[2022] UKFTT 00076 (TC)

TC 08407/V

Procedure – application by a non-party for copies of pleadings at early stage in the proceedings, before any judicial consideration of the substantive issues – inherent jurisdiction of the Tribunal – whether application should be decided by reference to CPR 5.4C(1), whether by applying it to the Tribunal or by relying on it as an expression of the principle of open justice – held no – whether access should be granted in pursuance of general "open justice" principle – held no – access at this early stage would not enable the Applicant to understand how the justice system works, how decisions are taken or scrutinise the way in which the Tribunal decides cases – even if it would, on the fact-specific balancing exercise, access at this stage would be denied

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2020/04634

BETWEEN

CIDER OF SWEDEN LIMITED	**Appellant**
-and-	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondents**
-and-	
ERNST & YOUNG LLP	**Third Party Applicant**

TRIBUNAL: JUDGE KEVIN POOLE

The hearing took place on 21 January 2022. The hearing was held by video using the Tribunal's video hearing service. All the participants attended remotely. A face to face hearing was not held because of the current state of the pandemic and the difficulty of arranging a face to face hearing in a way which would ensure the safety of all participants.

Prior notice of the hearing was published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Laurent Sykes QC on behalf of the Third Party Applicant

George Peretz QC and Khatija Hafesji of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

Max Schofield of counsel, instructed by KPMG LLP, for the Appellant

DECISION

INTRODUCTION

1. This decision concerns an application by the Third Party Applicant ("EY") for disclosure to them of various documents brought into existence in the context of existing appeal proceedings ("the main proceedings") before the FTT between the Appellant and the Respondents ("HMRC"). The main proceedings are still at an early stage; there has been no hearing of any type in them, nor is any listed or likely in the near future.

2. In summary, EY seek to obtain copies of the Notice of Appeal (with supporting grounds of appeal), HMRC's statement of case and any further pleadings. Their original application extended to "any interim applications and responses and associated skeleton arguments" in the main proceedings, but at the hearing this was cut down to "any interim applications made which have been heard or are about to be heard, and the Tribunal's decision on any such applications." These documents are sought "to review, consider and understand the parties' arguments in order to potentially inform our own clients' arguments in their own respective (unrelated) disputes."

3. In short, the underlying issues in this appeal have much wider relevance to a large number of overseas businesses in the sector, many of whom are clients of EY, and detailed knowledge of the arguments being deployed in this appeal will potentially assist EY in advising their clients.

THE FACTS

4. The Appellant and HMRC are currently engaged in proceedings both in the High Court and in the Tribunal in respect of the same underlying issues. The details of the underlying issues are not material for present purposes, but in broad terms the Appellant complains that the Excise Duty Post Duty Point Dilution regime gave rise to unlawful discrimination against it as an EU drinks manufacturer, as a result of which it is seeking both damages in the High Court under the *Francovich* principle and a refund of duty in the Tribunal.

5. As a result of press coverage, EY became aware of the High Court action and, having a number of its own clients interested in the same underlying issue, obtained copies of the claim form, particulars of claim, defence and HMRC's response to a request for further information in relation to the defence. These documents were obtained pursuant to CPR Rule 5.4C(1), which entitles any non-party to copies of such documents, subject to some safeguards. Relevant extracts from Rule 5.4C are set out below.

6. In the High Court particulars of claim, reference was made to the fact that the Appellant had notified an appeal to the Tribunal, claiming a repayment of excise duty arising from the same underlying circumstances. The reference number of the proceedings before the Tribunal was given. EY then made an application to the Tribunal by letter dated 22 July 2021 ("the Application"). After briefly setting out the background, the Application went on to say this:

> EY represent numerous taxpayers with a variety of disputes with HMRC including litigation matters before both the Court of Justice of the European Union as well as the UK Courts and Tribunals. The parties proposed interpretation and application of the relevant legislation and case law relating to: excise duty including the post production dilution duty (PDPD) regime, EU State Aid, and damages claims against Member States grounded on *Francovich v Italian Republic* (Joined cases C-6/90 and C-9/90) are therefore of interest and we understand form live issues in the present appeal before the Tribunal and the High Court claim.

> The Tribunal's decision in *Hastings Insurance Services Ltd & HMRC v KPMG LLP (Third Party)* [2018] UKFTT 478 (TC) clearly established that third parties interested in the outcome of appeal proceedings before the Tribunal are entitled to obtain copies of any of the pleadings filed by the parties, including copies of the skeleton arguments.
>
> Following *Hastings*, we now write to respectfully request copies of both parties' written pleadings which may have been filed with the Tribunal to date. We anticipate the scope of our request will include at least copies of the Appellant's Notice of Appeal with supporting grounds as well as the Respondents' Statement of Case which we anticipate would have been filed 60 days thereafter, but should there be any further written pleadings filed by either party, including interim applications and responses, or skeleton arguments, then for the avoidance of doubt, we also seek copies of these documents.
>
> Should copies of these documents be provided to EY, we do not propose to discuss or share the contents with the press, other legal or accountancy firms, or any members of the public who are not our clients. Instead, the purpose of receiving copies of the requested documents filed with the Tribunal is to review, consider and understand the parties' arguments in order to potentially inform our own clients' arguments in their own respective (unrelated) disputes. We remain agreeable to any confidential personal information that is irrelevant to facts and legal issues in dispute (for example, the client or witnesses' personal contact details) being redacted in the event this information appears in any of the requested documents filed with the Tribunal to date.

7. On the instructions of Judge Brooks, the Tribunal wrote to the Appellant's representative (KPMG) stating he was minded to grant the Application (to the extent of requiring the Appellant and HMRC to provide copies of the relevant documents to EY), but affording the Appellant or HMRC the opportunity to object. Objections having been received from both HMRC and KPMG on behalf of the Appellant (to which EY responded with further representations of their own), Judge Brooks gave directions for the matter to be decided at an oral hearing. That hearing came on before me on 21 January 2022.

8. I am grateful for the comprehensive and thoughtful submissions from all counsel on what is clearly a matter of much wider significance.

RULE 5.4C OF THE CIVIL PROCEDURE RULES

9. Rule 5.4C provides as follows:

> **Supply of documents to a non-party from court records**
>
> 5.4C—(1) The general rule is that a person who is not a party to proceedings may obtain from the court records a copy of—
>
> (a) a statement of case, but not any documents filed with or attached to the statement of case, or intended by the party whose statement it is to be served with it;
>
> (b) a judgment or order given or made in public (whether made at a hearing or without a hearing).
>
> (1A) Where a non-party seeks to obtain a copy of a statement of case filed before 2nd October 2006—
>
> (a) this rule does not apply; and

(b) the rules of court relating to access by a non-party to statements of case in force immediately before 2nd October 2006 apply as if they had not been revoked.

(The rules relating to access by a non-party to statements of case in force immediately before 2nd October 2006 were contained in the former rule 5.4(5) to 5.4(9). Practice Direction 5A sets out the relevant provisions as they applied to statements of case.)

(1B) [Omitted]

(2) A non-party may, if the court gives permission, obtain from the records of the court a copy of any other document filed by a party, or communication between the court and a party or another person.

(3) A non-party may obtain a copy of a statement of case or judgment or order under paragraph (1) only if—

(a) where there is one defendant, the defendant has filed an acknowledgment of service or a defence;

(b) where there is more than one defendant, either—

(i) all the defendants have filed an acknowledgment of service or a defence;

(ii) at least one defendant has filed an acknowledgment of service or a defence, and the court gives permission;

(c) the claim has been listed for a hearing; or

(d) judgment has been entered in the claim.

(4) The court may, on the application of a party or of any person identified in a statement of case—

(a) order that a non-party may not obtain a copy of a statement of case under paragraph (1);

(b) restrict the persons or classes of persons who may obtain a copy of a statement of case;

(c) order that persons or classes of persons may only obtain a copy of a statement of case if it is edited in accordance with the directions of the court; or

(d) make such other order as it thinks fit.

(5) A person wishing to apply for an order under paragraph (4) must file an application notice in accordance with Part 23.

(6) Where the court makes an order under paragraph (4), a non-party who wishes to obtain a copy of the statement of case, or to obtain an unedited copy of the statement of case, may apply on notice to the party or person identified in the statement of case who requested the order, for permission.

10. By virtue of CPR 2.3(1), "statement of case" for these purposes (including CPR 5.4C(1)(a):

(a) means a claim form, particulars of claim where there are not included in a claim form, defence, Part 20 claim, or reply to defence, and (b) includes any information in relation to them voluntarily or by court order"

11. It is common ground between the parties that if CPR 5.4C(1) is to be applied to the present case by analogy, it should cover the notice of appeal, any separate grounds of appeal

and HMRC's statement of case, together with any further and better particulars supplied in respect of either (together "the Pleadings").

THE ARGUMENTS

For EY

12. Mr Sykes QC argued, in outline, that I should follow the approach adopted by the FTT in *Hastings Insurance Services Ltd & HMRC v KPMG LLP (Third Party) [2018] UKFTT 478 (TC)*, following the Upper Tribunal in *Aria Technology Limited v HMRC (Situation Publishing Limited, third party)* [2018] UKUT 0111 (TCC), approved and adopted by the FTT in *Fastklean Limited v HMRC (Keith Gordon, Third Party)* [2020] UKFTT 0511 (TC).

13. This approach relied heavily on reference to CPR 5.4C(1) as being an expression of the principle of open justice. Part of that principle was to enable the wider public to see not just how claims were dealt with by the justice system but "why claims were brought" (citing Collins J in *R (oao Corner House Research) v BAE Systems PLC* [2008] EWHC 246 (Admin); [2008] C.P. Rep. 20). This meant, he argued, that there was no need for there to be a hearing (either actual or imminent) before the entitlement to see the pleadings should arise. EY had shown a legitimate interest in the documents it was seeking, being an interest in other contemplated related litigation. It was the practice of the High Court to disclose the pleadings to third parties on request and it would be inimical to open justice if the FTT did not do likewise. In line with CPR 5.4C, the burden lay on the Appellant and HMRC to show why access should be denied, not on EY to show why it should be granted.

For HMRC and the Appellant

14. Mr Peretz QC on behalf of HMRC (who consider this to be a matter of important principle, given the wider issues around taxpayer confidentiality in particular) argued, in outline, that the open justice principle did not apply at this early stage in the proceedings, accordingly the Tribunal had no jurisdiction to provide access to the documents which EY sought. Even if he were wrong in this, EY had not come close to demonstrating that they had a legitimate interest in the material which they sought, and accordingly they had not shown any good reason why they should be provided with access to the material.

15. Mr Schofield supported the submissions made by Mr Peretz QC and also added the following extra points on behalf of the Appellant. The authorities showed, in his submission, that for the principle of open justice to be engaged at all, there must be some kind of "judicial involvement" in the case (not necessarily a full hearing), and whilst the authorities examined in various contexts the necessary nature and extent of such involvement, the present case had clearly reached nowhere near that point. He also argued that even if it were accepted that the open justice principle applied at this stage of the proceedings, EY had failed to produce any evidence to show how public understanding of the judicial process would be advanced by providing access to the documents, nor was there any evidence as to the clients whose cases would be assisted by such access.

DISCUSSION

Introduction

CPR 5.4C(1)

16. It is clear that the issue at the heart of this matter is the scope of the principle of open justice. Mr Sykes argues that, in respect of the Pleadings at least, the very existence of CPR 5.4C(1) shows that third party access to them (subject only to safeguards of the type set out in CPR 5.4C(4)) is, of itself, a right which is inherent in the principle of open justice in the courts and there is no reason why the FTT should be any different. This, he submits, provided a short cut to the correct answer in this case, at least in relation to the Pleadings.

17. He submits that the reasoning of the Upper Tribunal in *Aria* and the approach of the FTT in *Hastings* both support this argument.

18. It is worth noting that in *Aria* the application was for sight of the appellant's notice of appeal to the Upper Tribunal (incorporating detailed grounds of appeal) against a decision of the FTT, and HMRC's response to the detailed grounds. The application was made for journalistic purposes. The application was made three months before the substantive hearing of the appeal (the application was heard on 20 March 2018 and the decision on it was issued on 10 April 2018, whereas the substantive appeal was not heard until 20-22 June 2018, with the final decision being issued on 2 November 2018). There are therefore some parallels to the present case, in that the nature of the documents being sought was similar and there had been no judicial involvement, at least on the part of the Upper Tribunal, in the appeal (and nor was any such involvement imminent).

19. On 9 August 2018 Judge Sinfield issued his decision in the FTT in *Hastings*, after considering written submissions from the parties in chambers. In *Hastings*, the third party (KPMG) were seeking, after the issue of the FTT's decision on the substantive appeal, copies of HMRC's statement of case and the skeleton arguments delivered by both parties. At that point, the Court of Appeal had issued its own decision in *Cape Intermediate Holdings Limited v Dring* [2018] EWCA Civ 1795 ("*Dring CA*") a few days earlier, and Judge Sinfield referred to that decision in *Hastings*.

20. It is clear that Judge Sinfield in both *Aria* and *Hastings* regarded the Upper Tribunal and the FTT as having the inherent jurisdiction to provide access to documents, the only question before him was whether, in accordance with the principle of open justice, that jurisdiction should be exercised.

21. In the absence of any rule in the procedure rules of either the Upper Tribunal or the FTT equivalent to the CPRs on the point, he expressed the view in *Aria* (at [18]) that where (as there) the Upper Tribunal's own procedure rules were "silent or uncertain in scope", the CPRs (and in particular CPR 5.4C) "can provide helpful guidance… and the UT should generally follow a similar approach in exercising its powers under the UT Rules"; at [19], he went on, after analysing the Upper Tribunal's procedure rule 14, to conclude that "rule 14(8) shows that the UT has an inherent power to disclose documents or information to non-parties (and may be under a duty to do so in certain circumstances[1]) but that a party to the proceedings may apply for a direction that effectively restricts that power or duty". He then went on, at [20], to say this:

> Taking account of the comments of Toulson LJ in *Guardian News*[2] and the provisions of the UT Rules, I have concluded that the UT has 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, on its own motion or on application by one or more of the parties, that any documents or information in them should not be disclosed to other persons.

22. In *Hastings*, after reciting that the same principle of open justice applied to the FTT as to the Upper Tribunal, Judge Sinfield went on to say at [5] that "the First-tier Tribunal has an inherent jurisdiction to determine how the principle of open justice should be applied in relation to any proceedings in the Tribunal". He considered that the FTT procedure rule 14 (which

[1] I do not regard the words in parentheses as suggesting rule 14(8) as being the source for the potential duty referred to, only a pointer to the possible existence of such a duty arising from the wider principle of open justice.
[2] *R (oao Guardian News & Media) v City of Westminster Magistrates' Court and the Government of the United States of America (Article 19 Intervener)* [2012] EWCA Civ 420.

allows the FTT to make an order prohibiting disclosure or publication of documents or information) did not imply any bar on disclosure by the FTT:

> "On the contrary, I consider that rule 14 indicates that, absent an order prohibiting disclosure and subject to any other statutory restriction, documents or information relating to proceedings may be disclosed on a limited basis or published more widely. Further, disclosure of documents or information relating to proceedings may be made by the Tribunal, to the parties to the proceedings or third parties, such as journalists."

23. He went on to consider how the FTT's power to permit disclosure should be exercised, referring to his own reasoning in the Upper Tribunal in *Aria*. He went on at [9] to refer specifically to CPR 5.4C(1) in the following terms:

> Paragraph 1 of CPR5.4C states that the general rule is that a person who is not a party to proceedings may obtain from the court records a copy of the statement of case and any judgment or order, but not any documents filed with or attached to the statement of case. CPR5.4C(1) is, therefore, not the source of the right of a non-party to obtain the statement of case but merely sets out how that right should be exercised. The right to obtain a copy of the statement of case or judgment is an expression of the principle of open justice which applies to the First-tier Tribunal as it does to the courts. I consider 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 CPR5.4C(1). In my view, such documents would include the notice of appeal, the statement of case by the respondent(s) and any reply, any list of documents (but not the documents themselves unless disclosable on other grounds – see below) and any judgment or order given or made in public, subject to the right of a party or a person identified in the document concerned to ask for a non-disclosure order under rule 14 of the FTT Rules.

24. It is noteworthy that Judge Sinfield only said the FTT had the inherent jurisdiction to allow access to CPR 5.4C(1) documents (subject to a right of objection under procedure rule 14), not that it was under an obligation to do so (even though he went on to grant access, on the facts of that case).

25. I agree. The FTT undoubtedly has the inherent jurisdiction to allow access to documents equivalent to those referred to in CPR 5.4C(1), as it does to any other relevant documents, but that is not the question here. The question here is whether it is appropriate for the FTT to exercise that jurisdiction in favour of EY in this case.

26. Mr Sykes argues that there is a short cut to the answer to this question in relation to the Pleadings, provided by CPR5.4C(1) and (3) and the comments made by Judge Sinfield in *Hastings* at [9] to the effect that the rights conferred in the High Court by CPR 5.4C(1) could be considered as an "expression of the principle of open justice".

27. In this, Mr Sykes suggested Judge Sinfield was echoing Collins J in *R (oao Corner House Research) v BAE Systems PLC* [2008] EWHC 246 (Admin), [2008] C.P. Rep. 20 at [18]:

> … the whole purpose behind the change in the rules to give access by third parties to the statements of claim and defences was in the interests of public justice to enable the media, and any member of the public, to be able to see how the courts were operating and to ensure that the public could look at and see why claims have been brought; why they have been rejected; why they were being allowed to proceed.

28. Mr Sykes also relied upon the Explanatory Notes to the SI that brought in CPR 5.4C(1) and upon a report of the New Zealand Law Commission[3] (described as "valuable" by Toulson LJ in *Guardian News & Media* which, he submitted, both supported the view that access to the pleadings in accordance with CPR 5.4C(1) was a core "open justice" right of any third party, which was subject only to the restrictions provided for in CPR5.4C(4).

29. In Mr Sykes' submission, therefore, no further enquiry is needed into the question of whether it would advance the principle of open justice to provide the documents which are being requested: the existence of CPR 5.4C(1) and the commentary on it make it clear that the advancement of the open justice principle always requires the provision of such documents (subject only to the safeguards provided for by CPR 5.4C(4) or, in jurisdictions where the CPRs do not apply, equivalent safeguards).

30. I take these points in turn. First, the decision in *Hastings* (which is of course not binding on me in any event) was delivered nearly a year before the Supreme Court in *Cape Intermediate Holdings Ltd v Dring* [2019] UKSC 38 ("*Dring SC*") gave its useful guidance on the nature of the principle of open justice; and of course the comments that were made in *Hastings* must be considered in their context, namely where documents were being sought after the substantive hearing had taken place in public and the Tribunal's decision had been issued (where clearly a reading of the pleadings and skeleton arguments was extremely likely to advance the public understanding of how the FTT had reached its decision).

31. In *Corner House*, the Court was concerned with whether documents in judicial review proceedings which were akin to the pleadings in normal private law proceedings should be subject to the same disclosure regime under CPR5.4C(1), rather than with the extent of the principle of open justice itself. The comments of Collins J about the "open justice" principle were by way of general background and not central to his decision.

32. The Explanatory Note to the SI which brought in Rule 5.4C(1) (which was also referred to by Collins J in *Corner House*, but only for the purposes of the issue before him) adds no significant weight to Mr Sykes' argument either, as it simply records that before the new rule was introduced, third parties (mainly members of the press) seeking copies of the pleadings were often being refused and this non-release was considered by them to be "contrary to the principle of open justice".

33. The New Zealand Law Commission report described the arguments around release of copies of pleadings before a hearing as "finely balanced", but ultimately recommended that the pleadings in most civil cases before the courts should be available to the public without leave of the court after the first "case conference", subject to any order to the contrary by the court. The Commission was however at pains to point out that its recommendations applied only to the courts, and not to the tribunals; it had been invited to consider them as well but had reached the view (at [33] of the Executive Summary) that "the special character of many tribunals made any general approach dangerous".

34. The crucial point here is that the FTT is different from the courts. It is a tribunal of first instance in which tax disputes between the citizen and the state are resolved. The very assertion that CPR 5.4C(1) is an "expression of the principle of open justice" points to the conclusion that the rules of law applicable to that principle are paramount, and should not be sidestepped or subverted by the inappropriate direct "reading across" of CPR 5.4C(1) into the FTT as effectively giving rise to a free-standing right, divorced of any requirement to consider whether its effect in the FTT would be in accordance with the principle of open justice. As Judge

[3] "Access to Court Records", published June 2006

Sinfield acknowledged in *Aria*, the most that can be provided by reference to the CPRs is "helpful guidance".

35. One important difference between the FTT and the courts is that CPR 5.4 provides for a publicly accessible register of all claims issued out of a court, which any member of the public may search upon payment of the relevant fee. This is significant. Without it, there would be no way for anyone to find out about the existence of a court case or, in practice, exercise their rights under CPR 5.4C. CPR 5.4 is an integral part of the overall scheme. The FTT has no equivalent to CPR 5.4; it does not make information about appeals lodged with it publicly available, and there has been no suggestion that it ought to do so by analogy to CPR 5.4 (though in the absence of such publication, any third party right of access to pleadings in such appeals is useless except where there are special circumstances, such as in the present case where the existence of the appeal became public by the inclusion of reference to it in High Court pleadings). It is easy to see why: citizens rightly consider their tax affairs to be private until they are being formally adjudicated on in public[4]. In passing, it is worth noting that the Upper Tribunal also publishes a list of appeals notified to it; however in relation to tax appeals (as they will almost invariably already have been the subject of a published decision in the FTT) issues of confidentiality do not arise in the same way in the Upper Tribunal as they do in the FTT.

36. Finally, even if CPR 5.4C(1) could be said to indicate that the right of a third party to provision of pleadings amounts (to use shorthand) to an "open justice right", it must not be forgotten that CPR 5.4C(4) makes it clear that the right is anything but unqualified. In deciding any application to refuse access under CPR 5.4C(4), a court would no doubt apply the "open justice principle" in deciding whether or not to refuse access. This gives the lie to the argument that there is some special unfettered "open justice" right, based on CPR 5.4C(1) for third parties to obtain pleadings as of right.

37. For these reasons, I do not consider an argument based on CPR 5.4C(1) provides the short cut Mr Sykes effectively argues for. I do not consider that this rejection of Mr Sykes' argument conflicts with what was said in *Aria*, as Judge Sinfield was careful in that case to limit his comments to the Upper Tribunal and did not consider the question of how those comments should apply to the FTT. So far as *Hastings* is concerned, the context was materially different from the present case and in any event I consider the principles as subsequently clarified by the Supreme Court in *Dring SC* must take precedence. I therefore turn to a consideration of the wider principle of open justice.

The principle of open justice

38. *Dring SC* is in my view the place to start. It was mainly concerned with the provisions of CPR 5.4C(2), which provide that "a non-party may, if the court gives permission, obtain from the records of the court a copy of any other document filed by a party, or communication between the court and a party or another person". CPR 5.4C(1) was not in issue before it. However, given my conclusion that an argument in the FTT based on CPR 5.4C(1) inevitably leads back to a consideration of what is required by the principle of open justice, the analysis of that principle by the Supreme Court in *Dring SC* (together with *Guardian News &* Media, which it endorsed) is clearly the leading authority in this area of the law.

39. I derive the following general principles from the cases, largely as summarised in *Dring SC*.

[4] The Respondents are of course under a duty of confidentiality pursuant to s.18 of the Commissioners for Revenue & Customs Act 2005. This duty does not apply to the Tribunal, but it is indicative of the general confidentiality with which Parliament expects a taxpayer's affairs to be treated, quite apart from any rights to privacy arising under the Human Rights Act.

(1) "Open justice" is a constitutional principle which applies to all courts and tribunals exercising the judicial power of the state (*Dring SC* at [41]). This clearly includes the FTT.

(2) All courts and tribunals (including the FTT) have inherent jurisdiction to determine what that principle requires in terms of access to documents or other information placed before them (*ibid*).

(3) The extent of any access permitted by procedure rules is not determinative (save to the extent they contain a valid prohibition) (*ibid*). (In passing, I would observe that this affords a further rebuttal of the argument that the FTT should effectively just follow CPR 5.4C(1).)

(4) When such access is sought, the court or tribunal must therefore consider how to exercise its inherent jurisdiction in the light of the "open justice" principle.

(5) What that principle requires in any individual case is to be judged by reference to whether granting the access which is sought would advance the purpose or purposes of the principle (*ibid* at [45]).

(6) As a general statement, the overall purpose of open justice as originally identified in *Guardian News & Media* at [79] is "to enable the public to understand and scrutinise the justice system of which the courts are the administrators" (*Dring SC* at [37] – and it is clear that the reference to "courts" here extends also to tribunals – *ibid* at [36]).

(7) There are two main facets to this overall purpose:

> (a) "to enable public scrutiny of the way in which court (and tribunals) decide cases – to hold the judges to account for the decisions they make and to enable the public to have confidence that they are doing their job properly" (*ibid* at [42]); and
>
> (b) "to enable the public to understand how the justice system works and why decisions are taken. For this they have to be in a position to understand the issues and the evidence adduced in support of the parties' cases" (*ibid* at [43]);

(8) Whilst there may be other facets, (a) these main two should not be regarded as mutually exclusive, because "public understanding of the justice system and how it works is the premise for public scrutiny of the judicial system" and (b) any attempt to identify further ones is "likely to create more heat than light, and may only result in successive exercises in special pleading" (*R oao Saifullah Gharab Yar v Secretary of State for Defence* [2021] EWCH 3219 (Admin)).

(9) It is for the person seeking access to explain why he seeks it and how granting him access will advance the principle of open justice. In particular, there is no "right" to access (except where relevant rules specifically afford such a right); the person seeking access must show a "legitimate interest" in doing so (*Dring SC* at [45]).

(10) In response to any request, the court or tribunal should carry out a "fact-specific balancing exercise" in which the person seeking access must explain why it is sought and how the grant of access will advance the open justice principle (*ibid* at [45]);

(11) In carrying out that exercise, the court or tribunal will consider "the purpose of the open justice principle and the potential value of the information in question in advancing that purpose", and will weigh in the balance "any risk of harm which its disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others" (*ibid* at [45] & [46]);

(12) The court or tribunal should also consider the "practicalities and proportionality of granting the request" (*ibid* at [47]).

40. The underlying question to be answered is therefore what the open justice principle requires in terms of access to the documents sought by EY at this stage, a question with this Tribunal has jurisdiction to decide (see [39(2)] above).

41. The answer to that question is decided by whether the applicant has shown that granting the access which is sought would advance the purpose or purposes of the principle of open justice (see [39(5)] and [39(9)] above).

42. If it is established that the granting of access would advance the purpose or purposes of the open justice principle, then a fact-specific balancing exercise must be carried out, in which the reason for seeking access and how access will advance the open justice principle should be balanced against any risk of harm to an effective judicial process or the legitimate interests of others (see [39(11)] above).

43. Finally, the practicalities and proportionality of granting the request should be considered (see [39(12)] above).

44. I note that this is a similar approach to that adopted by Judge Poon in *JTI Acquisition Company (2011) Limited v HMRC (Ernst & Young LLP Third Party)* [2021] UKFTT 0446 (TC) at [16]. In that case, the FTT was concerned with an application (made the day before commencement of a substantive hearing) for disclosure of the parties' skeleton arguments and any written submissions filed during the course of the final hearing (which Judge Poon treated as including written submissions made following the hearing at the direction of the FTT). In that case, Judge Poon considered (at [19] to [22]) that as there had been an "effective hearing" of the appeal by the time she decided EY's application (even though there was by then no dispositive decision on the appeal), the documents sought were covered by the principle of open justice. Further, she considered (at [29]) that EY had a legitimate interest in the documents and (at [33]) that there was no risk of harm to the judicial process by release of the documents. Finally (at [38]), she considered it was "proportionate" to grant access to the skeleton arguments (subject to such redactions as might be appropriate), but not to the post-hearing submissions.

Applying general principles

45. In the light of the principles set out above, I must therefore first decide whether EY have shown that granting access to the Pleadings or any interim applications (or decision on the same) would advance the purpose or purposes of the open justice principle.

46. Considering the first facet of the purpose identified at [39(7)] above (i.e. public scrutiny of the Tribunal's decision-making process), I do not consider that the release of the Pleadings at this stage of the proceedings would advance that purpose at all. There has been no hearing, nor is a hearing imminent. No judicial decision has been made, nor is one about to be made, on the issues dealt with in the Pleadings. The appeal is at an early stage, where there has been no judicial involvement at all (save in relation to this application) and no effective hearing. The position might be different in principle with respect to the subject matter of any interim applications (and decisions), but there have been none and therefore the point does not arise. There is therefore no assistance to be gained by EY or indeed any other member of the public, in furtherance of this purpose, by access to the Pleadings or other documents which EY seek (insofar as such other documents may exist).

47. Turning to the second facet of the purpose identified above (i.e. public understanding of how the system works, and why decisions are taken), the second limb of this (why decisions are taken) is in my view equally inapplicable in the present case (where no decision has been

or is about to be taken). The first limb (public understanding of how the system works) does not apply in my view either in the present circumstances: from reading the Pleadings, a third party would certainly gain an understanding of the legal basis upon which this particular claim is being advanced and defended (indeed that is EY's stated purpose in seeking access to them), but in advance of an effective hearing that would tell them nothing which would enable them to monitor how the system of justice in the Tribunal actually works. Again, the position might be different in relation to the subject matter of any interim applications (and associated decisions), if there had been any, but the point does not arise on the facts of this case.

48. Standing back and considering the overarching purpose of the principle of open justice referred to at [39(6)] above, I can see no basis upon which the provision of the Pleadings to EY at this early stage of proceedings (before any substantive judicial involvement or an effective hearing) will further their ability to understand or scrutinise the justice system administered by the Tribunal, as opposed to enabling them to understand the legal arguments being deployed by the parties. Again, if there had been any interim applications or associated decisions, the position might be different (in respect of the subject matter of any such application), but the point does not arise on the facts of this case.

49. I therefore consider that providing access to the Pleadings to EY at this stage would not advance the principle of open justice, as such provision would not further any identified purpose of that principle.

50. On that basis, the application is DISMISSED.

51. I should emphasise that if the application were made at a later stage of the proceedings when the substantive hearing had happened or (possibly) was about to take place (as in *JTI*) then the application of the open justice principle might well lead to the opposite conclusion.

52. If, contrary to the view expressed above, the provision of access to the Pleadings could be regarded as furthering the principle of open justice in some way, then it is still clear that there is no "right" to the provision of the documents (either unconditionally or absent some specific direction or strong countervailing reason): what is then required is a "fact-specific balancing exercise" on the part of the Tribunal to decide whether access should be granted.

53. It is quite clear that simply wishing to understand the legal basis of the arguments being advanced (whether out of academic or journalistic interest, or in order to inform one's conduct of a similar dispute) is a perfectly legitimate reason for seeking access to the documents. However, it is equally clear that the parties to the original dispute, at this early stage of the proceedings, also have their own legitimate interests in wishing to keep such matters confidential – whether because of an understandable wish for their confidential tax affairs not to become public knowledge before they are actually adjudicated on by the Tribunal (or, in the case of HMRC, their general duties of taxpayer confidentiality), or (more likely, as the High Court pleadings are already publicly available and are held by EY) because of a wish to preserve the confidentiality of the detailed lines of legal argument being deployed in the appeal.

54. In striking a balance between the principle of open justice and the countervailing wishes of the Appellant and HMRC to maintain the confidentiality of the documents for their respective reasons, given the stage the proceedings have reached, I would therefore refuse the application in any event, on the basis that I would consider any small advancement of the principle of open justice inherent in disclosure to be outweighed by the wish for confidentiality on the part of the Appellant and HMRC at this stage of their dispute, before there has been any judicial involvement in the substance of that dispute or effective hearing of it.

55. As to the issues of practicality and proportionality, no particular difficulties were pointed out by the parties in the context of the specific documents requested in this case (though the

Appellant's initial stance, to the effect that any documents disclosed should be appropriately redacted, was withdrawn at the hearing). I would not therefore have refused or limited access on the basis of either ground, if I were otherwise minded to grant the application.

SUMMARY AND CONCLUSION

56. I do not consider that a general right of access to pleadings in the FTT exists by reference to CPR 5.4C(1), either (a) by the application of that rule by analogy or by way of "guidance" to the FTT or (b) because that rule expresses a general underlying right to such access, applicable to the FTT, deriving from the principle of open justice (see [37]).

57. I do not consider EY to have shown that provision to it of the Pleadings at this early stage of the proceedings would advance any purpose or purposes of the principle of open justice (see [49]).

58. If I am wrong in both of the above issues, I would consider EY to have a legitimate interest in access to the Pleadings (see [53]), but I would consider that the interests of the Appellant and HMRC in the confidentiality of the documents outweigh that interest at this stage of the proceedings and so would still refuse access to them (see [54]).

59. In the absence of any submissions as to the practicality and proportionality of granting the access applied for, I would not have refused the application on this ground, if I had otherwise been minded to grant it (see [55]).

60. The application is accordingly DISMISSED.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

61. 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.

KEVIN POOLE
TRIBUNAL JUDGE

Release date: 18 FEBRUARY 2022