



**THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)**

**UPPER TRIBUNAL CASE NO: UA-2021-000413-GIA
[2023] UKUT 92 (AAC)**

Canal and River Trust v Information Commissioner and Wolfe

Decided following an oral hearing on 28 March 2023

Representatives

Canal and River Trust	Tom Hickman KC
Information Commissioner	David Gregory of counsel
David Wolfe	Spoke on his own behalf

DECISION OF UPPER TRIBUNAL JUDGE JACOBS

On appeal from the First-tier Tribunal (General Regulatory Chamber)

Reference: EA/2019/0204
Decision dates: 12 February 2021 and 7 September 2021

As the decision of the First-tier Tribunal involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 and the decision is RE-MADE.

The decision is: the Canal and River Trust was not a public authority under the Freedom of Information Act 2000 in respect of the information requested by Mr Wolfe.

REASONS FOR DECISION

Abbreviations

The 2012 Order	British Waterways Board (Transfer of Functions) Order 2012 (SI No 1659)
The 2012 Scheme	British Waterways Board Transfer Scheme 2012
CRT	Canal and River Trust
FOIA	Freedom of Information Act 2000

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PBA	Public Bodies Act 2011
TA1947	Transport Act 1947
TA1962	Transport Act 1962
TA1968	Transport Act 1968

A. The issue and how it arose

1. FOIA provides for information that is held by a public authority to be disclosed on request. Under Schedule 1 to FOIA, CRT is a public authority but only ‘in respect of information held by it relating to functions exercisable by it by virtue of the British Waterways Board (Transfer of Functions) Order 2012’.

2. On 25 June 2018, Mr Wolfe made a request to CRT for information relating to its review of mooring agreements on a particular stretch of canal. He was particularly interested in a proposed increase in mooring charges. I have to decide whether the information that he requested was held by CRT as a public authority under FOIA. CRT argued that the information it held related to a right or power exercised by it as a landowner and not to one of the ‘functions exercisable by it by virtue of’ the 2012 Order.

3. The Information Commissioner decided that CRT did not hold the information as a public authority. The First-tier Tribunal made two decisions. On 12 February 2021, it made a decision that CRT was a public authority in respect of the information requested. I have decided that it was not and set aside that decision. On 7 September 2021, the tribunal decided how the exemptions applied. That decision can no longer stand following my decision on the public authority issue. I have set it aside as well. Just for completeness, before me the Information Commissioner opposed CRT’s appeal and supported Mr Wolfe.

B. Interpreting legislation

4. The issue I have to decide is one of statutory interpretation. The Supreme Court explained the correct approach to statutory interpretation in *R (O) v Secretary of State for the Home Department* [2022] UKSC 3, [2023] AC 255:

29. ... Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained.

...

30. External aids to interpretation therefore must play a secondary role. Explanatory notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. ... But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity. ...

5. Lord Bridge’s speech in *Woodling v Secretary of State for Social Services* [1984] 1 WLR 348 provides a compact example of how the process works, especially the

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balance between analysing individual words and phrases and interpreting them in their context. The House of Lords had to interpret this statutory provision:

A person ... is so severely disabled physically or mentally that, by day, he requires from another person ... frequent attention throughout the day in connection with his bodily functions.

Lord Bridge said at 352:

The language of the section should, I think, be considered as a whole, and such consideration will, I submit, be more likely to reveal the intention than an attempt to analyse each word or phrase separately.

He then went on to comment on three parts of the provision separately. In doing so, he treated 'attention ... in connection with his bodily functions' as a whole but within the wider context.

C. The creation of CRT

6. Canals were created by private enterprise supported by statute. They were nationalised under TA1947 by being transferred to the British Transport Commission. Under TA1962, they were transferred from the Commission to the British Waterways Board.

7. In 2012, there was a further transfer, this time to CRT. CRT is registered as a charity and operates as a company limited by guarantee. The change was effected under PBA.

PBA – relevant provisions

8. Section 5(1)(b) provides for transfers of functions:

5 Power to modify or transfer functions

(1) A Minister may by order—

...

(b) transfer a function of such a person to an eligible person.

Section 6 provides for consequential provisions:

6 Consequential provision etc

(1) An order under sections 1 to 5 may make consequential, supplementary, incidental or transitional provision, or savings.

(2) Where an order under section 1, 2 or 5(1)(b) transfers functions, the power in subsection (1) includes power to make consequential or supplementary provision—

(a) to modify functions of the transferor or transferee;

(b) to modify the constitutional or funding arrangements of the transferor or transferee.

Section 23 provides for transfers of property, rights and liabilities:

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23 Transfer schemes

(1) A scheme for the transfer of property, rights and liabilities (a ‘transfer scheme’) may be made by—

(a) a Minister, in connection with an order under sections 1 to 5; ...

Section 35(2) authorises amendments to other legislation:

35 Orders: supplementary

...

(2) The provision which may be made by an order under this Act, other than an order under sections 26 to 29, may be made by repealing, revoking or amending an enactment (whenever passed or made).

The transfer to CRT

9. The transfer to CRT was effected by:

The 2012 Order transferred functions to CRT;

The 2012 Scheme transferred property, rights and liabilities;

A trust settlement between the Secretary of State and CRT; and

A funding grant of at least £39,000,000 a year.

The distinction between functions and property, rights and liabilities reflects the same distinction in sections 31(5) and 32 of TA1962.

D. The 2012 Order

10. This was made under sections 5(1), 6(1)-(3) and 35(2) of PBA.

11. Article 2 provides for the transfer of functions to CRT:

2 Transfer of statutory functions

(1) On the transfer date, the functions exercisable by the British Waterways Board—

(a) under or by virtue of the enactments listed in Schedule 1 (enactments conferring functions transferred by article 2), and

(b) under or by virtue of any local Act,

are transferred, so far as exercisable in relation to England and Wales, to Canal & River Trust.

(2) Schedule 2 (which makes consequential provision to the 1962 Act and the 1968 Act) has effect.

12. There is no definition of ‘function’ in either PBA or in the 2012 Order, although it was defined in section 92(1) of TA1962 to include ‘powers, duties and obligations’. The Order identifies those functions that are transferred by reference to Schedule 1. It contains a list of 21 statutes and two pieces of subordinate legislation.

13. The only function that any party has identified as relevant to this case is contained in section 43(3) of TA1962. As amended, it now provides:

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43 Charges and facilities: general provisions.

- (1) Subject to this Act,—
- (a) all charges schemes under Part V of the Transport Act 1947, shall cease to have effect, and
- (b) no local enactment passed or made with respect to any particular undertaking so far as it limits the discretion of the persons carrying on that undertaking as to the charges to be made by them—
- (i) for the carriage of passengers or goods,
- (ii) for the use of any railway, or of any inland waterway by any ship or boat,
- (iii) for services and facilities connected with the carriage of passengers or goods, or with the use of any railway, or of any inland waterway by any ship or boat, or
- (iv) for services and facilities in or connected with a harbour,
- (whether by specifying, or providing for specifying, the charges to be made, or fixing, or providing for fixing, maximum charges, or otherwise) shall apply to the charges of the British Waterways Board or Canal & River Trust...
- (2) Paragraph (b) of the foregoing subsection shall not be read as exempting the British Waterways Board or Canal & River Trust ... from any local enactment so far as it expressly provides for freedom from charges or otherwise prohibits the making of any charge.
- (3) Subject to this Act and to any such enactment as is mentioned in the last foregoing subsection, the British Waterways Board and Canal & River Trust ... shall each have power to demand, take and recover or waive such charges for their services and facilities, and to make the use of those services and facilities subject to such terms and conditions, as they think fit.

I have quoted section 43(1) and (2). They are part of the context for interpreting section 43(3), which is subject to them.

14. I have not been provided with a full list of the functions transferred to CRT. It is, though, necessary to have some idea of their variety in order to understand what is covered by the expression 'functions exercisable'. Mr Hickman referred me to section 105 of TA1968:

105 Maintenance of ... waterways

- (1) With a view to securing the general availability of the commercial and cruising waterways for public use, it shall be the duty of the Waterways Board and of Canal & River Trust, in relation to the waterways comprised in their respective undertakings, subject to the provisions of this section—
- (a) to maintain the commercial waterways in a suitable condition for use by commercial freight-carrying vessels; and
- (b) to maintain the cruising waterways in a suitable condition for use by cruising craft, that is to say, vessels constructed or adapted for the carriage of passengers and driven by mechanical power.

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This section imposes a general duty on CRT to maintain the waterways. That might be called part of CRT's core function. At the opposite extreme is section 15 of TA1962:

15 Compulsory purchase of land

...

(2A) The Minister may authorise Canal & River Trust to purchase compulsorily any land in England or Wales which it requires for the purposes of any of its functions under an enactment and the Acquisition of Land Act 1981 shall apply as if Canal & River Trust were a local authority within the meaning of that Act.

This section confers a power for CRT to acquire land, but only with Ministerial authority, which can be given only in so far as CRT requires the land for the purposes of one of its functions. It is, therefore, conditional on authority being given and subordinate to the CRT's other functions.

E. The First-tier Tribunal's analysis of Schedule 1 to FOIA

15. This is how the Tribunal Judge summarised the tribunal's reasoning on the application of Schedule 1 to FOIA:

43. I agree with the Commissioner and the Appellant [Mr Wolfe] that the key to the case at this stage is the word 'exercisable' as set out in Schedule 1 FOIA. In my view the ordinary meaning of the word 'exercisable' in the context of FOIA means that FOIA applies to the CRT in relation to functions which it could exercise by virtue of the 2012 Order, whether it is exercising them or not.

44. The concentration on the words 'by virtue of' to attempt to avoid this conclusion does not, in my view, assist the CRT. The CRT seeks to argue that this means in effect that a function must actually be exercised under the 2012 Order to be 'by virtue of' the 2012 Order. But there is nothing in the words 'by virtue of' which can so circumscribe the word 'exercisable' so that applies to functions which are actually 'exercised'. In my view the phrase 'exercisable by virtue of' needs to be read as a whole and the plain meaning is that it refers to functions that the CRT could exercise because they have been transferred by the 2012 Order.

45. I do not see how identifying that charges are in fact levied under the Transfer Scheme assists the CRT. Again, there is nothing in the wording in FOIA which identifies that functions actually exercised pursuant to the Transfer Scheme are otherwise exempt from FOIA even where it is accepted that such functions could also be exercised pursuant to the 2012 Order.

46. I also think there is considerable force in the Appellant's submission that the Transfer Scheme does not transfer any functions at all and that any private 'functions' that are then exercised by the CRT are subsidiary to the transfer of property under the Transfer Scheme. In my view that submission is correct and militates against an interpretation of FOIA which somehow carves out an exemption from FOIA on the basis that the Transfer Scheme is engaged.

47. It seems to me that reference to the Explanatory Document throws little light on the issue, although it is relied upon by both the CRT and the Commissioner. It is true that the Document expresses an intention to limit the application of FOIA to the CRT. But there is nothing in the Document which shows an intention to limit

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the ordinary meaning of the word ‘exercisable’, or to indicate that functions which could be exercised by virtue of the 2012 Order (but are, in fact, not so exercised) were to be excluded.

48. I can see there is some force in the CRT’s reliance on the reference to a ‘level playing field’ in the Document, and that other bodies can levy mooring charges without being subject to the requirements of FOIA. But it seems to me that the Document (and FOIA) sought to address the ‘level playing field’ point by a recognition that FOIA should only apply to those functions which are exercisable by virtue of the 2012 Order. But that of course does not take the matter any further forward: if Parliament had wanted to restrict the applicability of FOIA further it could have used the word ‘exercised’ rather than ‘exercisable’, but it did not do so.

49. Finally, in my view the *BBC* case does not assist the CRT and supports the Commissioner’s analysis. In that case the point was that even a minor purpose relating to journalism brought the BBC within the relevant exemption as set out in FOIA. In this case there is, in fact, a positive definition which includes information within FOIA even where the information relates to functions which only ‘could’ be exercised under specific provisions.

F. Analysis – Article 2 of the 2012 Order

16. The most appropriate meaning is that ‘functions exercisable’ in the 2012 Order refer to functions possessed by the Board under the legislation identified in the Order. Or to put it differently, ‘exercisable’ means conferred on the Board under the legislation identified. These are not glosses on the statutory language, nor do they involve substituting words for those of the Order. They are merely attempts to capture the meaning of the language of Article 2 in different words.

17. The 2012 Order was made under PBA. Its main purpose was to ‘transfer functions exercisable by the British Waterways Board’ to CRT. Whatever ‘exercisable’ means, it must take that meaning from the moment before the transfer took place. The First-tier Tribunal was wrong to say that “the key to the case at this stage is the word ‘exercisable’ as set out in Schedule 1 FOIA.” The correct starting point was the language of the 2012 Order, which identified functions ‘exercisable’ by the Board immediately before the transfer.

18. The functions transferred to CRT were identified as those ‘functions exercisable by the British Waterways Board ... under or by virtue of’ specified legislation. That expression had to have a meaning that was appropriate to cover all the functions in the specified legislation. The tribunal interpreted ‘exercisable’ to mean ‘functions it [CRT] could exercise ... whether it is exercising them or not’. That was wrong. It was a distinction that made no sense before the transfer, when it could not arise. It was a distinction that had no meaning until the functions of the Board were divided and transferred separately from the property, rights and liabilities; the former were transferred by the 2012 Order and latter by the 2012 Scheme. Until then and as a statutory corporation, the Board had only the powers and duties conferred on it by legislation. It was only after the transfer that CRT acquired rights as a landlord under the 2012 Scheme.

19. Another flaw in the First-tier Tribunal’s reasoning was to focus on the function in section 43(3) of TA1962. The tribunal’s interpretation made sense for that type of

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provision. But it was not appropriate for a duty, like the duty to maintain the waterways under 105 of TA1968. An interpretation that involves a potential choice is not apt when the function involves a duty that allows no element of choice. And it is difficult to understand how it could ever apply to a conditional function, like the compulsory purchase power under section 15 of TA1962, in which consent from a third party is a condition precedent to any choice.

20. The First-tier Tribunal decided that it was sufficient that the mooring charges could have been imposed under section 43(3). That is not how I read the subsection. The natural meaning of the language used suggests compulsion. Mr Wolfe emphasised the words 'make the use of those words services and facilities subject to such terms and conditions, as they think fit.' CRT could, he argued, have imposed its charges and other terms under those words. The important word there is 'make', which in the context conveys the notion of imposition rather than agreement. That is not language that is used in relation to contractual arrangements, even when in reality one of the parties often sets the terms on which an agreement will be made.

21. Mr Wolfe referred me to the decision of the Supreme Court in the linked cases of *Cavendish Square Holding BV v Makdessi and ParkingEye Ltd v Beavis* [2015] UKSC 67, [2016] AC 1172. The ParkingEye case involved free parking for 2 hours with a charge of £85 thereafter. Lords Neuberger, Sumption and Carnwath treated this as a contract:

94. It was common ground before the Court of Appeal, and is common ground in this court, that on the facts which we have just summarised there was a contract between Mr Beavis and ParkingEye. Mr Beavis had a contractual licence to park his car in the retail park on the terms of the notice posted at the entrance, which he accepted by entering the site. Those terms were that he would stay for not more than two hours, that he would park only within the marked bays, that he would not park in bays reserved for blue badge holders, and that on breach of any of those terms he would pay £85. Moore-Bick LJ in the Court of Appeal was inclined to doubt this analysis, and at one stage so were we. But, on reflection, we think that it is correct.

So did Lord Mance at [188]-[190]. I was surprised by that, but accept the possibility as a basis for analysis. It shows that it is possible to analyse something that looks like an imposed charge or terms as involving a contract. But that is not the same as treating something that looks like a contract as involving an imposed charge or terms. That eliminates the possibility that CRT was acting at the same time both under contract and under section 43(3).

22. There was a discussion about whether and when section 43(3) is ever used by CRT. Some examples were suggested. I am not concerned by the possibility that it might not be used at all; that does not render the provision redundant or my interpretation of the 2012 Order absurd. It contains a power that was transferred to CRT to use as and when required. It does not matter that at a particular time it may be little used or not used at all. The important point is that it was not used by CRT in respect of the mooring charges.

23. I have not mentioned the amendment to FOIA as part of the context. I have not overlooked it and deal with it later. It would be possible to construct an argument that the transfer was worded as it was in anticipation of that amendment, which has to be

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taken into account as part of the context for interpreting Article 2(1). I have rejected that possibility. It would be surprising if the appropriate interpretation of a principal provision was determined by an amendment to one particular piece of legislation. There is nothing to suggest that the amendment should be given such prominence in interpretation.

24. I was referred to the explanatory memoranda for both the 2012 Order and the 2012 Scheme. Following the approach set out in *R (O)* at [30], I do not need to refer to those memoranda as they cannot displace the meaning conveyed by the words of the legislation clear and unambiguous and which does not produce absurdity. In particular, I do not need to discuss the expression 'level playing field'. Inevitable, the parties did not agree on what this vague expression meant or its significance for this case. Any dispute about those matters is resolved by this decision.

G. Analysis - the amendment to FOIA

25. Before the 2012 Order, the British Waterways Board had been a public authority listed in Schedule 1 to FOIA. The 2012 Order amended the entry in Schedule 1 to FOIA to include the reference to CRT that I quoted in paragraph 1. This amendment was effected by paragraph 15(2)(b) of Schedule 3 to the 2012 Order. It was 'consequential, supplementary, [or] incidental' provision under section 6(1) of PBA operating in conjunction with section 35(2).

26. The language of the entry in FOIA adopts the language of Article 2 of the 2012 Order. Not only that, Schedule 1 expressly refers to the Order. The most natural and appropriate interpretation is that the FOIA entry should have the same meaning as Article 2.

27. Mr Hickman referred to the procedure under section 7(5) of FOIA. This provides for a public authority to be added to Schedule 1 but with limited application. I do not need to refer to that power in my analysis. The amendment relating to CRT was made under the authority of sections 6(1) and 35(2) of PBA. It was not made under section 7 of FOIA and did not need to be; that section does not provide an exhaustive power to amend FOIA.

**Authorised for issue
on 12 April 2023**

**Edward Jacobs
Upper Tribunal Judge**