



[2020] UKFTT 0102 (TC)

TC07598

PROCEDURE – HMRC seeking to rely on documents confidential to one appeal in joined appeal concerning that appellant and another appellant – first appellant objecting – decision based on relevance of material – application allowed in part

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**Appeal number: TC/2018/2349 and
TC/2018/1816**

BETWEEN

MARK MITCHELL

Appellants

-and-

PAUL BELL

-and-

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

Respondents

TRIBUNAL: JUDGE BARBARA MOSEDALE

**Sitting partly in private and partly in public at Taylor House, Rosebery Avenue, London
on 22 May 2019**

Julian Hickey, Counsel, instructed by Levy & Levy, for Mr Mitchell;

Mr B Akin, Counsel, instructed by Hill Dickenson, for Mr Bell;

**R Chapman QC, instructed by the General Counsel and Solicitor to HM Revenue and
Customs, for the Respondents**

DECISION

INTRODUCTION

1. Mr Bell and Mr Mitchell were shareholders of two companies, Universal Payroll Services Ltd and Universal Project Services Ltd. I will refer to these companies together, as they were in the hearing, as the Universal companies. Both companies were assessed by HMRC to recoup overpaid input tax in the period 2010-2014.
2. Both of the companies were then assessed to penalties on the basis that they deliberately reclaimed input tax to which they were not entitled. Both companies entered into liquidation in 2017 and have not appealed the assessments or penalties.
3. Personal liability notices consequent on those assessments and liquidations were then issued to Mr Mitchell and Mr Bell, making each liable for 50% of the penalty charged on each of the two companies, as HMRC considered them both to be shadow or de-facto directors. In total, each appellant was assessed to penalties of approximately £6 million.
4. The PLNs are under appeal to this Tribunal and, on 9 May 2018, the Tribunal made an order that the two separate appeals made by the appellants would proceed and be heard together, no doubt for the obvious reason that the two appeals concern in large part the same factual matrix and to have separate hearings would therefore risk inconsistent findings of fact.
5. Nevertheless, Mr Bell and Mr Mitchell are separately represented and their interests are not aligned. It seems it is Mr Bell's case that, if either of them was responsible, it was Mr Mitchell who ran the companies and was responsible for any irregularities which occurred; while Mr Mitchell's case appears to be that the reverse was true.
6. HMRC, in accordance with directions, served their list of documents on both appellants on 31 October 2018. However, as Mr Mitchell had already objected to the reference to certain documents in HMRC's joined statement of case, HMRC did not serve copies of the documents on Mr Bell.
7. On 21 December 2018, HMRC made an application (supported by Mr Bell) that it should have the permission of the Tribunal to rely on the objected to documents on their list of documents and that they should be permitted to disclose them to Mr Bell. Mr Mitchell applied on 18 January 2019 for an order excluding the same documents from the joined appeals.

HEARING PARTLY IN CAMERA

8. Mr Mitchell applied for Mr Bell and all other persons apart from his own representatives and those of HMRC to be excluded from this hearing. The application was on the basis that it would defeat the purpose of his application if Mr Bell were to see or hear about the contents of the documents Mr Mitchell considered should not be referred to in the hearing of the joined appeals.
9. HMRC did not send a copy of their skeleton argument to Mr Bell on the basis that Mr Mitchell wanted an in camera hearing and their skeleton contained information about documents confidential to Mr Mitchell.
10. Mr Bell accepted that it would frustrate Mr Mitchell's application if he were made aware of the details of the documents in dispute, but did not, before the hearing accept that he and his advisers should be excluded from any part of the hearing. But it was accepted that the Tribunal had power to exclude from a hearing any person whose attendance at the hearing would frustrate the purpose of the hearing (Rule 32(4)(c)) and, at the outset of the hearing, the three parties agreed that the hearing would proceed as follows:

- (1) Mr Hickey would open (for Mr Mitchell) with everyone present; at the end of his submissions he would cover the disputed documents in detail and would do that 'in camera' with only HMRC in the room;
- (2) Mr Chapman would respond on behalf of HMRC in open hearing but if he wished to respond by referring to the documents, he would do that in the absence of Mr Bell's party;
- (3) Mr Akin would respond on behalf of Mr Bell but in ignorance of the detail of the documents;
- (4) Mr Hickey would have a right of reply and if he chose to respond on the documents, would do that part of his response in the absence of Mr Bell's party.
- (5) It was agreed that all parties would be bound by my decision even though Mr Bell and his advisers would not have been present during a part of the hearing.

11. I was content to deal with the applications in that manner, and that was how the hearing proceeded with the exception that, as Mr Hickey's response did not refer to any of the documents in detail, Mr Bell and his party were not asked to leave during the course of it.

PUBLICATION OF DECISION

12. Mr Mitchell also applied (in his counsel's skeleton argument) that no part of my decision published as a consequence of this hearing would contain any of the information in the documents in dispute. While this point was not touched on at the hearing, nevertheless the parties having agreed that elements of the hearing would be in camera, it logically follows that my decision must be redacted to the extent I refer to documents which I decide should not be disclosed; I also consider it should be redacted to the extent it refers to any of the disputed documents in any event pending the possibility of an appeal from it. Otherwise, publication would render the right of appeal at least to some extent nugatory as information Mr Mitchell sought to keep private would have become public.

13. While I was invited to deal with the question with some level of generality and leave the parties to agree exactly which of the disputed documents, and in particular which parts of the disputed documents, could be relied on by HMRC in the hearing, I agree with Mr Chapman that I would have to give examples and so that it is inevitable that some part of my decision would cover in camera matters.

14. It seems to me that that means that my decision should be treated as follows:

- (1) The entire decision will be sent to Mr Mitchell and HMRC but with a direction that it should not be disclosed;
- (2) Any part of it referring to any part of the disputed documents which I decide HMRC cannot rely on should be permanently redacted and not available to either the public or Mr Bell;
- (3) Any part of my decision referring to any part of the disputed documents which I have decided HMRC may rely on should be temporarily redacted and not available to either the public or Mr Bell unless and until it is clear that the time limit for appealing is expired or any appeal has been unsuccessful;
- (4) The remainder of the decision should be published and sent to Mr Bell but his right of appeal would have to run from the date he received the decision redacted under (3).

DOCUMENTS IN DISPUTE

15. Originally there was 18 documents from HMRC's list of documents in dispute: these were documents on HMRC's documents list which Mr Mitchell did not consider HMRC were entitled to rely in the hearing and which he did not wish to be disclosed to Mr Bell.

16. In their skeleton, HMRC agreed not to rely on or disclose 7 of them (being nos 31, 32, 33, 62, 63, 64, 65 from the List of Documents). HMRC maintained their application to rely on and disclose the remaining 11 items which were nos. 34-38, 40-43, 55 and 66 which I shall refer to as the disputed documents. Mr Akin (for Mr Bell) concurred with HMRC's position: he did not ask for disclosure of anything HMRC had agreed with Mr Mitchell they would not rely upon.

17. HMRC also produced a supplementary list of documents just before the hearing. This was too late for them to be included in the bundle or the subject of this hearing. Mr Mitchell objected to items 5 and 17-49 on the list. It was agreed they would be dealt with under the general principles I was asked to give in respect of the original documents, but no specific reference would be made to them. Indeed, I understood counsel for HMRC had not even seen them.

THE LEGAL PRINCIPLES RELEVANT TO THIS APPLICATION

18. There seemed no dispute on the legal principles which I should apply in resolving this dispute, although the parties were sharply divided on how they should be applied to the actual documents in dispute.

Tribunal's power to exclude documents

19. Rule 15(2)(b) gave the Tribunal power to exclude evidence; rule 5(3)(d) gave it power to order disclosure. So the Tribunal had the power to accede to HMRC's request that it be ordered to disclose documents to Mr Bell; it had power to accede to Mr Mitchell's request to refuse to allow HMRC to rely on documents that they wished to rely on in this appeal. The question was whether it should accede to either application.

HMRC's power to rely on confidential documents

20. HMRC's position was that they had no power to disclose the documents to Mr Bell without an order from the tribunal because Mr Mitchell had refused to consent to the disclosure and they were documents which were affected by s 18 Commissioners for Revenue and Customs Act 2005 which provided:

(1) Revenue and Customs officials may not disclose information which is held by the Revenue and Customs in connection with a function of Revenue and Customs.

(2) But subsection (1) does not apply to a disclosure-

(a) which –

(i) is made for the purposes of a function of Revenue and Customs, and

(ii) does not contravene any restriction imposed by the Commissioners

...

(b) which is made for the purposes of civil proceedings (whether or not within the United Kingdom) relation to a matter in respect of which the Revenue and Customs have functions.

21. In *R (oao Ingenious Media Holdings plc and another) v HMRC* [2016] UKSC 54 Lord Toulson commented on this provision as follows:

‘...I take s 18(1) to be intended to reflect the ordinary principle of taxpayer confidentiality ...to which s 18(2)(a)(i) creates an exception by permitting disclosure to the extent reasonably necessary for HMRC to fulfil its primary function’

22. In my view, in ordinary tax litigation, HMRC neither obtain nor need to obtain an order from this Tribunal before they are able to rely in the proceedings on documents to which s 18(1) CRCA applies. They may rely on them because defending appeals against assessments (and similar litigation) is a function of HMRC and such disclosure (in the sense of relying on the documents in open court) is permitted under s 18(2)(a). Such disclosure is also covered by s 18(2)(c) as long as it is for the purpose of the civil proceedings, which would include proceedings in the tax tribunal.

23. I was not called to determine the exact boundaries of the exceptions in s 18(2) as HMRC wisely chose not to disclose to Mr Bell documents to which Mr Mitchell had objected. It was taken as read that if I admitted all or any part of those disputed documents into the hearing, they ought to be disclosed to Mr Bell. To the extent that I did not, they should not be disclosed to Mr Bell.

24. The question for the hearing was whether HMRC should be permitted to rely on the documents or part of them and that was determined by relevance.

Meaning of relevant evidence

25. The parties were agreed that the normal rule was that evidence should be admitted in the appeal if it was relevant. There was some discussion over the meaning of relevant but again the parties appeared agreed on this. Mr Hickey referred me to what Lord Steyn said in *R v Randall* [2004] WRL 56 at [20]:

A judge ruling on a point of admissibility involving an issue of relevance has to decide whether the evidence is capable of increasing or diminishing the probability of the evidence of a fact in issue. The question of relevance is typically a matter of degree to be determined, for the most part, by common sense and experience....

Mr Chapman pointed to Nugee J’s reference (see citation below) to something being ‘potentially probative’ but it seems to me that that was just a more succinct way of saying that relevant evidence is evidence capable of increasing or diminishing the probability of a fact in issue.

Irrelevant evidence to be excluded

26. The parties were agreed that irrelevant evidence in general should not be admitted. Mr Hickey referred me to *Infinity Distribution* where it was said:

[11] ...the admission of evidence which is irrelevant is as detrimental to the economical and proportionate conduct of Tribunal proceedings as it is in relation to court proceedings. Nonetheless, where irrelevant material is mixed up with relevant material, it may frequently be disproportionate to spent time before a final hearing disentangling the two, if the admission of the irrelevant alongside the relevant material causes no unfairness or inconvenience calling for active case management.

27. While all taxpayer material was confidential (see above), in this case it was agreed the disputed documents in this appeal included a lot of material prejudicial to Mr Mitchell and which he would not wish to see in the public domain. It was Mr Mitchell’s position that where the disputed document contained relevant and irrelevant confidential and prejudicial material, only the relevant should be admitted and the irrelevant redacted. HMRC agreed with that in

principle; they did not suggest this was a case where the irrelevant material should be admitted because it would be too onerous to spend time disentangling it from the relevant material.

28. HMRC complained that Mr Mitchell had refused to engage in an exercise of agreeing redactions. I am not surprised: it was quite clear to me that the parties were unable to agree on redactions as they were unable to agree on which parts of the disputed documents were relevant.

Relevant material to be excluded?

29. The parties were also agreed, as I am, that not all relevant evidence has to be admitted. Mr Hickey referred me to Nugee J's comment in *IAC Associates* at [35]:

....one starts with asking the question whether the evidence is admissible. It is admissible if it is relevant. It is relevant if it is potentially probative of one of the issues in the case. One then asks, notwithstanding that it is admissible evidence, whether [there] are good reasons why the court (or tribunal in this case) should nevertheless direct that it be excluded.

30. This was more succinctly put by Lightman J in *Mobile Export 365 Ltd* [2007] EWHC 1737 (Ch) where he said 'all relevant evidence should be admitted unless there is a compelling reason to the contrary'. This comment was approved by Ryder LJ at [31] in *Atlantic Electronics* [2013] EWCA civ 651.

31. There may be a number of compelling reasons to exclude relevant evidence; it is often excluded if produced too late for the other party to have a proper chance to respond. But in this case, with one exception, I did not understand Mr Mitchell to be saying relevant material should be excluded nor did I understand him to put forward grounds on which it should be excluded. The relevant material might be prejudicial to Mr Mitchell (in the sense he would not wish the public to know about it), but I did not understand him to suggest it should be excluded on that basis. His position was that *irrelevant* material should be excluded as it included prejudicial material. And the parties were agreed on this.

32. The exception was, although Mr Hickey did not phrase it quite like this, that relevant material should be excluded where it was mixed up with lots of irrelevant, prejudicial material if the matter of which it was potentially probative could be proved by reliance on other documents which were already in evidence in the appeal. Mr Chapman did not agree; he considered all relevant material should be admitted whether or not necessary to prove the point; after all, the more evidence to prove a point, the more likely HMRC were to be able to prove it. I deal with this point below in context.

APPLICATION OF PRINCIPLES TO FACTS

The issues in the appeal

33. Each of the appellant's notices of appeal denied, without giving much detail, that they were a shadow director. There was no mention of anything approaching a cutthroat defence but it is clear that their interests are not aligned as Mr Mitchell objected to disclosure of the disputed documents to Mr Bell as well as objecting to HMRC's reliance upon them.

34. The statement of case sets out HMRC's case that each of the appellants were shadow directors of the Universal companies on the basis of evidence from their director and Mr Mitchell that (says HMRC) shows that the appellants made the important decisions for the Universal companies. HMRC rely on the extent of the alleged VAT overclaims for their case that the two alleged shadow directors could not have been unaware of it and must have deliberately brought them about. HMRC also rely on the alleged fact that the input tax which

was denied was on invoices issued by two companies which HMRC alleged Mr Bell owned and controlled in whole or in part.

Division of documents in levels

35. I cannot deal with the application without some reference to the nature of the disputed documents and I therefore now do so.

36. *[Paragraph contains description of documents and is redacted at least temporarily].*

37. Mr Chapman's approach was to consider the information in the documents as meeting various degrees of relevance, running from Level 1 to Level 4. Anything not in any of these categories was accepted to be irrelevant. It was a sensible approach and Mr Hickey adopted and refined it. This led to Level 2 having 3 sub-divisions. The Levels agreed upon were:

(1) Level 1. A section of any document which directly refers to the Universal companies or either of them (other than simply a bare mention of their name).

(2) Level 2. A section of any document which shows interaction between the Universal companies and/or either Mr Mitchell or Mr Bell. As I have said it was agreed by Mr Chapman and Mr Hickey that this sub-divided as follows:

(a) Any mention of direct interaction by either Mr Mitchell and/or Mr Bell with either or both of the Universal companies;

(b) Any mention of interaction between the Universal companies or either of them with other companies controlled or allegedly controlled by Mr Mitchell and/or Mr Bell;

(c) Any mention of interaction between Mr Mitchell and Mr Bell even if in a context outside the Universal companies.

(3) Level 3 – Any mention in a document which goes to show Mr Mitchell's interactions with other companies which he controlled or allegedly controlled, and in particular his interactions with companies which had dealings with the Universal companies.

(4) Level 4. Anything which went to Mr Mitchell's or Mr Bell's credibility generally and in particular the credibility with which they presented the affairs of companies which they controlled or allegedly controlled.

Which of these levels comprise relevant evidence?

Level 1

38. Mr Chapman considered level 1 to be obviously relevant. Information which Mr Mitchell disclosed to HMRC about the Universal companies was highly relevant to their case as they had relied on it in making the assessments.

39. Mr Hickey accepted that documents or sections of documents containing Level 1 information were relevant and could be admitted into evidence; he did suggest some should not be admitted because they duplicated information available in other evidence already admitted.

40. Level 1 information is therefore admitted and should be copied to Mr Bell.

Level 2A

41. Level 2A was any mention of direct interaction by either Mr Mitchell and/or Mr Bell with either or both of the Universal companies. Mr Chapman considered this relevant material because it had the potential to prove control of the Universal companies by Mr Mitchell and/or Mr Bell.

42. Mr Hickey accepted that Level 2A evidence in the documents was relevant. He did suggest some should not be admitted because they duplicated information elsewhere, although he was not specific on this and I agree with HMRC that the fact there was similar evidence elsewhere did not make this evidence irrelevant, nor did I think it should be excluded on the grounds of their being a compelling reason to do so, because no case of specific prejudice arising from this information was made out.

43. Level 2A evidence is therefore admitted in its entirety and should be copied to Mr Bell.

Level 2B

44. Level 2B was any mention of interaction between the Universal companies or either of them with other companies controlled or allegedly controlled by Mr Mitchell and/or Mr Bell;

45. Mr Hickey's position was that this material was irrelevant as HMRC's statement of case only pleaded that Mr Mitchell and Mr Bell were shadow directors of the Universal companies; HMRC did not plead that companies which Mr Mitchell controlled were shadow directors of the Universal companies.

46. Mr Chapman considered this relevant material because it had the potential to prove control of the Universal companies by Mr Mitchell and/or Mr Bell although I was not left with a clear impression of HMRC's case on why this was so. [*One sentence redacted at least temporarily*]. However, I agree with Mr Hickey that HMRC's statement of case failed to explain the relevance of other companies to which Mr Mitchell was connected, in circumstances that it was their case that the disputed supplies were made by companies with which Mr Bell was connected.

47. I consider that any mention of the companies which are mentioned in the statement of case and which therefore clearly form a part of HMRC's pleaded case are relevant and admissible.

48. I do not accept that HMRC has shown that mentions in the documents of other companies is relevant [*remaining part of sentence redacted at least temporarily*]. If HMRC want to rely on evidence about the relationship of Mr Mitchell to his other companies, then they need to amend their statement of case to make clear their case on this. If and when they do that, the reference to those companies in the disputed documents may become relevant to the appeal.

49. In conclusion, it is only to the extent that the disputed document contained evidence about companies mentioned in HMRC's statement of case that it contained Level 2B evidence which is relevant to these appeals. To that extent only Level 2B material admissible and should be admitted into the appeal and copied to Mr Bell.

Level 2C

50. Level 2C evidence is any mention of interaction between Mr Mitchell and Mr Bell even if in a context outside the Universal companies.

51. Mr Hickey's position was that Level 2 C documents or parts of documents were wholly irrelevant.

52. Mr Chapman's position was that it was relevant as it tended to show the relationship between the two appellants at the time.

53. [*One sentence redacted at least temporarily*]. I agreed with Mr Chapman that this evidence was potentially relevant to the question of the relationship between them at the time and the credibility of Mr Mitchell's statements in meetings with HMRC that, if either of the two was responsible, it was Mr Bell. The relationship was not specifically pleaded but it seemed to me that this evidence was relevant as it was relevant to the case that Mr Mitchell at

least appeared to put forward in meetings with HMRC. While the defence does not appear in his notice of appeal, his notice of appeal was brief and his counsel did not object to Mr Chapman's suggestion that each appellant would be blaming the other.

54. I find that to the extent that any disputed document contains Level 2C evidence, those sections of the document are relevant and admissible and should be admitted into the appeal and copied to Mr Bell.

Level 3

55. Level 3 was any mention in a document which goes to show Mr Mitchell's interactions with other companies which he controlled or allegedly controlled, and in particular his interactions with companies which had dealings with the Universal companies.

56. Mr Hickey's position was that this information was wholly irrelevant as it dealt with Mr Mitchell's relationship with companies that were not the subject of the appeals.

57. Mr Chapman's view is that anything which showed Mr Mitchell's relationship with other companies might, by analogy, be probative of HMRC's case that Mr Mitchell was a shadow director of the Universal companies; *[rest of sentence redacted at least temporarily]*.

58. My view is at 48 above; mentions of the other companies are only relevant to the extent that the companies are mentioned in the statement of case. To that extent only, Level 3 information is admitted and should be copied to Mr Bell.

Level 4

59. Level 4 was anything which went to Mr Mitchell's or Mr Bell's credibility generally and in particular the credibility with which they presented the affairs of companies which they controlled or allegedly controlled

60. Mr Hickey's case is that this is not relevant. Mr Chapman said it was relevant as Mr Mitchell's credibility was in issue.

61. I find that Mr Mitchell's credibility is to some extent in issue: it is expressly stated in the statement of case that HMRC do not accept the credibility of all that he has said to them in respect of the Universal companies. It is not expressly stated in respect of Mr Bell but it is clearly implied: HMRC consider he knew about the inaccuracies in the Universal companies' VAT returns and Mr Bell denies this; HMRC allege he deliberately procured the inaccuracies; Mr Bell denies this. I find both appellants' credibility in respect of what they say in regards the Universal companies in issue and they know this.

62. But there is no statement that their credibility in general is an issue. *[Rest of paragraph redacted at least temporarily]*.

63. I consider HMRC need to be reasonably specific in the pleading as fraud requires particularity in pleading and in *Tooth v HMRC* [2018] UKUT 38 the Upper Tribunal ruled that

'...an allegation of deliberately bringing about a tax loss is a serious one, tantamount to an allegation of fraud.'

64. In the absence of any pleaded case that Mr Mitchell's statements about his other tax affairs were unreliable *[part of sentence redacted at least temporarily]*. I find L4 material not relevant.

OVERALL CONCLUSION

For reasons given above, it is appropriate to redact the disputed documents so that only the relevant material may be relied on by HMRC and disclosed to Mr Bell. The parties must agree the redactions in line with the principles I have outlined above and in particular:

Level 1 – relevant and admissible

Level 2A – relevant and admissible, and to be admitted even if duplicated elsewhere;

Level 2B - only relevant and admissible on the current pleadings to extent refers to companies mentioned in HMRC’s statement of case

Level 2C – relevant and admissible

Level 3 - only relevant and admissible on the current pleadings to extent refers to companies mentioned in HMRC’s statement of case

Level 4 – not relevant on the present pleadings.

THE WAY FORWARD

65. Directions will be issued separately on the production of a redacted version of this decision for publication.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

66. 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.

**BARBARA MOSEDALE
TRIBUNAL JUDGE**

RELEASE DATE: 30 OCTOBER 2019