

Nottinghamshire County Council entered into a 25-year PFI contract, in May 2006, with Veolia ES Nottinghamshire Ltd. to handle waste processing for 25 years. The contract came into effect on 26 June 2006. In 2007, Nottinghamshire elector and Friends of the Earth campaigner Mr Shlomo Downen, representing 'People Against Incinerators', requested information including the contract under the Environmental Information Regulations 2004. On 10 June 2008 the council supplied Mr Downen with a redacted copy of the waste contract, excluding the disputed schedules. The council paid Veolia £21.2 million under the contract in 2008/09.

Mr Downen took advantage of provisions in the Audit Commission Act to request copies of the invoices and the contract, during the annual inspection of accounts in June 2009. Veolia obtained an interim injunction preventing disclosure of disputed schedules and information in the contract described by Veolia as commercially sensitive. The issue was considered at a judicial review before Mr Justice Cranston in August 2009, and in October 2009 he ruled there was no statutory provision in the Audit Commission Act enabling the council to redact information from the accounts on the grounds of commercial confidentiality. Veolia's appeal was heard at the Court of Appeal on 5-6 July 2010.

Veolia was represented by Philip Coppel QC, Nottinghamshire County Council by Clive Lewis QC, Mr Downen by Timothy Pitt-Payne QC, and the Audit Commission by Mr Peter Oldham. The case was heard by Lord Justices Rix, Etherton and Jackson.

Section 15.1 of the Audit Commission Act enables an 'interested person' to inspect and copy 'all books, deeds, vouchers, receipts, bills and contracts relating to the accounts under audit'. Section 15.3 was amended in 2007 to enable personal information to be redacted from the accounts, subject to the consent of the auditor. Section 15 also enables an elector to question the auditor about the accounts and section 16 enables an elector to lodge a formal objection to the accounts.

Philip Coppel QC (for Veolia):

There is an obligation on the auditor to listen to an objection from an elector but not to act on every

objection. It is not an opportunity for a local government elector to go through every item and take exception to one item and go to the auditor. It is not an opportunity for a local government elector to duplicate what the auditor does. The auditor is independent of the local authority and is qualified. It is not the role of the local government elector, and that is the exaggerated role Mr Downen's side have suggested where the local government elector duplicates the work of the auditor. That view does not recognise that the auditor is independent and is qualified and must adhere to a code of conduct and to the audit process.

The process is confined to a 20 day period, strongly suggesting the purpose and the only purpose for making the accounts available for 20 days, is for the purpose of questioning the auditor. There is no other reason to have the time limit.

We say that the limitation in regulation 14.1 is incompatible with Mr Downen's suggestion that section 15.1 allows him to use the information at any time and for any purpose and to supply it to anybody. It is telling that neither Mr Downen, the [county] council nor the Audit Commission are able to offer any sensible reason for the confinement of the right to 20 working days for the period.

Auditors are required to give an opinion on the statement of accounts and he does not audit all of the other material. What he is auditing, for the purpose of section 5.1.b is the statement of accounts. He is entitled to quiz people, to explain what has been done. He has powers to require information. But the Audit Commission says that the opinion he gives is an opinion on the statement of accounts. That gives a better understanding of what the audit of accounts is to be. It is this that is available to the public to inspect.

If we look at the judgment, Mr Justice Cranston says the references strongly suggest that the accounts are not just accounts to be drawn up, but rather that they are a 'running total' of financial activity which never ends.

[Rix LJ: Your complaint is that although he is setting out a definition of accounts to be audited, his definition for the accounts for that purpose is wider?]

The accounts to be audited are those made up to 31st March each year. If there are intervening accounts then they are not going to be made up to the end of the financial year. The public has a right to inspect 'the audited accounts'. It is through that analysis we can identify what are the accounts to be audited.

[Etherton LJ: Is your point that he [Cranston J] refers to section 2.1.a. and says the accounts are a 'running record'?]

He has muddled the word accounts with the accounts to be audited.

What we say emerges from all of this is that it is the statement of accounts which contain the accounts for the body, that get to be audited. That is the document that is required to be prepared in accordance with the regulations, and which the responsible officer certifies, that is the document that gets approved by the council or its committee, that is the document which after the conclusion of the audit is available for inspection under regulation 18, and is required to be published, and it is the document which the public has a right to copy under section 14.

We say that it does not make sense to suggest when section 15.1 speaks of accounts to be audited that it means something different or bigger. In 'making up' the accounts, you might send documents to your accountant. In preparing that document, you will rely on the ledger or in the case of the council any of its accounting records or indeed any accounts it might keep. But the underlying material is not audited itself. It forms part of the material. What is audited is the document setting out income, expenditure and capital. Auditors go in and vouch that the figures produced by the council are correct. That is the first task. The second task is to ensure economy and effectiveness by the council.

What we say in relation to accounts to be audited is that they have to be identified within the statement of accounts. When that is done [here] we see there is nothing in [the Nottinghamshire County Council statement of accounts] relating to the waste contract, and that is why we must consider the second issue, which is what is the meaning of the phrase 'relating to' the accounts.

'Relating to' is equivalent to 'referring to'. It must [be apparent] from the character of the instrument.

We say that the technique that needs to be deployed is one that gives rise to the sensible outcome, and in this context it is to consider what is the objective of section 15.1, which serves to be fulfilled by the right of Mr Downen and others, and what falls to be disclosed from the exercise of that right. The answer is that it [the information] is only to be used in support of making an objection of the accounts to be audited.

That, in relation to 'relating to', is one which must be apparent from the face of the document itself. It cannot be that an 'interested person' can establish a relationship between the document and the accounts to be audited by reference to extraneous material. The connection is only made by the document [the statement of accounts]. The question is whether the contract and the invoices are documents relating to the accounts to be audited. In the case of the invoices, it is going to be an easier exercise because they will yield figures shown in the accounts to be audited, but in the case of the contract you do not get the figures to be audited. What you get is a legal basis on which those sums are calculated.

[Rix LJ: The [Veolia] invoices and contract must be items in the accounts. As you generalise the accounts into the format of the statement of accounts, which are very generalised with a few headings, the items are nevertheless still there. They should be there, so why don't they still relate to the accounts?]

There is a degree of removal between the individual items which inform the figures and those figures themselves. There is a greater distance between the documents and the statement of accounts. Secondly, in relation to the invoices, I acknowledge it is easier to show a connection than with the contract itself. It is more difficult to show that the contract is a document relating to the statement of accounts.

The way to do it is to identify the line in the accounts. Let's say it cost £10 million to collect waste, and say it was £6 million 10 years ago, or [an interested person] could look at another authority, [the interested person] could say to the auditor that the council is not achieving economy.

[Jackson LJ: The other way is to look at the pricing mechanism in the contract. He [the interested person] could say that the mechanism is not

acceptable, but he will not know that unless he sees that document.]

[Rix LJ: He wouldn't know. Take education. There would be a line in the statement of accounts for £600 million. How can you get to grips with the costs of school books provided under a contract? Never mind pricing mechanisms, it won't tell you how much you are paying for school books. It would not tell you what you are paying for waste management. That must be a legitimate requirement. The invoices must depend on the contract. How much about the contract do you need to know, if you are interested to know how much has been paid and why it has been paid?]

The only question is whether there is a misapplication of the pricing mechanism. I have accepted these invoices may be falling into the category of accounts to be audited, but it is a step too far to establish a connection between the accounts to be audited and the contract. The invoices will show whether the council is achieving economy and efficiency.

[Rix: Supposing you have a case of fraud and the fraud is achieved through a sham contract. Once you get the contract you realise it is all a subterfuge to cover an illicit payment. You need to see the contract.]

That is why the auditor needs the contract, in order to quiz the council and the contractor. The issue here is the competing interest of Veolia and the interest of the person interested in raising a point under section 5.1.e. The local government elector can look at previous years' or see if there is a discrepancy. That is sufficient, because we have an independent auditor who is required to secure an objective. That is enough of a 'stretch' for the phrase 'relating to' the accounts to be audited.

In the accounts to be audited there is no direct reference to the waste contract or to any of the schedules or to any amounts paid to Veolia in relation to the contract. How close a connection is required by the phrase 'relating to'? Mr Justice Cranston describes 'relating to' to be flexible in its meaning. We don't take issue with that and the real question here is: If the phrase should be made to stretch, by what principles should you determine the extent to which it should be stretched?

What I say it does not do is to give full effect to an interpretation which displaces a recognised legal right [commercial confidentiality], to one which respects that right, and that is the issue before the parties here. We say that the interpretation to be preferred is one that respects a well recognised legal right, not one that destroys that right.

[Mr Coppel referred to Hoffman LJ and Hobson LJ speeches in *Morgan* where the House of Lords held that tax officials could not use statutory powers to compel parties to disclose information protected by legal professional privilege.]

[Jackson LJ: The principle of [the need to protect] legal professional privilege is much more powerful than [the principle of protecting] commercial confidentiality.]

You see in the Freedom of Information Act and in the Environmental Information Regulations that there is protection for legal professional privilege.

[Rix LJ: You are entitled to say that commercial confidentiality is well recognised and is frequently protected in English and European law, but that legal professional privilege can only be lost or be surrendered in very special circumstances, whereas confidential information can more frequently be overturned under a balancing exercise between public and private interests. There are trade secrets, not necessarily commercial, and there are technical secrets which are at the essence of a company's ability to function.]

In this case, Veolia has a detailed financial model that sets out its know-how in its sphere. There isn't much of a trade secret as far as picking up rubbish in the street is concerned but how it is pricing up the recycling work or adjusting its prices, this is at the heart of Veolia's know-how and that is why it is so anxious for this information not to be disclosed.

The principle is that anyone doing business with a council will want to be very sure that, when they provide confidential information to a public authority, that confidentiality is maintained.

Jackson LJ: Sums under a PFI depend on the contract and how it has operated. Surely you need to see the pricing mechanism to work out what has happened?]

No My Lord, you see the efficiency by seeing the sums and the purpose provided by the service.

[Rix LJ: It depends what you put through but does it make much difference if the contract says £100,000 is payable each quarter, or £10 for each tonne of waste?]

It is the invoice that supplies the information. The purpose of enabling the local government elector to inspect the accounts is that he can say to the auditor, that the council is paying too much or more than a neighbouring authority. But the inspection is not there to drill down into the minutiae. It is the independent auditor who can look at that. It is not for the local government elector to supervise what the auditor is doing. The elector is not there to duplicate the work of the auditor.

[Rix LJ: We are not getting to the meat of this. If an invoice is not informative, it might just have a bottom line figure, you will need the contract to know what is going on. Your argument is that we need to be cautious because there is a problem with confidential information but you are not getting to the meat of it. When the court has to conduct a balancing exercise, or a reading down exercise, there are three ways you can read down the primary authority with confidential information in mind. One is to say that the statute only gives a limited right of access to certain documents. One way is to say that you can have documents but you should be concerned about how much confidential information you give away. It may be that the statute allows for redaction because the auditor can see the documents and can determine how far to dig, given that the auditor has obligations of confidentiality. Another way is to say you may inspect the documents but only for the purpose envisaged by the Act, to inspect and to object to the accounts.]

What we say is that the documents [in dispute] can't be said to be relating to accounts to be audited because you cannot find in the statement of accounts the amounts that have been paid [to Veolia]. Section 15 [rights of inspection] are not concerned with economy or effectiveness, and there are other statutory provisions which ensure best value.

[Etherton LJ: Are you saying that the ratepayer has nothing to do with the requirements [of the audit process] to achieve efficiency and economy?]

The ratepayer does have a role in section 5.1.e. but it is not a roving enquiry into the efficiency of the local authority, otherwise that would be a process that would never end. If Mr Downen wants to raise an issue under section 5.1.e. then he can make an objection [to the accounts]. The auditor must consider any objection but that is as far as it goes. The auditor is not concerned with issues such as: The council has entered into a bad contract. Mr Downen is seeking to go beyond section 15.

[In 2007, a statutory instrument amended section 15.3 to enable a local authority to redact personal information relating to third parties from inspected accounts, subject to the consent of the auditor.]

My learned friends make a lot out of section 15.3, that this was the chance for the legislature to look at what the interested person could inspect, and that Parliament decided not to apply an exemption for commercially confidential information. The short answer is that the provision was amended in 2007 and appears to have motivated by a concern that not to do so would offend the Directive relating to the processing of personal information.

The third issue is: What is the legal effect of section 15.1 on commercially confidential information? Does it destroy all confidential information? Mr Downen submits that any person can use the information for any purpose. The alternative is that confidential information is preserved. All section 15.1 does is give a right to deploy it for the purposes of the 1998 Act.

Veolia prefers that section 15.1 lacks a sufficient clear intention to displace the protection afforded to commercially confidential information by the law, so that the right of access given by section 15.1 does not extend to such information.

[End of Day 1 submissions].