

Analysis

Hastings Insurance: access to documents filed at the tribunal

Speed read

On 15 August 2018, the First-tier Tribunal released its decision in *Hastings Insurance Services Ltd and HMRC v KPMG LLP (Third Party)* and allowed an application by KPMG for inspection of the parties' pleadings and skeleton arguments in the underlying appeal. The decision is the first time that the tribunal has clearly set out the status and accessibility of documents filed in the course of a tax appeal and it clarifies a murky area of law which had been left unaddressed by the tribunal rules. The tribunal's decision that some documents can be inspected after a hearing if a third party can establish a 'legitimate interest' has significant ramifications for open justice, taxpayers' privacy and practitioners' drafting, especially given the broad nature of what precisely constitutes a 'legitimate interest'.



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Can a third party access or inspect documents which have been filed with the First-tier Tribunal (FTT) by the parties to a tax appeal? The answer to this question was, until now, entirely opaque and open to argument: neither the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules, SI 2009/273 ('the tribunal rules') nor case law had ever fully addressed the issue.

The FTT has now clarified the position in *Hastings Insurance Services Ltd and HMRC v KPMG LLP (Third Party)* [2018] UKFTT 478 (TC) ('the decision'), in which Judge Sinfield has taken the opportunity to clearly and firmly lay down the law in this area. His conclusions have significant implications not only for taxpayers' privacy, but also for practitioners and the principle of open justice.

Factual background

The decision in *Hastings Insurance Services Ltd v HMRC* [2018] UK FTT 27 (TC) (*Hastings*), released in January

2018, concerned the concept of 'fixed establishment' when determining the place of supply for VAT.

KPMG (which was neither a party nor a representative in *Hastings*) applied to the FTT, in a fully particularised way, for copies of HMRC's statement of case and the parties' skeleton arguments. This was to better understand HMRC's arguments in *Hastings*; and, in turn, HMRC's arguments in a different, unrelated case in which KPMG is instructed.

Both HMRC and Hastings Insurance objected to the application and it was dealt with on the papers.

The legal context

The Civil Procedure Rules, SI 1998/3132 (CPR) make express provision for accessing certain documents which have been filed with the court. Rule 5.4C(1) provides that, subject to various exceptions, third parties have the right to obtain from the court copies of a statement of case (but not any documents filed with or attached to that document) and any order or judgment made in public. Rule 5.4C(2) provides that a third party may obtain copies of any other document filed by a party if the court grants permission following an application.

'The principle of open justice is engaged in the First-tier Tribunal as it is in other courts'

In contrast, the tribunal rules are silent on whether or not a third party can take copies of or inspect documents filed with the FTT. However, the Upper Tribunal (UT) (also Judge Sinfield) recently considered this issue in the context of its own proceedings in *Aria Technology Ltd v HMRC and Situation Publishing Ltd as a third party* [2018] UKUT 111 (TCC). In that case, the UT considered an application by the taxpayer for a direction under rule 14 of the Tribunal Procedure (Upper Tribunal) Rules, SI 2008/2698 ('the UT rules'), that certain documents filed with the UT by the taxpayer should not be disclosed to a journalist, who was himself pressing an application for the parties' pleadings. The UT concluded that it had an inherent jurisdiction to determine how the principle of open justice should apply and 'an inherent power to grant a third party access to any documents relating to proceedings that are held in the UT records and has a duty under common law to do so in response to a request by an applicant unless the UT considers ... that any documents or information in them should not be disclosed to other parties'.

The decision

After noting the difference between the CPR and the tribunal rules, the FTT noted that third party access to documents could only be granted if the FTT had an inherent jurisdiction to do so. After briefly considering both the constitutional importance of the principle of open justice and relevant case law, the FTT found that it did have the inherent jurisdiction 'to determine how the principle of open justice should be applied' because 'the principle of open justice is engaged in the First-tier Tribunal as it is in other courts'.

The FTT then moved to the heart of the issue and found that 'the First-tier Tribunal has an inherent

jurisdiction to allow a non-party to inspect documents in its records that are the equivalent of the documents in CPR 5.4C(1).⁷

The FTT identified the 'equivalent documents' as: the notice of appeal; HMRC's statement(s) of case; any reply; the parties' lists of documents (but not the documents themselves); and any judgment or order made by the FTT in public.

The FTT then went on to adopt and apply the recent Court of Appeal decision in *Cape Intermediate Holdings Ltd v Dring (Asbestos Victims Support Group)* [2018] EWCA Civ 1795, in which the court considered an application by a public pressure group for access to documents used or disclosed in the context of civil proceedings. The Court of Appeal confirmed that the courts and tribunals have an inherent jurisdiction to allow the inspection of certain categories of documents, including:

- witness statements which would be available for inspection in the course of a trial;
- documents which are read out in court, which the judge is invited to read, or which judge has clearly read;
- skeleton arguments, written submissions and 'similar advocate's documents'; and
- 'any specific document ... necessary for a non-party to inspect in order to meet the principle of open justice'.

Thus the inherent jurisdiction applies much more widely than 'equivalent documents' in the context of both civil proceedings and the FTT.

Curiously, however, the FTT departed from *Cape* to the extent that it found that the principle of open justice in the FTT does not require the provision of *copies* of documents. Instead, the FTT found that 'copies of' should be read as 'access to' or 'inspection of', although it did note that it would have the power to order copies to be provided if appropriate.

The parties' objections were then addressed by the FTT.

HMRC raised two objections:

- taxpayer confidentiality pursuant to the Commissioners for Revenue and Customs Act (CRCA) 2005 s 18; and
- the absence of a tribunal rule allowing a third party access to documents.

Both objections were given short shrift, with the FTT noting that the first objection was misconceived, in that CRCA 2005 s 18 does not apply to the FTT.

Hastings Insurance took a more nuanced approach and made the following submissions:

- The test which KPMG had to satisfy was one of 'legitimate purpose'. The tribunal rejected this submission, finding that the test is one of 'legitimate interest' – a wider test which does not necessarily require a direct personal or professional interest. An interest in other related litigation was, in any event, sufficient.
- The parties' skeleton arguments should not be disclosed because, in effect, they were either departed from at the hearing or bore no resemblance to the oral submissions for other reasons. The FTT rejected this, as the skeletons were 'deployed by the parties at an effective public hearing and read by the tribunal ... they were submissions that were made, however briefly, at some stage of the hearing'.
- KPMG should not have access to any part of HMRC's statement of case, which referred to an appeal which was settled prior to a hearing. The tribunal agreed,

holding that it 'does not have any inherent jurisdiction to grant a non-party access to documents relating to an appeal that has settled before it has started'.

- KPMG should not have access to annexures to HMRC's statement of case. The FTT agreed.
- The documents should be redacted to remove reference to the amount of tax assessed and to evidence which was successfully excluded by Hastings Insurance. On the facts of the case, the tribunal refused to allow the redactions, on the basis that the skeletons were a mode of submission at some point and the evidence was clearly read by the tribunal.

On the basis that KPMG had a legitimate interest, the tribunal directed that KPMG be allowed to inspect the documents which were requested, without redactions, subject to a stay of the decision for 60 days.

Why does the decision matter?

The decision clarifies the law on the right of third parties to access and inspect documents which have been filed with the FTT and the ramifications are significant.

Care will now need to be taken as to what exactly is said in documents which will be filed with the tribunal and which fall within the categories identified in *Cape*. Any information in those documents should be treated as public information, and confidential or commercially sensitive information may need to be excluded or included in an annex. Even then, there is no certainty that confidentiality would be preserved. Whilst an analogy with the CPR would suggest that annexures are not disclosable to third parties, Judge Sinfield's reasoning as to why the annexures to HMRC's statement of case in *Hastings* should not be permitted to be inspected may not protect an annex which has been specifically referred to or which the FTT has been invited to read.

Taxpayers and public pressure groups now have the opportunity to hold HMRC to account and to ensure that it treats all taxpayers consistently by scrutinising pleadings in similar cases

Taxpayers can now inspect HMRC's documents in other, related cases, thus affording them an opportunity to reconnoitre the likely arguments they will face in similar litigation. This could provide invaluable 'early warning'. In addition, taxpayers with a legitimate interest in ongoing litigation, which could impact their own self-assessment to tax, may be able to request documents which may help to anticipate HMRC's view of the relevant tax treatment.

Taxpayers and public pressure groups also now have the opportunity to hold HMRC to account and to ensure that it treats all taxpayers consistently by scrutinising pleadings in similar cases. Flagrant inconsistent treatment is rare but mistakes are sometimes made by HMRC and enhanced opportunities to hold HMRC to account ought to be welcomed.

There are, however, a few remaining unanswered questions. In particular:

- Does the FTT have a *duty* to make documents open to inspection if a legitimate interest can otherwise be made out, just as the UT found that it was under a duty in *Aria Technology*?

- What are the implications of the tribunal's specific decision to allow KPMG to *inspect* the documents, rather than to direct that copies be provided? The prominent use in the FTT of email and electronic documents means that it is highly unlikely that there is a hard copy court file which a third party can physically inspect on tribunal premises. Must a third party therefore attend a tribunal centre (or the premises of a party) and ask that the documents it has permission to inspect be printed for inspection, with the obvious inconvenience and associated cost?

What next?

It is still too early to know whether Hastings Insurance and/or HMRC will appeal the decision. Any appeal would afford a good opportunity to clarify the remaining issues which arise from the decision.

In the meantime, practitioners should give careful thought as to where and how they plead confidential or sensitive information. Obviously, some information will be so critical that it will have to be pleaded or set out in a witness statement. Non-essential material, however, will need to be evaluated more carefully. Practitioners will also want to consider whether an application under rule 14 of the tribunal rules is necessary to protect particularly sensitive information contained within documents filed with the FTT. An application should ideally be made at the time the documents are filed and must, of course, set out the grounds on which the application is made.

The decision is to be welcomed, and not just for the clarity it has brought to this area of law: any decision which furthers the principle of open justice and good administration must be applauded

Parties faced with an application for inspection of documents by a third party may also find it more productive to agree on a compromise with the third party rather than oppose the application. This is especially true if the party is more concerned about the disclosure of particular aspects of a document, rather than the document per se; in that case, a more desirable outcome may be achieved by agreeing to provide a requested document with agreed redactions.

Conclusion

Practitioners will need to give more care and thought to the accessibility and protection of information filed with the tribunal. Greater resort to rule 14 may also be needed. Nonetheless, the decision is to be welcomed, and not just for the clarity it has brought to this area of law: any decision which furthers the principle of open justice and good administration must be applauded. ■

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