

TC07082



PROCEDURE – application for disclosure – whether documents relevant to issue in appeal – what has been pleaded – equivocal pleading -matter in issue when raised by appellant and not accepted by HMRC – application allowed in part

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**Appeal number: TC/2017/02605 and
TC/2017/06776**

BETWEEN

WORLDPAY (UK) LIMITED

Appellant

-and-

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

Respondents

TRIBUNAL: JUDGE BARBARA MOSEDALE

Sitting in public at Taylor House, Rosebery Avenue, London on 5 April 2019

Mr K Beal QC for the Appellant

**Mr O Thomas, QC and Mr M Donmall, counsel, instructed by the General Counsel and
Solicitor to HM Revenue and Customs**

DECISION

INTRODUCTION

1. HMRC applied for disclosure of various classes of documents, as I set out below. The appellant opposed the application on the grounds that the documents were not relevant to the issues in dispute.

LAW ON DISCLOSURE

2. The appellant cited a number of authorities on disclosure, the principles of which HMRC did not dispute and therefore very little was said on them.

3. The appellant did cite *Ebuyer* [2016] UKUT 123 (TCC) about disclosure of documents relied upon being the default rule in the FTT. Nevertheless, the appellant did appear to accept that the Tribunal can order specific disclosure, even of a class of documents, where they are relevant. Its concern was that HMRC was asking for documents which were not relevant.

4. It seemed to me that the issue here was one of relevance: relevant documents would normally be ordered to be disclosed unless there was a good reason not to do so. The appellant did not advance such a reason: it did not suggest that the disclosure exercise would be onerous or that there was too short a time in which to carry it out before the substantive hearing in June.

5. So I proceed on the basis that I will order the documents to be disclosed if they are relevant to issues which are in dispute between the parties in the substantive hearing, and not otherwise.

6. To determine whether or not the requested documents were relevant, however, depends on what were the issues in the case. And that was something on which the parties did not agree. So to decide what was in issue, I have to consider the law on pleadings.

LAW ON PLEADINGS

7. The Tribunal's rules require there to be pleadings: they require the appellant to set out its grounds of appeal and they require HMRC to file a statement of case in response. But what those pleadings must contain and the effect of something not being pleaded is not set out expressly in the Rules.

8. It is proper, I think, particularly in substantial cases in the Tax Tribunal where both sides are legally represented, like this one, to consider the CPR on pleadings, where more specific guidance is given. This is because the Tribunal's objective is to deal with cases fairly and justly, and the CPR has the same objective. And while the CPR do not directly apply in the Tribunal, it is accepted they can be a guide to the Tribunal (see [26] of *BPP* [2017] UKSC 55).

9. Under the CPR, pleadings are needed to identify the issues that the court or Tribunal will adjudicate upon. So the appellant's grounds of appeal ('statement of case' in the CPR) must raise the issues it seeks an adjudication upon. It is the position under the CPR (CPR 16.5(3)) that, unless implicit in the defence that the respondent does not accept an allegation made by the appellant, silence on the allegation is acceptance of it. The respondent, as much as the appellant, must set out its case in its pleadings.

10. Having said that, it is no longer the case that a failure to properly plead something is always fatal to being able to raise the issue: the purpose of pleadings is to give each party fair warning of the other party's case in the hearing, and if that is done (perhaps by what is said later in witness statements) then that may be sufficient. But it is normally going to be far too late to raise something new in a skeleton argument as that is almost certainly too late to give fair warning. A party which wishes to raise a new ground should normally apply to amend its pleadings.

11. See, for example what was said by Lord Woolf MR in *McPhilemy v Times Newspapers Ltd* [1999] 3 All ER 775, 792J-793A

"The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader."

THE ISSUES IN THIS APPEAL

12. The appeal concerns merchant acquirer services to 'merchants', who are normally retailers accepting payments by card. The issue to which HMRC say its disclosure application relates is whether, under the arrangements at issue in this appeal, the supply by WPUK (the appellant) of the remittance of monies to M, was made to its related company, Worldpay BV ('WPBV') or, as the appellant maintains, to the merchants, whom I shall describe as M.

The appellant's pleading

13. The appellant's position is that HMRC did not expressly plead that the appellant made the supply of remittance services to UKBV rather than to M. However, that seems to me to overlook that the appeal is the appellant's and it is for the appellant to state on what it wishes the Tribunal to rule in its favour. It would then be for HMRC to state the extent to which it disputes the appellant's case.

14. The appellant's case which it must plead is that its supplies to WPBV were standard rated and not exempt. That is the essence of its case. From what was said to me in the hearing of this application, it is a part of the appellant's case that a supply of remittance services by WPUK was (a) not a part of its (agreed to be) single supply made to UKBV and (b) was a supply which it made to M. I will refer to these as issues (a) and (b).

15. It makes sense for the appellant to plead this. Depending on the proper analysis of the law, the question of whether WPUK's supply to WPBV included a service of remittance of cash to M may be very important to the appellant's case that its supplies to WPBV were not exempt; moreover, as (it appears accepted by all) WPUK did remit cash to M, a case that the supply of remittance services by WPUK was made to M, supports the appellant's primary position that a service including remittance of cash was not made to UKBV.

16. My understanding from what Mr Beal said is that it considers the Tribunal should make a finding in WPUK's favour on both these issues (a) and (b). So did the appellant plead this?

17. I consider that its grounds of appeal at §§57-58 appear to be a pleading at least of (a) (that WPUK's supply to WPBV did not include remittance of cash); and the appellant clearly pleaded (b) (that it supplied a service of remittance of cash to M) at §§17-18.

HMRC's pleading

18. So issues (a) and (b) are something on which the Tribunal can make a finding. But the appellant only needs to prove either (a) or (b) to the extent that these issues are actually in dispute. And whether they are in dispute depends on HMRC's response to the appellant's pleadings.

19. The appellant's case was, firstly, that HMRC's decision letter accepted its case on (a) and (b). They point to bullet point 5 of ¶19 of Annex 2 to HMRC's decision letter which says

'it would appear that WPUK then has the obligation for the remittance to the UK retailer, under its separate agreement with the UK retailer'

However, HMRC's decision letter is not a part of the pleadings, although I am prepared to accept that it might colour them. I have to consider what was actually pleaded.

20. I find the pleadings do not contain an express denial of (a) or (b). But I also find they didn't accept it either. At §27 of the statement of case, HMRC say that the agreement of WPUK with M and WPUK's designation in it as 'remittance agent'

'...shows how the contracting parties have sought to reconcile the legal form of restructuring necessary...'

I consider this somewhat ambivalent on whether the parties to the contract successfully reconciled the legal form necessary. Further, at §§74-75 of the statement of case, HMRC state that WPUK remains responsible for the remittance of funds to M, and that WPUK supplies WPBV a complete merchant acquiring services (this is repeated at §77). This is somewhat ambivalent on whether the responsibility for the remittance is owed to WPBV or to M as it might reasonably be said that a complete merchant acquiring service would include remittance of funds.

21. Lastly, Mr Thomas points out that HMRC in the statement of case expressly reserved their position on 'economic reality' (see §81 of the SOC). However, the SOC contained no explanation of what HMRC meant by this.

22. I find that the appellant, not surprisingly in view of HMRC's less than clear pleadings, wanted clarity and asked HMRC a series of questions about its statement of case in a letter of 13 October 2017. HMRC's response was given on 27 November 2017.

23. As to issue (a), this point is not expressly addressed in the questions although in their reply to question (g), HMRC reiterated their view that WPUK provided merchant acquiring services, which might suggest that HMRC considered WPUK's services included remittance of monies.

24. So far as issue (b) was concerned, the appellant specifically asked HMRC whether they accepted that WPUK acted as remittance agent for M. HMRC's response was to say that they reserved their position on this pending sight of the appellant's witness evidence.

25. I agree with Mr Beal that HMRC did not have the right approach to pleadings. If HMRC was unsure of the point, they should have preserved their position by saying that they did not accept the WPUK was remittance agent for M, and then have retracted that if the evidence satisfied them that WPUK was such an agent for M. They should have explained what they thought the economic reality of the supply was. But, fundamentally, the question is not whether HMRC had the right approach to pleadings, but whether, on a fair reading of the pleadings and the surrounding material, the appellant had fair warning that HMRC did not accept the appellant's case on issues (a) and (b) and required them to prove it.

26. By HMRC's statements that they reserved their position, the appellant should have been quite clear that HMRC did not accept their case on (b). Taking that into account, and HMRC's repeated statement that WPUK provided a complete merchant acquirer service to WPUK, I think that the appellant should also have understood HMRC did not accept their case on (a) either. This is because a complete merchant acquirer service would, at least arguably, include remittance of money.

27. It was open to the appellant to ask HMRC to clarify its case after its witness evidence was served; it was open to HMRC to do so without being asked. Neither did so and so the above summary is the current state of the pleadings.

28. Further, I find the evidence of the appellant's witness Mr Dunn dealt with both issues (a) and (b). Moreover, that evidence raised questions on (a) and (b) which no doubt the parties will seek answers to in oral examination (if the points are in issue). In particular, he said at §97(g) and §115 that WPBV instructed WPUK to remit funds to M and at §98(h) that WPUK's fee to M for remittance was detailed in the agreement between WPUK and WPBV; and at §117 that the remittance to M was a term of the agreement between WPUK and WPBV as well as a term of the agreement between WPUK and M. As I have said, precisely what he meant may well be explained in oral examination but one reading of the written evidence is that it does not entirely support the appellant's pleaded case.

29. I also note that Mr Beal pointed out that since the pleadings, HMRC had agreed to WPUK's special method which, he said, accepted that WPUK's supply of remittance was made to M. However, I don't think that the PESM does supplement the pleadings (even if it could) because it does not contain a clear representation that HMRC accepted that WPUK's supplies of remittance services were made to M. In particular, while remittance services are singled out at 'Sector 3C', the PESM does not state to whom they are supplied, and Sector 3 is actually stated to deal with

...the card processing business of WPUK including its support to WPBV....

So the PESM contained neither an express nor implicit statement that the remittance services were supplied to M.

Decision on what is in issue

30. My conclusion is that issues (a) and (b) are both an issue in this appeal. This is because they were pleaded by the appellant and form a part of its case. HMRC's responses to the appellant's pleadings were equivocal and then expressly reserved on matter (b); the appellant then led evidence on both matters (a) and (b) (as well as many other things). In my view, while I think that HMRC's pleadings on their position on (a) and (b) was unclear, and forced the appellant to ask for specific answers to specific questions, nevertheless, at least once it had received the answers, the appellant was fairly on notice that its case of (b), and impliedly (a), was not accepted by HMRC. The PESM did not change this position.

31. Moreover, the appellant did lead evidence on matters (a) and (b) which it would not have had to do if the points were not in issue. Moreover, the gist of the appellant's written evidence on points (a) and (b) does not necessarily entirely support its pleaded case.

32. Taking all this into account, for a fair resolution of the appeal, the tribunal will have to consider that evidence and make a determination on whether the appellant has made out its case on issues (a) and (b). Issues (a) and (b) are live in the appeal.

Pleading on economic reality?

33. But that is as far as it goes. In their skeleton for the interim case, HMRC stated that:

HMRC's case is that as a matter of economic and commercial reality WPUK's remitting funds to [M] was part of its services to WPBV

But it has not pleaded this. At best HMRC in their statement of case reserved their position on economic reality in a wholly unspecified manner: that is not a positive pleading.

34. There may be a fine, even negligible, line between (as HMRC has done) putting the appellant to proof of its case on issues (a) and (b) and (as HMRC has not done) raising a positive case that the economic and commercial reality was that WPUK supplied to WPBV its service of remitting funds to [M] but to the extent that there is a distinction, HMRC has not crossed that line. As matters stand, HMRC can only put the appellant to proof of its case on issues (a)

and (b). They cannot, to the extent that this is any different, plead a positive case that the economic reality is that the supply was made to WPBV.

35. I note that HMRC suggest that they may apply to amend their statement of case in light of the disclosure they receive: I entirely agree with Mr Beal that this is completely the wrong way of doing things. HMRC should make their case clear at the outset. If they consider that the contracts do not reflect commercial reality, then they should say so, and ask for disclosure related to that issue. Applications to amend should be made sooner rather than later in all cases and certainly should not wait on disclosure.

36. I also note that HMRC specifically stated that it did not plead that the contracts (or any terms of them) with WPBV or M were shams or abusive (in the *Halifax* sense). This left a dispute between the parties whether, when sham/abuse was not pleaded, the Tribunal could look beyond the written terms of the contract in deciding what was actually supplied by WPUK to WPBV and to M. The extent to which the Tribunal can look beyond the actual contractual terms in deciding the nature of the supply is therefore an unresolved issue between the parties and one to be decided at the hearing. And whether the answer to that is affected by HMRC's failure to positively plead that economic reality was that supply of remittance services was made to WPBV is also something that will have to wait for the hearing.

ARE THE DOCUMENTS WHICH HMRC SEEK RELEVANT TO WHAT IS IN ISSUE?

37. HMRC seeks documents relevant to two matters:

- (1) Documents relating to the application by WPBV for membership of the VISA and Mastercard schemes; and
- (2) Documents about the decision to make WPUK the remittance agent of M including the correspondence with Selfridges Retail Limited and including tax advice. (Selfridges is put forward as a representative merchant).

Visa/Mastercard documentation

38. WPUK was a full member of VISA and Mastercard before UKBV was established and the change in contracts introduced. UKBV became an associate/affiliate member of Visa and Mastercard and (it appears accepted by both parties) had to become a member of some type in order to act as a merchant acquirer.

39. The specific request by HMRC was for:

- (a) Documents relating to the decision as to whether to apply for principle or associate membership for VISA, including internal communications and third party communications with VISA.
- (b) Documents relating to WPBV's application to VISA for associate membership;
- (c) Documents relating to the decision whether to apply for principle or affiliate membership for Mastercard, including internal communications and third party communications with Mastercard.

This has to be understood as a request to know why UKBV applied for associate/affiliate membership, rather than full membership, and what was said to or by Visa and Mastercard about this. It therefore seems to me that this request breaks into two:

- (1) Documents known to both WPUK/WPBV on the one hand, and to Visa/Mastercard on the other hand;
- (2) Documents known only to one side of the arrangements (ie WPUK/WPBV).

40. As HMRC said, I find that evidence was given by Mr Dunn and Mr Braganza, on behalf of the appellant, about the the preceding discussions with Visa/Mastercard and evidence was given by Mr Braganza on WPUK's internal decision making process with respect to the establishment of WPBV. HMRC's position was HMRC had the right to check that the documentary evidence was consistent with the witness evidence.

Decision on category 1 information

41. HMRC claimed that this evidence requested was relevant to its case that the economic reality was that the remittance was a part of the service supplied to WPBV; as I have said, it did not plead economic reality and so it could not justify disclosure on this ground.

42. Having said that, HMRC is entitled to disclosure of matters which are relevant to an issue in the appeal (see ¶¶4-5). Whether the remittance service was supplied to WPBV and/or to M is an issue in this appeal; assuming (and not deciding) that the Tribunal can look beyond the terms of the contracts to the surrounding circumstances in deciding what was supplied and to whom, what was said by WPUK and WPBV to Visa and Mastercard about the intended relationship between WPUK and WPBV would be potentially relevant. When I take into account that the appellant's witnesses specifically mention the negotiations with Visa and Mastercard, I consider the material at (1) (the material passing between WPUK and/or WPBV on the one hand and Visa and/or Mastercard on the other) is relevant.

43. WPUK's internal decision making process cannot inform its relationship with Visa/Mastercard as it would not be known to Visa/Mastercard; however, WPUK (it appears agreed) set up WPBV to undertake the role of merchant acquirer (to some extent) previously undertaken by WPUK; so while internal communications would not normally inform a two-party contractual position, they may do so where one of the contracting parties is closely related to and established the second contracting party for the express purpose of entering into the contract with that second contracting party.

44. For this reason, I come to the same conclusion as in the preceding paragraph in respect of the material at (2). Whether the remittance service was supplied to WPBV and/or to M is an issue in this appeal; assuming (and not deciding) that the Tribunal can look beyond the terms of the contracts to the surrounding circumstances in deciding what was supplied and to whom, WPUK's internal communications about WPBV's intended application to Visa and Mastercard would be potentially relevant. When I take into account that the appellant's witnesses specifically mentioned the decision making process within WPUK, I consider the material at (2) (the internal communications of WPUK with respect to Visa and/or Mastercard) is relevant.

45. I acknowledge that the appellant is right to say that the mere mention of documents or a class of documents in a witness statement does not make them relevant and therefore disclosable; the point here is that the information is potentially relevant *and* was mentioned by witnesses.

46. I also acknowledge that it is the appellant's case that the Tribunal cannot look beyond the terms of the contracts, but that is a proposition HMRC clearly does not agree with, and therefore I have to consider relevance by reference to the propositions of law both parties make, as it is not appropriate to decide such propositions in this interim hearing. So I have to answer the question of disclosure on the assumption that HMRC may be right to say that the Tribunal can look beyond the terms of the contracts. At the hearing it is open to the appellant to show that the Tribunal cannot look beyond the terms of the contract.

Category 2 information

47. The second category of documents which HMRC wanted disclosed was as follows:

All documents relating to the decision to make WPUK the remittance agent of [M] and to structure the amended contracts such that [M] made a separate payment for that service, including (but not limited to) disclosure of all correspondence with Selfridges Retail Limited concerning that change, and tax advice relating to that change.

48. It seems to me that this request also breaks into two:

- (3) Documents known to both WPUK and M (the two parties to the contract);
- (4) Documents known only to one contracting party (WPUK).

Decision on category 2 information

49. In this case, however, the documents known only to one of the contracting parties, WPUK, being the internal communications and the tax advice from third parties, cannot inform the contractual position between WPUK and M, as they were not known to M. So information (4) cannot be relevant. Unlike at 43 above, this is not a case where there is a close relationship between the two contracting parties: WPUK and M have only a commercial relationship. The documents at (4), being WPUK's internal communications and tax advice from third parties, cannot be relevant the relationship between WPUK and M and therefore cannot be relevant to issues (a) or (b). (And to the extent that the tax advice was privileged, it would not be disclosable on that ground either).

50. But, I consider the documents at (3) potentially relevant for the same reasons as given above at ¶42. Whether the remittance service was supplied to M is an issue in this appeal. Assuming (and not deciding) that the Tribunal can look beyond the terms of the contracts to the surrounding circumstances in deciding what was supplied and to whom, documents passing between WPUK and M about their contract would be potentially relevant.

51. I make the same qualifications as at §§45-46

OVERALL CONCLUSION

52. I order disclosure of items at §39 of this decision. I also order disclosure of documents at §47, but in relation to the documents at §47, only in so far as they amount to correspondence with Selfridges Retail Limited. The internal documents and tax advice mentioned in §47 is not ordered to be disclosed.

53. The parties should seek to agree a timescale for disclosure. If they are unable to do so, they should revert promptly to the Tribunal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

54. 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.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 09 APRIL 2019