

BBAG Update 18

The appeal hearing before the First Tier Tribunal (Information Rights).

Before Judge Robin Callender Smith and Richard Fox and David Wilkinson.

Appellant Bradford & Bingley Action Group (BBAG)

Respondents. The Information Commissioner (IC) and the Cabinet Office (CO)

BBAG's appeal contended that the IC's decision to uphold the CO's refusal to provide the information requested under the Freedom of Information Act 2000 as exempt, on the grounds of public interest, was misconceived. David Blundell, the chairman of BBAG, and Roger Lawson, the chairman of the UK Shareholder's Society (SHARESOC), attended the Information Rights Tribunal at Victory House, 30-34 Kingsway, London on the 16th April, a B&B shareholder His Honour Anthony Thompson QC also attended as an observer and provided sound advice to BBAG during the intermission. There were eight members of the CO and IC's legal teams.

There were no opening statements but the Tribunal accepted that Messrs Bloch and Mackinlay's witness statements on behalf of BBAG were a matter of record as no other party wished to cross question them. The first witness Mr S Muers, deputy director of the CO, confirmed that he had served in his current position since October 2011, his twelve page statement concentrated on his current responsibilities and experience and the adverse effect disclosure would have on government policy and ministerial communications. He admitted to having no knowledge of events during the nationalisation of B&B in 2008, was relying on general principles and admitted that he did not know the name of his predecessor at that time. BBAG considers that Mr Muers' statement, apart from the parts redacted of which BBAG has no knowledge, was not relevant to the appeal except in offering another example of the delaying tactics that the CO have indulged in for over fifty four months.

After a closed session lasting 45 minutes, during which the Tribunal decided that some information should be disclosed, the IC made its closing submission. Mr Oliver Gilman argued that the decision in favour of the CO was finely balanced but nevertheless it was rigorous, he went on to discuss past Tribunal decisions which in his view favoured the IC's position. The closing statement by Ms Christina Michalos counsel for the CO emphasised that disclosure would prejudice the economic interests of the UK, formulation and development of government policy and ministerial communications, quoting at least twelve paragraphs of Mr Muer's statement and past Tribunal decisions in support of that position. She went on to emphasise the importance of robust and good decision making in the future which would be adversely affected by disclosure, that the information requested is recent and remains live and that BBAG's "contention that disclosure would enable the improvement of standards of corporate governance is not a factor to take into account as it is not directed to objective facts but rather the nebulous, speculative and future use of the information based on the appellant's opinion."

Prior to BBAG's closing statement and despite disagreeing with their decisions it wished to place on record its thanks to the IC and the Independent Valuer Peter Clokey for the excellent level of service both provided which was in stark contrast with other government departments particularly the CO. However it believes the valuer's decision was flawed due to the terms of reference specified by the Government, paragraph (b) of the skeleton argument, and its failure to advise that the Bank of England had provided funding to B&B. BBAG also asked the Tribunal whether past decisions were binding on it or that the facts relating to this issue were paramount. It assured BBAG that the facts in this appeal were paramount, consequently the latter confirmed that it saw no point in exchanging views with the respondents on past decisions and was content to rely on the impartiality of the Tribunal.

The main points of BBAG's closing statement are summarised below:-

1. BBAG considered that Mr Muers' statement and the CO's skeleton argument were both repetitive and largely irrelevant, the former's lack of knowledge of events in respect of the B&B nationalisation whilst relying on "policy and principles," provides an excellent example of the obfuscation and delaying tactics to which BBAG has been subjected which are a matter of record. When he was asked why the CO issued a reply to Mr J Bloch's FOIA request which was untrue his reply was "I do not know". BBAG takes issue with the CO's argument that disclosure should not be taken into account in respect of improvements in corporate governance as it is not directed to objective facts! It drew the Tribunal's attention to paragraphs (a) and (c) of its skeleton argument regarding the IFRS accounting standards together with Sir Mervyn King's statement and the Special Liquidity Scheme, these are matters of fact not opinion. It also quoted figures from the UK and Irish Bank crisis published by the Local Authority Pension Fund Forum which made clear that B&B had a significantly stronger balance sheet than Northern Rock, RBS and HBOS.
2. BBAG stated that the 930,000 shareholders were the owners of B&B who had their property expropriated by the Government and despite numerous requests under the FOIA still did not know why and how this had happened. Furthermore, the sale of the savings book had destroyed it as a viable business and it was being run down, the trend in its accounts suggested a considerable surplus in the future which would pass to HMT not the shareholders who were the former legal owners.
3. BBAG rejected the CO's submission that the matter is current and still live, forty months have passed between the nationalisation and the completion of the CO's internal review. Furthermore, government policy on the banks had been formed at the time of the Northern Rock crisis and the legislation passed then was used to nationalise B&B. This was a self contained decision with a clear end point in September 2008, it was done and dusted and a line drawn under it.
4. BBAG stressed the failure of the CO, HMT and the FSA to provide the information requested and the conflict between the comments of the B&B board and the FSA confirmed in a series of events that reinforced this. The rights issue completed in early August 2008 less than eight weeks before nationalisation, the

interim results published in August confirming the company was a going concern, assurances to the public from the FSA telephone helpline regarding the viability of B&B on the 18/09/2008 just six working days before Gordon Brown's decision to nationalise, the positive statement issued to the public by B&B on the 25/09/2008 the day before the decision to nationalise on the 26/09/2008 followed by FSA statements post nationalisation which conflicted with its own helpline and Messrs Kent and Pym, chairman and chief executive of B&B.

Finally, BBAG repeated the last paragraph of its skeleton argument:-

“If a government confiscates the property of its citizens without reason, explanation or fair compensation particularly when it may be seen at fault in its duty of care to investors and savers by not adequately regulating the companies involved in the banking crisis, then all concepts of democracy and equity are laid aside and, we submit, the role of fair and honest government is devalued.”

The Judge Robin Callender Smith then closed the hearing and advised the parties that the Tribunal's decision would probably be published in the week commencing the sixth of May.