Neutral Citation: [2022] UKFTT 00361 (TC)

Case Number: TC08613

FIRST-TIER TRIBUNAL
TAX CHAMBER

On papers

Appeal reference: TC/2021/03866 and others

Procedure — application by journalist for copies of skeleton arguments and hearing bundle for case management hearing to choose lead appeals

Decided on: 03 October 2022
Judgment date: 04 October 2022

Before

TRIBUNAL JUDGE SINFIELD

Between

BOUNCYLAGOON LIMITED AND OTHER APPELLANTS IN THE VAT UMBRELLA APPEALS

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

and

ANNA MEISEL

Third Party Applicant

Application dealt with on papers in chambers on 3 October 2022, each party having made written submissions

DECISION

INTRODUCTION

1. This decision concerns an application made on 28 September 2022 by Anna Meisel, a journalist with the BBC, for electronic copies of the parties' skeleton arguments and the hearing bundle referred to at a case management hearing earlier that day relating to a number of appeals referred to as the VAT Umbrella litigation.

2. The case management hearing was held on 28 September using the Tribunal's video hearing service. The purpose of the hearing was to select lead cases under rule 18 of the Tribunal Procedure (First Tier Tribunal) (Tax Chamber) Rules 2009 ('the FTT Rules') and give case management directions which will enable them to proceed to a hearing. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public. Ms Meisel applied to attend the hearing remotely.

3. On 29 September, the Tribunal emailed the representatives of the parties, attaching Ms Meisel's application, to ask them to confirm that they had no objection to the Tribunal passing on the skeletons and bundle to the BBC journalist who had attended the hearing. In emails dated 30 September, the Respondents ('HMRC') confirmed that they had no objection to the Tribunal providing the skeletons and bundle to Ms Meisel. The Appellants' representative, Joseph Hage Aaronson LLP ('JHA'), objected to Ms Meisel's application on the following grounds:

(1) the skeleton arguments and the documents contained within the bundle go beyond the detail that was discussed during the hearing; and

(2) Ms Meisel has not provided any reasons for her application, beyond stating that she is a journalist.

4. For the reasons set out below, I have decided that the Tribunal will provide electronic copies of the parties' skeletons to Ms Meisel but not the hearing bundle.

BACKGROUND

5. JHA represent 18,017 Appellants in the VAT Umbrella litigation. Each Appellant has been compulsorily de-registered for VAT by HMRC and some are subject to other decisions by HMRC including removal from the VAT Flat-Rate Scheme, assessments for undeclared VAT and denial of entitlement to make an Employment Allowance deduction under section 4 of the National Insurance Act 2014. HMRC made the decisions because they take the view that:

> "The Appellants in this litigation are participants in an organised and contrived structure with the purpose of defrauding the Revenue by claiming tax benefits which they were not entitled to. These benefits include registration for VAT, the use of the VAT Flat Rate Scheme (FRS), and the use of the Employment Allowance (EA Scheme)."

6. The Appellants dispute this and appeal against HMRC's decisions.

CASE LAW

7. In *Cape Intermediate Holdings Ltd v Dring (for and on behalf of Asbestos Victims Support Groups Forum UK* [2019] UKSC 38 ('*Cape'*), the Supreme Court confirmed that the principle of open justice applies to all courts and tribunals and that all courts and tribunals (including the First-tier Tribunal) "have an inherent jurisdiction to determine what that principle requires in terms of access to documents or other information placed before the court

or tribunal". The Supreme Court also confirmed in *Cape* that the key question is "how that jurisdiction should be exercised in the particular case".

8. In *Cider of Sweden Limited v HMRC* [2022] UKFTT 76 (TC) ('*Cider of Sweden*'), the FTT considered an application by a third party for disclosure to them of various documents (pleadings) before there had been any hearing. At [39] of *Cider of Sweden*, Judge Poole set out the principles derived from the Supreme Court's decision in *Cape* (which in the passage below is referred to as '*Dring SC*'*)*:

> "(1) 'Open justice' is a constitutional principle which applies to all courts and tribunals exercising the judicial power of the state (*Dring* SC at [41]). This clearly includes the FTT.
>
> (2) All courts and tribunals (including the FTT) have inherent jurisdiction to determine what that principle requires in terms of access to documents or other information placed before them (ibid).
>
> (3) The extent of any access permitted by procedure rules is not determinative (save to the extent they contain a valid prohibition) (ibid). (In passing, I would observe that this affords a further rebuttal of the argument that the FTT should effectively just follow CPR 5.4C(1).)
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> (4) When such access is sought, the court or tribunal must therefore consider how to exercise its inherent jurisdiction in the light of the 'open justice' principle.
>
> (5) What that principle requires in any individual case is to be judged by reference to whether granting the access which is sought would advance the purpose or purposes of the principle (ibid at [45]).
>
> (6) As a general statement, the overall purpose of open justice as originally identified in *Guardian News & Media* at [79] is 'to enable the public to understand and scrutinise the justice system of which the courts are the administrators' (*Dring SC* at [37] - and it is clear that the reference to 'courts' here extends also to tribunals - ibid at [36]).
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> (7) There are two main facets to this overall purpose:
>
> > (a) 'to enable public scrutiny of the way in which courts (and tribunals) decide cases - to hold the judges to account for the decisions they make and to enable the public to have confidence that they are doing their job properly' (ibid at [42]); and
> >
> > (b) 'to enable the public to understand how the justice system works and why decisions are taken. For this they have to be in a position to understand the issues and the evidence adduced in support of the parties' cases' (ibid at [43]);
>
> (8) Whilst there may be other facets, (a) these main two should not be regarded as mutually exclusive, because 'public understanding of the justice system and how it works is the premise for public scrutiny of the judicial system' and (b) any attempt to identify further ones is 'likely to create more heat than light, and may only result in successive exercises in special pleading' (*R oao Saifullah Gharab Yar v Secretary of State for Defence* [2021] EWCH 3219 (Admin)).
>
> (9) It is for the person seeking access to explain why he seeks it and how granting him access will advance the principle of open justice. In particular, there is no 'right' to access (except where relevant rules specifically afford such a right); the person seeking access must show a 'legitimate interest' in doing so (*Dring SC* at [45]).

> (10) In response to any request, the court or tribunal should carry out a 'fact-specific balancing exercise' in which the person seeking access must explain why it is sought and how the grant of access will advance the open justice principle (ibid at [45]);
>
> (11) In carrying out that exercise, the court or tribunal will consider 'the purpose of the open justice principle and the potential value of the information in question in advancing that purpose', and will weigh in the balance 'any risk of harm which its disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others' (ibid at [45] & [46]);
>
> (12) The court or tribunal should also consider the 'practicalities and proportionality of granting the request' (ibid at [47])."

9. It follows from the above principles that there are three stages to the consideration of an application by a third party for access to documents. First, the Tribunal must consider whether disclosure will further the principle or principles of open justice, ie to enable the public to understand and scrutinise the justice system and how and why decisions are made. Secondly, the Tribunal must conduct a fact-specific balancing exercise, weighing the value of the information sought in advancing the principle of open justice against any risk of harm which its disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others. Finally, the Tribunal must consider the practicalities and proportionality of granting the request.

10. The application for disclosure of documents in *Cider of Sweden* was made before there had been any hearing and, indeed, no hearing was even imminent in that case. Applying the three stage approach in [46] – [49], Judge Poole refused the application on the ground that disclosure of the documents at that stage of the proceedings would not advance the principle of open justice because it would not enable the public to understand and scrutinise the justice system or how and why decisions are made. Judge Poole was, however, careful to observe that at [48]:

> "… the position might be different in relation to the subject matter of any interim applications (and associated decisions), if there had been any, but the point does not arise on the facts of this case"

and in [51] stated:

> "… if the application were made at a later stage of the proceedings when the substantive hearing had happened or (possibly) was about to take place (as in JTI) then the application of the open justice principle might well lead to the opposite conclusion."

DISCUSSION

11. I begin by considering whether providing the documents requested to Ms Meisel will further the principle or principles of open justice. In this case, there has been a hearing albeit a hearing to give case management directions rather than a substantive hearing of the appeals. At the case management hearing, the skeleton arguments which I had read before the hearing took place, were referred to by me and by both parties. The skeletons were not read out or quoted from extensively during the hearing because it was not necessary to do so. They were, however, taken into consideration by me in discussing with the parties what directions should ultimately be made. I should make it clear that no directions have as yet been made as the parties are agreeing certain details before submitting the proposed directions to me for approval. I have no doubt that an observer, such as Ms Meisel, would struggle to understand the parties' submissions and my comments on them during the hearing without the skeletons. In such circumstances, it seems to me that providing the skeleton arguments to a journalist would further the principle of open justice in that it would enable the journalist to understand

the proceedings more fully and, if they so chose, report them more accurately. I do not consider that, as suggested by JHA, it is necessary for a person requesting access to or copies of documents to do more than indicate, as Ms Meisel has done, that they are sought for journalistic purposes. As the Court of Appeal stated in *R (Guardian News & Media Ltd) v Westminster Magistrates Court* [2013] QB 619 at [85]:

> "In a case where documents have been placed before a judge and referred to in the course of proceedings, in my judgment the default position should be that access should be permitted on the open justice principle; and where access is sought for a proper journalistic purpose, the case for allowing it will be particularly strong."

12. In such a case, the journalist stands in the place of the public and enabling the journalist to understand and scrutinise the justice system and how and why decisions are made also enables the public to do so which advances the principle of open justice. Accordingly, I have decided that the Tribunal should provide Ms Meisel with electronic copies of the skeleton arguments.

13. I do not consider, however, that providing Ms Meisel with a copy of the hearing bundle will further the principle of open justice in any material way. As the focus of the hearing was the directions to be given in relation to five lead cases, the contents of the hearing bundle were not referred to or considered in any detail because it was unnecessary for the purpose of the hearing. In those circumstances, the hearing bundle would not assist Ms Meisel to understand the proceedings or my decision in the hearing or any directions that are issued subsequently. The hearing bundle (of 1,423 pages) contained details and correspondence that referred to Appellants and matters that were not chosen as lead cases and may never become the subject of a public hearing. Providing access to such details and correspondence would not advance the principle of open justice when those appeals may never be the subject of any public hearing or judicial decision. Accordingly, I have decided that the Tribunal should not provide Ms Meisel with an electronic copy of the hearing bundle.

14. I have also considered whether the utility of the information contained in the skeleton arguments and hearing bundle in advancing the principle of open justice is outweighed by any risk of harm which its disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others. I cannot see that providing the skeleton arguments or hearing bundle to Ms Meisel carries any risk that the judicial process will be compromised or affected in any way. I note that JHA has never suggested that the Appellants have any legitimate interests that the documents will not be disclosed and I cannot see how they could as they must be assumed to be aware of the principle of open justice.

15. Finally, I considered the practicality and proportionality of providing Ms Meisel with electronic copies of the skeleton arguments. It is obvious (and JHA did not contend to the contrary) that the provision of electronic copies is a straightforward matter. All that the Tribunal is required to do is send an email with the skeletons and bundle attached. Accordingly there are no issues of practicality and proportionality which could justify refusing the application.

DECISION

16. For the reasons given above, I grant Ms Meisel's application to be provided with electronic copies of the parties' skeletons but refuse her application for an electronic copy of the hearing bundle

RIGHT TO APPLY FOR PERMISSION TO APPEAL

17. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant

to rule 39 of the FTT Rules. The application must be received by the FTT 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.

JUDGE GREG SINFIELD
CHAMBER PRESIDENT

Release date: 04th OCTOBER 2022