



Appeal number: UT/2016/0225

PROCEDURE – application to prevent Upper Tribunal disclosing appeal documents to a third party - refused

**UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER**

BETWEEN:

ARIA TECHNOLOGY LIMITED

Appellant

- and –

**THE COMMISSIONERS FOR
HER MAJESTY’S REVENUE AND CUSTOMS**

Respondents

- and –

SITUATION PUBLISHING LIMITED

Third Party

Tribunal: Judge Greg Sinfeld

**Sitting in public at Royal Courts of Justice, Strand, London, WC2A 2LL on 20
March 2018**

Aria Taheri, director of Aria Technology Limited, for the Appellant

Gareth Corfield, reporter on The Register, for the Third Party

DECISION

Introduction

1. Aria Technology Limited ('ATL') has appealed to the Upper Tribunal ('UT') against a decision of the First-tier Tribunal ('FTT') released on 16 February 2016 ('the Decision'). In making that appeal, ATL has served a notice of appeal with detailed grounds and the Respondents ('HMRC') have filed a response to the grounds. This decision does not concern ATL's substantive appeal, however, but its application under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 ('the UT Rules') that certain documents should not be disclosed to a third party. ATL's application is made in response to one made by Mr Gareth Corfield, a reporter for The Register, a technology and science news website (www.theregister.co.uk), published by Situation Publishing Limited, that, Mr Corfield informs me, is read by some six million visitors each month. In its final form, Mr Corfield's application to the UT was for copies of ATL's notice of appeal, the associated grounds of appeal and HMRC's response.

2. A short hearing took place on 20 March 2018. Mr Aria Taheri, now the sole director of ATL, appeared for ATL and Mr Corfield represented The Register. I am grateful to both of them for their submissions. HMRC attended the hearing but did not make any representations. At the end of the hearing, I announced that ATL's application was refused and that Mr Corfield and The Register would be allowed access to the documents and that I would give my reasons in writing later. These are those reasons.

Background

3. So far as material, the background to ATL's application is as follows.

4. ATL was established as a business in 1993 by Mr Taheri. It was incorporated as a limited company on 17 July 1997 and registered for VAT on 1 August 1997. The main business activity declared on the application to register for VAT was "wholesale/retail of computer hardware." Mr Taheri was and remains the owner and sole shareholder of ATL.

5. In 2006, ATL sold products by way of retail to the general public and wholesale to other businesses. During the three month period ending 31 July 2006, among other business activities, ATL bought CPUs from suppliers in the UK and sold them wholesale to customers in Spain, Luxembourg, Portugal and Canada. In its VAT return for the period 07/06, ATL claimed credit for input tax of £1,513,316.35 which gave rise to a repayment to ATL of £445,156.98. The input tax shown on the return included £758,770.69 claimed by ATL in relation to the purchase of computer parts ('CPUs') in the period 07/06.

6. In a letter dated 6 October 2008, HMRC notified ATL of their decision to deny ATL's claimed input tax on the CPUs. In another letter, dated 7 October 2008, HMRC amended ATL's return for period 07/06 to show input tax in the sum of £754,545.66 and an amount of £313,613.71 as tax due to HMRC instead of the repayment originally claimed. HMRC decided to deny the input tax and assess ATL for tax due for period 07/06 because HMRC considered that the transactions relating to the CPUs were connected with the fraudulent evasion of VAT and that ATL, through its directors and officers, knew or should have known of that connection to fraud. In November 2008,

ATL appealed to the First-tier Tribunal (Tax Chamber) ('FTT') against the decision and assessment.

7. The FTT heard the appeal over 15 days at various times between August 2014 and October 2014 with further written submissions thereafter. The principal issue before the FTT was whether ATL knew or should have known that the CPU deals were connected to fraud.

8. In the Decision, the FTT found that HMRC had established fraudulent tax losses and that there was an orchestrated scheme for the fraudulent evasion of VAT connected with the CPU transactions. On the principal issue of whether ATL knew or ought to have known of the connection to fraud, having reviewed the evidence at length, the FTT concluded that were satisfied that ATL, through Mr Taheri and others, knew that the CPU deals were connected to fraud. The FTT also found that, if ATL had not known that the transactions were connected with fraud, then it ought to have known that they were so connected. Accordingly, the FTT decided that ATL was not entitled to credit for the input tax claimed in relation to the CPUs and confirmed the assessment. In the usual way, the Decision was published on the FTT's website with neutral citation [2016] UKFTT 098 (TC).

9. ATL applied to the FTT for permission to appeal against the Decision. The FTT refused the application and ATL applied to the UT which granted permission to appeal. ATL's appeal was entered in UT's register of cases, which is published on the UT's website. The register also shows the dates of future hearings and subsequently showed ATL's appeal as listed to be heard by the UT on 19-21 June 2018.

10. On 13 September 2017, Mr Corfield made an application by email to the UT for copies of "particulars of claim, defence (if filed) and any public orders or judgements made so far" in ATL's appeal. Mr Corfield quoted Rule 5.4C of the Civil Procedure Rules ('CPR') which he mistakenly believed applied to proceedings in the UT. When told by the UT administration that the CPR do not apply, Mr Corfield renewed his application on 9 October relying on *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2012] EWCA Civ 420 ('*Guardian News*'), which I discuss further below. Mr Corfield explained that his purposes were journalistic in nature and that reporting on an apparent dispute between ATL and HMRC was of editorial interest to The Register in the current climate surrounding allegations of tax irregularities by technology companies. He also stated that examining ATL's grounds of appeal against the background of the FTT's decision was a matter of public interest.

11. The UT replied by email dated 18 October 2017 which explained that the documents that are produced for the purposes of an appeal to the UT are not the same as those produced and filed for the purposes of a civil claim. There were no particulars of claim or defence nor, at that stage, was there any order or judgment. The reply included my comment that, in principle, Mr Corfield should be able to see, either complete or in an appropriately redacted form, the notice of appeal, with grounds, that was lodged by ATL at the start of the process and the response to the grounds of appeal, if one was lodged, by HMRC. I instructed the UT clerks to give the parties an opportunity to make representations in case ATL or HMRC objected to the documents being disclosed to Mr Corfield, eg on grounds that all or part of the material is commercially sensitive or confidential for other reasons.

12. On 20 November, Mr Taheri responded objecting to the documents being provided to Mr Corfield. HMRC were neutral in relation to the application. Having considered the representations made by Mr Taheri and Mr Corfield, the UT responded on 18 December stating that it took the view that, applying the comments of the Court of Appeal in *Guardian News*, the default position is that documents such as the notice of appeal and response should be disclosed and particularly where, as in this case, access to the documents is required for a proper journalistic purpose unless a person applies for and is granted an application for an order or direction under either rule 14(1) or (2) of the UT Rules. In fact, the response should also have referred to rule 14(8) of the UT Rules which is discussed below. Mr Taheri made such an application and it was listed for a hearing before me to consider Mr Corfield's request and Mr Taheri's objection.

Discussion

13. Toulson LJ, who delivered the principal judgment of the Court of Appeal in *Guardian News* held, at [69] and [70], that open justice was a principle of common law that applied to all tribunals:

“69. The open justice principle is a constitutional principle to be found not in a written text but in the common law. It is for the courts to determine its requirements, subject to any statutory provision. It follows that the courts have an inherent jurisdiction to determine how the principle should be applied.

70. Broadly speaking, the requirements of open justice apply to all tribunals exercising the judicial power of the state. The fact that magistrates courts were created by an Act of Parliament is neither here nor there ...”

14. I consider that it is clear from those paragraphs in *Guardian News* that, notwithstanding that the UT is also a creature of statute and has its own rules of procedure, it has an inherent jurisdiction to determine how the principle of open justice should be applied. In the case of the UT, the applicability of and ability to apply the principle is put beyond argument by section 25 of the Tribunals, Courts and Enforcement Act 2007 which provides that, in relation to the production and inspection of documents and all other matters incidental to the UT's functions, the UT has, in England and Wales or in Northern Ireland, the same powers, rights, privileges and authority as the High Court (and, although not relevant in this case, the same powers, rights, privileges and authority in Scotland as the Court of Session).

15. At [85] of *Guardian News*, Toulson LJ set out the nature of the court's or tribunal's task when considering an application for access to documents:

“85. In a case where documents have been placed before a judge and referred to in the course of proceedings, in my judgment 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. However, there may be countervailing reasons. In company with the US Court of Appeals, 2nd Circuit, and the Constitutional Court of South Africa, I do not think that it is sensible or practical to look for a standard formula for determining how strong the grounds of opposition need to be in order to outweigh the merits of the application. The court has to carry out a proportionality exercise which will be fact-specific. 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.”

16. It can be seen that Toulson LJ’s remarks were concerned with documents that had already been placed before a judge and referred to during proceedings but, in my view, his remarks cannot be seen as limited to such documents. That is for three reasons. First, Toulson LJ was simply addressing the facts of the *Guardian News* case which concerned an application for access to documents in extradition proceedings that had already been heard. The second reason why Toulson LJ’s “default position” (that access should be permitted on the open justice principle) should not be regarded as limited to documents that had already been placed before a judge and referred to in the course of proceedings is that such a restriction would severely undermine the principle of open justice. As Toulson LJ observed at [2] of *Guardian News*: “It is not only the individual judge who is open to scrutiny but the process of justice.”

17. Finally, CPR 5.4C provides that a non-party can, with permission, obtain access to any documents that have been filed and are in the court records and the right to access is not limited to documents that have been referred to in open court nor is there any requirement that a hearing must have taken place. As relevant to this application, it states:

“(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)

...

(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.

...

(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.”

18. As the UT informed Mr Corfield in response to his initial request for the filed documents, the CPR do not apply to the UT which has its own rules of procedure. That does not mean that the CPR have no role to play, as was made clear by the Supreme Court in *BPP Holdings v HMRC* [2017] UKSC 55 at [26]. While they do not apply to proceedings in the UT, the CPR can provide helpful guidance where the UT Rules are silent or uncertain in scope and the UT should generally follow a similar approach in exercising its powers under the UT Rules. Accordingly, I have quoted CPR 5.4C at length because it illustrates how the UT might approach an application by a non-party for access to documents held in the UT’s records.

19. There is no equivalent to CPR 5.4C in the UT Rules but there is also nothing that prohibits the UT from allowing a person who is not a party to the proceedings to have access to documents that have been filed and are in the UT records. Further, some rules imply that the UT has an inherent power or even a duty under common law to disclose or publish documents or information relating to proceedings. Rule 14 of the UT Rules deals with the use of documents and information. Rule 14(1)(a) provides that the UT may make an order prohibiting the disclosure of specified documents or information relating to the proceedings. Rule 14(2) allows the UT to give a direction prohibiting the disclosure of a document or information to a person if certain conditions are satisfied. Rule 14(2) is not relevant to the application in this case because it only applies to the parties to proceedings. That is made clear by the reference in rule 14(2) to a “direction”, which rule 5(2) makes clear can only be given in relation to the conduct or disposal of proceedings, and the use of the term “party” in rule 14(3). Rule 14(1), however, can apply to parties and non-parties such as The Register. Further, rule 14(7) provides that information about mental health cases and the names of any persons concerned in such cases must not be made public unless the UT gives a direction to the contrary. This suggests that the default position in cases other than mental health cases is that information about the cases should be made public. Rule 14(8) gives the UT the power to direct, on its own initiative or on the application of a party, that certain documents or information must or may be disclosed to the UT on the basis that the UT will not disclose such documents or information to other persons. I consider 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) but that a party to the proceedings may apply for a direction that effectively restricts that power or duty.

20. Taking account of the comments of Toulson LJ in *Guardian News* 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.

21. In this case, I consider that Mr Taheri's objection, on behalf of ATL, to the application by Mr Corfield, on behalf of The Register, was an application for a direction under rule 14(8) of the UT Rules that, in effect, provides that the UT will not disclose the documents requested to Mr Corfield or The Register. Rule 5(3)(f) provides that the UT may hold a hearing to consider any matter, which happened in this case, although it is clear there is no requirement that a hearing must be held, and I would expect most applications for access to documents to be dealt with on the papers.

22. I now turn to consider whether to grant ATL's application and deny Mr Corfield and The Register access to the notice of appeal, with associated grounds, lodged by ATL and the response to the grounds of appeal lodged by HMRC. It is clear from [85] of *Guardian News*, quoted above, that I must conduct a balancing exercise in which I evaluate the competing interests at issue in the application in the context of the facts of this appeal. I must weigh the purpose of the principle of open justice and the potential value of the material in advancing it against the need to deal with the appeal fairly and justly which is the overriding objective of the UT Rules and includes consideration of any risk of harm which access to the documents may cause ATL and others.

23. In his submissions at the hearing, Mr Taheri set out the background to the appeal to the FTT and his criticisms of the Decision which form the subject of the substantive appeal to the UT which is due to be heard in June 2018. Mr Taheri was very concerned that any reporting of his appeal before he had had an opportunity to contest it in the UT in June would have a negative impact on his reputation, ATL's business and the staff working for ATL. To demonstrate the serious nature of the risk, Mr Taheri referred to an incident that occurred in August 2014 when the FTT was hearing ATL's appeal. At that time, ATL's bank withheld settlement funds from ATL's merchant service provider in relation to credit card sales without warning for a period of 12 days. This left ATL short of funds and unable to pay key suppliers when invoices fell due. Mr Taheri said that, eventually, the bank explained that the reason for stopping the payments was ATL's appeal against HMRC in the FTT. Mr Taheri said that ATL had also had issues with suppliers who reduced the company's credit limit when the appeal was live. Mr Taheri was also concerned that The Register would not publish an accurate and correct report of the forthcoming proceedings in the UT which, again, would be damaging to ATL's business. He gave an example of previously being misquoted in an article in The Register. Mr Taheri said that he had no objections to Mr Corfield attending the proceedings in June 2018 and reporting on them at that time but he feared that publication by The Register in advance would be prejudicial to the business and people working in it.

24. In relation to Mr Taheri's concerns about unfair reporting, Mr Corfield submitted that he was under a duty to report the proceedings fairly and in good faith. As for the possibility of an adverse reaction by ATL's creditors, Mr Corfield contended that a fair news report that set out the arguments put by both sides would be likely to prevent the situation that had arisen with ATL's bank and some of its suppliers at the time of the FTT hearing. He suggested that such a report might possibly enhance ATL's position.

25. It is clear from *Guardian News* and the cases cited in it that there is a strong presumption, founded on the open justice principle, that non-parties should be allowed access to documents relating to proceedings that are held in the UT records. That presumption is particularly strong where access is sought for a proper journalistic purpose. Correspondingly, in my opinion, a party that seeks to prevent access for a proper journalistic purpose must provide cogent reasons, supported by evidence, why the UT should not allow access.

26. In my view, Mr Taheri has not demonstrated that allowing Mr Corfield and The Register access to ATL's notice of appeal and grounds and HMRC's response would lead to any unfairness or is likely to cause ATL or any other person real harm. It seems to me that the problems that ATL experienced with its bank in 2014 are not relevant to the position in 2018. Even if the payments were withheld by the bank because ATL was engaged in a hearing of an appeal in the FTT, which I consider unlikely, it is clear that the bank resumed crediting the payments to ATL's account while the hearing was ongoing and continued to do so notwithstanding the subsequent release of the Decision in which the FTT found that ATL, through Mr Taheri and others, knew or ought to have known that it was engaging in transactions connected with the fraudulent evasion of VAT. Mr Taheri has not provided any evidence that ATL's bank or suppliers are likely to withhold payments or restrict credit because ATL is engaged in an appeal in the UT which challenges the Decision. The fact that ATL is no longer experiencing difficulties with its bank and suppliers even after the publication of the Decision also undermines Mr Taheri's submission that allowing Mr Corfield and The Register access to the documents now will cause reputational damage to him and ATL. Any damage to reputation has already been done by the findings of the FTT described in the Decision which is a published and publicly available document.

27. I accept that Mr Taheri is entitled to be concerned about how ATL's appeal is reported but I do not accept that there is any evidence that Mr Corfield or The Register intends or is likely to misrepresent or distort the facts. I have been given no reason to doubt Mr Corfield's statement that he is required to report the proceedings fairly and accurately. Any damage caused by the fair and accurate reporting of ATL's appeal to the UT is no more than might be expected in any appeal against an adverse finding at first instance and does not amount to unfairness.

28. In conclusion, I am not satisfied that allowing Mr Corfield and The Register access to ATL's notice and grounds of appeal and HMRC's response would create a risk of unfairness or harm to ATL or any other person.

Decision

29. For the reasons given above, ATL's application for a direction under rule 14(8) of the UT Rules is refused. Accordingly, the UT will provide copies of ATL's notice of appeal, with the grounds of appeal, and HMRC's response to the grounds of appeal to Mr Corfield and The Register. As stated at the hearing, I direct that the documents requested will not be provided to Mr Corfield and The Register until the time for appealing against this decision has passed. Under rule 44(4) of the UT Rules, an application by a party for permission to appeal must be received by the UT not later than one month after this decision is sent to that party.

Judge Greg Sinfield

Release date: 10 April 2018