[2023] AACR 3

Information Commissioner v Dr Gary Spiers and Garstang Medical Practice
[2022] UKUT 93 (AAC)

Judge Wright
24 March 2022 **UA-2021-001702-GIA**

Information Rights; Tribunal Procedure and Practice; Rule 7A of General Regulatory Chamber Rules

A judge of the First-tier Tribunal upheld a registrar's decision to join the Information Commissioner to proceedings between the two respondents to this appeal. The ruling was made in proceedings before the First-tier Tribunal in which Dr Spiers was applying for an offence of contempt to be certified by the First-tier Tribunal under rule 7A of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 ("the GRC Rules") against the Garstang Medical Practice.

The reasons the judge gave for joining the Information Commissioner to the proceedings were: the Information Commissioner was under a duty to promote the following of good practice by public authorities and, in particular, to perform his functions under section 47 of the Freedom of Information Act 2000 ("FOIA") so as to promote the observance by public authorities of the requirements of FOIA, and as such was to be seen as the 'regulator' of public authorities within the context of FOIA; the Information Commissioner was not being required to make any investigation of his own, or on behalf of the First-tier Tribunal, about Garstang's compliance with the decision notice which had been substituted by the First-tier Tribunal; the contempt application was one which could result in very serious consequences and in considering that application the First-tier Tribunal would want to consider the interests of Dr Spiers, Garstang and the other users of the First-tier Tribunal for whom maintaining the authority of the First-tier Tribunal was of importance, and it was therefore "in the interests of justice that the First-tier Tribunal had the benefit of submissions from the Information Commissioner given his role in upholding information rights in the public interest; as a party to the original proceedings that resulted in the decision of the First-tier Tribunal which Dr Spiers was alleging needed to be enforced, the Information Commissioner would be well placed to assist the First-tier Tribunal should matters arise in that regard and to direct that tribunal's attention to any matters that would be relevant to the exercise of its discretion under section 61(4) of FOIA; Dr Spiers's contempt application potentially raised novel and complex issues relating to the exercise of that discretion, which it would be of assistance to the First-tier Tribunal to have the submissions of the Information Commissioner as the independent regulator of information rights; and although the Information Commissioner would incur costs in becoming a respondent to the contempt application, those costs to the public purse did not outweigh the benefit to the First-tier Tribunal's ability to deal with the application fairly and justly which would result from having the Information Commissioner's input on it. The decision also required the Information Commissioner to make submissions on the rule 7A contempt proceedings within a certain period of time.

The Information Commissioner appealed to the Upper Tribunal.

Held, allowing the appeal, that:

1. reading the word "proceedings" in the context of rule 7A of the GRC Rules and those rules more generally, including the definition of "party" in rule 1(3), the Information Commissioner was not a party to the rule 7A certification for contempt application brought by Dr Spiers and needed to be joined to those proceedings: paragraphs [25]-[28];

2. a consideration of the case law in *ML v Tonbridge Grammar School* [2012] UKUT 283 (AAC), *Roger Bell v Information Commissioner and Ministry of Justice* [2012] UKUT 433 (AAC), *CM v HMRC* [2014] UKUT 272 (AAC), and *Re Pablo Star Ltd* [2017] EWCA Civ 1768, showed that requiring a person or body to be joined to proceedings without their consent ought only to arise where their interests or rights may be affected by the decision in issue: paragraphs [31]-[40];

3. in joining the Information Commissioner to the rule 7A contempt application, without the consent of the Information Commissioner and against his express and, per *Bell*, clearly fully informed wishes, the First-tier Tribunal gave no consideration to whether the Information Commissioner's rights or interests may have been affected by the proceedings, which failure was a clear and material error of law. Had that issue been addressed, there was no proper basis on which it could have been concluded that the Information Commissioner's interests or rights were affected by Dr Spiers's contempt proceedings. There was no dispute on the rule 7A application involving the Information Commissioner and there was no need for the Information Commissioner to be bound by the First-tier Tribunal's decision whether to certify Garstang for contempt: paragraph [41];

4. it is questionable whether the general nature of the duties under section 47 of FOIA required the Information Commissioner to be the regulator of information rights to enforce compliance by public authorities at all stages, given *Information Commissioner v Moss and Royal Borough of Kingston Upon Thames* [2020] UKUT 174 (AAC); [2021] AACR 7, but in any event the general nature of those duties leaves it for the Information Commissioner to decide what action he should take in any given situation to promote observance of FOIA: paragraphs [43]-[44].

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Rupert Paines of counsel appeared for the appellant

Neither respondent appeared at the hearing, but Dr Spiers filed written submissions for the hearing

DECISION

The decision of the Upper Tribunal is to allow the appeal. The ruling given by the First-tier Tribunal on 8 November 2021 under case number EJ/2021/0001 was made in error of law. Under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and give the ruling the First-tier Tribunal should have given. That ruling is not to join the Information Commissioner to the proceedings before the First-tier Tribunal under reference EJ/2021/0001.

REASONS FOR DECISION

Introduction

1. I apologise to the parties for the time it has taken me to make my decision on this appeal. This was caused, albeit only in part, by a period of ill-health on my part.

2. The appeal is brought by the Information Commissioner against a ruling made by the First-tier Tribunal on 8 February 2021 ("the tribunal"). The ruling was made in proceedings before the First-tier Tribunal in which Dr Spiers was applying for an offence of contempt to be certified by the First-tier Tribunal under rule 7A of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 ("the GRC Rules"). Dr Spiers alleges that the Garstang Medical Practice has failed to comply with the Decision Notice substituted by the First-tier Tribunal in case EA/2019/0137.

3. This decision of the Upper Tribunal is not about whether the Garstang Medical Practice ("Garstang") has failed to comply with the substituted decision notice. Nor is it about

whether Garstang should or should not be certified for contempt under rule 7A. Those matters remain to be addressed by the First-tier Tribunal.

4. What this decision concerns is whether it was lawful for the First-tier Tribunal (a) to join, under rule 9 of the GRC Rules, the Information Commissioner to the rule 7A 'certification for contempt' proceedings (assuming the Information Commissioner was not already a party to those proceedings), and (b) require the Information Commissioner to make submissions in those proceedings including submissions on "whether or not, and on what grounds, the Information Commissioner supports the application to certify an offence of contempt as regards Garstang Medical Practice".

Relevant background

5. It was a registrar of the First-tier Tribunal acting under delegated authority who made the first decision joining the Information Commissioner to the rule 7A certification for contempt proceedings between the two respondents to this Upper Tribunal appeal. That decision was made on 6 January 2021. The reasons given by the registrar for so doing were (in summary): the Information Commissioner is responsible for regulating the Freedom of Information Act 2000 ("FOIA"); Dr Spiers is alleging an offence by one of the public authorities which the Information Commissioner regulates under FOIA; and, as 'regulator', the First-tier Tribunal considered that that the Information Commissioner should participate in the rule 7A contempt proceedings and give appropriate input about whether a body he regulates should, or should not, be certified for a breach of the legislation for which he is the allocated regulator. The decision also required the Information Commissioner to make submissions on the rule 7A contempt proceedings within a certain period of time. Those submissions were to include submissions on the matters set out at the end of paragraph four above.

6. It is worth noting at this stage, as important background, the decision of the Upper Tribunal in *Information Commissioner v Moss and the Royal Borough of Kingston upon Thames* [2020] UKUT 174 (AAC). With his customary economy and conciseness, Upper Tribunal Judge Jacobs summarised the issue on that appeal and his decision on it as follows:

> "The issue is this: when the First-tier Tribunal on appeal substitutes a decision notice for that of the Information Commissioner, who is responsible for (a) deciding whether the public authority has complied with that notice and (b) taking action to enforce it? The Commissioner says it is the tribunal. The tribunal says it is the Commissioner. I have decided that it is the tribunal."

7. Judge Jacobs recognised that, for it to be *only* the First-tier Tribunal which is responsible for (a) deciding whether a public authority has complied with a substituted decision notice, and (b) taking action to enforce any non-compliance, he had to be satisfied both that the First-tier Tribunal has the power to enforce its decisions and that the Information Commissioner does not have that enforcement power. He was satisfied of both stages in this argument. The First-tier Tribunal's power was in section 61 of FOIA. By contrast, although the Information Commissioner has power to enforce his own notices under sections 52 and 54 of FOIA, the exercise of that power would be wholly outwith the control of the First-tier Tribunal and thus contrary to the fundamental constitutional principles identified by the Supreme Court in *R (Evans) v Attorney General* [2015] UKSC 21; [2015] 1 AC 1787. The First-tier Tribunal's substituted decision notice was binding on the public authority in that *Moss* case and, therefore, Judge Jacobs concluded (at paragraph [33]):

> "it would not be permissible for the Information Commissioner to use her powers of enforcement as that would, in the context of FOIA, be a breach of the fundamental constitutional principles set out by Lord Neuberger by allowing the Commissioner to control the enforcement of a tribunal's decision. That control would be subject to judicial review, but that would still leave open the possibility that the Commissioner might exercise her discretion against enforcement in a manner and on grounds that were beyond the control of review".

8. The decision of Judge Jacobs in *Information Commissioner v Moss* is an important starting point for consideration of the arguments on this appeal as it locates the fundamental responsibility for enforcing First-tier Tribunal decisions with the First- tier Tribunal and not with the Information Commissioner.

9. The Information Commissioner asked for the registrar's case management decision to be reconsidered by a judge: per rule 4(3) of the GRC Rules. This led to the ruling which is the subject of this appeal. The reasons for the tribunal's ruling upholding the substance of the registrar's decision were as follows. First, the duties of the Information Commissioner include a duty to promote the following of good practice by public authorities and, in particular, to perform his functions under section 47 of FOIA so as to promote the observance by public authorities of the requirements of FOIA. To that extent, it was not inaccurate to describe the Information Commissioner as the 'regulator' of public authorities within the context of FOIA. Second, the Information Commissioner was not being required by the First-tier Tribunal to make any investigation of his own, or on behalf of the First-tier Tribunal, about whether Garstang had failed to comply with the decision notice substituted by the First-tier Tribunal. Third, in regard to the overriding objective in rule 2 of the GRC Rules and its role on determining whether to join the Information Commissioner to the proceedings under rule 9(1) of the GRC Rules, the contempt application was one which could result in very serious consequences. In considering the contempt application the First-tier Tribunal would want to consider, amongst all the relevant factors, the interests of Dr Spiers, Garstang and the other users of the First-tier Tribunal for whom maintaining the authority of the First-tier Tribunal is of importance. It was therefore "in the interests of justice and appropriate that the [First-tier Tribunal] has the benefit of submissions from the Information Commissioner given [his] role in upholding information rights in the public interest". Fourth, as a party to the original proceedings that resulted in the decision of the First-tier Tribunal which Dr Spiers was alleging needed to be enforced, the Information Commissioner would be well placed to assist the First-tier Tribunal should matters arise in that regard and to direct that tribunal's attention to any matters that would be relevant to the exercise of its discretion under section 61(4) of FOIA. Following the decision in *Information Commissioner v Moss*, Dr Spiers's contempt application potentially raised novel and complex issues relating to the exercise of that discretion, "upon which it would be of assistance to the [First-tier Tribunal] to have the submissions of the Information Commissioner as the independent regulator of information rights". Fifth, although the Information Commissioner would incur costs in becoming a respondent to the contempt application, those costs to the public purse did not outweigh the benefit to the First-tier Tribunal's ability to deal with the application fairly and justly which would result from having the Information Commissioner's input on it.

10. The First-tier Tribunal refused the Information Commissioner permission to appeal against its ruling joining the Information Commissioner to Dr Spiers's contempt application. However, Upper Tribunal Judge Wikeley gave the Information Commissioner permission to appeal on 15 April 2021 and suspended the effect of the First-tier Tribunal's ruling joining the

Information Commissioner to the proceedings. Judge Wikeley characterised the primary ground of appeal as being that the Information Commissioner cannot be joined to the proceedings against his wishes. Judge Wikeley also raised a logically prior point about whether Dr Spiers's application that Garstang be certified for an offence of contempt to the Upper Tribunal was a separate set of proceeding from the proceedings before the First-tier Tribunal that had resulted in the substituted decision notice, or was just a continuation, or further part, of those proceedings. If it was the latter then no question of joining the Information Commissioner to the proceedings arose as he was already a party in those proceedings.

11. Before turning to the address the arguments on the appeal, I should observe that this is one of eight cases, of which I am aware, where the First-tier Tribunal joined the Information Commissioner as a respondent to contempt applications made to the First-tier Tribunal in respect of alleged failures by a party to meet obligations imposed on it by earlier decisions of the First-tier Tribunal. In each of those cases the Information Commissioner has applied to the Upper Tribunal for permission to appeal against the rulings of the First-tier Tribunal joining him to those contempt proceedings. I have stayed determining those permission to appeal applications until this appeal had been decided. I also, however, refused to suspend the effect of the First-tier Tribunal's 'joinder' rulings in those other seven cases. As I understand it, some at least of those other contempt applications have been determined by the First-tier Tribunal without the input of the Information Commissioner and without the First-tier Tribunal seeking to enforce its joinder ruling so as to obtain submissions on the contempt applications from the Information Commissioner.

Relevant Legislation

12. The relevant legislation falls within a relatively short compass.

13. Section 1 of FOIA provides the general right to access information held by public authorities. It is subject to exceptions but provides the important starting point.

> **"General right of access to information held by public authorities.**
>
> (1) Any person making a request for information to a public authority is entitled—
>
> (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
>
> (b) if that is the case, to have that information communicated to him."

14. Section 58 of FOIA sets out the powers of the First-tier Tribunal on an appeal brought against an Information Commissioner's decision notice. It provides as follows:

> "**Determination of appeals.**
>
> 58.-(1) If on an appeal under section 57 the Tribunal considers—
>
> (a) that the notice against which the appeal is brought is not in accordance with the law, or
>
> (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,
>
> the Tribunal shall allow the appeal or substitute such other notice as could

> have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.
>
> (2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based."

15. I interpolate at this stage that the First-tier Tribunal, in a decision dated 3 November 2020, had allowed Dr Spiers' appeal[1] and substituted a decision notice in the following terms under section 58(1) of FOIA (in place of the Information Commissioner's Decision Notice):

> "The Garstang Medical Practice (the "Practice") was not entitled to rely on the exemption in section 14 of the Freedom of Information Act 2000 in order to withhold the information requested by the Appellant. The Practice is to provide the information to the appellant by 14 December 2020 unless the Practice wishes to rely on any alternative permitted exemptions to disclosure."

16. Section 61 of FOIA provides the basis of the Upper Tribunal's contempt jurisdiction in FOIA cases and for the First-tier Tribunal to first certify an offence of contempt to the Upper Tribunal. Insofar as is material, section 61 is as follows:

> "**Appeal proceedings**
>
> 61.(1) Tribunal Procedure Rules may make provision for regulating the exercise of rights of appeal conferred by sections 57(1) and (2) and 60(1) and (4).
>
> (2) In relation to appeals under those provisions, Tribunal Procedure Rules may make provision about—
>
> (a) securing the production of material used for the processing of personal data, and
>
> (b) the inspection, examination, operation and testing of equipment or material used in connection with the processing of personal data.
>
> (3) Subsection (4) applies where—
>
> (a) a person does something, or fails to do something, in relation to proceedings before the First-tier Tribunal on an appeal under those provisions, and
>
> (b) if those proceedings were proceedings before a court having power to commit for contempt, the act or omission would constitute contempt of court [2]

[1] The appeal proceedings brought by Dr Spiers to the First-tier Tribunal concerned information he had sought from Garstang for copies of General Medical Services contracts. Put very broadly, and I need do no more than this for the purposes of this decision, it is Dr Spiers's case in his rule 7A certification for contempt application that Garstang has failed to comply with the terms of this substituted Decision Notice. Garstang was not a party in those appeal proceedings.

[2] My decision on this appeal by the Information Commissioner to the Upper Tribunal is not concerned with the merits of Dr Spiers's certification application under rule 7A. However, the terms of section 61(3)(b) of FOIA and its correlate in rule 7A(3)(e) of the GRC Rules may give rise to an arguable point about whether a finding of contempt or punishment for contempt could be made in the absence of any 'penal notice' attached to the First-tier Tribunal's substituted Decision Notice: see, by analogy, *MD v SSWP* (Enforcement Reference [2010] UKUT 202 (AAC); [2011] AACR 5.

(4) The First-tier Tribunal may certify the offence to the Upper Tribunal.

(5) Where an offence is certified under subsection (4), the Upper Tribunal may—

(a) inquire into the matter, and

(b) deal with the person charged with the offence in any manner in which it could deal with the person if the offence had been committed in relation to the Upper Tribunal.

(6) Before exercising the power under subsection (5)(b), the Upper Tribunal must—

(a) hear any witness who may be produced against or on behalf of the person charged with the offence, and

(b) hear any statement that may be offered in defence."

17. Rule 1(3) of the GRC Rules deal with who is a "party" and provides relevantly as follows:

""appellant" means a person who—

(a) commences Tribunal proceedings, whether by making an appeal, an application, a claim, a complaint, a reference or otherwise; or

(b) is added or substituted as an appellant under rule 9 (addition, substitution and removal of parties);

"certification case" means a case in which the Tribunal may certify an offence to the Upper Tribunal under section 61(4) of the Freedom of Information Act 2000 or section 202(2) of the Data Protection Act 2018;

"party" means—

(a) a person who is an appellant or a respondent;

(b) if the proceedings have been concluded, a person who was an appellant or a respondent when the Tribunal finally disposed of all issues in the proceedings;

"respondent" means—
(a) in proceedings appealing against or challenging a decision, direction or order, the person who made the decision, direction or order appealed against or challenged;

(b) a person against whom an appellant otherwise brings proceedings; or

(c) a person added or substituted as a respondent under rule 9 (addition, substitution and removal of parties)"

18. Rule 7A of the GRC Rules is in the following terms:

"7A.-(1) This rule applies to certification cases.

(2) An application for the Tribunal to certify an offence to the Upper Tribunal must be made in writing and must be sent or delivered to the Tribunal so that it is received no later than 28 days after the relevant act or omission (as the case may be) first occurs.

(3) The application must include—

(a) details of the proceedings giving rise to the application;

(b) details of the act or omission (as the case may be) relied on;

(c) if the act or omission (as the case may be) arises following, and in relation to, a decision of the Tribunal, a copy of any written record of that decision;

(d) if the act or omission (as the case may be) arises following, and in relation to, an order of the Tribunal under section 166(2) of the Data Protection Act 2018 (orders to progress complaints), a copy of the order;

(e) the grounds relied on in contending that if the proceedings in question were proceedings before a court having power to commit for contempt, the act or omission (as the case may be) would constitute contempt of court;

(f) a statement as to whether the applicant would be content for the case to be dealt with without a hearing if the Tribunal considers it appropriate, and

(g) any further information or documents required by a practice direction….

(6) A decision disposing of the application will be treated by the Tribunal as a decision which finally disposes of all issues in the proceedings comprising the certification case and rule 38 (decisions) will apply."

19. Rule 9 of the GRC Rules provides the First-tier Tribunal with the power to join a person or body to the proceedings before it. Insofar as is relevant, it provides as follows:

"**Addition, substitution and removal of parties**

9.—(1) The Tribunal may give a direction adding, substituting or removing a party as an appellant or a respondent.

(2) If the Tribunal gives a direction under paragraph (1) it may give such consequential directions as it considers appropriate.

(3) Any person who is not a party may apply to the Tribunal to be added or substituted as a party.

(4) If a person who is entitled to be a party to proceedings by virtue of another enactment applies to be added as a party, and any conditions applicable to that entitlement have been satisfied, the Tribunal must give a

direction adding that person as a respondent or, if appropriate, as an appellant."

20. Lastly, rule 38 of the GRC Rules deals with decisions and reasons being given for them.

"38.—(1) The Tribunal may give a decision orally at a hearing.

(2) Subject to rule 14(10) (prevention of disclosure or publication of documents and information), the Tribunal must provide to each party as soon as reasonably practicable after making a decision (other than a decision under Part 4) which finally disposes of all issues in the proceedings or of a preliminary issue dealt with following a direction under rule 5(3)(e)—

(a) a decision notice stating the Tribunal's decision;

(b) written reasons for the decision; and

(c) notification of any right of appeal against the decision and the time within which, and manner in which, such right of appeal may be exercised. (3) The Tribunal may provide written reasons for any decision to which paragraph (2) does not apply."

Discussion and Conclusion

Was the Information Commissioner already a party?

21. I address first Judge Wikeley's logically anterior point about whether Dr Spiers's application for the First-tier Tribunal to certify an offence of contempt to the Upper Tribunal under rule 7A of the GRC Rules was just a further stage in the proceedings that had led the First-tier Tribunal to substitute a decision notice in its decision of 3 November 2020. I am persuaded by the Information Commissioner's argument that Dr Spiers's contempt application to the First-tier Tribunal under rule 7A was a separate set of proceedings. The answer to this question is obviously an issue of legal substance and does not turn on the administrative act of the First-tier Tribunal giving the rule 7A application a different case reference number to the case reference for the appeal from which it arises.

22. In raising this possible argument Judge Wikeley drew attention to the wording in section 61(3) of FOIA and its reference to a person doing or failing to do something in relation to "appeal" proceedings before the First-tier Tribunal. That wording and the similar wording in rule 7A(3)(a) of "the proceedings giving rise to the application" can only refer to the original proceedings before the First-tier Tribunal that led to the substituted Decision Notice. This wording may therefore, it was suggested, tie the contempt application into, and as part of, the same proceedings as those original appeal proceedings. Judge Wikeley also referred to the case of *Razzaq v Charity Commission for England and Wales* [2016] UKUT 546 (TCC) and suggested it may arguably sit inconsistently with the rule 7A application by Dr Spiers being viewed as a new set of proceedings.

23. I am not persuaded that the wording of section 61(3) of FOIA or rule 7A(3)(a) of the GRC Rules provides any necessary support for a rule 7A application being part of the same

appeal proceedings. The wording of those statutory provisions, in my judgement, reads just as easily as simply describing the set of proceedings in which there has been an alleged act of commission or omission which forms the basis of certification application under rule 7A, and is neutral about whether that application is a step in the same (appeal) proceedings.

24. Nor do I consider that *Razzaq* provides any material support for the rule 7A contempt application necessarily being part of the same proceedings. As will be apparent from what I say further below, whether the rule 7A application is part of the earlier appeal proceedings to which it relates depends on construing rule 7A in the context of the GRC Rules in which it sits. *Razzaq* was not a rule 7A case and so does not assist with the issue of statutory construction I am required to confront in relation to the first issue on this appeal. The issue in *Razzaq* was whether people who had not been parties to the appeal proceedings before the First-tier Tribunal could be joined to the appeal proceedings under rule 9 of the GRC Rules after the appeal had been dismissed, for the purpose of them seeking permission from the First-tier Tribunal to appeal its decision. The Upper Tribunal decided in *Razzaq* that rule 9 of the GRC Rules did enable the First-tier Tribunal to join a person as a party to the proceedings after the appeal to the First-tier Tribunal had been dismissed but where permission to appeal could be sought from the First-tier Tribunal. Little or nothing in *Razzaq* deals on a reasoned basis with whether the appeal proceedings were separate from, or the same as, the application to seek permission to appeal from the First-tier Tribunal against its decision on the appeal. If anything, paragraph [12] in *Razzaq* – with its language of the First-tier Tribunal retaining jurisdiction to consider a joinder application following "the conclusion of the substantive proceedings" (my underlining) might support an argument that the two stages the Upper Tribunal was addressing in *Razzaq* were considered to be separate proceedings. A more direct and thus stronger Upper Tribunal authority that the permission to appeal stage before the First-tier-Tribunal is a separate set of proceedings from the appeal proceedings before that tribunal is *SL v Secretary of State for Work and Pensions and KL- D* [2014] UKUT 128 (AAC) (at paragraph [21]).

25. As a matter of general starting point, and shorn of any consideration of the GRC Rules, the word "proceedings" can be used without any particular precision (see, for example, *Quazi v Quazi* [1979] 3 All ER 424 at 429f). It can be used to refer to the court action as a whole or the "day to day steps in the action": *Smalley v Robey and Company* [1962] 1 QB 577 at 581. So the word 'proceedings' on its own does not assist in answering whether Dr Spiers's rule 7A contempt application to the First-tier Tribunal was a separate set of proceedings from the appeal proceedings. In those circumstances, it is necessary to answer the question arising under this first issue by construing the word 'proceedings' in the context of rule 7A of the GRC Rules and those rules more generally, as the court did in respect of the rules in issue before it in *Smalley*. So construed, I am satisfied that a contempt application under rule 7A constitutes separate 'proceedings' from the appeal proceedings to which it relates. Three inter-related considerations are relevant here.

26. First, by the time of the rule 7A contempt application the First-tier Tribunal will already have made a decision, per rule 38(2) of the GRC Rules, "finally disposing of all the issues in the [appeal] proceedings", under sections 57 and 58 of FOIA.

27. Second, perhaps most crucially, but also emphasising the first consideration, rule 7A(6) of the GRC Rules expressly provides that "[a] decision disposing of the [rule 7A] application will be treated by the Tribunal as a decision which finally disposes of all issues **in the proceedings comprising the certification case** and rule 38 (decisions) will apply" (both forms of emphasis are mine). Bearing in mind the definition of "certification case" in rule

1(3) of the GRC Rules, this wording makes plain, in my judgement, that the rule 7A contempt proceedings (ie the 'certification case') comprise a separate set of proceeding. The rule 7A application is the proceedings comprising the certification case. Thus, read together, rules 7A and 38 draw a clear distinction between the appeal proceedings and the certification for contempt proceedings.

28. Third, a consideration of who is or was a "party" under rule 1(3) of the GRC Rules shows the Information Commissioner was not a "respondent" to the rule 7A contempt application at the point that application was made. He therefore could only have been made a respondent to that application under rule 9 of the GRC Rules. This is for two reasons. First, because although the Information Commissioner was a "party" to the appeal proceedings, those proceedings had concluded as the First-tier Tribunal had, per rule 1(3) of the GRC Rules, "finally disposed of all the issues in the [appeal] proceedings". Taken on its own I recognise that this provision may simply be said to beg the very question in issue: namely, what is constituted in the proceedings and have all the issues in the proceedings been finally disposed of (and those issues may be said to include compliance with the substituted Decision Notice). However, and given that may be said to be so, the definition of "respondent" in rule 1(3) of the GRC Rules points strongly in favour of the rule 7A contempt application being separate proceedings. Ignoring a person or body that is added as a respondent under rule 9 (as the argument at this stage is concerned with whether there is any scope for doing so if the Information Commissioner is already a party to the proceedings), the first definition of "respondent" in rule 1(3) does not apply to the Information Commissioner because Dr Spiers's rule 7A contempt application was not an appeal or challenge by him against any decision (or direction or order) made by the Information Commissioner. Nor, however, does the second definition of "respondent" in rule 1(3) apply to the Information Commissioner because, at least on the facts of this case, the rule 7A contempt application was not being brought by Dr Spiers against the Information Commissioner. Therefore, nothing in the definition of "respondent" in rule 1(3) of the GRC Rules shows the Information Commissioner to be a respondent to Dr Spiers's rule 7A contempt application.

Could the Information Commissioner be required to be a party?

29. The First-tier Tribunal was therefore correct in considering that the Information Commissioner was not a party to the rule 7A certification for contempt application brought by Dr Spiers and needed to be joined to those proceedings to be made a party. It was wrong in law, however, in my judgement, to join the Information Commissioner to those proceedings where the Information Commissioner had not asked, or consented, to be joined to the proceedings and where his interests or rights were not affected by the proceedings. And that is the case even though the decision or ruling under challenge on this appeal was a case management decision. In such circumstances, such a decision should generally only be set aside if it is "plainly wrong in the sense of being outside the generous ambit where reasonable decision makers may disagree" (per *Global Torch Limited v Apex Global Management Limited (No2)* [2014] 1 WLR 4495 at paragraph [13] and see also *Ashmore v Corporation of Lloyd's* [1992] 1 WLR 446 at 454) or it is quite clear that the judge misdirected herself in law (*AH and others (Sudan) v Secretary of State for the Home Department* 2007] UKHL 49; 2008] 1 A. C. 67 at the paragraph; [30]). I am satisfied on either basis that the decision to join the Information Commissioner to Dr Spiers's rule 7A contempt application against Garstang was plainly wrong in law.

30. There are four decisions of the Upper Tribunal which have addressed the circumstances in which a person or body may be joined to proceedings in which they are not a party.

31. In *ML v Tonbridge Grammar School* [2012] UKUT 283 (AAC) Upper Tribunal Judge Rowland stated, at paragraph [21], that the equivalent of rule 9(1) of the GRC Rules:

> "gives the First-tier Tribunal a very broad power to add persons or bodies as respondents to proceedings, although a person or body should not, in my judgment, be added as a respondent without their consent unless the law requires it".

32. In the later decision of *CM v HMRC* [2014] UKUT 272 (AAC) Upper Tribunal Judge Mark commented on what Judge Rowland had said in paragraph 12 of *ML* as follows:

> "11. I do not take that as meaning that there must be some express provision of law that demands that they be added. There is nothing in the rules to that effect. It is sufficient that the addition of a respondent is reasonably required to deal with the case fairly and justly, which in this case includes taking into account the position of HMRC and the need for a single composite decision. The overriding objective to deal with cases fairly and justly must be given effect to by the tribunal when it exercises any power under the 2008 Rules (see rule 2(3)(a)), and this includes when exercising its discretion under rule 9(2). In many cases, such as that being dealt with by Judge Rowland, where it may be helpful to add another respondent, it may still be possible to deal with a case fairly and justly without doing so, and in those cases I would accept that the consent of the respondent should be obtained before being added."

33. In the earlier decision of *Roger Bell v Information Commissioner and Ministry of Justice* [2012] UKUT 433 (AAC), Upper Tribunal Judge Jacobs said the following about whether Mr Bell ought to have been joined as a party to the Ministry of Justice's appeal to the First-tier Tribunal against a Decision Notice of the Information Commissioner that had, in part, been in Mr Bell's favour. (Mr Bell had also brought his own appeal against the Decision Notice because he considered it did not go far enough. His appeal, however, had been struck out on jurisdictional grounds. The 'potential error of law' discussed by Judge Jacobs below was not a material error of law because, as Judge Jacobs found, Mr Bell had lost interest in receiving the information he had requested):

> "19…….In this case, the First-tier Tribunal appears to have overlooked that Mr Bell had an interest in preserving the Commissioner's decision in his favour, not least because the MoJ had also lodged an appeal. I regard that as sufficient to justify Mr Bell being involved in some way when the Commissioner's decision favourable to him was the subject of an appeal. It troubles me that the judge showed no concern for the potential prejudice caused to Mr Bell by striking out his appeal without at least offering him the chance to become a party to the MoJ's appeal. I regard that as a potential error of law.
>
> 20. I accept, as counsel pointed out, that Mr Bell did not ever say that he wished to preserve the favourable decision that he had received from the Commissioner or ask to be made a party. However, those who represent themselves, however intelligent they may be, regularly fail to understand what may be in their own best interests. It is part of the role of the tribunal, embodied in the overriding objective in rule 2, to protect them. At least, that requires the tribunal to ensure that the decisions they make are properly informed. In some cases, it may require the tribunal to act contrary to the person's wishes. What is required depends on the circumstances of the case." (my

underlining added for emphasis)

34. I agree with Judge Mark in *CM* that the decision in *ML* should not be read as laying down a rule that a person can only be joined to proceedings without their consent if some specific piece of law requires them to be joined. That is not, for example the approach taken in *Bell*.

35. But what is then said in *CM* must be understood in the context of the case before Judge Mark. It was concerned with competing claims for child tax credit, in relation to a legal test of which parent had the responsibility for the child, where no decision that could bind both parents was made by HMRC. It was in that context that Judge Mark spoke in *CM* about the "need for a single composite decision" and the possibility of the First-tier Tribunal of the Social Entitlement Chamber, in seeking to meet that need, joining the second parent to an appeal brought by the first parent against an HMRC decision that that first parent did not have responsibility for the child. That would include joining the second parent even if he or she did not consent, as was contemplated in *Bell*. See to similar effect (on joinder) *GC v HMRC* (CHB) [2018] UKUT 223 (AAC).

36. Although the language in *CM* of "the addition of a respondent is reasonably required to deal with the case fairly and justly" (mirroring the language of the "overriding objective" in rule 2(1) of the GRC Rules) appears broad, in my judgement what all the above cases demonstrate, and the principle which underlies all of them, is that requiring a person or body to be joined to proceedings without their consent ought only to arise where their interests or rights may be affected by the decision in issue. That was the reason for the local authorities being made respondents in the First-tier Tribunal proceedings in the *ML* case. It was also why it was considered the First-tier Tribunal had erred in law (although not materially) in *Bell*, because it had failed to recognise that Mr Bell had an interest in having the Information Commissioner's decision notice being upheld. The parent who was not the appellant in the *CM* case may not have had an immediate or direct interest in a formal legal sense in the other parent's appeal, but their rights may well have been affected had the other parent's appeal succeeded as it would probably have led to HMRC removing the non-appellant parent's award of child tax credit.

37. The principle I have drawn from the above Upper Tribunal decisions is consistent with, and supported by, the Court of Appeal's decision in *Re Pablo Star Ltd* [2017] EWCA Civ 1768; [2018] 1 WLR 738. The Court of Appeal's decided, in paragraph [60], that:

> "In considering whether or not it is desirable to add a new party pursuant to CPR r 19.2(2) two lodestars are the policy objective of <u>enabling parties to be heard if their rights may be affected by a decision in the case</u> and the overriding objective in CPR Pt 1." (my underlining added for emphasis)

38. Although the Court of Appeal in *Pablo Star* was dealing with the Civil Procedure Rules governing civil proceedings in the courts, the relevant rule of which I set out below, I can see no good reason for the *ratio* from *Pablo Star* set out above not applying equally to joining a person or body to proceedings under rule 9 of the GRC Rules. Notwithstanding the potentially wider catchment of either limb of CPR rule 19.2(2), the Court of Appeal made it clear that a critical consideration was whether the rights of another person or body may be affected by the decision. That consideration seems to me to carry even greater force in a context where the other party or person does not wish to be joined to the proceedings, bearing in mind the consequences (e.g. costs) of being made a party and the potential

sanctions that could apply to that joined party if they do not then participate in the proceedings.

39. Rule 19.2(2) of the CPR before the Court of Appeal in *Pablo Star* provided that:

> "The court may order a person to be added as a new party if
>
> > (a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or
> >
> > (b) there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue."

40. Moreover, although Judge Wikeley when giving permission to appeal in this case raised a question about whether the point about joining a party had been argued out in the *ML* case, the point was in issue *Pablo Star*. The Court of Appeal described the appeal as raising "a point of practice as to the circumstances in which it is permissible and, where permissible, appropriate to join a third party to proceedings for restoration of a dissolved company to the Register of Companies". The *ratio* of the decision in *Pablo Star* is thus on point and powerful authority that a person or body should only be joined to proceedings without their consent if their interests or rights are affected by the decision.

41. The First-tier Tribunal in joining the Information Commissioner to Dr Spier's rule 7A contempt application, without the consent of the Information Commissioner and against his express (and, per *Bell*, clearly fully informed) wishes, gave no consideration to whether the Information Commissioner's rights or interests may have been affected by the proceedings. That failure was a clear and material error of law. Had the First-tier Tribunal addressed that issue, I can find no proper basis on which it could have concluded that the Information Commissioner's interests or rights were affected by Dr Spiers's contempt proceedings. The allegation in those proceedings was not directed against the Information Commissioner. It was, and is, Dr Spier's case that the Garstang Medical Practice has failed to meet the requirements placed on it by the First-tier Tribunal's substituted decision notice. As *Information Commissioner v Moss* establishes, it is for the First-tier Tribunal to decide this dispute between Dr Spiers and Garstang. There is no dispute on the rule 7A application involving the Information Commissioner. And there cannot be any need (per *CM* and *GC*) for the Information Commissioner to be bound by the First-tier Tribunal's decision whether to certify, or not certify, Garstang for contempt.

42. Nor can I identify any other basis on which the rule 7A proceedings may affect the interests of the Information Commissioner. The issues the First-tier Tribunal required the Information Commissioner to assist it with did not engage his interests. They were really about the Information Commissioner adopting an *amicus* role and assisting the First-tier Tribunal with its approach to Dr Spier's contempt application against Garstang and its decision whether to certify for contempt. None of that affects the interests of the Information Commissioner.

43. Further, and despite Dr Spiers's argument suggesting otherwise, I do not consider that the Information Commissioner's "general functions" in section 47 of FOIA – "to promote the following of good practice by public authorities and …..to promote the observance by public authorities of the requirements of [FOIA and the codes of practice made under it]" – mean that his interests were affected by the rule 7A contempt application.

The section 47 duties might just possibly be distilled into what the First-tier Tribunal described as the Information Commissioner's role in "upholding information rights in the public interest" or in him being the "independent regulator of information rights". However, it is at the very least questionable whether the wide duty of promoting good practice and observance of FOIA amounts in itself to the Information Commissioner being the regulator of information rights, in the sense of him enforcing compliance by public authorities at all stages. Moreover, it is established, following *Information Commissioner v Moss*, that it is for the First-tier Tribunal to enforce compliance with its substituted Decision Notices **and** that it would be contrary to constitutional principle for the Information Commissioner to be engaged in that enforcement. I therefore find it difficult to see how the general duties in section 47 of FOIA can found an argument that the Information Commissioner's interests in enforcement, or rights in respect of enforcement, under FOIA generally, but which cannot involve enforcement of First-tier Tribunal decisions, provides the basis for his interests being affected by the enforcement of the First-tier Tribunal's decision. This would seem to elide the constitutional distinction drawn in *Information Commissioner v Moss* and effectively bring the Information Commissioner into the enforcing of First-tier Tribunal decisions by the back door.

44. Further, I accept the Information Commissioner's argument that the general nature of his duties under section 47 of FOIA is such that it leaves it to the Information Commissioner *what* action he should take in any given situation to promote observance of FOIA. Nothing in these proceedings suggests he has breached that duty in terms of Garstang's alleged failure to abide by the First-tier Tribunal's substituted Decision Notice. Moreover, for the reasons already given it is for the First-tier Tribunal, not the Information Commissioner, to determine that issue and take enforcement action, and any enforcement duty that may arise under section 47 has no place in that First-tier Tribunal area of decision making.

45. I wish to stress that all of the above concerns a situation where the First-tier Tribunal required the Information Commissioner to be party in Dr Spiers's rule 7A contempt application against the Garstang Medical Practice. I t would arguably have been open to the First-tier Tribunal, and for some of the reasons it gave, to have invited the Information Commissioner to become a party and assist the First-tier Tribunal on matters of general approach[3] to this new area of its jurisdiction, though possibly that would have been needed only in one or two test cases. That may arguably placed the Information Commissioner in an appropriate *amicus* role and accorded with his general duties under section 47 of FOIA. But that is not what occurred here.

46. For the reasons given above, the appeal succeeds and I remake the First- tier Tribunal's "joinder" decision/ruling in the terms set out above.

[3] Had such a situation arisen, it would not, I would have thought, have been appropriate for the Information Commissioner in an *amicus* role to express any view on whether the rule 7A contempt application should or should not succeed. The role of an *amicus* is to represent no-one.