' paid to BBMM under the ASC, and what it covered. This included a query by Mr Swift on whether BBMM might be including sums in DCP rates that were already covered by the fixed sum. An example given by Mr Swift was the provision of depots, which Mr Carney replied was paid for by a combination of the fixed sum and DCP charges made by BBMM. Mr Swift has also averred that the way in which National Highways has explained how figures are subsidised by the lump sum is at odds with that presented to HHJ

Godsmark KC. We accept that Mr Carney's direct knowledge on this topic was more limited than Mr Swift would like but so, in our assessment, was the relevance of the issue in this appeal. It relates to Mr Swift's wider concerns about charges to third parties, and its only potential relevance to whether the requested information is first credibility, and second whether National Highways' own protective measures against being overcharged might go further than has been admitted. These arguments are entirely speculative, and we reject them. We did not find this evidence to be of any real assistance, notwithstanding the great importance attached to it by Mr Swift. The mechanism of the ASC has already been the subject of detailed consideration and findings of fact in this Tribunal.

59. Rather than expose weaknesses in National Highway's evidence, cross-examination tended to reveal more about Mr Swift's understanding of the issues. This is relevant insofar as these reasons are intended to explain to the parties why the Tribunal has reached its decision. There was a long exchange concerning how National Highways would know that BBMM had charged it the "correct rate". Mr Carney was evidently confused as to what this meant. Mr Swift clarified that he meant how National Highways would know it was being charged correctly, and how it could justify the rates charged to third party insurers when attempting to recover the cost of repair. Mr Carney replied that most insurers understood that costs-reimbursable charges tended to be less overall than a schedule of fixed rates, and that this was reflected in negotiation and by the courts. For the reasonableness of the amount charged overall across the contract period, an assessment could be undertaken by a quantity surveyor or similar person as had been explained in the previous appeals.

60. The above answers did not satisfy Mr Swift. He referred to some of the charging rates he has been able to obtain from unrelated civil proceedings, and gave the example of the individual named at the top of p.568 of the Additional Bundle. That individual had been charged at £21.65 between March 2017 and July 2018, but in August 2018 the rate had increased to £24.70. That figure had been charged to National Highways, who had in turn charged it to third party insurers. How did National Highways know if that rate was *correct*? Mr Carney was unable to provide any answer beyond what he and other witnesses had already said.

61. That mutual incomprehension between Mr Swift and Mr Carney may explain the former's inability to accept what he has been told by National Highways, and indeed by this Tribunal. There was no such thing as an objectively "correct" specified rate that BBMM was entitled to charge. It charged whatever it decided the work had cost it, according to the costs-reimbursable methodology that has been described more than once by Mr Read. If 'correct' means that this has been done accurately, then that is a matter for BBMM to explain if required to do so by National Highways. It did not need to provide prior justification, or even notice, before charging a particular amount. The extent to which it would realistically be called upon to explain its figures has already been dealt with in previous appeals: proactively by National Highways in response to a surprising figure, during a meeting between the two, or during an audit. Such a query by National Highways would of course recognise an important feature of the methodology: BBMM could never evidence that the particular named

individual cost exactly £24.70 per hour, because it has never claimed that he does. The figure is *averaged* from the relevant expenses across the workforce to produce a rate that BBMM selects for a particular type of worker. Mr Swift seemed to think that this basis would be insufficient for National Highways to prove any claim for damages against a third party. We cannot accept that unsubstantiated assertion, and as it happens the relevant legal principles are conveniently set out by HHJ Godsmark KC. Mr Carney makes the same point at paragraph 16 of his witness statement, referring both to the approach taken by the courts and to the complete lack of interest in this topic by the usually very assiduous defendant insurance industry. So by 'correct', we find that Mr Swift really means evidence that would prove BBMM's charges to *his* satisfaction. We doubt that even an army of forensic accountants could ever do so.

62. The voluntary disclosure of information in 2015 previously thought not to be held has already been taken as evidence to support National Highways' credibility rather than undermine it. We agree. We also acquit National Highways of misleading the Commissioner or the Tribunal in connection with appeal EA/2021/0257. The willingness of Kier to release information voluntarily is not relevant to whether it held that information on National Highways' behalf pursuant to FOIA. National Highways was entitled to litigate to preserve its position on that issue just as it was entitled to later change its mind. Nor do we consider that the Commissioner's decision undermines National Highways' case in appeal EA/2021/0082 or before us. The information was held by a different contractor pursuant to different contractual arrangements. Mr Swift has not demonstrated that the contractual arrangements between BBMM and National Highways should lead to the same result. We further reject Mr Swift's description of the information in that case as "lesser". If anything the opposite is true, when the contractor claims against third parties it does so under the name of a public authority. When billing National Highways it more resembles any other supplier. No significance attaches to National Highways' decision not to seek the voluntary disclosure of information from BBMM, given that it maintains the information does not fall within FOIA in any event.

63. The above analysis is sufficient to dispose of Mr Swift's arguments. We see no basis for departing from the finding made in appeal EA/2021/0082. No material evidence has been presented to us that was not available at that previous hearing. On the contrary, it has been fortified by yet more patient explanation from Mr Carney. We find that the requested information was not (and indeed, is not) held by National Highways. We further find that the information has similarly not been held by BBMM on National Highways' behalf. Nothing has been presented to us that might disturb that finding in appeal EA/2021/0082 at [117], with which we agree in any event. The figures were BBMM's own internal pricing information used to bill a public authority. Even if there was a contractual right to challenge or audit those charges, we cannot find that BBMM held the information for any purposes other than its own. The appeal must therefore be dismissed.

Postscript

64. It follows from the above that we also reject Mr Swift's assertion that previous requests have been frustrated by deliberate games of smoke and mirrors, or semantic traps, and we also reject his repeated assertions of dishonesty on the part of National Highways' witnesses. The Tribunal's previous findings are clear. It is Mr Swift who assumes that he can only have lost because some qualifier has been illegitimately inserted into his request. The word 'averaged' has now been used in this way, which was only ever an adjective used by Mr Read to help explain the methodology. While we have dutifully considered the parties' arguments, the appeal should never have come this far. For the moment however, there is no need for further analysis of the reasonableness of bringing this appeal.

Signed | Date:

Judge Neville | 21 October 2022

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[i] https://ico.org.uk/media/action-weve-taken/decision-notices/2021/4018463/ic-84355-n0n7.pdf

[ii] https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2332/Swift,%20Philip%20EA.2018.0104%20(04.12.18).pdf

[iii] https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2568/Swift%20Philip%20EA-2019-0119%20(09.12.19).pdf

[iv] https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2845/Swift%20Philip%20EA-2019-0390-(12.04.21).pdf

[v] https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i3092/Swift.%20P%20EA-2021-0082%20(Dismissed)2.03.22.pdf