

THIRD PARTY ACCESS TO DOCUMENTS IN THE FIRST-TIER TRIBUNAL (TAX CHAMBER): INHERENT JURISDICTION AND INHERENT RISK

1. Introduction

Taxpayers bringing appeals against HMRC in the First-tier Tribunal (Tax Chamber) (the “FTT”) are rightly concerned to mitigate the risk that documents relating to their appeals which contain confidential or commercially sensitive information are not accessed by third parties, such as competitors, the media or support groups. This is particularly acute in the FTT because (1) taxpayers will almost inevitably carry the evidential burden of deciding which documents they rely on to prove their case (in contrast to mutual, and wider, disclosure obligations in commercial claims); and (2) the subject matter of any tax dispute will frequently go to the heart of a taxpayer’s business (rather than be confinable to a particular contract or point of dispute).

The latest application by the FTT of recent Supreme Court guidance on third party access to documents is therefore helpful for taxpayers seeking to balance the risks of third party disclosure (and timing of any disclosure) against the potential benefits of presenting particular documents or evidence to support their appeals.

2. Inherent jurisdiction: which documents are caught

The leading authority of *Cape Intermediate Holdings Limited v Dring* [2019] UKSC 38 clarifies that the civil courts and tribunals (including the FTT) have a very broad inherent jurisdiction to grant third parties access to:

- 2.1 Statements of case (as defined in CPR 2.3) or judgments/orders made in public (under CPR 5.4C(1) in the civil courts);
- 2.2 Witness statements and expert reports, which stood as evidence-in-chief at trial and which would have been available for inspection during the trial (under CPR 32.13 in the civil courts); and
- 2.3 Documents which have been placed before the court/tribunal and referred to (not merely those read or treated as read) during the hearing. This

includes (without limitation) skeleton arguments, written submissions and similar advocates’ documents, but also, it appears, underlying documents (i) included in hearing/trial bundles, (ii) referred to in skeleton arguments/submissions or (iii) exhibited to witness statements/experts’ reports.

Prior to the Supreme Court’s guidance in *Dring* as applied by the FTT in *Cider of Sweden Ltd v HMRC and Ernst & Young LLP* [2022] UKFTT 76 (TC) (18 February 2022) (which is examined below), similar applications for access to pleadings documents were made by third parties to the Upper Tribunal (Tax and Chancery Chamber) in *Aria Technology Limited v HMRC and Situation Publishing Ltd* [2018] UKUT 111 (TCC) and to the FTT in *Hastings Insurance Services Limited v HMRC* [2018] UKFTT 478 (TC). In *Fastklean Ltd v HMRC (Keith Gordon, third party)* [2020] UKFTT 511 (TC), an underlying document contained in a hearing bundle was sought and successfully obtained by a third party applicant in the FTT.

3. The FTT’s inherent jurisdiction: the general principles

In *Cider of Sweden*, the Appellant taxpayer sought a refund from HMRC of Excise Duty it had paid under the Post Duty Point Dilution (“PDPD”) regime. In parallel, the Appellant taxpayer had issued a claim for damages against HMRC in the High Court under the *Francovich* principle that the PDPD regime amounted to unlawful State aid. We understand both sets of proceedings are ongoing and do not comment as to their substance.

A third party, Ernst & Young LLP (“EY”), became aware of the FTT proceedings through obtaining third party disclosure of statements of case in the High Court proceedings under CPR 5.3C(1). In the High Court Particulars of Claim, reference was made to an appeal being notified to the FTT by the Appellant taxpayer. Accordingly, EY (as an adviser to overseas clients in the same sector as Cider of Sweden Ltd) made a written application to the FTT requesting they be provided with copies of the Notice of Appeal with supporting grounds of appeal, HMRC’s statement of case and any further pleadings. Upon being notified of EY’s request, both the

Appellant taxpayer and HMRC indicated they wished to object. A hearing was listed for the FTT to determine EY's application.

Tribunal Judge Kevin Poole, sitting in the FTT, dismissed EY's application. In rejecting EY's arguments, the FTT applied the Supreme Court's guidance in *Dring* and summarised certain general principles that apply to third party applications for access to documents, including:

- "Open justice" is a constitutional principle which applies to all courts and tribunals exercising the judicial power of the state, including the FTT;
- All courts and tribunals (including the FTT) have inherent jurisdiction to determine what the principle requires in terms of access to documents or other information;
- The extent of any access permitted by procedure rules is not determinative (unless they contain a valid prohibition);¹
- When such access is sought, the court or tribunal must therefore consider how to exercise its inherent jurisdiction in light of the common law principle of open justice. This requires assessment of whether granting the access sought would advance the purpose/s of the principle;
- The overall purpose of open justice is to enable the public to understand and scrutinise the justice system of which the courts are the administrators, with two main facets (which are not mutually exclusive):
 - To enable public scrutiny of the way in which courts 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; and
 - 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;
- It is for the third party to explain why they seek access and how granting access will advance, not merely accord with, the principle of open justice. There is no right to access (except where the rules provide it) and the third party must show a legitimate interest in doing so;

- Upon a third party request for access, the court or tribunal should carry out a fact-specific balancing exercise in which the third party must explain why the documents are sought and how the grant of access will advance the open justice principle; and
- 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 sought in advancing that purpose, and will weigh in the balance any risk of harm to an effective judicial process or to the legitimate interests of others. The court or tribunal will also consider the practicalities and proportionality of granting the request.

In applying the general principles to the facts in *Cider of Sweden*, the FTT did not consider that granting EY access to the documents requested at the current stage of the FTT proceedings would advance the purpose of the open justice principle, since those documents would not further EY's ability to understand or scrutinise the justice system administered by the FTT:

"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." (para 46)

While Judge Poole conceded that "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)", it was considered that "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" (para 47). However, Judge Poole did note this conclusion may have differed if the FTT proceedings were more progressed since access to documents may then have furthered EY's ability to understand or scrutinise the FTT's management of the proceedings.

Nevertheless, even if EY being granted access to the documents sought would have advanced the open justice principle, Judge Poole considered that the Appellant and HMRC's own legitimate interests in keeping those documents confidential (at that

¹ N.B. In the FTT procedure rules, r14(a) provides that the Tribunal may make an order prohibiting disclosure or publication of

specified documents. However, there are no express provisions equivalent to CPR 5.1C in the FTT procedure rules

stage of the FTT proceedings) outweighed EY's interest on the facts. In reaching this view, Judge Poole expressly acknowledged that the "FTT is different from the courts" (para 34) and that "citizens rightly consider their tax affairs to be private until they are being formally adjudicated on in public. [Fn: The Respondents are of course under a duty of confidentiality pursuant to s.18 of the Commissioners for Revenue & Customs Acts 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]" (para 35).

The FTT's decision in *Cider of Sweden* is to be welcomed by taxpayers and HMRC alike. In assessing whether to exercise its inherent jurisdiction, the stage in proceedings at which documents are sought by a third party is of crucial importance to the FTT's assessment of whether the open justice principle would be served through third party access being granted. But even if the open justice principle would be served, the legitimate interests of the third party in seeking access must still then be weighed in the balance against the parties' own legitimate interests in wishing to keep such matters confidential. In the FTT, the parties' legitimate interests include "an understandable wish for their confidential tax matters not to become public knowledge before they are actually adjudicated on by the Tribunal (in

the case of HMRC, their general duties of taxpayer confidentiality), or... because of a wish to preserve the confidentiality of the detailed lines of legal argument being deployed in the appeal" (para 53).

4. **Inherent risk: what this means for parties to FTT appeals**

In practical terms, when bringing appeals in the FTT, taxpayers should be cognisant that nearly all documents utilised in the appeal may be sought by third parties for commercial, journalistic or other purposes. Pleadings and skeleton arguments are the most commonly sought documents by third parties and the FTT's inherent jurisdiction means there will always be a risk that documents containing commercially sensitive or confidential information may be obtained by those third parties upon an application. If a hearing has taken place or is soon to take place, a third party applicant will be in a stronger position in bringing an application for access to documents relating to that hearing. Taxpayers seeking to prevent such access must therefore be prepared to promptly challenge and test the legitimate interests of third parties and, in the event a taxpayer's efforts are unsuccessful, be prepared to deal with the fallout of those documents potentially being made public. Ultimately, taxpayers must clearly distinguish between (1) those documents they might wish to rely on to best present their appeals and (2) those documents which they are content in practice to deploy.

CONTACT

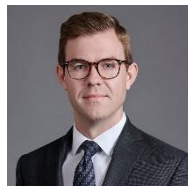


Richard Jeens

Partner, Disputes and Investigations

T: 0207 090 5281

E: richard.jeens@slaughterandmay.com



Tom Windsor

Associate, Disputes and Investigations

T: 0207 090 5164

E: tom.windsor@slaughterandmay.com

London

T +44 (0)20 7600 1200

F +44 (0)20 7090 5000

Brussels

T +32 (0)2 737 94 00

F +32 (0)2 737 94 01

Hong Kong

T +852 2521 0551

F +852 2845 2125

Beijing

T +86 10 5965 0600

F +86 10 5965 0650

Published to provide general information and not as legal advice. © Slaughter and May, 2022.

For further information, please speak to your usual Slaughter and May contact.

www.slaughterandmay.com