



Neutral Citation: [2023] UKUT 187 (TCC)

Case Number: UT/2022/000091

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Application decided on the papers

*Application for publication of interlocutory decision (disclosure application in judicial review)
- application granted – interlocutory decision published as appendix to this decision*

Judgment date: 31 July 2023

Before

UPPER TRIBUNAL JUDGE SWAMI RAGHAVAN

On the application of

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Applicants

Representation:

For the Applicants: Caroline Ardron, lawyer, for the General Counsel and Solicitor to His Majesty's Revenue and Customs

DECISION

APPLICATION FOR PUBLICATION OF INTERLOCUTORY DECISION

1. HMRC applied on 11 July 2023 for publication of this tribunal's decision in *R (on the application of) Refinitiv Ltd and others v The Commissioners for His Majesty's Revenue and Customs* UT/2022/000091. That decision, which refused the disclosure sought by the claimants in a judicial review matter, was released to the parties on 12 April 2023 following an interlocutory remote hearing on 28 March 2023 ("the interlocutory decision") but was not published.
2. HMRC seeks to rely upon the interlocutory decision in response to an appellant's application in an unrelated First-tier Tribunal (Tax Chamber) matter to which the claimants (in *Refinitiv and others*) are not a party. HMRC submit the interlocutory decision gives "guidance on the duty of candour and how the duty to disclose documents is circumscribed by the nature of the case". The claimants were given the opportunity to respond to HMRC's application.
3. In accordance with the open justice principle and noting there were no objections to the application within the deadline specified, I see no reason not to grant the publication application. The fact it is considered that the decision is one that a party wishes to rely on in other proceedings, suggests to me that my original view on publication (that the decision would only be of interest to the parties in the case as it concerned that particular circumstances of their case, and where a full decision in the substantive proceedings would in due course be published) was incorrect.
4. The interlocutory decision is published as appendix to this decision so that any person who wishes to refer or rely on it in proceedings is able to do so.

UPPER TRIBUNAL JUDGE SWAMI RAGHAVAN

Release date: 01 August 2023

Appendix: The Interlocutory Decision



Case Number: UT/2022/000091

**UPPER TRIBUNAL
(Tax and Chancery Chamber)**

THE KING on the application of

- (1) REFINITIV LTD**
- (2) REFINITIV UK EASTERN EUROPE LTD**
- (3) LIPPER LTD**
- (4) THOMSON REUTERS CORPORATION**

Claimants /Applicants

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Defendants / Respondents

Sitting in public via remote video hearing treated as taking place in London on 28 March 2023

For the Claimants / Applicants: Julian Ghosh KC, Sam Grodzinski KC, Laura Ruxandu Counsel, instructed by Baker & McKenzie LLP

For the Defendants /Respondents: Jonathan Bremner KC, Counsel, instructed by the General Counsel and Solicitor to His Majesty’s Revenue and Customs

IT IS DIRECTED THAT:

- 1. The Claimants’ application of 27 January 2023, for a direction requiring HMRC to provide disclosure, is refused.**
- 2. The costs of, and occasioned by, the application be costs in the case.**

REASONS

INTRODUCTION

5. The claimants seek judicial review of HMRC's decision to issue charging notices ("CNs") for Diverted Profits Tax ("DPT") of approximately £167 million in relation to the development of intellectual property that was sold in 2018. The claimants say HMRC's decision to issue these notices was an abuse of power because it encroached on an Advance Pricing Agreement ("APA") that HMRC reached with the claimants under Part 5 of the Taxation (International and Other Provisions) Act 2010 ("TIOPA"). That agreement had set an arm's length price for services the claimants provided in relation to the IP for the period 2008-2014. Permission was granted by the Administrative Court (Foster J) and the matter was subsequently transferred to this tribunal. The substantive hearing is listed to be heard in July this year.

6. The claimants seek an order that HMRC disclose all documents which contain evidence showing the reasons why HMRC issued the CNs. This decision sets out my reasons for refusing that application.

7. The disclosure application arose in the following context. After the applicants filed their claims, HMRC filed its grounds of resistance. These referred to two arguments, in line with the arguments HMRC had rehearsed in their responses to the claimants' pre-action protocol letters. In brief, one argument (Ground 1) was that the APA was of no effect because it expired prior to the period to which the charging notice related. The second (Ground 2) was that there could be no encroachment, because DPT concerned a different tax to that covered by the APA. However after permission was granted, HMRC dropped Ground 2. The claimants wanted to know what role Ground 2 played in HMRC's decision making, and accordingly wrote to HMRC for further details on 20 September 2022. HMRC indicated in a series of holding letters that it would respond. Eventually, on 10 January 2023 HMRC filed a supplementary witness statement from the decision maker (a "designated HMRC officer" in the terminology of the DPT legislation), Mr Andrew Page. The claimants considered the evidence remained unclear on the role of Ground 2 in the decision-making and moreover that Mr Page's evidence was internally inconsistent. They applied to this Tribunal for disclosure on 27 January 2023. The parties provided further submissions in writing and an oral hearing was listed. I have considered those various submissions, including the skeleton arguments prepared for the hearing, together with the oral submissions made at the hearing, which lasted a full half day. I was also assisted by the transcript that the parties kindly provided.

8. The disclosure sought requires HMRC disclose all relevant documentation (including but not limited to internal correspondence and governance documents) that evidence the designated officer's decision-making process, in particular:

- (i) which relate to how matters corresponding to Ground Two affected the decision to issue the CNs and the amount of DPT in those CNs, and/or
- (ii) which otherwise show (directly or by inference) the basis on which the designated officer decided that the APA should not affect the conclusions reached in those CNs.

9. The claimants base their case for disclosure on public law principles regarding the public law duty of candour, and the need to be transparent and clear about the decision-making process and the reasons for the decision. They emphasise the importance of these principles given their central argument in the judicial review that HMRC abused their power when deciding to issue the CNs.

Relevant legal principles

10. There is no dispute that the Upper Tribunal is able to, under its case management power in Rule 5 (and in particular Rule 5(3)(d)), order the disclosure the claimants seek.

11. Regarding the principles to be applied when considering whether to order disclosure in the particular context of judicial review proceedings, I was referred to a number of public law authorities by both parties, a number of which were conveniently summarised by Morris J in *R (Jet2.com) v Civil Aviation Authority* [2018] EWHC 3354 (Admin).

12. In support of the claimants' application for disclosure here, Mr Grodzinski, in addition, took me to a number of authorities to support wider propositions of principle in relation to the public authority defendant's duty of candour and the particular need for the public authority defendant to be transparent and clear about its decision and decision making process. The public authority had to assist the court with "full and accurate explanations of all the facts relevant to the issues the court must decide" *R (Quark) Fishing Ltd v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1409. The court must not "be left guessing about some material aspect of the decision-making process" *Abraha v Secretary of State for the Home Department* [2015] EWHC 1980 (Admin) at [114], per Singh J as he then was. The public authority ought also ordinarily to exhibit documents significant to its decision. Mr Ghosh for the claimants also referred to *R (oao Phoenix Life Holdings Ltd and others) v HMRC* [2019] EWHC 2043 (Admin) where the court ordered disclosure in relation to the decision making process.

13. Of particular relevance, given the factual nature of the dispute here as to the reliance HMRC's decision-maker placed on Ground 2, is the test explained in *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53 [2001] 1 AC 650. There, the House of Lords held disclosure will be ordered where it appears "necessary in order to resolve the matter fairly and justly". It is therefore critical to understand what "the matter" for resolution is.

14. That question, regarding the nature of the dispute, is also key to understanding the ambit of the principles on transparency and clarity around decision making. In agreement with Mr Bremner for HMRC, I do not accept that the cases the claimants rely on, establish a general requirement on the public authority, irrespective of the kind of public law challenge that is being made, to disclose everything about the decision-making process and all the documents underlying its decision. As the extract from *Quark Fishing* makes clear, the explanations given should concern "the facts relevant to the issues...". In that case one of the grounds was that there was no proper *de novo* reconsideration of the relevant fishing license. It can therefore be appreciated from the particular public law challenge in that case why focus was needed on the decision-making process and the reasons and documents underlying the decision. That is also true of the other cases. In *Jet2* the grounds concerned the factual issue of improper purpose. *Abraha* was an immigration case which concerned the legality of detention. That included issues as to the reasonableness of the length of detention and questions of what was apparent to the public authority in terms of prospects of the claimant's removal. It is to be noted that the function of the duty of candour and co-operation was explained as helping the court to fully understand the decision making process "under challenge". In *Phoenix Life*, there was a disputed question, relevant to the public law issue, as to whether the public authority had in fact made a decision. The disclosure was necessary to resolve that.

15. The particular extent of the duty of candour, and the necessity in a given case for disclosure will thus be sensitive to the particular public law issues raised. The key question remains "whether, in any particular case, disclosure of documents is necessary for the fair and just disposal of the issues". There is no dispute that question falls to this tribunal to determine.

Application of principles to case here

16. I turn then to consider the nature of the dispute in this judicial review. The parties offer competing views on this: whereas the claimants emphasise their case concerns an allegation of abuse of power and absolutely encompasses the decision making process, HMRC argue it is purely a legal matter in the sense that it turns on the legal interpretation of the scope and effect of APAs under the relevant legislation.

17. The straightforward and conventional answer to this issue is to look at how the claimants have put their case in their Statement of Grounds and Reasons (“SoGR”) and in relation to which permission to apply for judicial review was granted. Paragraph 3 of that statement describes “the essential basis of challenge” and relief sought as follows.

“...that the [CNs] are fundamentally inconsistent with and undermine a binding [APA] that was entered into between the Claimants and HMRC. The APA was executed by the Claimants on 15 November 2012 and by HMRC on 24 January 2013. As such, HMRC’s decision to issue the Notices constitutes an abuse of their powers and is irrational; it erodes trust and confidence in the APA regime more widely; and all of the Claimants invite the Court to exercise its supervisory jurisdiction by granting a quashing and/or declaratory order accordingly”.

18. This paragraph neatly and correctly summarises the essence of the claimants’ case. Centre stage is the effect of the APA between the claimants and HMRC, reached within the statutory setting of TIOPA, on HMRC’s power to decide to issue the charging notices, and the scope of that power. The judicial review claim is couched in terms of abuse of power. Foster J, in her grant of permission decision, accepted that articulation, observing that the case “might sit more happily as an absence of statutory power in certain circumstances”. She explained that the case was “...obviously...not, in its pure form, a representation case but the analogy that is made is that of legitimate expectation” and continued that “it appears that the public law element is focussed there.”

19. It is accordingly plain that the public law nature of the claim, and the particular allegation of abuse of power in that regard, is grounded in the fact of there having been an APA that was agreed between the claimants and the parties in the terms that it was. The claim does not revolve around whether HMRC abused its powers in a more general public law sense.

20. In reply, Mr Ghosh pointed to paragraph 51 of the SoGR to emphasise the broader public law nature of the claim. In that paragraph the claimants set out a number of material matters which it was said HMRC failed “to take into account”. However on closer analysis, the substance of those points and their context, indicate they are all points which HMRC are said not to have taken account of in the sense of them having reached a substantively wrong view on the relevant law and its application to the facts. In other words, they are points which go to the merits of HMRC’s legal stance on timing (Ground 1) as applied to the facts of the claimants’ situation. As paragraph 51 itself concludes by way of summary, the allegation is that HMRC’s attribution of additional profits to the claimants on the 2018 disposal “is entirely inconsistent with the substantive contractual effect of the APA” in respect of the relevant transactions. The points in paragraph 51 are not therefore points which go to what was or was not in the decision maker’s mind when he issued his decision.

21. HMRC’s depiction of the case the claimants have set out in their SoGR is therefore the better one. The description of the case as a “legal” issue, is effectively a shorthand way of contrasting the need, on the one hand, to interpret how the APA and CN (DPT) regimes interact (which although an issue of interpretation has a public law element as recognised by Foster J)

with, on the other hand, a public law challenge focussed on the process of HMRC's decision making.

22. The claimants advanced various reasons for why it was wrong to describe the claimant's case as one turning simply on legal interpretation. First, Foster J's rejection of HMRC's argument that the issue should be dealt with in appeal proceedings before the FTT rather than in a judicial review showed she did not view the case in narrow legal terms. Second, HMRC themselves sought to rely on factual evidence about the decision making process in the three witness statements they had filed. Third, it is suggested there is an overlap between Grounds 1 and 2. The claimants needed the disclosure to know whether HMRC did rely on Ground 2. If they did, that would mean the decision to impose CNs was fatally flawed given HMRC had conceded Ground 2.

23. None of these points, in my view, change the initial analysis above as to the nature of the case. In rejecting HMRC's case on forum, Foster J, did not reject an argument that the case would involve legal interpretation. Rather, as outlined above, she agreed there was a public law angle (using an analogy of legitimate expectation) which meant it was appropriate for the case to be dealt with in the Administrative Court. Her decision clearly envisaged that legal issues surrounding the interpretation of the effect of the APA would be central to the judicial review claim.

24. As to the three witness statements that were originally filed, two appear mainly concerned with HMRC's practice respectively in relation to the APA and DPT regimes (those of Shane Booth and Stefan Ellender). The third, that of the decision-maker Mr Page, sets out the events leading up to the issue of the CNs, including the representations made on behalf of the claimants, HMRC's response to those, and Mr Page's evidence on why he did not consider the APA to be relevant to the 2018 CNs. None appear to me to rely in any significant way on HMRC's decision-making process in relation to the particular decision that was made. Rather, to the extent the evidence deals with the decision making process, this appears to be advanced to show the operation of the statutory scheme of the DPT in showing the statutory context of the two regimes. The witness statements reflect the way HMRC have responded to the claimants' case (as described above), in their detailed grounds of resistance. Neither the witness statements or those grounds of resistance expand the nature of the dispute so as to encompass the broader public law challenge which the claimants suggest.

25. Regarding the significance of the suggested overlap between Ground 1 and 2, this could only be relevant if it is assumed the question of the extent to which Ground 2 featured in the actual decision making was encompassed within the claimants' case. However, for the reasons discussed that is not their case as shown in the SoGR. What the claimants need to know is what arguments HMRC are running to meet the claimants' allegation that the CNs wrongly encroached on the APA. Following HMRC's filing of its detailed grounds of resistance, it is clear that HMRC's response is restricted to Ground 1. To the extent the claimants seek to argue that Ground 1 must have Ground 2 embedded within it and is thereby flawed, then that line of argument is a legal one which, if correct, would ultimately show a lack of merit in Ground 1. It does not depend on whether the decision maker in fact relied on Ground 2.

26. In reply, Mr Ghosh also argued disclosure was needed to be able to respond to HMRC's reliance on s31(2A) of the Senior Courts Act 1981 (obligatory refusal of judicial review relief if it appears to the court "to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred"). Without sight of the documents surrounding the decision, the claimants were in no position to challenge an argument that the outcome would not have been substantially different.

27. However, HMRC's recourse to s31(2A), and an evidence-based enquiry into the question of what decision would be made if Ground 2 were not relied on, would only become relevant in the scenario where Ground 2 fell to be analysed. For the reasons already discussed, Ground 2 is not however in contention, first because HMRC has dropped it, and second because the particular basis which HMRC relied on, as between Grounds 1 and 2, to impose the CNs, is not the focus of the judicial review claim advanced. Rather, it is whether HMRC's decision wrongfully encroached on the APA.

28. Taking account of the particular issues raised in this case, I do not therefore consider the disclosure sought is necessary for the fair and just disposal of those issues. Nor do the circumstances in which HMRC have initially run but then dropped a ground of resistance, or the alleged inconsistencies in the evidence from Mr Page which has been filed, alter that analysis.

29. The fact that HMRC originally advanced two reasons for resisting the claim but now advance one has the effect of narrowing the area of dispute between the parties. As discussed, in contrast to cases involving allegations, for instance, of improper purpose which require focus is on the particular reasons the decision maker had in mind when making their decision, this is not the sort of public law case where the narrowing of issues in the course of proceedings should spawn a spin-off enquiry into why an argument that was dropped was dropped. Proceeding along those lines would in my view wrongly shift focus from the particular basis on which permission has been granted to apply for judicial review. Although in these disclosure application proceedings it has been suggested disclosure is needed to show the extent to which HMRC *knowingly* encroached onto the APA, that was not part of the claimants pleaded case upon which permission was granted.

30. As for the criticisms of Mr Page's evidence, these would not, in my view, necessitate the disclosure sought, even if made out, given the focus of the case on legal interpretation as described above. I am not persuaded, in any event, that his evidence is inconsistent. The claimants contrast various statements (where Mr Page says on the one hand Ground 2 was "in play" at the time the CNs were issued, that he "was aware of Ground 2 as a further reason" and that it "offered some support for the decision") with a statement that he "did not rely on it" when making his decision. For my part, I do not agree the statements are inconsistent as I do not consider the former extracts can fairly be taken to say that Mr Page placed reliance on Ground 2. There is no inconsistency in that awareness of a reason, and acknowledgment that it offered support does not necessarily equate to reliance. The rather more straightforward reading of Mr Page's evidence is that he relied on Ground 1 for his decision; he did not rely on Ground 2. Even to the extent the decision making process were in issue, (and as I have said, I do not consider that is the focus of this case) then the evidence is not such that the tribunal "is left guessing about some material aspect of the decision-making process" per *Abraha*.

31. As already indicated, the duty of candour and to disclose documents are circumscribed by the nature of the case. These principles do not assist the claimants in this application. They do not operate to provide an independent basis for disclosure, where, as I have concluded here, disclosure is not necessary for the fair and just disposal of the issues in this case.

32. The disclosure application is accordingly refused.

JUDGE SWAMI RAGHAVAN

Release date:12 April 2023