



19 October 2016

PRESS SUMMARY

R (on the application of Ingenious Media Holdings plc and another) (Appellants) v Commissioners for Her Majesty's Revenue and Customs (Respondent) [2016] UKSC 54
On appeal from [2015] EWCA Civ 173

JUSTICES: Lady Hale (Deputy President), Lord Mance, Lord Kerr, Lord Reed, Lord Toulson

BACKGROUND TO THE APPEAL

This case concerns the scope of the duty of confidentiality owed by Her Majesty's Revenue and Customs ("HMRC") in respect of the affairs of taxpayers. This duty is set out in statutory form in Section 18(1) of the Commissioners for Revenue and Customs Act 2005 (the "2005 Act"), which provides that HMRC officials may not disclose taxpayer information. Section 18(2) of the 2005 Act sets out a number of situations in which this duty may be overridden. These include where a disclosure is "made for the purposes of a function" of HMRC (s.18(2)(a)(i)) and "function" is given a broad and general definition in various sections. There are also a number of more specific situations set out in ss.18(2)(b) to (j), such as for the purposes of civil or criminal proceedings.

Mr Patrick McKenna is the Founder and Chief Executive Officer of Ingenious Media Holdings plc ("Ingenious Media"), an investment and advisory group specialising in the media and entertainment industries. It promoted film and investment schemes involving film production partnerships which utilised certain tax relief previously available [8]. On 14 June 2012 the Permanent Secretary for tax in HMRC, Mr David Hartnett, gave an "off the record" interview to two financial journalists from *The Times* about tax avoidance [9]. On 21 June 2012 *The Times* published two articles on film schemes and tax avoidance which identified Mr McKenna as one of two main providers of film investment schemes in the UK and informed readers that such schemes had enabled investors to avoid at least £5 million in tax – a figure that had been provided by Mr Hartnett. The articles also contained a direct quote from the interview with Mr Hartnett about Mr McKenna, which was attributed to a "senior Revenue official" [10-11].

Mr McKenna and Ingenious Media brought a claim for judicial review of the decision of HMRC, acting by way of Mr Hartnett, to disclose information which concerned them to *The Times* journalists. The court at first instance held that it should not approach the disclosures as if it were the primary decision maker. It found that the disclosures made by Mr Hartnett were not irrational, were made for a legitimate purpose and were proportional [14]. This approach was upheld by the Court of Appeal [15]. Ingenious Media Holdings appealed to the Supreme Court.

JUDGMENT

The Supreme Court unanimously allows Ingenious Media's appeal. Lord Toulson, with whom the other Justices agree, gives the lead judgment.

REASONS FOR THE JUDGMENT

Judicial review is not the only course of action available to challenge the conduct of a public body. Public bodies are not immune from the ordinary application of the common law, including the law of

confidentiality [28]. This case should be approached from the perspective of the common law of confidentiality [17, 28].

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 the information was received or it relates. The tax affairs of individual taxpayers are matters between HMRC and the taxpayer, and confidentiality is a vital element in the working of the system [17].

However, this principle may be overridden by explicit statutory provisions [18]. By taking together ss.5, 9 and 51(2) of the 2005 Act, HMRC's interpretation of the phrase "disclosure made for the purpose of a function" of HMRC in s.18(2)(a)(i), would permit disclosure of anything which in the view of HMRC is necessary, expedient, incidental, conducive to or in connection with the exercise of the functions of the collection and management of revenue. However, if this interpretation was correct the provisions permitting disclosure in the specific circumstances in s.18(2)(b) to (j) would be superfluous. Furthermore, such a construction would run counter to the principle of legality, by which fundamental rights cannot be overridden by general or ambiguous words [19]. In enacting the 2005 Act, Parliament cannot have envisaged that it was authorising HMRC officials such a wide ranging discretion to disclose confidential information about the affairs of individual taxpayers, limited only by the rationality test applied in judicial review claims, as this would significantly undermine the primary duty of confidentiality in s.18(1) [22]. The correct interpretation of Section 18(2)(a)(i) is that it permits disclosure to the extent reasonably necessary for HMRC to fulfil its primary function [23].

It is for the court to decide whether there has been a breach of confidentiality by applying the law to its own judgment of the facts. The opinion of the individual who has disclosed the information is not irrelevant, but the court will decide what weight it should be given [26]. This principle applies whether the duty of confidentiality is contractual or where, as in the current case, the person or body owing a duty of confidentiality holds a public office, is a public body, or is performing a public function, subject to any contrary statutory provision [27, 29].

An impermissible disclosure of confidential information is no less impermissible because the information is passed on in confidence, or "off the record" [31]. The information supplied by Mr Hartnett to the journalists about Mr McKenna and Ingenious Media was confidential in nature, in respect of which HMRC owed a duty of confidentiality under s.18(1) of the 2005 Act [32]. The fact that Mr Hartnett did not anticipate his comments being reported is not a justification for making them [35]. The desire to foster good relations with the media and to publicise HMRC's view about tax avoidance schemes and speculation that the journalists may have subsequently informed Mr Hartnett about other tax avoidance schemes do not provide sufficient justification for the disclosures either [34]. The disclosures by Mr Hartnett were not therefore justified under s.18(2)(a) of the 2005 Act [36].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

<http://supremecourt.uk/decided-cases/index.html>