[2018] UKFTT 0478 (TC)

TC06656

Appeal number: TC/2012/04698

PROCEDURE – application by third party for access to statement of case and skeletons after decision issued – granted

FIRST-TIER TRIBUNAL
TAX CHAMBER

BETWEEN

HASTINGS INSURANCE SERVICES LIMITED

Appellant

- and -

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE & CUSTOMS

Respondents

- and -

KPMG LLP

Third Party

TRIBUNAL: JUDGE GREG SINFIELD

Application dealt with in chambers at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 09 August 2018 on written submissions

DECISION

Introduction

1. KPMG LLP ('KPMG') applied to the First-tier Tribunal for copies of HMRC's statement of case and both parties' skeleton arguments in this appeal. The appeal was heard in public over eight days in November 2016 and the Tribunal's decision was issued on 19 January 2018 with neutral citation [2018] UK FTT 27 (TC). KPMG was not a party to the appeal nor did it represent any party. KPMG seeks the documents requested in order better to understand HMRC's arguments in the appeal which, KPMG state, are relevant to their arguments in a different case in which they are instructed. In support of their application for access to the documents, KPMG rely on my decision in the Upper Tribunal in *Aria Technology Limited v HMRC* [2018] UKUT 111 (TC) ('*Aria Technology*').

2. The Tribunal wrote to the parties in the appeal to give them the opportunity to make representations. Both the Appellant and the Respondents ('HMRC') made submissions objecting to the documents requested being made available to KPMG. Having considered the objections, which I discuss below, I have decided that KMPG should be allowed to inspect the documents.

Power of the Tribunal to allow access to documents relating to proceedings

3. In the civil courts, Rule 5.4C of the Civil Procedure Rules ('CPR') provides that a person who is not a party to civil proceedings may obtain certain documents from the records of the court as of right and other documents with the permission of the court. In this Tribunal, the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ('FTT Rules') make no provision for granting a non-party access to documents. Accordingly, the First-tier Tribunal can only allow a non-party to have access to documents if it has an inherent jurisdiction to do so.

4. The inherent jurisdiction of a court or tribunal to allow a member of the public to have access to and inspect documents relating to proceedings in that court or tribunal is founded on the fundamental constitutional principle of open justice. Although it is a principle of common law, the principle of open justice applies to the tribunals, which were created by statute, as much as to the courts. This is clear from *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2012] EWCA Civ 420 ('*Guardian News*'), in which Toulson LJ, with whom the other members of the Court of Appeal agreed, stated at [69] and [70]:

> "69. The open justice principle is a constitutional principle to be found not in a written text but in the common law. It is for the courts to determine its requirements, subject to any statutory provision. It follows that the courts have an inherent jurisdiction to determine how the principle should be applied.
>
> 70. Broadly speaking, the requirements of open justice apply to all tribunals exercising the judicial power of the state. The fact that Magistrates Courts were created by an Act of Parliament is neither here nor there …"

5. In *Aria Technology Limited v HMRC* [2018] UKUT 111 (TC) ('*Aria Technology*'), I held that it was clear from paragraphs [69] and [70] of *Guardian News* that the Upper

Tribunal has an inherent jurisdiction to determine how the principle of open justice should be applied and to grant a non-party access to documents relating to proceedings in accordance with that principle. *Aria Technology* concerned an application to the Upper Tribunal but it is clear that, as a tribunal exercising the judicial power of the state, the same requirements of open justice apply to the First-tier Tribunal. It is for the First-tier Tribunal to determine how the principle of open justice should be applied, subject to any legislative provisions and the supervision of the Upper Tribunal and appellate courts. Accordingly, the First-tier Tribunal has an inherent jurisdiction to determine how the principle of open justice should be applied in relation to any proceedings in the Tribunal.

6. The FTT Rules do not expressly allow the First-tier Tribunal to allow a non-party to inspect or have access to documents relating to proceedings. There are, however, two rules that may be relevant to the question of whether the Tribunal has an inherent jurisdiction to allow non-parties to have access to documents relating to proceedings. The first is rule 14 of the FTT Rules which is headed "Use of documents and information" and provides:

> "The Tribunal may make an order prohibiting the disclosure or publication of -
>
> (a) specified documents or information relating to the proceedings; or
>
> (b) any matter likely to lead members of the public to identify any person whom the Tribunal considers should not be identified."

7. Nothing in rule 14 suggests the existence of a general rule that documents or information relating to proceedings cannot be disclosed. On the contrary, I consider that rule 14 indicates that, absent an order prohibiting disclosure and subject to any other statutory restriction, documents or information relating to proceedings may be disclosed on a limited basis or published more widely . Further, disclosure of documents or information relating to the proceedings may be made by the Tribunal, the parties to the proceedings or third parties, such as journalists.

8. Rule 32(1) of the FTT Rules is also relevant because it provides that, subject to limited exceptions that are not relevant in this case, all hearings must be held in public. In my opinion, that rule shows that the principle of open justice is engaged in the First-tier Tribunal as it is in other courts.

9. In *Aria Technology*, I observed that CPR 5.4C provides that a non-party can, with permission, obtain access to any documents that have been filed and are in the court records and the right to access to such documents is not limited to documents that have been referred to in open court nor is there any requirement that a hearing must have taken place. Although CPR5.4C does not apply to the First-tier Tribunal, I do not consider that means that the Tribunal is unable to allow non-parties access to such documents. Paragraph 1 of CPR5.4C states that the general rule is that a person who is not a party to proceedings may obtain from the court records a copy of the statement of case and any judgment or order, but not any documents filed with or attached to the statement of case. CPR5.4C(1) is, therefore, not the source of the right of a non-party to obtain the statement of case but merely sets out how that right should be exercised. The right to obtain a copy of the statement of case or judgment is an expression of the principle of open justice which applies to the First-tier Tribunal as it does to the courts. I consider that the First-tier Tribunal has an inherent jurisdiction to allow a non-party to inspect documents in its records that are the equivalent of the documents in CPR5.4C(1). In my view, such

documents would include the notice of appeal, the statement of case by the respondent(s) and any reply, any list of documents (but not the documents themselves unless disclosable on other grounds – see below) and any judgment or order given or made in public, subject to the right of a party or a person identified in the document concerned to ask for a non-disclosure order under rule 14 of the FTT Rules.

10. The extent of the inherent jurisdiction has recently been considered by the Court of Appeal in *Cape Intermediate Holdings Ltd v Dring (Asbestos Victims Support Group)* [2018] EWCA Civ 1795 ('*Cape*'). The case concerned an application by a pressure group involved in lobbying and promoting asbestos knowledge and safety, for access to all documents used or disclosed in the trial of claims relating to damages for mesothelioma victims. Having carried out a comprehensive review of the authorities on inherent jurisdiction, Hamblen LJ, with whom the other members of the Court agreed, summarised the position at [112] as follows:

> "(1) There is no inherent jurisdiction to allow non-parties inspection of:
>
> (i) trial bundles;
>
> (ii) documents which have referred to in skeleton arguments/written submissions, witness statements, experts' reports or in open court simply on the basis that they have been so referred to.
>
> (2) There is inherent jurisdiction to allow non-parties inspection of:
>
> (i) Witness statements of witnesses, including experts, whose evidence stands as evidence in chief and which would have been available for inspection during the course of the trial under CPR 32.13.
>
> (ii) Documents in relation to which confidentiality has been lost under CPR 31.22 and which are read out in open court; which the judge is invited to read in open court; which the judge is specifically invited to read outside court, or which it is clear or stated that the judge has read.
>
> (iii) Skeleton arguments/written submissions or similar advocate's documents read by the court provided that there is an effective public hearing in which the documents are deployed.
>
> (iv) Any specific document or documents which it is necessary for a non-party to inspect in order to meet the principle of open justice."

11. It is clear from [92] of *Cape* that the "similar advocate's documents" referred to in [112(2)(iii)], includes chronologies, dramatis personae, reading lists and written closing submissions and any other documents provided to the court to assist its understanding of a case.

12. At [129], Hamblen LJ stated that the factors relevant to the exercise of the inherent discretion to provide access to documents are likely to include the same factors as under CPR5.4C, namely:

> "(1) The extent to which the open justice principle is engaged;
>
> (2) Whether the documents are sought in the interests of open justice;
>
> (3) Whether there is a legitimate interest in seeking copies of the documents and, if so, whether that is a public or private interest.
>
> (4) The reasons for seeking to preserve confidentiality.

(5) The harm, if any, which may be caused by access to the documents to the legitimate interests of other parties."

I consider that "copies of" in (3) above must be read as "access to" or "inspection of" as, unlike CPR5.4, the principle of open justice does not appear to require the provision of copies, although that does not mean that the court or tribunal is prohibited from doing so.

Discussion

13. HMRC objects to KPMG's request "on the basis of taxpayer confidentiality, pursuant to s18 Commissioners for Revenue and Customs Act 2005, and that the First-tier Tribunal Rules make no provision for disclosure or inspection of a party's skeleton argument by a third party." HMRC's first objection is misconceived and can be dealt with quite shortly. Section 18 of the 2005 Act provides that HMRC officials may not disclose information held by HMRC subject to various exceptions. KPMG has not sought disclosure from HMRC but from the Tribunal. Section 18 places no restriction on disclosure by the Tribunal. In any event, section 18(2)(e) provides that the prohibition on disclosure by HMRC officials does not apply to disclosure pursuant to an order of the court (which includes the First-tier Tribunal).

14. HMRC's second objection is that the First-tier Tribunal has no power to allow a non-party to have access to and inspect documents because the FTT Rules do not contain any provision equivalent to CPR 5.4. I have already dealt with this objection in my discussion of the inherent jurisdiction of the Tribunal. The fact that the FTT Rules do not specifically provide that the First-tier Tribunal may allow a non-party to inspect documents does not mean that the Tribunal may not do so if, as I have concluded for reasons set out above, it has an inherent jurisdiction to allow such access.

15. Assuming (but without conceding the point) that the Tribunal has an inherent jurisdiction to allow a non-party to have access to certain documents in the interests of open justice, the Appellant observes that the Tribunal should satisfy itself that KPMG has a legitimate purpose in requesting access to the documents. In my view, the appropriate test is whether the non-party has a legitimate interest in the documents. I consider that the concept of legitimate interest is a broad one and certainly not confined to journalistic purposes. It is clear from [135] and [136] of *Cape* that an entirely private or commercial interest, such as an interest in related litigation, in a document can qualify as a legitimate interest. The public interest of a pressure group involved in lobbying and promoting knowledge about asbestos and its safe use, as in *Cape*, can also qualify as a legitimate interest. KPMG say that they are seeking access to better understand HMRC's arguments in the appeal which are relevant to HMRC's arguments in a different case in which they are instructed. In the light of Hamblen LJ's comments in [135] and [136] of *Cape*, I consider that a legitimate interest does not require a direct personal or professional interest in the outcome of proceedings. In my view, an interest in other related litigation, whether actual or in contemplation, is sufficient. Accordingly, I find that KPMG have a legitimate interest in obtaining access to the documents requested.

16. The Appellant also submits that the underlying purpose of the open justice principle is that, as Colman J stated in *Law Debenture Trust Corp (Channel Islands) Limited v Lexington Insurance Co-and others* [2003] EWHC 2297 at [22(ii)] when summarising the judgment of Potter LJ in *GIO Personal Investment Services Ltd v Liverpool & London* Steamship *P&I Ass. Ltd* [1999] 1 WLR 984, that "justice should be seen to be done by

exposing to public scrutiny not only oral argument upon which judges were invited to arrive at their judgements but documents which provided a substitute mode of submission". The Appellant relies on this statement of principle to support a submission that the parties' skeleton argument should not be provided to KPMG because they did not constitute a substitute mode of submission to their respective counsels' oral submissions on their behalf. The Appellant states that, in its case, this is because its counsel spent the first two days of the hearing delivering his oral opening to the appeal with the first day spent rehearsing the legal background to the appeal and the second day applying the law to the documentary evidence before the Tribunal. The Appellant says that in no sense was the Appellant's skeleton argument a substitute mode of submission. In relation to HMRC's skeleton argument, the Appellant states that the submissions in the skeleton were substantially based on HMRC's expert witness reports and the Appellant successfully applied to have most of those reports excluded from the proceedings with the result that HMRC's counsel largely abandoned the approach set out in HMRC's skeleton argument. On that basis, the Appellant contends that HMRC's skeleton argument cannot be a substitute mode of submission for oral submissions that were made on a different basis.

17. It seems to me that the Appellant is really arguing that its own skeleton argument should not be disclosed because its counsel ignored it in opening and HMRC's skeleton is irrelevant because the arguments in it were largely abandoned by their own counsel. Those submissions miss the point. The skeletons were deployed by the parties at an effective public hearing and read by the tribunal. It is clear from [112(2)(iii)] of Cape, that the Tribunal has an inherent jurisdiction to allow a non-party to have access to such documents. In [129], Hamblen LJ also observed that, where the applicant has a legitimate interest in inspecting the identified documents or class of documents, the court is likely to lean in favour of granting access to documents falling within the categories set out in [112(2)]. There is no suggestion in Hamblen LJ's judgment in *Cape* or in any of the authorities that he refers to that the court's inherent jurisdiction to allow members of the public to have access to skeleton arguments that have been deployed at a hearing and read by the court is restricted to those parts which replicate oral submissions made in open court and which survive the hearing intact. Counsel's submissions often expand on or even differ from the submissions in the skeleton which is to be welcomed as nothing would be served by counsel simply reciting the contents of a skeleton. Skeleton arguments provide an introduction or guide to each party's case which can be extremely helpful to the Tribunal (and the other party) in preparing for the hearing but they are not a substitute for oral submissions. Skeleton arguments often also contain points or arguments that are not developed in oral submissions because they are conceded by the other party or accepted by the Tribunal without needing to be developed. Not to provide access to those parts of the skeleton argument would mean that the member of the public would not have a full and complete understanding of the arguments deployed by that party. It is, in my view, important for a proper understanding of the legal process, consistent with the principle of open justice, that members of the public should understand what submissions were made in the skeleton arguments even if they were modified or withdrawn during the hearing. The point is that they were submissions that were made, however briefly, at some stage of the hearing. It seems to me to be arguable from *Law Debenture Trust* at [28] - [35] and *Cape* at [124] – [126] that if a skeleton argument or part of it is withdrawn before the hearing then that the Tribunal would not have any inherent jurisdiction to disclose the document or part but that does not appear to have happened in this case. Accordingly, I do not accept that the Appellant's submissions on

this point provide any reason not to allow KPMG to have access to the skeleton arguments.

18. The Appellant makes four further submissions. First, the Appellant submits that the Tribunal should not allow KPMG to have access to any part of HMRC's statement of case relating to an appeal under reference TC/2009/10180. That appeal was settled confidentially by agreement between the Appellant and HMRC under section 85 of the Value Added Tax Act 1994. Before it was settled, that appeal had been consolidated with the appeal under reference TC/2012/04698 and a consolidated statement of case was produced by HMRC. The Appellant submits that the statement of case provided to KPMG should be the deconsolidated version used in the appeal under reference TC/2012/04698 as no submissions in relation to the other appeal were made at the hearing. I agree. It is quite clear that the Tribunal does not have any inherent jurisdiction to grant a non-party access to documents relating to an appeal that has settled before it has started (see *Cape* at [125]). That is because, in such circumstances, the principle of open justice is not engaged because there has been no public hearing or determination by the Tribunal. For the same reason, the Appellant submits that paragraphs 4 - 20 of the deconsolidated statement of case should be redacted. I do not accept this submission. Having read the unredacted deconsolidated statement of case, it is clear that the paragraphs were included by way of background and were read by the Tribunal as such. Those paragraphs informed the decision of the Tribunal in the appeal under reference TC/2012/04698 and excluding them from the statement of case would mean any person reading it would not have a complete understanding of HMRC's case.

19. Secondly, the Appellant states that the annexures to HMRC's statement of case should not be provided to KPMG because the case law distinguishes between materials that might be regarded as a mode of submission and exhibits to those materials. The Appellant submits that no reference to the annexures to HMRC's statement of case was made for these purposes at the hearing. The two annexures are copies of the decisions of HMRC which were the subject of the appeals under references TC/2009/10180 and TC/2012/04698. The letters are referred to in HMRC's skeleton which does not quote from them or ask the Tribunal to read them. Further, the decision letters are not mentioned in the Tribunal's decision and there is no indication that the Tribunal had read them (which is not surprising as appeal TC/2009/10180 had been settled and the matters in appeal TC/2012/04698 had moved on between the date of that decision letter and the hearing). It is clear from [112(1)(ii)] of *Cape* that there is no inherent jurisdiction to allow a non-party to inspect the decision letters referred to in skeleton arguments simply on the basis that they have been so referred to.

20. The Appellant also submits that the amount of tax assessed, which is set out in paragraph 6 of HMRC's skeleton argument and in paragraph 16 of the statement of case, should be redacted because there is no reference to the amount in the Tribunal's decision. I can see no reason for redacting the skeleton in this way and reject this submission for the same reasons as I have given in [17] above for allowing access to the skeleton arguments generally. If an appellant is concerned that the amount of an assessment should not become public then the appellant should apply for an order under rule 14 of the FTT Rules prohibiting the disclosure or publication of that information. As far as I am aware, no such order was sought in this case and I cannot see any grounds on which such an order would be made.

21. Finally, the Appellant submits that HMRC's skeleton argument should be redacted to exclude any reference to the parts of HMRC's expert witness reports provided by Mr Kendall that were excluded from the proceedings by the Tribunal following an application by the Appellant. The Appellant submits that to disclose such materials would be inconsistent with the principle of open justice. The Tribunal set out a summary of Mr Kendall's first expert report at [36] of the decision and also described parts of his evidence at [62]. The Tribunal dealt with the Appellant's application to exclude the expert evidence of Mr Kendall at length in [37] – [63]. As I have stated in [17] above, I consider that it is arguable that where a skeleton argument or part of it is withdrawn before the hearing then that the Tribunal would not have any inherent jurisdiction to disclose the document or part but that does not appear to have happened in this case. It appears from the decision that Mr Kendall's evidence was the subject of extensive submissions at the hearing. It is clear from the decision that the Tribunal read both of Mr Kendall's expert reports before deciding to admit only parts of them for the reasons given in the decision. In those circumstances, I cannot see any reason to redact any part of HMRC's skeleton argument that was read by the Tribunal and the subject of submissions at the hearing.

Decision

22. For the reasons given above, I direct that KPMG be allowed to inspect the deconsolidated version of HMRC's statement of case used in the appeal under reference TC/2012/04698 (but without the annexures to it) and both parties' skeleton arguments in the appeal without any redactions.

23. As set out in the final paragraph below, the parties have a right to apply for permission to appeal against this decision. In order to ensure that the right to appeal is not purely academic, I direct that the statement of case and skeleton arguments shall not be provided to KPMG until 60 days after the date of release of this decision.

Right to apply for permission to appeal

24. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with the Tribunal's decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this Decision Notice.

GREG SINFIELD
TRIBUNAL JUDGE

RELEASE DATE: 15 AUGUST 2018