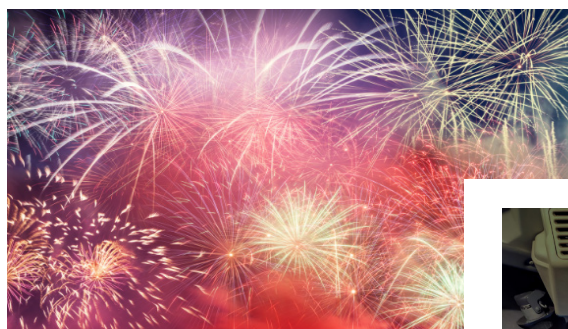




New year, new cases: Specific disclosure under the pilot scheme

Even though many may have had more subdued New Year celebrations than normal, I doubt many of us would have spent the time reading the latest authorities on disclosure under the Pilot Scheme. As the scheme has just been extended for another year, readers might find a summary of a decision handed down on 31 December 2020 useful. In *HMRC v IGE USA Investments Ltd* [2020] EWHC 1716 (Ch) it was held that specific disclosure is available under the disclosure pilot scheme for issues arising on an interlocutory application that were not issues within the scope of the pleadings – that is, issues not included in a List of Issues for Disclosure. Sadly it is not entirely clear how the decision fits with other authority on how Lists of Issues for Disclosure relate to the statements of case, so there remains a point to be resolved.

HMRC brought a claim for declarations against certain GE companies arising from their contention that they had validly rescinded 2 settlement agreements with GE (with the consequence, on the Revenue's case, that GE is liable to be assessed for significant amounts of tax). The claim was originally brought as a case of innocent misrepresentation. Then HMRC applied to amend to allege fraudulent misrepresentation. There was a CMC at which an order for extended disclosure was made (although the List of



Issues for disclosure was not settled pending the outcome of the amendment application).

GE asked HMRC to produce certain documents for the purposes of the amendment application – namely certain internal HMRC documents relating to the possibility of the HMRC's Fraud Investigation Service investigating the case with a view to bringing a criminal prosecution ("the FIS Documents"). On HMRC's case the FIS Documents were totally irrelevant, being internal documents created years later and secondary to the underlying contemporaneous evidence that would establish (or not) any arguable case of fraud. Those documents had already been disclosed. HMRC considered that the FIS Documents were directed at a different question, and amounted to remote hearsay and inadmissible opinion evidence incapable of influencing the outcome of the amendment application. HMRC refused to produce the documents.

GE applied for an order for production of the documents



under Paragraph 18.1 of PD51U – the power to vary an order for Extended Disclosure. HMRC argued there was no power to make such an order – orders for Extended Disclosure related to Issues for Disclosure, which are apparent from the statements of case and identified following the procedures laid down in the Practice Direction; in any event disclosure for the purposes of an interlocutory application was exceptional, the documents were irrelevant or inadmissible, and should be refused. HMRC was successful before the Master on the jurisdiction issue and so the Master did not go on to consider the merits.

GE appealed. On appeal, James Pickering QC sitting as a Deputy High Court judge, allowed the appeal, holding there was jurisdiction, and ordering the documents to be disclosed. In essence he held that the definition of "Issues for Disclosure" in paragraph 7.3 of

of the PD51U was not confined to issues in dispute arising from the pleadings. Paragraph 7.3 provides “‘Issues for Disclosure’ means for the purposes of disclosure only those key issues in dispute, which the parties consider will need to be determined by the court with some reference to contemporaneous documents in order for there to be a fair resolution of the proceedings. It does not extend to every issue which is disputed in the statements of case by denial or non-admission”. In the court’s judgment that did not mean that Issues for Disclosure were, effectively, a sub-set of pleaded issues, but rather those key issues in dispute wherever they may arise.

The judge’s decision was announced at the end of the hearing on 29 June 2020 with reasons to follow. Before the reasons were published, the decision in *Lonestar Communications v Kaye* [2020] EWHC 1890 (Comm) was handed down, on 15 July 2020. That case held at [32] that it followed from the process laid down by PD51 for identifying the Issues for Disclosure that “*Issues for Disclosure must also be issues crystallised in the statements of case*”, i.e. HMRC’s essential argument. Mr Pickering QC at [56] disagreed with *Lonestar*, holding it to be a non sequitur that Issues for Disclosure must be found within the statements of case. Thus there are now conflicting authorities on the point.

He then went on to consider the merits of the application holding that an order for

disclosure would be reasonable and proportionate. He did not seemingly apply the established CPR and pre-CPR authorities to the effect that the jurisdiction to order disclosure for interlocutory application is to be exercised sparingly, and was one of necessity (see e.g. *Harris v The Society of Lloyd’s* [2008] EWHC 1433 (Comm)), suggesting that a lower standard applies under the Pilot Scheme for such applications.

As for the outcome of the amendment application itself, HMRC’s application was allowed (see *HMRC v IGE USA Investments* [2020] EWHC 2121 (Ch) (Zacaroli J)), although it is now under appeal on a question of the applicable limitation period. In relation to the FIS documents, Zacaroli J held at [136] “*As to the point relating to FIS, it was in any event faced with a different and more targeted question to that posed by the Full Disclosure Representation or the claims based on deliberate non-disclosure and its opinion is not relevant.*”

Those who practice in the field of fraud know that cases are often won and lost on what documents can become available through disclosure. Usually it is the party accused of fraud who is resisting disclosure and the victim the one seeking it. In this case it was the other way around. The important point though is that despite what some may have assumed, the strictures of a List of Issues for disclosure based on the statements of case are apparently not the only way to secure disclosure in cases falling under the pilot scheme if this decision is correct. Litigants

should think carefully about whether to avail themselves of the power though – as this case shows, documents showing an arguable case of fraud are unlikely to be neutralised at the interlocutory stage by fishing in documents created years later for other purposes.

Gareth Tilley acts for HMRC in the ongoing proceedings.

Gareth Tilley