[2021] UKFTT 0446 (TC)

TC 08330A/V

PROCEDURE – application by a non-party for copies of skeleton arguments and written submissions before issue of dispositive decision – Cape Intermediate Holdings Ltd *followed – three-stage approach in applying* Cape *– (i) whether information sought has potential value in advancing open justice – (ii) whether risk or harm to maintenance of effective judicial process or to legitimate interests of others – (iii) relevant considerations in relation to practicality and proportionality – application granted in part*

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/04496

BETWEEN

JTI ACQUISITION COMPANY (2011) LIMITED **Appellant**

-and-

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

-and-

ERNEST & YOUNG LLP **Third Party**

TRIBUNAL: JUDGE HEIDI POON

Application dealt with in chambers on 2 June 2021 with parties' written submissions of 21 April 2021 forwarded on 5 May 2021

John Gardiner QC, and Michael Ripley, Counsel, instructed by RPC LLP, for the Appellant

Elizabeth Wilson QC, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. By letter dated 22 March 2021, Ernest & Young LLP ('EY') applied to the First-tier Tribunal for disclosure of documents in relation to the appeal proceedings, the substantive hearing of which took place over three days on 23 to 25 March 2021.

2. The appellant opposes the application; the respondents 'adopt a neutral position'; that is, 'HMRC neither consents to the disclosure requested by the application, nor objects to it'.

3. The application raises legal issues as how the Tribunal is to consider an application by a third party for disclosure of trial documents in an ongoing set of proceedings.

THE APPLICATION

4. EY's application was marked 'Urgent' and sent by email attachment to the Tribunal's inbox at 18:08 hrs on 22 March 2021. It was forwarded for my attention as the hearing judge at 8:01 hrs on 23 March 2021, and I read it directly in case it was relevant to the substantive hearing due to start. Whilst the application was made without notice, I was clear that the litigating parties needed to be afforded the opportunity to make representations on the application. Notwithstanding the fact that the application was marked 'Urgent', it was only after the substantive hearing was concluded that parties were able to make their representations.

5. EY's application contains six paragraphs, with the final paragraph being an offer to provide further information if required. The first five paragraphs are summarised below.

(1) Apart from the case name and reference in the heading, the proceedings are identified as being 'listed for final hearing before Judge Heidi Poon of the First-tier Tribunal ("FTT") commencing 23 March 2021 via the Video Hearing Platform'.

(2) 'By way of background', EY states that it 'represents numerous taxpayers with a variety of disputes with HMRC including litigation matters' and that 'HMRC's proposed application and interpretation of the legislation and case law relating to "unallowable purpose" is of particular interest' which is understood to be 'a live issue' in the appeal.

(3) Citing *Hastings Insurance Services Ltd & HMRC v KPMG LLP (Third Party)* [2008] UKFTT 478 (TC) ('*Hastings*'), EY states:

> '[*Hastings*] clearly established that third parties interested in the outcome of appeal proceedings are entitled to obtain copies of any of the pleadings filed by the parties, including copies of the skeleton arguments.'

(4) The documents sought for disclosure are related in the following terms:

> 'Following *Hastings*, [EY] write to respectfully request copies via email of both parties' skeleton arguments which have been filed with the FTT in advance of the final hearing … as well as any further written submissions that may be filed during the course of the final hearing.'

(5) The purpose and the undertakings in EY's use of the said documents are given:

> '… the purpose of receiving copies of the skeleton arguments is to review, consider and understand the parties [sic] arguments … in order to potentially inform our own clients' arguments in their respective (unrelated) disputes.'
>
> 'For the avoidance of doubt, … [EY] do not propose to discuss or share the contents with the press or legal or accountancy firms, or members of the public who are not our clients.'
>
> '[EY] are agreeable to any confidential personal information that is irrelevant to facts and legal issues in dispute … being redacted …'

6. The Tribunal issued Directions on 29 March 2021 for parties to make representations on EY's application, together with directions in relation to parties' post-hearing submissions, which were in the main on the evidence given by the appellant's key witness. EY's application requests both parties' skeleton arguments lodged prior to the hearing, as well as any further written submissions filed as part of the proceedings. I accept that the post-hearing submissions by parties pursuant to the 29 March 2021 Directions are therefore covered by EY's application.

APPELLANT'S OBJECTIONS

7. The Appellant opposes the application, and cites *Cape Intermediate Holdings Ltd v Dring* [2019] UKSC 38 ('*Cape*') and *Fastklean Limited v HMRC* [2020] UKFTT 0511(TC) ('*Fastklean*') in making its submissions, which are summarised as follows.

(1) The 'only normative explanation' given in the application 'does not satisfy the legitimate interest test'; it is not for other taxpayers to inform the arguments relied on by EY's clients. The appellant has incurred professional fees in obtaining legal advice; there is no good reason why third parties should be permitted to benefit from that advice.

(2) The appellant has 'a legitimate interest' in its skeleton argument and grounds of appeal being kept confidential to it, HMRC and the Tribunal. 'A commercial interest is a legitimate interest': *Cape* at [46].

(3) EY's clients will no doubt be well aware of HMRC's view of the law from the context of their own disputes with HMRC on the unallowable purpose issue; the matters arising in cases concerning unallowable purpose are 'highly fact specific'; no explanation has been provided by EY as to why having sight of the deployment of HMRC's legal arguments to the facts of this appeal would assist EY's clients.

(4) Ordering disclosure of the parties' pleadings and skeleton arguments is not necessary as EY and its clients will be provided with sufficient detail of the arguments in the published decision by the Tribunal.

(5) Should the application be granted, the appellant will require EY to provide an undertaking that it will not share a copy of (or the content of) any document supplied to it with any third party. The appellant further requires that it be allowed to redact its pleadings and skeleton argument before their disclosure to preserve confidential and commercially sensitive information.

DISCUSSION

The relevant legal principles

Tribunal's inherent jurisdiction

8. *Hastings* is cited in EY's application in support of its application. I do not consider that *Hastings* can be read as having established that an 'interested' third party is 'entitled' to obtain copies of the relevant documents, if 'entitled' is taken to mean by right.

9. What *Hastings* has established is that the First-tier Tribunal (similar to the Upper Tribunal in *Aria Technology Limited & HMRC v Situation Publishing Ltd* [2018] UKUT 111 (TCC)) has 'an inherent jurisdiction to determine how the principle of open justice should be applied and to grant a non-party access to documents relating to proceedings in accordance with that principle' (*Hastings* at [5]).

10. The operative word here is 'inherent', since the jurisdiction of the First-tier Tribunal is otherwise created only by statute. The inherent jurisdiction of this Tribunal means it has the power to *consider* a non-party application for disclosure; the authorities do not establish an 'entitlement' to disclosure by application.

Non-party applications underpinned by the principle of open justice

11. The Supreme Court in *Cape* drew on legal principles laid down in earlier authorities to bear on the application in question. It adopted the principles formulated in *R(Guardian News and Media Ltd) v City of Westminster Magistrates' Court (Article 19 intervening)* [2012] EWCA Civ 420, which was endorsed by the majority of the Supreme Court in *Kennedy v Charity Commission (Secretary of State for Justice intervening)* [2014] UKSC 20, and unanimously by the Supreme Court in *A v British Broadcasting Corporation (Secretary of State for the Home Department intervening)* [2014] UKSC 25. From these precedents, the approach to follow in considering a non-party application for disclosure is summarised at [38] in *Cape*:

> '… where documents have been placed before a judge and referred to in the course of proceedings … 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." In evaluating the grounds for opposing access, the court would have to carry out a fact-specific proportionality exercise. "*Central to the court's evaluation will be the purpose of the open justice principle*, the potential value of the material in advancing that purpose and, conversely, any risk of harm which access to the documents may cause to the legitimate interests of others"... (italics added)

12. While there is a 'default position' of allowing access, the Supreme Court in *Cape* stated clearly at [45] that there is no entitlement to access as if by right.

> 'However, although the court has the power to allow access, the applicant has no right to be granted it (save to the extent that the [Civil Procedure] rules grant such a right). It is for the person seeking access to *explain why he seeks it* and *how granting him access will advance the open justice principle*. In this respect it may well be that the media are better placed than others to demonstrate a good reason for seeking access. But there are others who may be able to show *a legitimate interest* in doing so….' (italics added)

13. What does it mean to advance the open justice principle? From the guidance in *Cape*, whether the open justice principle is advanced is to be assessed in the light of the two-fold purpose of the principle; namely:

(a) to enable public scrutiny of the way in which courts decide cases: *Cape* [42];

(b) to enable the public to understand how the justice system works and why decisions are taken: *Cape* [43].

14. The dictionary meaning of 'to advance' in relation to a process or a plan connotes 'to forward' or 'help on', and is the meaning with which I understand the guidance in *Cape* refers in relation to advancing the purpose of the open justice principle. It seems that whether the open justice principle is 'advanced' is not entirely synonymous with whether open justice is 'engaged'; that being the term which appears more often than 'advanced' in the line of authority prior to *Cape*. The nuanced difference may be that the *engagement* of the open justice principle pertains to the jurisdictional foundation for the court to exercise its inherent jurisdiction, while the *advancement* consideration is apposite to the 'legitimate interest' test vis-á-vis a non-party.

15. The onus is on the applicant to explain *why* and *how* the grant of access to the requested documents will advance the purpose of the open justice principle. The construction of the term 'a legitimate interest' vis-á-vis a non-party at [45] of *Cape* seems to be referential to the advancement criterion of the open justice principle, as highlighted by the comment that 'the media are *better placed than others* to demonstrate a good reason for seeking access', in carrying out the public scrutiny of the justice system. Others may be able to show a legitimate interest, which will probably be in respect of the second limb of the two-fold purpose.

***The three-stage approach from* Cape**

16. In summary, a three-stage approach can be derived from *Cape* whereby this Tribunal is to carry out a 'fact-specific balancing exercise' by weighing up factors as concerns:

(1) 'the purpose of the open justice principle and the potential value of the information in question in advancing that purpose' (*Cape* at [45]);

(2) 'any risk of harm which [the] disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others' (*Cape* at [46]);

(3) 'Also relevant must be the practicalities and the proportionality of granting the request' (*Cape* at [47]).

First: The purpose of the open justice principle being advanced

17. The justice system has two essential operative features to ensure that the two-fold purpose of the open justice principle is achieved. The first is that the proceedings are held in open court, to which the press and the public are admitted. The second concerns the reporting of the proceedings, which involves not only the publication of the judgment of the court in the proceedings being made public as a record, but also that the press should be free to publish a fair and accurate report of the proceedings to a wider public.

18. It is in connection with the press being able to make a fair and accurate reporting of a set of proceedings that the Supreme Court in *Cape* has singled out journalistic interest in its remark: 'where access is sought for a proper journalistic purpose the case for allowing it will be particularly strong'. I am not here dealing with an application for a proper journalistic purpose, but an accountancy firm seeking the documents to advise its clients. Further, the application is made in advance of the issue of a dispositive decision; I need also to consider if the principle of open justice is engaged for the inherent jurisdiction to be exercised.

Is the principle of open justice engaged?

19. In *Hastings*, KPMG applied for disclosure of HMRC's statement of case and both parties' skeleton arguments 'in order better to understand HMRC's arguments in the appeal' as related in the dispositive decision (at [1]). In *Fastklean*, the barrister applied for the disclosure of an email being referred to in the dispositive decision as containing HMRC's current internal procedure for issuing the relevant penalties. There is a *prima facie* case of the open justice principle being engaged arising from the decisions in question by the Tribunal.

20. Unlike *Hastings* or *Fastklean*, EY's application is made, and being considered, before a dispositive decision on the case has been released. However, as observed by Hamblen LJ in the Court of Appeal decision in *Dring (on behalf of the Asbestos Victims Support Groups Forum UK) v Cape Intermediate Holdings Ltd* [2018] EWCA Civ 1795 at [124] ('*Cape CA*'), the fact that there had been no dispositive judgement by the court in *Cape* (due to settlement by a consent order) does not preclude the open justice principle from being engaged.

> '… there has to be an effective hearing for the principle to be engaged. Once there is a hearing, however, the right of scrutiny arises, the principle of open justice is engaged and it will continue to be so up and until any settlement or judgment. The same will apply to the hearing of interlocutory applications.'

21. The reasoning why the principle of open justice is engaged as soon as there is an effective hearing is set out in detail at [28] to [35] in *The Law Debenture Trust Corp (Channel Islands) Ltd v Lexington Insurance Co* [2003] EWHC 2297 (Comm)('*Law Debenture*'), where Coleman J considered an application for inspection of skeleton arguments in a case which had settled. For present purposes, there had been an effective hearing for the principle of open justice to be engaged, even though no dispositive decision has yet been published.

22. Furthermore, although parties' written submissions lodged after the hearing have not been read at open court, their supplemental submissions are to be considered as having passed into the public domain: see Lord Bingham in *SmithKlime Beecham Biologicals SA v Connaught Laboratories Inc* [1999] 4 All ER 498, p 512.

Does the applicant have a legitimate interest?

23. EY's application seems to suggest that there is some inherent entitlement to access documents once the principle of open justice is engaged. Whilst the Tribunal has inherent jurisdiction to consider this application, there is no inherent entitlement for a non-party to gain access to documents relating to a set of proceedings. As the Supreme Court in *Cape* has stated: 'although the court has the power to allow access, the applicant has no right to be granted'.

24. In *Cape*, examples of what may be a 'legitimate interest' (assessed in the light of advancing the purpose of the open justice principle) include: (a) a proper journalistic interest in reporting a set of proceedings, as the media function as the eyes and ears of the public; (b) where a judge has forgotten or ignored some important piece of information, thereby making the decision 'less transparent' (see [44]).

25. The stated purpose in EY's application is 'to review, consider and understand' the parties' arguments 'in order to potentially inform [its] own clients' arguments in their respective (unrelated) disputes'. The Appellant contends that EY has not met the legitimate interest test. I understand the contention to be on the ground that EY is in the business of advising clients, who pay a fee to obtain its advice. The stated purpose by EY for obtaining the said documents is therefore a business or commercial interest, and is unrelated to the open justice principle. In this regard, I am reminded of the observation by Moore-Bick J (as he was then) in *Dian AO v Davis Frankel & Mead (a firm) and another* [2004] EWHC 2662 (Comm)('*Dian*') at [31]:

> 'Alfa [The applicant] has no interest in the performance of the judicial function in that case, … It simply seeks permission to use the court file as a source of potentially useful information to assist it in other litigation. *That does not in my view engage the principle of open justice*. Although, as [counsel for Alfa] pointed out, one consequence of observing the principle of open justice is that those who are present at a hearing may obtain access to information that they may be able to use to their advantage in other contexts, that is simply a consequence of doing justice in public. It is not one of its primary objects.' (italics added)

26. Moore-Bick J went on to say at [56] in *Dian* that the applicant nevertheless had a legitimate interest in the following terms:

> '… although Alfa is not interested in whether justice was properly administered in the Dian case, I think it does have a legitimate interest in obtaining access to documents on the court record in so far as they contain information that may have a direct bearing on issues that arise in the litigation in the Caribbean…. in the case of documents that were read by the court as part of the decision-making process, the court ought generally to lean in the favour of allowing access in accordance with the principle of open justice…'

27. Juxtaposing [31] and [56] of *Dian* prompted me to consider that the open justice principle being 'engaged' may not be synonymous with the purpose of the principle being 'advanced'. Nevertheless, if the legitimate interest test as formulated in *Cape* is applied to the facts in *Dian*, and reading the pronouncements of Moore-Bick J in context, it seems (at [31]) what was being said is that the applicant Alfa had no interest in advancing the first limb of the purpose of the open justice principle, but that (at [56]) Alfa had a legitimate interest in the light of the second limb of the purpose of the open justice principle.

28. Similarly, the Court of Appeal concluded at [131] in *Cape CA* that 'the authorities make clear, an entirely private or commercial interest in a document can qualify as a legitimate interest. Often, as in *GIO*[1] and *Law Debenture Trust* and *Dian,* it will be an interest in related litigation.' The interest as stated by Dring (on behalf of the Asbestos Victims Support Groups Forum UK) for disclosure of court documents is recorded in *Cape* at [6] as follows:

> 'In the Forum's view, the documents might assist both claimants and defendants and also the court in understanding the issues in asbestos-related disease claims. No particular case was identified but it was said that they would assist in current cases.'

29. On that basis, the Supreme Court granted access to the Forum in relation to copies of all statements of case, witness statements, expert reports and skeleton arguments and written submissions. The role of skeleton arguments and written submissions in advancing the purpose of the open justice principle is stated at [29] of *Cape*: 'The confidence of the public in the integrity of the judicial process must depend upon having an opportunity to understand the issues.' For these reasons, I conclude that EY has established that it has a legitimate interest in the parties' skeleton arguments and written submissions lodged in these proceedings.

Second: Any risk or harm to judicial process or to the legitimate interests of others

30. The appellant has asserted that it has a commercial interest in keeping its skeleton argument confidential to HMRC and the Tribunal. It is unclear to me the basis for this assertion, given that there has been no application under Rule 14 of The Tribunal Procedure (First-Tier Tribunal) (Tax Chamber) Rules 2009 ('the Tribunal Rules') to prohibit the disclosure or publication of specified documents by either party to these proceedings.

31. In *Lilly Icos Ltd v Pfizer Ltd* [2002] EWCA Civ 2 ('*Lilly Icos*'), the Court of Appeal was not directly concerned with the rights of access to documents of non-parties, but with an application by the patentee for an order to maintain confidentiality of a document after the proceedings had terminated. The said document had been treated as confidential during the proceedings and referred to during a public hearing. Buxton LJ observed at [5] how the application could impact indirectly on the position of non-parties in two ways, namely:

> 'First, if a party is at liberty to "use" a disclosed document, he may no doubt make it available to a non-party, in the absence of a special order preventing that. Second, if the court does make an order under CPR 31.22(2), but the document in question comes into the possession of a third party, for instance by accident or theft, then any use by the third party of the document with knowledge of the court's order will arguably be a contempt.'

32. If the Appellant had made a Rule 14 application which had been granted for its skeleton argument to be kept confidential, then a parallel can be drawn with the consideration faced by the court in *Lilly Icos*. No embargo exists under Rule 14 in respect of any document lodged for the hearing. It follows that the parties' skeleton arguments have entered into the public domain for a non-party to apply for access. The risk and harm to the Appellant is allayed by being able to redact documents before disclosure, and by obtaining requisite undertakings from EY.

33. Whilst the Tribunal will relate the parties' legal arguments in some detail in the published decision, the purpose in relation to the open justice principle is to understand how the Tribunal reaches its decision – it is to judge the judge, not to judge the case. To that end, I am unable to identify any risk or harm to the judicial process by allowing access to the requested documents in principle, even though the dispositive decision is yet to be released.

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[1] *Gio Personal Investment Services Ltd v Liverpool and London Steamship P&I Association Ltd* [1999] 1 WLR 984, (1999) Times, 13 January, CA.

Third: Practicality and proportionality

34. The Supreme Court in *Cape* used the mandatory term 'must' at [47] in relation to the third stage of consideration. By 'must', I understand it to mean that even if an application has passed the first and second stages of consideration, it remains necessary to consider the practicality and proportionality in granting the request.

35. The Appellant has requested for any documents to be redacted in the event that this application is granted. To my mind, there are two sets of documents covered by this application: (i) parties' skeleton arguments lodged prior to the hearing commencing on 23 March 2021; and (ii) parties' sequential written submissions pursuant to Directions issued on 29 March 2021.

36. The skeleton arguments are parties' legal submissions; the written submissions post-hearing are parties' submissions on the evidence heard. The post-hearing written submissions are fact-specific, and fairly voluminous; they include annotations of excerpts of the transcript of the key witness' oral evidence, and spreadsheet diagrams to illustrate the steps in a scheme.

37. I have regard to the fact that access to trial documents is outwith the routine operation of the justice system, and its grant places additional administrative burden on judicial resources. As Master McCloud observed in *Mitchell v News Group Newspapers Ltd* [2013] EWHC 2355 (QB) in response to the *Jackson* reforms, 'judicial time is thinly spread', and the emphasis must be to a fair and proportionate deployment of judicial resources in the administration of justice.

38. EY's interest in the case pertains to the issue of 'unallowable losses' under sections 441 and 442 of Corporation Tax Act 2009. Whilst the written submissions post-hearing are in principle covered by this application, the materials are spread out and much harder to delineate than the pre-hearing skeleton arguments. The substantive issue of 'unallowable losses' is highly fact-specific; the parties' submissions on the evidence are therefore unlikely to be of direct utility to the purpose as stated by EY in its application. I am of the view that it is sufficient to meet EY's stated purpose by granting access to parties' skeleton arguments alone. The legal submissions are contained in the parties' skeleton arguments of 21 pages (Appellant's) and 18 pages (HMRC's). I consider it proportionate to allow the application, but only to the extent of the parties' skeleton arguments.

DISPOSITION

39. For the reasons stated, the Tribunal makes the following Directions.

(1) A copy of the Appellant's skeleton argument of 21 pages and dated 1 March 2021 is to be provided to EY, subject to redactions as deemed necessary by the Appellant.

(2) A copy of the Respondents' skeleton argument of 18 pages and dated 8 March 2021 (without cross-referencing) is to be provided to EY.

(3) The Appellant is to determine the terms of undertakings it requires from EY for the provision of its skeleton argument, and to obtain the requisite undertakings to its satisfaction from EY before disclosure.

(4) The Appellant is to reach an agreement with the Respondents in relation to any redactions in the Respondents' skeleton argument which are to be effected in line with the redactions made to its own skeleton argument.

(5) The (redacted) skeleton arguments shall be provided to EY no later than 60 days after the date of release of this decision, and only provided when no application for permission to appeal has been made by any party.

(6) Any party may apply at any time for these Directions to be amended, suspended or set aside, or for further directions.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

40. 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.

DR HEIDI POON
TRIBUNAL JUDGE

Release date: 25 JUNE 2021