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ANALYSIS: INGENIOUS: SUPREME COURT RULES HMRC IN BREACH OF CONFIDENCE

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Analysis

Ingenious: Supreme Court rules HMRC in breach of confidence

Speed read

The Supreme Court in *Ingenious Media* has overturned the decisions of the High Court and the Court of Appeal, holding that the former permanent secretary for tax, David Hartnett, breached HMRC's duty of confidentiality when making off the record comments to journalists from *The Times*. The Supreme Court concluded that although the case was brought by way of judicial review, the question was whether HMRC had breached its common law duty of confidentiality. The Supreme Court unanimously agreed that briefings to journalists of this sort, irrespective of the fact they were made off the record, had breached that duty.

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On 19 October 2016, the Supreme Court unanimously overturned the decisions of the High Court and the Court of Appeal in concluding that David Hartnett (the then permanent secretary for tax) had breached HMRC's duty of confidentiality when briefing journalists at *The Times*.

Background

On 14 June 2012, Mr Hartnett gave an interview to two journalists from *The Times*, describing the actions that HMRC was taking against individuals involved in tax avoidance, including one particular person involved in film schemes.

That individual was identified (correctly) by the journalists as Patrick McKenna, the founder and CEO of the Ingenious Media group. Mr Hartnett's comments during that interview were published by *The Times* in two articles on 21 June 2012, in which Mr Hartnett was reported as saying of Mr McKenna: 'He's an urbane man, he's a former Deloitte partner, he's a clever guy, he's made a fortune, he's a banker, but actually he's a big risk for us.'

The articles noted HMRC's belief that film schemes had enabled investors to avoid £5bn in tax (even though this number was provided by Mr Hartnett as 'utterly' off the record). Other comments made by Mr Hartnett – for example, that film schemes are nothing other than 'scams for scumbags' – were not for quotation and were not quoted.

Ingenious Media and Mr McKenna challenged Mr Hartnett's disclosures, as a breach of HMRC's duty of confidentiality, by way of judicial review.

Duty of confidentiality

HMRC's duty of confidentiality is provided for in s 18(1) of the Commissioners for Revenue and Customs Act 2005, which provides that: 'Revenue and Customs officials may not disclose information which is held by the Revenue and Customs in connection with a function of the Revenue and Customs.'

A person will commit an offence if he discloses such information relating to a person whose identity 'is specified in the disclosure or can be deduced from it' (s 19). The key exception to this duty is where the disclosure 'is made for the purposes of a function of the Revenue and Customs' (s 18(2)).

The function of HMRC is, in essence, the 'collection and management' of tax (s 5). However, pursuant to s 9(i): 'The Commissioners may do anything which they think: (a) necessary or expedient in connection with the exercise of their functions; or (b) incidental or conclusive to the exercise of their functions.'

The decisions of the High Court and the Court of Appeal

The High Court and the Court of Appeal dismissed the applications on the basis that disclosures to the press were a legitimate exercise of HMRC's function. For the High Court, Mr Hartnett's disclosures were permitted in order to foster a spirit of cooperation with the press. The Court of Appeal took a similar approach, holding that there was a public interest in HMRC disclosing its views regarding film schemes; and that taxpayers that were contemplating such an investment might even feel aggrieved if HMRC did not make its views public.

The Court of Appeal also noted the circumstances of the disclosure. In particular, Mr McKenna was already known to the journalists and Mr Hartnett's comments were made 'off the record'.

In the context of a judicial review, both the High Court and the Court of Appeal considered that Mr Hartnett's actions could not be regarded as so unreasonable that the court should intervene.

The decision of the Supreme Court

In considering (and allowing) the claim, the Supreme Court (whose judgment was delivered by Lord Toulson) considered: the basis on which the court was considering HMRC's actions; and the scope of HMRC's duty of confidentiality.

The nature of the claim

It is notoriously difficult to hold public bodies to account by way of judicial review. Lord Toulson noted that because the claim had been brought by way of an application for judicial review, the High Court and Court of Appeal had taken the view they could not consider Mr Hartnett's disclosures as if they were primary decision makers. Rather, they had decided that Mr Hartnett's actions were not irrational on public law principles.

This, however, was not the correct approach. Indeed, it was a 'cardinal error to suppose that the public law remedies and principles associated with judicial review … occupy the entire field whenever the party whose conduct is under challenge holds a public position' (para 28).

Lord Toulson was clear that 'public bodies are not immune from the ordinary application of the common law, including in this case the law of confidentiality' (para 28). Accordingly, the question was whether, in the court's judgment, there had been a breach of confidentiality. Referring to the case of *W v Egdell* [1990] 1 Ch 359 (involving the disclosure of a confidential report by a doctor), the question is not 'what the doctor thinks but … what the court rules' (para 26, citing Lord Bingham).

The ability to make common law claims against HMRC was considered in *Neil Martin Ltd v HMRC* [2007] EWCA

Civ 1041, which concerned a claim for loss as a result of errors in the processing of construction industry certificates. It was held that no separate private law claim could grow out of a statutory duty. Either the statutory duty itself gave rise to a private law remedy or it did not. In that case, it was only where an employee at HMRC unilaterally made an application on behalf of the company that the employee (and, vicariously, HMRC) assumed a duty to the company.

Whilst s 18 imposes a statutory duty of confidentiality, with its own sanction in s 19, Lord Toulson aligns HMRC's duty with the common law duty of confidentiality. As a result, it was possible (in line with *Neil Martin*) to demonstrate that HMRC was subject to a standalone duty. On the face of it, therefore, the circumstances in which claims may be brought against HMRC are likely to remain limited.

Nonetheless, the ready acceptance that HMRC is subject to the full application of common law is noteworthy. HMRC has been largely untroubled by private law claims and its actions rarely subject to successful scrutiny by taxpayers. Lord Toulson confirms that taxpayers can, in theory, consider the range of common law rights and remedies available to them.

Scope of the duty of confidentiality

Lord Toulson defines HMRC's duty of confidentiality by reference to the *Marcel* principle (from *Marcel v Commissioner of Police of the Metropolis* [1992] Ch 225), which established that where confidential information is obtained in the furtherance of a public duty, the recipient will generally owe a duty to the person from whom it is received or to whom it relates not to use it for other purposes. In the case of HMRC, Lord Wilberforce has noted (in *R v Inland Revenue Commrs, ex parte National Federation of Self Employed and Small Businesses Ltd* [1982] AC 617) that 'total confidentiality … is a vital element in the working of the system'.

Lord Toulson notes that the *Marcel* principle may be overridden by explicit statutory provisions; and, as a result, his approach is to ask not what duty was imposed by s 18, but the extent to which s 18 limited the established duty of confidentiality. The question, therefore, was: what is 'disclosure … made for the purposes of a function' of HMRC?

HMRC relied on the broad words in s 9 to argue that it is anything which is 'necessary or expedient or incidental or conducive or in connection with' the HMRC functions of collecting and managing revenue (see para 19).

Lord Toulson rejected this interpretation, as it would effectively emasculate the duty of confidentiality. He cited the principle of legality, which he explained by reference to Lord Hoffmann's use of the term in *R v Secretary of State for the Home Office, ex parte Simms* [2000] 2 AC 115: 'Fundamental rights cannot be overridden by general or ambiguous words … the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.'

In fact, the more general the words, the stronger the presumption that such words cannot erode a taxpayer's rights.

Put bluntly, Lord Toulson considered that s 18(2)(a)(i) cannot have been envisaged as authorising HMRC officials to discuss individual taxpayers with the press whenever they thought it expedient to do so.

Underlying the judgment is the not-so-subtle criticism that fundamental rights of the taxpayer were regarded, not as objective rights, but as subject to the views of HMRC officials at the time.

Accordingly, Lord Toulson dismisses the idea that confidential information can be disclosed because a meeting is 'off the record'. A disclosure is no less impermissible because the recipient is sworn to secrecy: 'every schoolchild knows that this is how secrets get passed on' (para 31).

Lord Toulson also challenges the whole idea of HMRC officials making off the record disclosures at all, suggesting that it is – or, given that no-one appeared to have focused on this point, 'should be' – a matter of 'serious concern' (para 35).

The court therefore concluded that HMRC had unjustifiably breached its duty of confidentiality. What the court has not yet decided – and what is clearly crucial – is what happens as a result.

The court has invited submissions as to the form of the order and exactly what will be decided. How influenced the court may be by the separate proceedings relating to the Ingenious film schemes is likely to be of considerable interest.

Impact of the decision

Some might argue that it should not have been necessary for the Supreme Court to confirm that it was wrong for HMRC to release confidential taxpayer information to journalists in secret meetings.

Nonetheless, the judgment emphasises that HMRC's duty of confidentiality is a fundamental duty owed to the taxpayer and aligned with the common law duty. In practice, it is likely that HMRC will now be increasingly wary of making disclosures, unless they fall squarely within a specific exclusion or are overwhelmingly justified. (Lord Toulson gives an extreme example where disclosure to the press is necessary to avoid an anti-smuggling operation from being wrecked.)

The judgment is embarrassing for HMRC and we may see some changes in how HMRC conducts itself, particularly with regard to the press. At the same time, HMRC will consider itself free to rely on this judgment in continuing to deny information to bodies such as the Public Accounts Committee.

Wider consequences

This decision may give taxpayers scope to consider other common law remedies, but it is unlikely to change profoundly the ability of a taxpayer to scrutinise the actions of HMRC.

Indeed, the fact that the court refocused the discussion onto a question of common law breach of confidentiality means that the strength of the judicial review application was not addressed.

Arguably, it was even implicit in Lord Toulson's judgment that HMRC might actually have succeeded were this a matter of public law. If a court will not intervene into actions taken by HMRC that represent a clear breach of confidentiality and a matter of 'serious concern', then what purpose does judicial review serve?

In recent years, HMRC's role has increasingly (and unashamedly) focused on changing taxpayer behaviour. Allied to this has been an increasing number of rules addressing governance and strategy, or dealing with supposedly administrative matters such as accelerated payments and information requests. In each case, there are limited rights for a taxpayer to challenge decisions by HMRC, leaving judicial review as the only recourse.

What the Supreme Court does not tell us is how readily it would ever apply that remedy. ■

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- HMRC and freedom of information (Iain Macleod, 10.7.14)
- Privacy and confidentiality before the tribunals (Liesl Fichardt & Robert Sharpe, 28.11.13)