



[2022] UKFTT 00094 (TC)

TC 08424/V

PROCEDURE – application for third party disclosure – application granted

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**Appeal numbers: TC/2018/04806
TC/2018/04807
TC/2018/04808
TC/2018/04809**

BETWEEN

**GUNFLEET SANDS LIMITED
GUNFLEET SANDS II LIMITED
WALNEY (UK) OFFSHORE WINDFARMS
LIMITED
ORSTED WEST OF DUDDON SANDS (UK)
LIMITED**

Appellants

-and-

**THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS**

Respondents

-and-

KPMG LLP

**Third Party/
Applicant**

TRIBUNAL: JUDGE NIGEL POPPLEWELL

Application considered on the papers on 8 March 2022

DECISION

Introduction

1. In an application dated 30 November 2021 (the “**application**”) the Applicant applied to the Tribunal for copies of (i) the Appellants’ grounds of appeal, (ii) the Respondents’ (or **HMRC**) statement of case (iii) the skeleton arguments of the Appellants and the Respondents (together, “**the parties**”) and any reply filed by the Appellants (if applicable), and (iv) the transcript of the proceedings ((i) to (iv) together, the “**Requested Documents**”), to be provided to the Applicant by the Tribunal from the Tribunal’s files in respect of the above-mentioned proceedings.

2. The application is made pursuant to Rules 2 and 5 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (SI 2009/273) and to the inherent jurisdiction of the Tribunal itself.

Background

3. The Appellants’ appeal was heard by the Tribunal between 15 November 2021 and 26 November 2021. My decision was released to the parties on 3 February 2022. Some typographical errors were then brought to my attention and a revised decision incorporating amendments made pursuant to the slip rule will shortly be released to the parties.

4. After I had received a copy of the application, I asked the Tribunal to circulate copies to the parties with a request that if they wished to make representations on the application, they should do so before mid-February 2022. HMRC responded within that deadline indicating that they did not wish to make any representations and were content for me to proceed to determine the application as I considered appropriate. They noted that as regards the transcripts, the costs of those have been shared equally by the parties. The appellant sought an extension of time to 23 February 2022 to make any representations. Neither I nor the Tribunal had received any such representations on or before that date.

5. I have considered the application, and I am very grateful to its author, Amanda Brown QC, for its comprehensive analysis of the relevant case law which I have gratefully adopted in this decision.

6. In the Applicant’s view, the appeal raises important issues of law which are of legitimate interest to the Applicant. The application states that “*the Applicant is currently instructed in another, unrelated, dispute with HMRC in which the same points of law have arisen: it is the Applicant’s understanding that one of the points in issue in the Appellants’ appeal is the question and extent of whether qualifying expenditure for capital allowances purposes should be determined by reference to assets which, when taken together, form a “single entity”. This is a live issue in a matter in which the Applicant is currently instructed and the Respondents’ legal arguments in these proceedings are of obvious relevance and interest to that matter*”.

The Law

7. Guidance as to the making of an application of this kind was provided by the Tribunal in *Hastings Insurance Services Ltd v Revenue and Customs Commissioners, on the application of KPMG LLP* [2018] UKFTT 478 (TC) (“**Hastings**”). In that decision, Judge Sinfield confirmed that a third party should be allowed by the Tribunal to inspect documents on the Tribunal’s

files if the third party can satisfy a “legitimate interest” in those documents (as per paragraph 15). As the Judge highlighted:

“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.”

8. *Hastings* was decided by the Tribunal in light of the then-current decision of the Court of Appeal in *Cape Intermediate Holdings Ltd v Dring (for and on behalf of Asbestos Victims Support Groups Forum UK* [2018] EWCA Civ 1795. As the Tribunal will be aware, the Court of Appeal's decision has now been superseded by the Supreme Court's decision in *Cape Intermediate Holdings Ltd v Dring (for and on behalf of Asbestos Victims Support Groups Forum UK* [2019] UKSC 38 (“*Cape*”). However, in their decision, 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*”.

9. More recently, the Tribunal applied the principles and approach set out in *Hastings* and *Cape* in the context of an application by a practicing barrister for documents in proceedings in which he did not represent any party. The application was made on the basis that he was a “*barrister practicing frequently in the Tribunal with a particular interest in the operation of the Taxes Management Act*” (see *Fastklean Ltd v HMRC* [2020] UKFTT 511 (TC) (“*Fastklean*”). In accepting that the barrister had a legitimate interest in the documents concerned, the Tribunal agreed with Judge Sinfield's view in *Hastings* that a “*legitimate interest does not require a direct personal or professional interest in the outcome of proceedings and that an interest in other related litigation, whether actual or in contemplation, is sufficient*”.

Grounds of the Application

10. Ms Brown submits as follows.

(1) As per the decision of this Tribunal in *Hastings*, the Requested Documents are documents from the Tribunal's file to which the Applicant should be entitled if it can demonstrate a legitimate interest.

(2) The Applicant has a clear legitimate interest in the Requested Documents:

a) The Applicant's interest in the Requested Documents in the present proceedings is the same as the interest which KPMG had in the relevant documents in *Hastings*. As that

interest was found to be a legitimate one in *Hastings* and *Fastklean*, she submits that the same conclusion should be reached in the present case.

b) In any event, she submits that there is a clear legitimate interest in being aware of and understanding the arguments put forward by the Respondents in cases which involve points of law which are materially similar to those in which the Applicant is instructed. Only with that knowledge can the Applicant properly advise its clients of the Respondents' likely approach and legal arguments.

c) In addition, the provision of the Requested Documents prepared by the Appellants (i.e., the grounds of appeal, its skeleton argument and any reply) is necessary to allow the Applicant to properly understand the context and background to the Respondents' position in its statement of case and its skeleton argument. In a similar way, the provision of the transcripts is necessary to allow the Applicant to understand how the Respondents' position in its statement of case and in its skeleton argument evolved during the course of the proceedings.

(3) In light of the constitutional importance of the principle of open justice, she submits that the matters set out in [10] above are enough to allow the application, unless the parties could demonstrate that disclosure would risk any harm to the "*maintenance of an effective judicial process or to the legitimate interest of others*" (as per the decision of the Supreme Court in *Cape* at paragraph 46). She submits that no such harm should be caused if the application is allowed. The Requested Documents have been filed with and considered by the Tribunal as part of the proceedings heard in public, and there should be nothing so sensitive in the case (such as national security concerns, the welfare of a child, etc.) which might otherwise constitute a good reason for denying access.

(4) In addition, provision of the Requested Documents would not be disproportionate as (i) she understands that the proceedings have only recently concluded, and (ii) the scope of the present application is for a narrow and specified set of documents.

Discussion and Decision

11. I am satisfied from the foregoing that the applicant has demonstrated a clear legitimate interest in the Requested Documents. The "single entity" issue was a significant issue in the proceedings as the Applicant will now have seen from my decision. Neither of the parties has opposed the application, and I have seen no indication that disclosure would cause any harm to the maintenance of an effective judicial process or to the legitimate interest of others. Disclosure would not be disproportionate. The Requested Documents can readily be provided at the flick of an electronic switch. I have considered, however, whether I should grant this application on condition that the Applicant reimburses the parties for some element of the costs which they have incurred in commissioning the transcripts. It seems to me that there is much value in those transcripts from which the Applicant and their client will benefit, even though they were commissioned for the benefit of the parties and for the Tribunal with no thought to any benefit for a person such as the Applicant. The key question (see *Cape*) is how I exercise my jurisdiction in the particular circumstances of this case. It seems only fair to me, and I do not think it is any form of fetter on the concept of legitimate interest, that the Applicant should make a contribution to the costs of the transcripts from which they, and their client, will now benefit. I am fortified in reaching this conclusion by the provision in paragraph 47 of *Cape* "*The non-party who seeks access will be expected to pay the reasonable costs of granting that access.*" I therefore grant the application on condition that the Applicant or their client

reimburses the parties 20% of the costs of the transcribers (plus VAT to the extent it is not recoverable by the parties). I leave it to the parties to deal with the detail of this reimbursement but I am happy to consider any application in relation to it should the parties fail to reach agreement.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

12. 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 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.

NIGEL POPPLEWELL
TRIBUNAL JUDGE
Release date: 13 MARCH 2022