Michaelmas Term
[2016] UKSC 54
On appeal from: [2015] EWCA Civ 173

JUDGMENT

R (on the application of Ingenious Media Holdings plc and another) (Appellants) *v* Commissioners for Her Majesty's Revenue and Customs (Respondent)

before

Lady Hale, Deputy President
Lord Mance
Lord Kerr
Lord Reed
Lord Toulson

JUDGMENT GIVEN ON

19 October 2016

Heard on 4 July 2016

Appellants	*Respondent*
Hugh Tomlinson QC	James Eadie QC
Jessica Simor QC	David Pievsky
(Instructed by Olswang LLP)	(Instructed by HMRC Solicitors Office)

LORD TOULSON: (with whom Lady Hale, Lord Mance, Lord Kerr and Lord Reed agree)

1. This appeal concerns the scope of the duty of confidentiality owed by Her Majesty's Revenue and Customs ("HMRC") in respect of the affairs of tax payers. The duty is now in statutory form.

Commissioners for Revenue and Customs Act 2005

2. Section 18 of the Act is headed "Confidentiality". It provides (with emphasis added by me to highlight the important words):

> "(1) *Revenue and Customs officials may not disclose information which is held by the Revenue and Customs in connection with a function of the Revenue and Customs.*
>
> (2) *But subsection (1) does not apply to a disclosure -*
>
> *(a) which -*
>
> *(i) is made for the purposes of a function of the Revenue and Customs, and*
>
> (ii) does not contravene any restriction imposed by the Commissioners,
>
> (b) which is made in accordance with section 20 or 21,
>
> (c) which is made for the purposes of civil proceedings (whether or not within the United Kingdom) relating to a matter in respect of which the Revenue and Customs have functions,

(d) which is made for the purposes of a criminal investigation or criminal proceedings (whether or not within the United Kingdom) relating to a matter in respect of which the Revenue and Customs have functions,

(e) which is made in pursuance of an order of a court,

(f) which is made to Her Majesty's Inspectors of Constabulary, the Scottish inspectors or the Northern Ireland inspectors for the purpose of an inspection by virtue of section 27,

(g) which is made to the Independent Police Complaints Commission, or a person acting on its behalf, for the purpose of the exercise of a function by virtue of section 28, …

(h) which is made with the consent of each person to whom the information relates, …

(3) Subsection (1) is subject to any other enactment permitting disclosure.

(4) In this section -

(a) a reference to Revenue and Customs officials is a reference to any person who is or was -

(i) a Commissioner,

(ii) an officer of Revenue and Customs,

(iii) a person acting on behalf of the Commissioners or an officer of Revenue and Customs, or

(iv) a member of a committee established by the Commissioners,

(b) a reference to the Revenue and Customs has the same meaning as in section 17,

(c) *a reference to a function of the Revenue and Customs is a reference to a function of -*

(i) the Commissioners, or

(ii) an officer of Revenue and Customs,

…”

3. Sections 20 and 21, which are referred to in section 18(2)(b), cover various situations where disclosure is authorised on public interest grounds, such as disclosure to another public body for the purposes of the prevention, detection or prosecution of crime.

4. Section 5 is headed “Commissioners’ initial functions”. It provides:

“(1) The Commissioners shall be responsible for -

(a) the collection and management of revenue for which the Commissioners of Inland Revenue were responsible before the commencement of this section, [and]

(b) the collection and management of revenue for which the Commissioners of Customs and Excise were responsible before the commencement of this section, …”

5. Section 9 is headed “Ancillary powers”. It provides:

> "(1) The Commissioners may do anything which they think -
>
> (a) necessary or expedient in connection with the exercise of their functions, or
>
> (b) incidental or conducive to the exercise of their functions."

6. Section 51 (headed "Interpretation") defines "function" as meaning "any power or duty (including a power or duty that is ancillary to another power or duty)".

7. Section 19 makes it a criminal offence for a person to contravene section 18(1) by disclosing revenue and customs information relating to a person whose identity is specified in or can be deduced from the disclosure, subject to a statutory defence if the defendant shows that he reasonably believed that the disclosure was lawful or that the information had already been lawfully made available to the public.

Facts

8. Mr Patrick McKenna is a former senior partner of a global firm of chartered accountants. He is the founder and chief executive officer of Ingenious Media Holdings plc. The company and its subsidiaries (collectively "Ingenious Media") are an investment and advisory group specialising in the media and entertainment industries. Among other things they have promoted film investment schemes involving film production partnerships. The schemes were devised by Mr McKenna and utilised certain tax relief which was then available. The marketing of the schemes stopped when the tax relief ceased to be available.

9. On 14 June 2012 the Permanent Secretary for Tax in HMRC, Mr David Hartnett, gave an interview to two financial journalists from *The Times*. They had requested the meeting to discuss tax avoidance. The meeting was recorded and was agreed to be "off the record".

10. On 21 June 2012 *The Times* published two articles on the subject of film schemes and tax avoidance. They informed readers that:

> "Patrick McKenna … and … [X] … are the two main providers of film investments schemes in the UK.
>
> …
>
> To the Revenue the two men represent a threat. HM Revenue and Customs believes that film schemes have enabled investors to avoid at least £5 billion in tax. Much of that sum, the Revenue says, is attached to schemes created by [X] or Mr McKenna.
>
> …
>
> Mr McKenna, 56, founder of Ingenious Media, is also involved in a long-running Revenue inquiry into three of his partnerships.
>
> …
>
> 'He's never left my radar,' a senior Revenue official said of Mr McKenna. 'He's an urbane man, …, he's a clever guy, he's made a fortune, he's a banker, but actually he's a big risk for us so we would like to recover lots of the tax relief he's generated for himself and other people. Are we winning? I would say, beginning to. I think we'll clean up on film schemes over the next few years.'"

11. The "senior Revenue official" was Mr Hartnett. The words attributed to him are a direct quotation from the transcript of the interview, and Mr Hartnett was the source of the reference to £5 billion (although in the interview Mr Hartnett gave the figure "utterly off the record"). Mr Hartnett said other things which were not for quotation (and were not quoted), including a description of the film schemes as "scams for scumbags". At the time of the interview, HMRC had not reached a formal decision whether to challenge their validity.

12. There is no dispute that Mr Hartnett imparted information to *The Times* regarding the tax activities of Mr McKenna and Ingenious Media, and HMRC's attitude towards them, derived from information held by HMRC about them.

Mr Hartnett's reasons for disclosure

13. The reasons given by Mr Hartnett for what he said to the journalists about Mr McKenna and Ingenious were that it was generally in HMRC's interests to try to establish good relations with the financial press; that they provided a way of emphasising to the general public HMRC's views on elaborate tax avoidance schemes; and that Mr Hartnett thought that the journalists might have information of significant value to HMRC, which they might reveal as the dialogue continued, such as details of tax avoidance arrangements which the journalists had uncovered but were unknown to HMRC. Mr Hartnett emphasised that the interview was agreed to be off the record, and that he did not anticipate that his comments about Mr McKenna and Ingenious Media would be published.

The claim

14. The claim by Ingenious Media and Mr McKenna was brought by way of an application for judicial review, although in substance it was a straightforward claim for breach of a duty of confidentiality. The form in which the claim was brought appears to have influenced its perception by the courts below. At first instance, Sales J held that it was not appropriate for the court to approach Mr Hartnett's decision to say what he said as if the court were the primary decision-maker: [2013] EWHC 3258 (Admin), para 40. The court, he held, could only intervene if satisfied that Mr Hartnett could not rationally take the view that speaking to the journalists as he did would assist HMRC in the exercise of its tax collection functions. Sales J emphasised, at para 50, that the rationality standard is a flexible one, which varies in the width of discretion allowed to a decision-maker according to the strength of the public interest and the strength of the interests of any individual affected by the decision to be taken. He laid stress on the fact that the disclosures made were limited and that the interview was agreed to be off the record. The disclosures made were, in his judgment, not irrational, were made for a legitimate purpose and were proportionate. In short, he approached the matter as a review on public law principles of an administrative act, and he dismissed the claim.

15. Sales J's judgment was upheld by the Court of Appeal in a judgment given by Sir Robin Jacob, with which Moore-Bick and Tomlinson LJJ agreed: [2015] 1 WLR 3183. Sir Robin rejected the claimants' arguments that the disclosures made were not "in connection with a function" of HMRC, properly construed, and that the judge had adopted the wrong standard of review. As to the first argument, he held that a wide meaning should be given to section 18(2)(a)(i) ("… subsection (1) does not apply to a disclosure which is made for the purposes of a function of the Revenue and Customs"). As to the second argument, Sir Robin echoed Sales J's holding that it was not for the court to "review all the facts de novo as though it were the primary decision maker" (para 46).

Analysis

16. From the judgments below and the arguments in this court, three main issues emerge: what is the proper construction of the section 18(2)(a)(i) read with the other provisions of the Act; what is the proper approach of the court in judging the conduct of Mr Hartnett; and what is the significance of his understanding that his interview with the journalists was to be off the record?

The interpretation of section 18

17. Unfortunately the courts below were not referred (or were only scarcely referred) to the common law of confidentiality. The duty of confidentiality owed by HMRC to individual taxpayers is not something which sprang fresh from the mind of the legislative drafter. It is a well established principle of the law of confidentiality that where information of a personal or confidential nature is obtained or received in the exercise of a legal power or in furtherance of a public duty, the recipient will in general owe a duty to the person from whom it was received or to whom it relates not to use it for other purposes. The principle is sometimes referred to as the *Marcel* principle, after *Marcel v Commissioner of Police of the Metropolis* [1992] Ch 225. In relation to taxpayers, HMRC's entitlement to receive and hold confidential information about a person or a company's financial affairs is for the purpose of enabling it to assess and collect (or pay) what is properly due from (or to) the tax payer. In *R v Inland Revenue Comrs, Ex p National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, 633, Lord Wilberforce said that "the whole system … involves that … matters relating to income tax are between the commissioners and the taxpayer concerned", and that the "total confidentiality of assessments and of negotiations between individuals and the revenue is a vital element in the working of the system". See also *Conway v Rimmer* [1968] AC 910, 946 (Lord Reid); and *R v Inland Revenue Comrs, Ex p Preston* [1985] AC 835, 864F (Lord Templeman).

18. The *Marcel* principle may be overridden by explicit statutory provisions. In *In re Arrows Ltd (No 4)* [1995] 2 AC 75, 102, Lord Browne-Wilkinson said:

> "In my view, where information has been obtained under statutory powers the duty of confidence owed on the *Marcel* principle cannot operate so as to prevent the person obtaining the information from disclosing it to those persons to whom the statutory provisions either require or authorise him to make disclosure."

19. Subsections (2)(b) et seq of section 18 contain specific provisions permitting the disclosure of taxpayer information for various purposes other than HMRC's primary function of revenue collection and management. What then is the proper interpretation of the far broader words of subsection (2)(a)(i) "disclosure … made for the purposes of a function" of HMRC? On HMRC's interpretation, it would be hard to conceive a wider expression. By taking sections 5, 9 and 51(2) in combination, it is said to include anything which in the view of HMRC is necessary *or* expedient *or* incidental *or* conducive to *or* in connection with the exercise of the functions of the collection and management of revenue. If that is the right interpretation of subsection (2)(a)(i), it means that a number of the subsequently listed specific exceptions are otiose, including (c) and (d), which deal with disclosure for the purposes of civil or criminal proceedings relating to matters connected with customs and excise. Secondly, and more fundamentally, it means that the protection which would otherwise have been provided to the taxpayer by HMRC's duty of confidentiality will have been very significantly eroded by words of the utmost vagueness. So to construe the words would run counter to the principle of construction known as the principle of legality, after Lord Hoffmann's use of the term in *R v Secretary of State for the Home Office, Ex p Simms* [2000] 2 AC 115, 131. He explained the principle as follows:

> "Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual."

20. Lord Hoffmann said that this presumption will apply "even" to the most general words, but I would say further that the more general the words, the harder it is likely to be to rebut the presumption.

21. A similar principle can be seen in the courts' approach to the interpretation of powers delegated under a so-called Henry VIII clause. In *R (Public Law Project) v Lord Chancellor* [2016] 3 WLR 387, para 26, Lord Neuberger of Abbotsbury PSC, with the agreement of the other members of the court, cited with approval the following passage in *Craies on Legislation*, 10th ed (2012), edited by Daniel Greenberg, at para 1.3.11:

> "as with all delegated powers the only rule for construction is to test each proposed exercise by reference to whether or not it is within the class of action that Parliament must have contemplated when delegating. Although Henry VIII powers

> are often cast in very wide terms, *the more general the words used by Parliament to delegate a power, the more likely it is that an exercise within the literal meaning of the words will nevertheless be outside the legislature's contemplation.*" (Emphasis added)

22. To take the present case, the general principle of HMRC's duty of confidentiality regarding individual tax payers' affairs is long established. (In 2011 Mr Hartnett articulated it when refusing to give any information to the House of Commons Public Accounts Committee about tax payers with whom HMRC had reached settlements.) In passing the 2005 Act, Parliament cannot be supposed to have envisaged that by section 18(2)(a)(i) it was authorising HMRC officials to discuss its views of individual taxpayers in off the record discussions, whenever officials thought that this would be expedient for some collateral purpose connected with its functions, such as developing HMRC's relations with the press. If Parliament really intended to delegate to officials such a wide discretion, limited only by a rationality test, in place of the ordinary principles of confidentiality applicable to public bodies in respect of confidential or private information obtained under statutory powers or for a statutory purpose, it would have significantly emasculated the primary duty of confidentiality recognised in section 18(1).

23. For those reasons section 18(2)(a)(i) requires to be interpreted more narrowly. I take section 18(1) to be intended to reflect the ordinary principle of taxpayer confidentiality referred to in para 17, to which section 18(2)(a)(i) creates an exception by permitting disclosure to the extent reasonably necessary for HMRC to fulfil its primary function.

24. It was argued by HMRC that despite being headed "Confidentiality", section 18 is not confined to information which is in any real sense confidential, but is far wider in its scope. Therefore, it was argued, the exception contained in subsection (2)(a)(i) must be given a similarly expansive interpretation in order to avoid absurdity. In support of this argument HMRC relied on the wording of section 19, which makes it a criminal offence for an official to disclose revenue or customs information relating to an identifiable person, but provides a defence if the person charged proves that he reasonably believed that "the information had already and lawfully been made available to the public". The creation of this defence showed, in HMRC's submission, that section 18 was not essentially or only about protecting confidentiality, because it self-evidently extended to the disclosure of information which was already in the public domain.

25. This argument found favour with the Court of Appeal, but I do not consider that it bears the weight which HMRC seeks to put on it. The argument is too subtle, and it is open to other objections. It is well settled that information may be available

to the public and yet not sufficiently widely known for all confidentiality in it to be destroyed. As Eady J put it in *McKennitt v Ash* [2006] EMLR 10, para 81, where information has been obtained in circumstances giving rise to a duty of confidentiality, "the protection of the law will not be withdrawn unless and until it is clear that a stage has been reached where there is no longer anything left to be protected". Whether that stage has been reached may be a hard question on which reasonable people may disagree. It is a fallacy to suppose that because a defence to a criminal charge under section 19 is available to a person who reasonably believed the information to be available to the public, it must follow that Parliament intended section 18 to prohibit the disclosure of information of the most ordinary kind about which there could be no possible confidentiality. Moreover, even if section 18(1) has the wide scope suggested by HMRC (which it is not necessary to decide in this case), it does not follow that Parliament must be taken to have intended by subsection (2)(a)(i) to confer on officials a wide ranging discretion to disclose confidential information about the affairs of individual taxpayers.

The court's approach to review of HMRC's conduct

26. Ordinarily it is a matter for the court to decide the question whether there has been a breach of a duty of confidentiality, applying established principles of law to its own judgment of the facts. Among other authorities, the point is well illustrated by the decision of the Court of Appeal in *W v Egdell* [1990] 1 Ch 359. The plaintiff was detained in a secure mental hospital, under a hospital order coupled with a restriction order, after pleading guilty to manslaughter on the grounds of diminished responsibility. The defendant, a consultant psychiatrist, was engaged on his behalf to prepare a report in connection with an intended application to a mental health review tribunal for his discharge. The defendant's report presented a disturbing picture and it led to the withdrawal of the application. The defendant was nevertheless so concerned that matters in his report ought to be known to those responsible for the plaintiff's care and discharge that he sent a copy of it to the medical director at the hospital, with a view to its onward transmission to the Home Office. The plaintiff sued the defendant for breach of his contractual duty of confidence. Dismissing the action, the trial judge held that the doctor's duty of confidentiality did not bar him from disclosing the report to the hospital if the doctor judged the report to be relevant to his care, nor from disclosing it to the Home Secretary if the doctor judged the report to be relevant to the exercise of the Home Secretary's discretionary powers. The Court of Appeal upheld the judge's decision but not his approach. Bingham LJ said, at p 422, that the answer to the question whether the doctor's disclosure was justified "must turn not on what the doctor thinks but on what the court rules". He added that it did not follow that the doctor's conclusion was irrelevant; in making its ruling the court would give such weight to the doctor's considered judgment as seemed in all the circumstances to be appropriate.

27. The same principle applies whether or not the duty of confidentiality is contractual. It applies equally where the person or body owing a duty of confidentiality holds a public office or is a public body or is performing a public function, subject to any contrary statutory provision.

28. It is a cardinal error to suppose that the public law remedies and principles associated with judicial review of the exercise of administrative power, developed by the common law from the ancient prerogative writs, occupy the entire field whenever the party whose conduct is under challenge holds a public position. It is important to emphasise that public bodies are not immune from the ordinary application of the common law, including in this case the law of confidentiality. The common law is multi-faceted and remains the bedrock of the English legal system.

29. Having rejected the view that section 18(2)(a)(i) should be interpreted as making the disclosure of information about individual taxpayers a matter for the discretion of HMRC officials, subject only to a rationality control, I disagree with the view of the lower courts that it was not for them to approach the disclosures made by Mr Hartnett as if they were primary decision makers. In accordance with ordinary principles, the question of breach of confidentiality is one for the court's judgment.

"Off the record"

30. "Off the record" is an idiom and like many idioms can bear different shades of meaning. It may, for example, be intended to mean "strictly confidential" or it may be intended to mean "not to be directly quoted or attributed". The judge found that Mr Hartnett understood it to mean that the interview was to be a "background briefing", intended to influence the journalists' views and what they wrote about matters affecting HMRC but not to be published. There has been no appeal against that finding, but nothing in my view turns on what precisely Mr Hartnett intended.

31. As a matter of principle, a disclosure of confidential information may sometimes be permissible on a restricted basis. (In the case of *W v Egdell*, previously cited, the doctor was lawfully justified in passing on his report to those who had responsibility for the plaintiff's care, whereas it would not have been lawful to pass it to someone who had no such responsibility.) But an impermissible disclosure of confidential information is no less impermissible just because the information is passed on in confidence; every schoolchild knows that this is how secrets get passed on. The references by the courts below to the nature of the interview leave me in some doubt whether they had a clear regard for the distinction.

Conclusion

32. The information supplied by Mr Hartnett to the journalists about Mr McKenna and Ingenious Media was information of a confidential nature, in respect of which HMRC owed a duty of confidentiality to them under section 18(1). It was limited in scope, but it was not insignificant, as is evident from the use made of it in the articles which followed the interview.

33. At the time of the interview the tax consequences of the film schemes discussed in it were under consideration by HMRC. The schemes themselves were things of the past. It is not suggested that the disclosures made by Mr Hartnett were reasonably necessary for the purpose of HMRC's investigations into the schemes.

34. As to the justifications put forward by HMRC, a general desire to foster good relations with the media or to publicise HMRC's views about elaborate tax avoidance schemes cannot possibly justify a senior or any other official of HMRC discussing the affairs of individual tax payers with journalists. The further suggestion that the conversation might have led to the journalists telling Mr Hartnett about other tax avoidance schemes, of which HMRC knew nothing, appears to have been no more than speculation, and is far too tenuous to justify giving confidential information to them.

35. The fact that Mr Hartnett did not anticipate his comments being reported is in itself no justification for making them. The whole idea of HMRC officials supplying confidential information about individuals to the media on a non-attributable basis is, or should be, a matter of serious concern. I would not seek to lay down a rule that it can never be justified, because "never say never" is a generally sound maxim. It is possible, for example, to imagine a case where HMRC officials might be engaged in an anti-smuggling operation which might be in danger of being wrecked by journalistic investigations and where for operational reasons HMRC might judge it necessary to take the press into its confidence, but such cases should be exceptional.

36. I would reject the argument that the disclosure was justified under section 18(2)(a), allow the appeal and invite the parties' written submissions as to the appropriate form of order.