



Neutral Citation Number: [2023] EWCA Civ 261

Case No: CA-2021-003418

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER
UPPER TRIBUNAL JUDGE JONATHAN RICHARDS
UPPER TRIBUNAL JUDGE JONATHAN CANNAN
[2021] UKUT 0250 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 March 2023

Before :

LORD JUSTICE ARNOLD
LADY JUSTICE CARR
and
LADY JUSTICE WHIPPLE

Between :

(1) MARK MITCHELL

**Appellant/
Respondent**

(2) PAUL BELL

Appellant

- and -

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

Respondents

Barrie Akin (instructed by Hill Dickinson LLP) for the Appellant (Mr Bell)
Julian Hickey and Rebecca Sheldon (instructed by Levy & Levy Solicitors) for the
Respondent (Mr Mitchell)
James Puzey, Jenny Goldring and Aparna Rao (instructed by Solicitor to HM Revenue
and Customs) for the Respondents (HMRC)

Hearing date: 25 January 2023

Approved Judgment

LADY JUSTICE WHIPPLE:

Introduction

1. By this appeal, Mr Bell challenges the UT's determination that he is not entitled to see certain documents which are in the possession of HMRC and which HMRC wish to disclose to him. The documents arise out of HMRC's investigation into the tax affairs of another taxpayer, Mr Mitchell. Mr Mitchell's objection to the disclosure of at least some of those documents was successful in the FTT and UT. The issue for this Court is whether Mr Mitchell's objections lie on solid ground and should be upheld. This appeal is brought with the leave of this Court.

Legislation

2. To resolve the issue, it is necessary to have regard to the Commissioners' statutory powers under the Commissioners for Revenue and Customs Act 2005 ("CRCA"), and to the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, SI 2009/273 (the "FTT Rules"). Relevant parts of the legislation and the FTT Rules are set out in the Appendix to this judgment. What follows is an overview of the key provisions which relate to this appeal.
3. Section 5(1) of the CRCA sets out HMRC's functions, which include the collection and management of tax. Section 51(2)(a) defines a function as any power or duty (including a power or duty that is ancillary to another power or duty). Section 17 confers powers on HMRC to use information acquired in connection with a function in connection with any other function. Section 18 is headed "Confidentiality". By section 18(1), HMRC are prohibited from disclosing information which is held in connection with their functions. But that prohibition does not extend to categories of disclosure listed in section 18(2), which include (a) disclosure made for the purposes of a function of HMRC which does not contravene any restriction imposed by HMRC; and (c) disclosure for the purposes of civil proceedings relating to a matter in respect of which HMRC have functions. Disclosure in pursuance of a court order is also permitted, see section 18(2)(e).
4. Section 18 was considered by the Supreme Court in *R (Ingenious Media Holdings plc) v Revenue and Customs Commissioners* [2016] UKSC 54, [2016]1 WLR 4164. The Court acknowledged the general and long-established principle of confidentiality owed to taxpayers (at [22]). Lord Toulson, with whom the other members of the Court agreed, said this at [23]:

"... I take section 18(1) to be intended to reflect the ordinary principle of taxpayer confidentiality referred to in para 17, to which section 18(2)(a)(i) creates an exception by permitting disclosure to the extent reasonably necessary for HMRC to fulfil its primary function."
5. The FTT has powers to manage proceedings before it. Those powers are subject to the overriding objective of dealing with cases fairly and justly (Rule 2). Disclosure for standard or complex cases in the FTT is governed by Rule 27, and in particular

Rule 27(2)(b) which requires each party to serve a list of documents which that party intends to “rely on or produce” in the proceedings. A party can apply for specific disclosure under Rule 5(3)(d) which empowers the FTT “permit or require a party or another person to provide documents, information or submissions to the Tribunal or a party”. Rule 15(2)(a) empowers the FTT to admit evidence and Rule 15(2)(b) empowers the FTT to exclude evidence which would otherwise be admissible, including where admission of that evidence would be unfair (see Rule 15(2)(b)(iii)). By Rule 25, a respondent to an appeal in the FTT (which will typically be HMRC) is required to send or deliver a statement of case which sets out the respondent’s position in relation to the case (Rule 25(2)(b)).

6. This Court has held that the FTT Rules are made for “important as well as simple cases” and has emphasised the narrow approach to disclosure under the FTT Rules, contrasting Rule 27(2), which extends only to documents which a party intends to “rely on or produce”, with standard disclosure in civil proceedings which extends not only to documents upon which a party relies but in addition to documents which adversely affects a party’s own case, adversely affect another party’s case, and/or support another party’s case (see CPR 31.6 and the commentary in the White Book, *E Buyer UK Ltd v Revenue and Customs Commissioners* [2017] EWCA Civ 1416, [2018] 1 WLR 1524 per Vos LJ at [94], and *HMRC v Smart Price Midlands Ltd* [2019] EWCA Civ 841, [2019] 1 WLR 5070 per Rose LJ at [15]). That narrow approach is just a starting point and the interests of fairness and justice, encapsulated in the overriding objective, may require disclosure in the FTT to be drawn more broadly in any particular case: see *Smart Price Midlands* per Rose LJ at [40], [53] and [56], a case concerning a taxpayer’s appeal to the FTT against a finding by HMRC that he was not a “fit and proper person” to sell controlled liquor wholesale in which the Court of Appeal confirmed that disclosure corresponding to standard disclosure under the CPR was appropriate.

Background

The PLNs

7. In or around 2013, HMRC commenced an investigation into the personal and business tax affairs of Mr Mitchell under Code of Practice 9 (“COP 9”). As part of that investigation, HMRC conducted interviews with Mr Mitchell. One area of questioning extended to the tax affairs of two companies, Universal Payroll Services Ltd (“Payroll”) and Universal Project Services Ltd (“Project”), of which Mr Mitchell had been a director.
8. On 8 December 2017, HMRC issued separate personal liability notices, or “PLNs” against each of Mr Mitchell and Mr Bell. The PLNs were issued under para 19 of Schedule 24 to the Finance Act 2007 and by them HMRC sought to recover from Mr Mitchell and Mr Bell penalties which HMRC asserted were due from Payroll and Project for VAT periods between 2010 and 2014. Payroll and Project had by that time both gone into liquidation and HMRC pursued Mr Mitchell and Mr Bell on the basis that at the material time they were both “shadow directors” of those companies to whom deliberate inaccuracies in the VAT returns of Payroll and Project could be attributed. The amount of penalties said to be owed was around £12m and HMRC sought half of that sum from each of Mr Mitchell and Mr Bell.

9. Mr Mitchell and Mr Bell requested HMRC to undertake an internal review. That review concluded on 12 February 2018 and upheld both PLNs, in part relying on evidence obtained from the COP 9 investigations conducted by HMRC.

The Appeals

10. Mr Mitchell and Mr Bell appealed to the First-tier Tribunal (“FTT”) against the PLNs. Mr Bell’s Notice of Appeal was dated 19 February 2018. In it, he denied liability for the tax. He said he had resigned as a director of Payroll and Projects and although he remained a shareholder, he took no active role in running Payroll or Project, that the VAT assessments in question fell outside the period when he was a director and that he was unaware of how the VAT returns were prepared. He said he had not seen the evidence on which HMRC relied in the PLN, which evidence was extracted by way of the COP 9 interviews, and he reserved the right to amend his Notice of Appeal once that evidence became available. Mr Mitchell’s Notice of Appeal to the FTT was dated 1 March 2018; it contained a denial of liability and a denial that he was a shadow director of Payroll or Project at the material time.
11. On 9 May 2018 the FTT directed the appeals of both Mr Mitchell and Mr Bell to be heard together and directed HMRC to serve a single Statement of Case addressing both appeals. The appeals were categorised as complex. On 9 July 2018, HMRC served their Statement of Case, summarising the facts and issues and setting out their contentions. In relation to Mr Mitchell, HMRC asserted that he was a shadow director of Payroll and Project at the material time, relying on evidence obtained in the course of the COP 9 investigation. In relation to Mr Bell, HMRC asserted that he too was a shadow director of Payroll and Project at the material time, relying in part on an extract from Mr Mitchell’s COP 9 interview where Mr Mitchell had said that Mr Bell made all the decisions in both companies. The Statement of Case referred to a number of documents and classes of documents which had come into HMRC’s possession as part of the COP 9 investigation, including meeting notes between HMRC and Mr Mitchell and outline disclosure volunteered to HMRC by Mr Mitchell as part of the COP 9 process. Mr Bell’s representatives asked HMRC to disclose all of those documents.
12. HMRC asked Mr Mitchell to consent to the disclosure of those documents to ensure transparency between the parties to the combined appeals, but Mr Mitchell’s representatives responded by letter dated 22 October 2018 saying that material should only be disclosed “to the extent that it is relevant to the appeals” and suggested that any “non-relevant personal information should be redacted”.
13. On 31 October 2018, HMRC served their List of Documents. This was a single list to address both appeals. Included on that list were the documents which had been obtained as part of the COP 9 investigation into Mr Mitchell. By letter dated 7 December 2018, his representatives wrote to HMRC objecting to the disclosure of some of these documents on grounds that they were irrelevant: “...Within HMRC’s list are a number of documents which relate either to Mr Mitchell personally, or other companies of which he is a Director/Shareholder. These have no relevance to the matter.”

The Applications to the FTT

14. On 21 December 2018, HMRC applied to the FTT for a direction that they should be permitted to disclose the COP 9 documents listed on its list of documents to Mr Bell (“HMRC’s application”). That was an application under Rule 5(3)(d) of the FTT Rules for an order that HMRC be permitted to disclose documents to Mr Mitchell and Mr Bell. It set out the background referred to rule 27 of the FTT Rules and sections 5, 17 and 18 of the CRCA. In their application, HMRC asserted that the appeals related to the PLNs which were within one of HMRC’s functions, and so the disclosure fell within section 18(2) CRCA (see below and the Appendix to this judgment) but that “due to the procedural complexity of the two appeals ... [HMRC] request the Tribunal’s permission to disclose Mark Mitchell’s COP 9 investigation documents to Paul Bell”.
15. On 18 January 2019, Mr Mitchell filed a cross-application (“Mr Mitchell’s application”). He applied for a direction under Rules 2, 5, 6 and 15(2)(b)(iii) of the FTT Rules for a direction that HMRC’s application should be refused on the basis that the scope of the proposed disclosure included documents which were not relevant to the dispute between the parties; alternatively, that those documents should be excluded from evidence because it would be unfair to admit them. Mr Mitchell’s application listed 18 documents contained in HMRC’s list which Mr Mitchell said should not be disclosed to Mr Bell. These are the “Disputed Documents”.

The Tribunal Decisions

FTT Decision

16. The applications came before Judge Barbara Mosedale sitting in the FTT on 22 May 2019. All parties were represented by counsel at that hearing. The FTT heard submissions from all three parties at a public hearing and then Mr Bell and his advisors withdrew to allow HMRC and Mr Mitchell to advance arguments at a private hearing. The FTT’s decision was delivered in two versions: first, in a published version which marked certain passages which had been redacted, and secondly in an unredacted format to which only HMRC and Mr Mitchell had access. This Court has been provided with the redacted and the unredacted versions of the FTT decision.
17. In her written decision (both versions) issued on 30 October 2019, the Judge recorded that there was no dispute on the legal principles to be applied. She started with Rule 15(2)(b) which gave the FTT the power to exclude evidence and noted Rule 5(3)(d) which conferred power on the FTT to order disclosure. She recorded HMRC’s view that they had no power to disclose the Disputed Documents to Mr Bell without Mr Mitchell’s consent, citing section 18 CRCA and *R (Ingenious Media Holdings plc and another) v HMRC* [2016] UKSC 54. In response, she said that:

“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.”

18. She went on to identify the issue as “whether HMRC should be permitted to rely on the documents or part of them” and held that “that was to be determined by relevance” (see [24]). She recorded the parties’ agreement that “evidence should be admitted in the appeal if it was relevant” ([25]), that irrelevant evidence should be excluded, citing *HMRC v Infinity Distribution Ltd* [2016] EWCA Civ 1014 where Nugee J held at [11] that the “admission of evidence which is irrelevant is detrimental to the economical and proportionate conduct of Tribunal proceedings” ([26]), and that in some circumstances relevant evidence could be excluded if it there was some compelling reason to do so ([29], [30] and [32]) relying on *HMRC v IA Associates* [2013] EWHC 4382 (Ch) per Nugee J 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 the tribunal in this case) should nevertheless direct that it be excluded”.

19. The Judge noted that Mr Mitchell’s and Mr Bell’s interests were “not aligned” and that Mr Mitchell objected to disclosure of the Disputed Documents to Mr Bell as well as HMRC’s reliance on them ([33]). She divided the Disputed Documents into various levels, 1 to 4 (with Level 2 split into three sub-levels). She decided that Levels 1, 2A and 2C contained relevant documents that should be disclosed. No issue arises in relation to those Levels on appeal. However, that left the following levels for determination:
- i) Level 2B: this comprised documents where there was mention of interaction between Payroll or Project and other companies controlled or allegedly controlled by Mr Mitchell or Mr Bell;
 - ii) Level 3: this comprised documents which went 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 Payroll or Project.
 - iii) 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. This level also appears to have covered documents which related to Mr Mitchell’s personal tax affairs.
20. I leave Level 3 documents on one side, because it turns out that there are no documents in that category. So far as the remaining Disputed Documents are concerned:
- i) In relation to Level 2B, the Judge said:

“49. ... 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 [is] admissible and should be admitted into the appeal and copied to Mr Bell.”

That meant that Disputed Documents which contained evidence about companies controlled by Mr Mitchell which were not mentioned in HMRC’s Statement of Case were not required to be disclosed, on grounds (by inference) that those documents were irrelevant.

- ii) In relation to Level 4, the Judge held that Mr Mitchell’s credibility was to some extent in issue, because HMRC’s Statement of Case expressly stated that HMRC did not accept the credibility of all that he had said to them in respect of Payroll and Project, and that Mr Bell’s credibility was also in issue by implication from HMRC’s Statement of Case (see [61]). But, she said, “there is no statement that their credibility in general is in issue” ([62]) and held that:

“64. In the absence of any pleaded case that Mr Mitchell’s statements about his other tax affairs were unreliable ... I find L4 material not relevant.”

That meant that Disputed Documents which contained evidence about Mr Mitchell’s handling of his own tax affairs or the tax affairs of other companies with which he was associated, were not required to be disclosed, on grounds that they were irrelevant.

21. Her overall conclusion was that only relevant documents were to be disclosed and the remainder (some Level 2B and 4 documents) were to be redacted to the extent not relevant.
22. Both Mr Mitchell and Mr Bell sought permission to appeal, which permission was granted by Judge Mosedale on 21 February 2020. HMRC did not seek to appeal, even though HMRC’s application was one of the applications which had given rise to the judgment under appeal.

UT Decision

23. The matter came before the UT (Judge Jonathan Richards and Judge Jonathan Cannan) on 20 and 21 July 2021. Their decision was handed down on 8 October 2021 ([2021] UKUT 0250 (TCC)). Mr Mitchell had appealed in relation to the FTT’s decision that Disputed Documents falling within Levels 2C and 3 should be disclosed. Mr Mitchell contended the FTT was in error because these documents were irrelevant and prejudicial. The argument about Level 3 fell away, for reasons I have explained, leaving 2C. The UT dismissed Mr Mitchell’s appeal. He does not renew his appeal to this Court and it is not necessary to set out the UT’s reasons for reaching that decision.
24. Mr Bell had appealed against the FTT’s decision that Disputed Documents failing within Levels 2B (to some extent, at least), 3 and 4 should not be disclosed. The

argument about Level 3 fell away leaving Levels 2B (to some extent) and 4 in dispute. HMRC served a Response under Rule 24 of the UT Rules (SI 2008/2698) in which they supported Mr Bell's appeal.

25. The UT said that Mr Bell's appeal was against the FTT's case management decision with which the UT should not interfere if the FTT had applied the correct principles in exercising its discretion, referring to *HMRC v Ingenious Games LLP* [2014] UKUT 0062 (TCC) (a different *Ingenious* case) at [56]. They referred to Rules 2, 5, 15, 25 and 27 of the FTT Rules. They held that the FTT was entitled to take the view that the question whether Mr Bell should have sight of the Level 2B documents (to the extent they remained in dispute) and Level 4 documents was co-extensive with the question whether HMRC were entitled to rely on them, a position with which Mr Bell had agreed in the FTT ([81]-[82]). There was "some potential relevance" in the Level 2B documents ([91]). But the FTT was not "plainly wrong" to decline to give Mr Bell sight of the Level 2B Disputed Documents, in circumstances where Mr Bell had not mentioned in his grounds of appeal to the FTT that he would be making a positive case against Mr Mitchell; further, he was not permanently deprived of sight of those documents because he could make an application for disclosure at an appropriate point ([83], [92]). In relation to Level 4 Disputed Documents, the UT doubted that many of the documents on HMRC's list could properly be said to be relevant to credibility at all; the FTT was entitled to require a satisfactory explanation of why such a potentially broad category of documents should be included on HMRC's list and the FTT had not been satisfied that these documents were of "sufficient relevance" ([95]); there was nothing wrong with the FTT's conclusion that the relevance of the Level 4 Disputed Documents was "not sufficient" ([96]). The UT rejected Mr Bell's argument that the Level 4 Disputed Documents had the potential to assist him in the preparation of his appeal because, they reasoned, Mr Bell's own case lacked relevant detail and in any event Mr Bell could make an application for specific disclosure of his own ([98]). The UT dismissed Mr Bell's appeal ([99]).

Appeal and Respondent's Notice

26. Mr Bell now appeals to this Court. His grounds of appeal are that the UT was wrong to refuse him sight of the Disputed Documents falling in Levels 2B and 4. HMRC supports Mr Bell's appeal and has filed a Respondent's Notice which formalises that position and seeks no relief or outcome different from that sought by Mr Bell.
27. Mr Mitchell resists Mr Bell's appeal and has lodged a Respondent's Notice by which he seeks to uphold the UT's decision for the reasons given by the UT and in addition for the reasons given by the FTT (to the extent that the FTT differed in its reasoning from the UT). He asserts that no documents are disclosable to Mr Bell unless they are relevant to the facts and allegations pleaded in HMRC's Statement of Case, and that Level 2B documents (to the extent they refer to companies not mentioned in HMRC's Statement of Case) and Level 4 documents are not relevant and therefore not disclosable by HMRC (see paragraph 6.5 of Mr Mitchell's Respondent's Notice).

Parties' Submissions

28. We are grateful to all counsel and their legal teams for their very helpful submissions, both in writing and at the hearing. Before summarising the points advanced, it is important to observe that the focus of argument before this Court appears to have

shifted, as a result of or in coincidence with the arrival of Mr Puzey to lead HMRC's legal team. HMRC's submissions to this Court invite a close analysis of HMRC's statutory powers under section 18 CRCA, a provision which appears not to have been given much airtime below. In light of the changed emphasis of HMRC's submissions and the fundamental issues raised by them, we invited Mr Puzey, supported by Ms Goldring and Ms Rao who had appeared in the UT but not the FTT, to address the Court first in sequence.

HMRC

29. HMRC maintained that Mr Bell should be provided with disclosure of all the Disputed Documents, including those in Levels 2B and 4, because they had the potential to assist him in the substantive appeal and fairness required that he should see them. HMRC were permitted to make disclosure of these Disputed Documents under the primary legislation: section 18(2)(a) permits HMRC to make disclosure of documents for the purposes of their functions which would include prosecuting an appeal in the FTT and section 18(2)(c) permits HMRC to make disclosure of information held in connection with a function of HMRC for the purposes of civil proceedings. HMRC did not require the FTT's authorisation to make disclosure. With the benefit of hindsight, HMRC's application to the FTT had been unnecessary.
30. Mr Puzey strongly disputed Mr Mitchell's submission that the FTT retained power to supervise the exercise of HMRC's powers to make disclosure under section 18(2). He argued that there was no jurisdiction in the FTT to do so. The FTT Rules do not confer any such jurisdiction and the only route for challenging HMRC's proposed disclosure under section 18(2) was by way of judicial review. Mr Puzey also disputed Mr Mitchell's suggestion that section 18(2) only conferred power on HMRC to disclose documents to the extent that they were relevant to the pleaded case of a party to an FTT appeal; Mr Puzey said that section 18(2) could not be read down in that way, on its face it was a broad permission to disclose, in the context of enabling HMRC to carry out its function of collection and management of tax; the only limits on HMRC flowed from HMRC's status as a public authority subject to general principles of public law.
31. In any event, the FTT had erred in its approach, even assuming it did have jurisdiction to determine the issues before it, because the FTT (and the UT and Mr Mitchell) had wrongly conflated the concept of disclosure with the concept of admissibility. Those were separate issues which arose at different stages in the litigation and involved different considerations. He referred us to the notes in the White Book 2022 to CPR Part 31, Rule 6 which emphasises the distinction. Further, the FTT had been wrong to conclude these documents were not relevant. The Disputed Documents might well assist Mr Bell or undermine Mr Mitchell in the context of likely "cut-throat" defences being run by both of them, and in that sense they were relevant. It was vital that Mr Bell should have access to any exonerating material which might be in the hands of HMRC. It was no answer to suggest, as the UT had done, that Mr Bell could make an application for specific disclosure because he did not know what the Disputed Documents contained.
32. Finally, there was inconsistency between the position taken by the FTT that the Level 2B and 4 documents in question were irrelevant and the apparent position of the UT that they were of some but insufficient relevance. The UT was right to find the

documents were relevant and that should have caused the UT to reverse the FTT rather than uphold it.

33. In all the circumstances, Mr Puzey invited the Court to allow this appeal: the FTT decision could not stand, and nor could the UT decision which upheld the FTT.

Mr Bell

34. Mr Bell, represented in this Court as below by Mr Akin, supported HMRC's submissions. He noted the discrepancy between the FTT's view that the Level 2B and 4 documents were irrelevant and the UT's conclusion that they were of some relevance. He argued that the UT had been in error in refusing to overturn the FTT's decision. He emphasised that Mr Bell could not make an application for specific disclosure because he did not know what was in the Disputed Documents in Level 2B and 4. Further, "general" credibility was very much in issue in Mr Bell's appeal, even though it was not pleaded: credibility was necessarily a general concept and it was artificial for the FTT to seek to confine evidence going to credibility in the way it had done; Mr Mitchell's honesty or lack of it in relation to his own tax affairs or in relation to other companies with which he had dealings was obviously relevant to that wider question.

Mr Mitchell

35. Mr Mitchell, represented in this Court as below by Mr Hickey and Ms Sheldon, maintained his objection to HMRC's proposed disclosure of Level 2B (to the extent that the FTT had refused permission) and Level 4 documents. He sought to uphold the reasoning of the UT, alternatively and to the extent that it differed, the reasoning of the FTT. Mr Mitchell submitted that disclosure is determined by relevance, and relevance is to be assessed by reference to HMRC's Statement of Case, relying on *Burns v FCA* [2018] 1 WLR 4161. HMRC's case against both Mr Mitchell and Mr Bell depended on showing a "deliberate inaccuracy" (para 19 of Schedule 24 to the Finance Act 2007) which was tantamount to an allegation of fraud (*Tooth v HMRC* [2021] UKSC 17, [2021] 1 WLR 2811), and that needed to be pleaded clearly and with particularity (*Belmont Finance Corp Ltd v Williams Furniture Ltd* [1979] Ch 250 at 268 per Buckley LJ). The extent to which documents can be relied on by a party turns first and foremost on whether the document is admissible, which is answered by reference to whether it is relevant in the context of the parties' pleadings, see *Infinity Distribution* at [11] and *IA Associates* at [35].
36. Section 18(2) did not override the fundamental concepts of taxpayer confidentiality protected by section 18(1), nor did it confer an unbounded power on HMRC to disclose such documents as they saw fit. The common law still applied to any exercise by HMRC of those powers and could only permit disclosure to the extent that the relevance criterion was met, judged by reference to the parties' pleaded cases.
37. The FTT did have jurisdiction over HMRC's exercise of section 18 powers of disclosure, pursuant to Rules 5 and 15, and specifically under Rule 15(2)(b)(iii). The

FTT had a wide discretion when it came to case management and the FTT's decision that these documents were not relevant was ultimately a case management decision with which this Court should be slow to interfere; Mr Bell could not reach the high hurdle of showing that the UT and FTT decisions were "unjustifiable", see *BPP Holdings Ltd v Commissioners for HM Revenue and Customs* [2017] 1 WLR 2945 (Ch) at [33]. So far as Level 2B was concerned, HMRC did not name the other companies with which Mr Mitchell was associated in their Statement of Case, and the FTT was therefore entitled to conclude that Disputed Documents, to the extent they concerned the other companies, were not relevant. So far as Level 4 was concerned, HMRC had not itself sought to rely on documents relating to Mr Mitchell's own tax affairs or the tax affairs of other companies with which he was associated; HMRC made no allegation of bad character, or propensity, or similar fact, in relation to those matters, and therefore asserted no link between these documents and the appeals against the PLNs. Mr Bell was on a 'fishing expedition' for documents which were not relevant and which he was not entitled to see.

Discussion

38. This appeal raises a number of issues. I have grouped the issues under the following heads which I will address in the following sequence:
- i) The nature and scope of HMRC's powers under section 18 CRCA.
 - ii) FTT's jurisdiction in relation to section 18 CRCA.
 - iii) HMRC's application.
 - iv) The appeal against the FTT's decision on relevance.

i) The nature and scope of HMRC's powers under Section 18 CRCA

39. The CRCA brought together into a single tax collecting authority the two bodies which had previously existed, namely the Inland Revenue and HM Customs and Excise. The CRCA sets out the functions and powers of the new unitary authority, HMRC, and is the statutory foundation for that body. Section 5 lists the functions of HMRC, including the function of collecting and managing the tax. That function (previously commonly referred to as "care and management") has for many years existed; immediately prior to the CRCA, it was contained in the Taxes Management Act 1970 in relation to the Inland Revenue and the Customs and Excise Management Act 1979 in relation to HM Customs and Excise. It was famously described as conferring on the tax authority a "wide managerial discretion" as to the best means of obtaining for the national exchequer the highest net return that is practicable from the taxes committed to the charge of that authority, having regard to the staff available to them and the cost of collection, see *R v Inland Revenue Commissioners, ex p National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 (the "*Fleet Street Casuals*" case) at p 636 per Lord Diplock, confirmed in *R (Wilkinson) v Inland Revenue Commissioners* [2005] UKHL 30, [2005] 1 WLR 1718 per Lord Hoffmann at [20]. The duty of confidence which HMRC owes to taxpayers has also long been recognised as part and parcel of the care and management function, see as examples the *Fleet Street Casuals* case per Lord Wilberforce at p 632, and *Ingenious Media Holdings* at [22]-[23] per Lord Toulson, referred to at para 4 above.

40. Section 18(2) contains three exceptions to the duty of confidence which are potentially relevant in this appeal. The first is section 18(2)(a) which permits HMRC to make disclosure for the purposes of a function of HMRC which does not contravene any restriction imposed by the Commissioners. In this case, HMRC wished to disclose the Disputed Documents to Mr Bell so that he could have knowledge of them as he prepared for his FTT appeal, and as a matter of fairness. I would readily accept that the disclosure of documents in HMRC's possession, which HMRC considers to be required out of fairness in the context of ongoing tax litigation, is part of HMRC's function of collection and management of the tax. It has not been suggested that for HMRC to have disclosed the Disputed Documents would have contravened any restriction imposed by HMRC.
41. Mr Hickey says that as a matter of common law, in the context of an ongoing dispute before the FTT, there is a further condition to be read into section 18(2)(a), namely that the proposed disclosure must be relevant to the issues raised in the parties' pleaded cases. I reject that submission. Section 18(2)(a) contains no such condition on its face. Nor does the scheme and purpose of section 18 require it: section 18 balances the individual's right to confidentiality against the desirability of disclosure in certain instances, in the context of HMRC fulfilling their statutory functions which are themselves functions of a public nature conducted by a public body in the public interest. There may very well be instances where HMRC wishes to disclose material even though that material is not strictly relevant to an issue pleaded in the course of an FTT appeal but HMRC considers that disclosure would be in the wider public interest. For example, HMRC may be in possession of material which might exonerate a taxpayer in the context of that taxpayer's FTT appeal but the issue to which that material goes remains unpleaded because the taxpayer is not aware of its existence or content. The contrary conclusion, that HMRC should be prohibited from disclosing such material because the pleadings do not raise the precise issue to which that document might go, is inimical to the public interest and would be an absurd outcome. I accept the general proposition that HMRC's discretion to make disclosure is not unbounded: limits exist in the terms of section 18(2) itself, and the ordinary obligations imposed by public law would apply, so, for example, HMRC could not make disclosure exercising its powers under section 18(2)(a) if to do so would be irrational. For these reasons I reject Mr Hickey's submission that relevance to the pleaded case is a condition of section 18(2)(a). I conclude that section 18(2)(a) would apply, at least in principle, if HMRC wished to make disclosure of the Disputed Documents to Mr Bell.
42. I reach a similar conclusion in relation to section 18(2)(c). That permits HMRC to make disclosure for the purposes of civil proceedings. The term "civil proceedings" is not defined in the CRCA but Mr Puzey submits that the term extends to FTT appeals, a proposition with which no one takes issue, and which I do not doubt. Section 18(2)(c) seems particularly apt on the facts of this appeal, where civil proceedings are extant and where HMRC wishes to make disclosure to assist one of the parties to those proceedings. Mr Hickey maintains his submission that this provision too is subject to an implied condition that the documents which HMRC proposes to disclose must be relevant to the issues pleaded by the parties in the course of the civil proceedings; for reasons similar to those I have already articulated in the context of section 18(2)(a), I disagree. The language does not suggest the existence of such a condition and the scheme and purpose of section 18 does not warrant such a

condition being read in. Indeed, the apparent purpose of the provision, to enable HMRC to make disclosure of confidential documents in fulfilment of their statutory functions, would be thwarted if such a condition was read in. In the context of civil proceedings, the example of HMRC wishing to disclose potentially exculpatory material is even stronger. It shows that section 18(2)(c) can operate as a safeguard where the procedural code of the tribunal (or other litigation forum) contains a narrow disclosure rule – for example, in the FTT, where the basic rule under Rule 27(2) is limited to disclosure of documents on which a party intends to rely - but HMRC is in possession of documents on which HMRC do not wish to rely but which would assist another party to that appeal. I conclude that section 18(2)(c) would apply, at least in principle, if HMRC wished to make disclosure of the Disputed Documents to Mr Bell.

43. Section 18(2)(e) operates where disclosure is ordered by “a court” which I would accept includes a tribunal, as Mr Puzey submits. In this case, at least so far as the disputed Level 2B (some) and Level 4 documents are concerned, disclosure has not been ordered and this exception is not engaged. However, to the extent that the FTT has ordered disclosure to Mr Bell of other levels of Disputed Documents, this exception is engaged, because HMRC will make disclosure of those documents pursuant to the FTT’s order.
44. In summary, I am satisfied that HMRC are in principle empowered to disclose the Level 2B and 4 documents, which are the subject of this appeal, pursuant to either or both of section 18(2)(a) and section 18(2)(c). Section 18(2)(e) is not engaged on the facts of this appeal.

ii) FTT’s jurisdiction in relation to s 18 CRCA

45. The FTT was established by the Tribunals, Courts and Enforcement Act 2007. It derives its jurisdiction from statute. We were shown no provision which might confer jurisdiction on the FTT to adjudicate the exercise of powers by HMRC under section 18(2)(a) and/or (c). That is not a matter of surprise, at least not to me: challenges to HMRC’s decisions made in pursuance of their wide managerial discretion are ordinarily for the Administrative Court rather than the FTT.
46. Mr Hickey argued that the FTT had power (by which, possibly, he should be taken to mean jurisdiction) to prohibit HMRC’s disclosure under section 18(2), by virtue of FTT Rules 5 and 15. Rule 5 concerns the FTT’s case management powers and permits the FTT to regulate its own procedure “*subject to ... any other enactment*” (see Rule 15(1)). The first and obvious point to make in answer to Mr Hickey’s submission is that the CRCA is “an enactment” to which Rule 5 is subject, not the other way around. The CRCA is, as I have noted, the founding statute for HMRC, and it would be unexpected, to say the least, to find that HMRC’s functions (or the exercise of powers conferred by the statute in connection with those functions) were subject to the scrutiny of the FTT through Rule 5, which simply concerns case management. Secondly, Rule 5 is concerned with case management of appeals, but the powers of disclosure under section 18(2)(a) and (c) are not limited to appeals in the FTT, they have a much wider potential ambit. It would make no sense for Rule 5 to confer jurisdiction over the exercise of HMRC’s powers under section 18(2)(a) or (c) in circumstances where there was an appeal in progress, but not otherwise. Thirdly, Rule 5 does not, on its face, permit the FTT to *prohibit* disclosure which a party wishes to make. Rule 5(3)(d) empowers the FTT to permit or require

disclosure, and so in an appropriate case the FTT could direct HMRC to disclose documents (and that would engage the exception in s 18(2)(e) to which I have already referred), but Rule 5 does not on its face permit any restriction on what a party may disclose in reliance on other legislation or simply as a voluntary act. I would accept that the FTT has some power to restrict disclosure by a party to an appeal in exercise of its general case management powers under Rule 5(1), for example, if a party proposed disclosure within the FTT regime which was abusive in some way, then the FTT could, I think, prevent that; but that extreme example does not reflect the present case. I am not persuaded that Rule 5 confers any jurisdiction on the FTT to interfere in the exercise by HMRC of its discretionary powers under section 18(2)(a) or (c).

47. Rule 15 is concerned with the FTT's power to make directions about evidence and submissions. Specifically, Rule 15(2) permits the FTT to admit evidence which would not otherwise be admissible or exclude evidence which would otherwise be admissible on grounds including unfairness (see Rule 15(2)(b)(iii)). Rule 15(2) deals with admissibility of evidence; it does not deal with disclosure. The distinction was emphasised by the commentary to the Civil Procedure Rules in the "White Book" 2023, a passage brought to the Court's attention by Mr Puzey:

"31.6.6 It is important to note that disclosure of documents and admissibility of evidence are two distinct concepts. It is not a ground for refusing disclosure that the document would not be admissible in evidence, and so the existence of potentially inadmissible documents should still be disclosed. See eg *O'Rourke v Derbyshire* [1920] AC 581 at 624, 630-631 (relating to the pre-CPR position)."

48. *Infinity Distribution* and *IA Associates* concerned questions of admissibility of witness evidence; those cases, and the other authorities upon which Mr Hickey relied, are not of assistance in relation to disclosure. In this case, the FTT may have to decide, at some future point, whether the evidence which Mr Bell hopes to obtain from HMRC if he succeeds in this appeal is admissible as evidence in the appeals. The FTT will use Rule 15 to decide that issue. But that will be at a future point after disclosure has occurred. I am not persuaded that Rule 15 confers any power on the FTT to regulate disclosure by the parties to an appeal.
49. In summary, in my view the FTT lacks jurisdiction to adjudicate proposed disclosure by HMRC pursuant to powers contained in s 18(2)(a) or (c). I agree with Mr Puzey that the only route for challenge to a disclosure decision under either of those provisions is by way of judicial review.

iii) HMRC's application

50. HMRC reached the conclusion that Mr Bell should see the Disputed Documents for reasons which would at first blush, at least, appear reasonable. HMRC thought that fairness required disclosure, to enable Mr Bell to prepare his case for the FTT. There was an obvious possibility, based on these documents, of a cut-throat defence being run by each of them. HMRC listed the Disputed Documents on their list of documents which was served pursuant to the FTT's directions in the appeals. I have no difficulty with HMRC intimating an intention to disclose the Disputed Documents in that way: Rule 27 requires a party to list not only those documents on which a party intends to rely (and HMRC did intend to rely on some of the Disputed Documents in

its own case against Mr Mitchell and Mr Bell), but also those documents which that party *intends to produce* in the proceedings, and HMRC did intend to produce the Disputed Documents in the sense of disclosing them to Mr Bell.

51. HMRC invited Mr Mitchell to consent to disclosure and when Mr Mitchell withheld his consent, HMRC applied to the FTT for an order. Their application was in these terms: “The Respondents HEREBY apply for an Order under Rule 5(3)(d) of the [FTT Rules] that the Respondents be permitted to disclose documents to ... Mr Bell.” HMRC’s application referred to sections 5, 17 and 18 of the CRCA and seemed to acknowledge that the proposed disclosure fell within HMRC’s existing powers under section 18(2)(c) (see paras [26] and [27] of HMRC’s application) but in light of the complexity of the matter (para [28]) sought the FTT’s direction for disclosure.
52. HMRC did not need Mr Mitchell’s consent to their proposed disclosure, nor did HMRC need the FTT’s permission to make that disclosure, because HMRC possessed powers under section 18(2)(a) and (c) to make that disclosure quite independently of the FTT Rules. A question arises as to why HMRC made their application to the FTT at all. It seems that HMRC wanted the protection of an order of the FTT before making disclosure in light of Mr Mitchell’s objections to disclosure. Mr Puzey says that with hindsight HMRC’s application was not necessary. I agree. But HMRC did make their application and the FTT did adjudicate it, and it is that sequence of events that gives rise to this appeal. HMRC’s application was defective on its face by referring to section 18(2)(c) as the proposed basis for making disclosure and then inviting the FTT to make an order under Rule 5(3)(d): the FTT has *no* jurisdiction over the exercise of HMRC’s powers under s 18(2)(c). But the FTT was not thereby deprived of its own powers to order disclosure under the FTT Rules in an appropriate case. The two regimes co-exist and can provide alternative routes to disclosure in the context of an FTT appeal.
53. I can see no reason in principle why HMRC should not have asked the FTT to exercise its case management powers under Rule 5 in relation to disclosure of the Disputed Documents. HMRC’s mistake was to connect the exercise of those case management powers with section 18(2)(c). But if section 18(2)(c) is excised from the equation, there is no difficulty in terms of jurisdiction. To the extent that the FTT made orders for disclosure under Rule 5 in relation to other levels of Disputed Documents, those orders are binding on the parties to the FTT appeal and find recognition in section 18(2)(e).
54. It would obviously have been much better if HMRC had been clearer, from the outset, about what they were asking for and on what basis; the way they went about their application seems to have left Mr Mitchell and Mr Bell under the impression that the issue of disclosure of the Disputed Documents was a matter over which the FTT had exclusive jurisdiction, when that was not the case.
55. When the matter came before the FTT, the FTT acknowledged that HMRC did not need the permission or direction of the FTT to make disclosure of confidential documents under section 18(2)(a) or (c) (see [22], set out at para 17 above). But the FTT then said that the question for it was whether HMRC should be permitted to rely on the documents or part of them ([24]); further, that question was to be determined by relevance ([24]); relevance meant admissibility judged by reference to the pleaded

cases ([25]-[32]); and some Level 2B and 4 documents were not relevant, in that sense ([49] and [[64]).

56. The FTT's conclusion was in these terms:

“64. ... 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 ...”

57. For reasons already discussed, the FTT had no jurisdiction over HMRC's exercise of powers under section 18(2)(a) and/or (c). If the FTT was purporting, in this passage, to prohibit HMRC from disclosing the Disputed Documents (all or any of them) under any of its powers, then it was exceeding its jurisdiction.

58. However, I think that the better way of understanding this passage is that the FTT was simply responding to HMRC's application by declining to make an order directing HMRC to disclose those documents which the FTT had concluded were not relevant, namely some of the Level 2B and all of the Level 4 documents, in exercise of its case management powers under Rule 5(3)(d). HMRC had sought an order under that provision and power to make or refuse such an order lay within the FTT's jurisdiction. The FTT had noted the limits of its jurisdiction in relation to section 18(2) at an earlier stage of the decision (see [22], set out at para 17 above), but went on to adjudicate HMRC's application anyway. I understand the FTT to have done that as a matter of case management under Rule 5. Properly understood, the FTT was not purporting to prevent HMRC from exercising its powers under section 18(2)(a) or (c).

59. This is my preferred reading of the FTT's decision, and it follows that it is open to HMRC now, as it has always been, to exercise their powers under either or both of section 18(2)(a) or (c) and to make disclosure of the Level 2B and 4 Disputed Documents to Mr Bell, if they consider that to be appropriate. If Mr Mitchell wishes to challenge that decision, he will need to apply for judicial review.

(iv) The appeal against the FTT's decision

60. Finally, then, I come to the appeal against the FTT's decision. In truth, the outcome of the appeal is of modest significance in light of my conclusions so far, because this appeal will not determine whether HMRC can disclose the Level 2B and 4 Disputed Documents to Mr Bell; HMRC have and always have had the power to do that anyway. Mr Mitchell seeks to uphold the FTT's decision (and the UT's endorsement of it) for the reasons given by each tribunal. I cannot accept that submission. It seems to me that the FTT erred in its approach to the disclosure issue raised by HMRC's application, and that its conclusion that some of the Level 2B and 4 documents did not need to be disclosed in the context of this FTT appeal was wrong. I reach that conclusion for the following three reasons.

61. First, the FTT materially misstated the question it had to resolve. At [24] the FTT said that the “question for the hearing was whether HMRC should be permitted to rely on the documents or part of them and that was to be determined by relevance”. But the question was not whether HMRC could *rely* on the Disputed Documents; rather,

the question was whether HMRC should be permitted to *produce* those documents at the hearing by way of disclosure to Mr Bell. True it was that HMRC wished to rely on some of them in their own case against Mr Mitchell and Mr Bell respectively; but the real point of HMRC's application was to enable HMRC to show those documents to Mr Bell to assist him in his appeal. The two limbs of Rule 27(2) are different and HMRC's application arose under the second limb, not the first limb as the FTT seems to have thought; the FTT should have recognised the true character of HMRC's application and examined the reasons for it. Secondly, the FTT was wrong to suggest that the decision about disclosure to Mr Bell was to be resolved by reference to relevance which it went on to define in terms of admissibility. That was not the right test. I accept Mr Puzey's submission that the FTT, like Mr Mitchell, wrongly conflated disclosure with admissibility: see the discussion at paras 31 and 47 above. Thirdly, in determining what approach to disclosure it should apply, the FTT appears to have lost sight of the overriding objective which requires the FTT to ensure that the proceedings are fair and just. The FTT did not engage with HMRC's case that fairness required disclosure of Level 2B and 4 Disputed Documents to Mr Bell because they had the potential to assist his appeal. The FTT limited the scope of disclosure going to credibility, when credibility is necessarily a general concept, and was an obvious line of argument for Mr Bell. The FTT suggested that Mr Bell could make an application for specific disclosure in due course, but that was not realistic given that he did not know what was in the Level 2B and 4 Disputed Documents. The point which the FTT should have had in mind was that Rule 27(2) provided only the starting point for disclosure, but the rule is flexible and can be varied in appropriate circumstances to meet the fairness and justice of the case. That was the point made by the Court of Appeal in *Smart Price Midlands* (see para 6 above). In many cases before the FTT that starting point is adequate as an end point too, because HMRC and the taxpayer already have all the documents which relate to the dispute. But this case was different, because it involved two appellants with apparently divergent cases, in circumstances where HMRC held documents relating to the tax affairs of one of them, which documents could have real significance to the other. The FTT needed to consider whether the scope of disclosure should be broadened to something closer to the standard rule under the CPR.

62. I conclude that the FTT decision erred in its approach to HMRC's application. Accepting the high threshold which applies when considering an appeal from a case management decision (see *BPP Holdings* on which Mr Mitchell relies), I conclude that this is a case where the FTT's case management decision, to the extent that it dismissed HMRC's application in relation to some Level 2B and Level 4 documents, must be set aside. To the extent that the UT upheld FTT in relation to those documents (on grounds, essentially, that it was a case management decision with which the UT would not interfere), the UT was wrong and that part of the UT's decision must also be set aside.
63. That reasoning leads to this end point: to the extent that the FTT (upheld by the UT) allowed HMRC's application, the FTT's order is untouched by this appeal and remains in place; to the extent that the FTT refused HMRC's application and upheld Mr Mitchell's cross application, the FTT was in error and the FTT's decision must be set aside and to that extent, the UT's decision must also be set aside; it would not, however, be appropriate for this Court to re-take the decision itself as to whether the Level 2B and 4 documents should be disclosed under Rule 5(3)(b), although it has

power to do so (by CPR 52.20(1)), because this Court has not considered the documents closely and anyway disclosure is properly part of the FTT's case management function; but there is no good reason to remit this matter to the FTT for it to reconsider HMRC's application, to the extent that it related to Level 2B and 4 documents, given that, as is now clear, HMRC have the powers to disclose the Disputed Documents anyway and do not need the permission of the FTT, the UT or this Court to do so. I therefore conclude that this appeal should be allowed and that "no order" should be substituted for the FTT's refusal of those parts of HMRC's application which are under appeal to this Court.

Disposal of the Appeal

64. Mr Mitchell seeks to uphold the FTT's decision (and the UT's endorsement of it) for the reasons given by each tribunal. I cannot accept that submission. It seems to me that the FTT erred in its approach to the disclosure issue raised by HMRC's application and its conclusion that some of the Level 2B and 4 documents did not need to be disclosed in the context of this FTT appeal was wrong.
65. In summary, I conclude that:
 - i) The Disputed Documents were covered by taxpayer confidentiality under section 18(1) CRCA.
 - ii) Two exceptions to section 18(1) were engaged on the facts and HMRC could have relied from the outset (and can in principle rely now) on either exception to disclose the Disputed Documents to Mr Bell. Those exceptions are contained in section 18(2)(a) and s 18(2)(c) CRCA.
 - iii) The FTT lacks jurisdiction to adjudicate an exercise by HMRC of its powers under section 18(2)(a) or s 18(2)(c). Any challenge to such an exercise would have to be by way of judicial review.
 - iv) The FTT did have jurisdiction to determine issues of case management using powers under Rule 5 (Rule 5(3)(d) in particular). The FTT exercised those powers in determining HMRC's application, as it was entitled to do. The two regimes (Rule 5 and s 18(2)) exist entirely independently of each other.
 - v) To the extent FTT decided that HMRC's application should be dismissed (in relation to some Level 2B and all Level 4 documents) on grounds of irrelevance, the FTT made material errors and that part of the FTT's decision must be set aside.
 - vi) The UT decision which upheld the FTT's dismissal of those parts of HMRC's application was wrong and to that extent the UT decision must also be set aside.
 - vii) This Court should substitute "no order" on those parts of HMRC's application which sought permission to disclose some Level 2B and all Level 4 documents.
66. I would allow this appeal.

Post-Script

67. Since writing my judgment, I have had the advantage of reading My Lord, Lord Justice Arnold's judgment in draft. He and I agree that the FTT lacked jurisdiction to adjudicate any question relating to HMRC's exercise of their statutory powers under s 18(2)(a) and (c). But we differ in our analysis after that common point. The difference between us goes to the jurisdiction of the FTT to determine HMRC's application at all. Arnold LJ considers that the FTT lacked jurisdiction to adjudicate HMRC's application because that application referred to section 18(2)(c), and that Mr Mitchell's cross application responded to that application and also lay outside the FTT's jurisdiction. By contrast, I think the FTT had jurisdiction to consider HMRC's application under its case management powers contained in Rule 5.
68. I accept that HMRC's application was unclear and contradictory. But two important facts take primacy in the analysis, in my view: (i) whatever else it said, HMRC's application invited an order under Rule 5(3)(d); and (ii) the FTT did in fact adjudicate HMRC's application. So, the question for this Court is whether the FTT had jurisdiction to do that, and I think it did. I do not share Arnold LJ's scepticism about a party applying for an order against itself which I consider to be possible under Rule 5(3)(d).
69. Arnold LJ's analysis leads to rather dramatic consequences. First, on his analysis, the FTT's (and the UT's) decisions must (as it seems to me) be set aside in their entirety on grounds that the FTT lacked jurisdiction. It is not possible to preserve part of the FTT's order and make no order on the remainder, as I have suggested. Secondly, his analysis results in HMRC being on a different footing in terms of access to the FTT's case management powers, by comparison with Mr Bell and Mr Mitchell, both of whom could on his approach have made applications for or against disclosure under Rule 5. Thirdly, on his approach, the FTT would be left in a situation where it had to question HMRC's intentions under section 18(2) in any case where disclosure was in issue, because if HMRC did wish to make disclosure under section 18(2), the FTT would lack jurisdiction. I think that would be an unwelcome complication for the FTT when exercising its ordinary powers of case management, and it would undermine the central and agreed proposition that Rule 5 should operate entirely independently of section 18(2).
70. Returning to my Lord's judgment, I make two final comments. First, I do not accept my Lord's view that Rule 27(2) "regulates the exercise" of HMRC's powers under section 18(2)(a) or (c), even in the context of an extant appeal in the FTT (see para 81). I think the better view is that HMRC can, as it did in this case, choose to list proposed disclosure under section 18(2) on their list of documents prepared for an FTT appeal, but the FTT cannot require HMRC to do it that way, because the FTT lacks jurisdiction over any aspect of the exercise of HMRC's statutory powers under section 18(2). Secondly, I would not wish to encourage Mr Mitchell to apply for judicial review if HMRC now decide to disclose the remaining Disputed Documents to Mr Bell in exercise of their section 18(2)(a) or (c) powers; but in fairness to Mr Mitchell, I think that questions about the legality in public law terms of HMRC's actions should be left to the Administrative Court. The rationality of HMRC's proposed exercise of their section 18(2) powers did not arise for decision in this appeal and I did not understand Mr Hickey to offer any concession which should bind

him in future on that matter (in contrast to what Arnold LJ says at paras 81 and 82 below).

LADY JUSTICE CARR:

71. I agree that the appeal should be allowed. I have had the benefit of reading the judgment of Arnold LJ in draft and see that he also agrees that the appeal should be allowed. However, he reaches that conclusion by a different route to that of Whipple LJ.
72. All three of us agree that Rule 5 of the FTT Rules does not confer any jurisdiction on the FTT to interfere with the exercise by HMRC of its powers under section 18 of the CRCA. HMRC did not need Mr Mitchell's consent, or any court order, to make disclosure under section 18.
73. It is at this stage that the views of Arnold LJ and Whipple LJ diverge. Arnold LJ concludes that, on the facts of this case, the FTT therefore had no jurisdiction to make the order that it did. In particular, he relies on the wording of HMRC's application (which referred to the seeking of "permi[ssion]" to disclose and cited section 18(2) (c)). There was, in Arnold LJ's view, no jurisdiction under Rule 5 either to permit or prevent HMRC from disclosing the documents under section 18. Whipple LJ, on the other hand, agrees that HMRC's application was misconceived in so far as it relied on (or referred to) section 18, but finds that that mistake did not deprive the FTT of its ordinary case management powers, including under Rule 5. However, the FTT judge erred in its approach to the exercise of that jurisdiction.
74. I prefer the reasoning of Whipple LJ, including at paras 67 to 70 above. As she says at para 52, the two regimes (under s. 18 and Rule 5) can co-exist independently and provide alternative routes to disclosure in the context of a FTT appeal. The FTT Judge was well alive to the limits of her jurisdiction in relation to section 18 (see [22] of her judgment), and Rule 5(3)(d) was fairly and squarely in play on the face of HMRC's application. I see no difficulty in principle with the FTT Judge exercising her (very broad) case management powers under Rule 5 so as to assist the parties and progress the appeal in accordance with the overriding objective in Rule 2 of the Rules.
75. I would add only this. Whilst, as set out above, HMRC did not need consent or a court order in order to make disclosure under section 18, and to this extent their application was poorly drafted (or ill thought-out), I nevertheless have some sympathy with HMRC's position. This is a highly-charged appeal involving serious allegations against Mr Mitchell and Mr Bell; large sums of money are at stake; and Mr Mitchell and Mr Bell are apparently running cut-throat defences, with Mr Mitchell objecting to disclosure of the documents in question. However rational a decision by HMRC to disclose the documents (under section 18) might be, I can see why in all the circumstances HMRC might have felt it appropriate not to proceed without more. It seems to me counter-intuitive in the context of the overriding objective (and unduly prescriptive) to suggest that the FTT Judge did not have jurisdiction to make the orders that she did.

LORD JUSTICE ARNOLD:

76. I agree that the appeal should be allowed. I am largely, but not entirely, in agreement with the reasoning of Whipple LJ. Both for that reason and because we are disagreeing with two specialist tribunals, I will explain the reasons why I consider that the appeal should be allowed in my own words.
77. HMRC applied under Rule 5(3)(d) for an order that they “be *permitted* to disclose documents to Mr Mitchell and Mr Bell [emphasis added]”. HMRC’s application notice recited that Mr Mitchell’s solicitors had objected to HMRC disclosing documents concerning Mr Mitchell to Mr Bell. It relied upon sections 5(1), 17 and 18(2) of the Commissioners for Revenue and Customs Act 2005 in support of the proposition that “[HMRC] may disclose information for the purposes of civil proceedings relating to a matter in respect of which [HMRC] have functions”. It then asserted that HMRC’s defence of the appeals “clearly falls within one of [HMRC’s] functions and therefore the documents included on [HMRC’s] List of Documents are disclosable”. It also specifically confirmed that the documents included in HMRC’s list of documents were (a) documents which HMRC had in their possession, the right to possess or the right to take copies of and (b) documents which HMRC intended to rely upon or produce in the proceedings, in accordance with Rule 27(2) of the Rules. It concluded: “[HMRC] request the Tribunal’s *permission* to disclose Mark Mitchell’s COP 9 investigation documents to Paul Bell [emphasis added]”.
78. Mr Mitchell cross-applied for a direction under Rules 2, 5, 6 and 15(2)(b)(iii) of the Rules that HMRC’s “application for disclosure ... is refused”. HMRC were not making an application for disclosure, however. They were seeking, in effect, a determination that Mr Mitchell could not validly object to HMRC voluntarily disclosing the documents to Mr Bell for the purposes of the appeals. In the alternative Mr Mitchell sought a direction that the documents be excluded from evidence on the basis that it would be unfair to admit the evidence.
79. It is worth noting that there was no application by Mr Bell for an order for specific disclosure by HMRC. If there had been, the FTT would clearly have had jurisdiction to make an order under Rule 5(3)(d), and HMRC could then have disclosed any documents they were ordered to disclose pursuant to section 18(2)(e).
80. Despite HMRC’s clear invocation of section 18(2)(c) in its application notice, at the hearing before the FTT counsel then appearing for HMRC submitted that (as Judge Mosedale recorded the submission at [21]) “[HMRC] 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 [section 18(1)]”. Judge Mosedale rejected that submission at [22] (quoted by Whipple LJ in paragraph 17 above). She nevertheless accepted at [24] the common position of the parties that the question she had to decide was whether the HMRC should be permitted to rely on the documents and that was to be determined by relevance. The effect of this was not only to contradict her own analysis of HMRC’s powers, but also to conflate disclosure of documents with admissibility. The UT adopted essentially the same approach.
81. The FTT and the UT therefore did not ask themselves the right questions, which were whether the FTT had power to prevent HMRC from voluntarily disclosing the documents to Mr Bell for the purposes of the appeals, and if so whether Mr Mitchell had any valid ground for invoking such power. Counsel for Mr Mitchell accepted in

this Court that HMRC have a rational belief that the documents are potentially relevant to the issues which are likely to arise on the appeals, and in particular that they may be of assistance to Mr Bell. It follows that the answer to the first question is no. As Judge Mosedale said, HMRC had power to disclose the documents by virtue of section 18(2)(a) and (c). In the context of disclosure for the purposes of proceedings before the FTT, Rule 27(2) regulates the exercise of that power in that, unless there is a direction to contrary, it requires a list of documents to be produced and empowers the FTT to control the timing of lists of documents; but it goes no further than that. In the absence of any public law challenge by Mr Mitchell to HMRC's decision voluntarily to disclose the documents, the FTT had no power which Mr Mitchell could invoke to prevent HMRC from disclosing the documents. Rule 15(2)(b)(iii) empowers the FTT to exclude evidence from the proceedings on the ground of unfairness, but that has nothing to do with whether HMRC may voluntarily disclose documents to a party. Rule 5(3)(d) empowers the FTT, among other things, "to permit or require a party ... to provide documents ... to the Tribunal or a party", but HMRC did not need the FTT's permission. What Rule 5(3)(d) does not do is to empower the FTT to prevent a party from voluntarily disclosing documents to the Tribunal and another party which the first party has the power to disclose, at least where there is no abuse of that power. Even if Rule 5(3)(d) did empower the FTT to prevent HMRC from voluntarily disclosing the documents, the answer to the second question is no. Mr Mitchell had no valid ground for invoking that power.

82. Whipple LJ considers that, even though the FTT has no jurisdiction under Rule 5 to prevent HMRC from disclosing documents in the exercise of HMRC's powers under section 18(2)(a) or (c), the FTT nevertheless had power to make or refuse the order which HMRC sought under Rule 5(3)(d). I respectfully disagree with this proposition, which seems to me to be contradicted by Whipple LJ's own analysis in paragraphs 39 to 49 (with which I agree) of HMRC's powers under section 18(2)(a) and (c) and of the FTT's powers under Rule 5. What HMRC asked the FTT for was permission to disclose the documents, but as Whipple LJ says in paragraph 52 HMRC did not need the FTT's permission. HMRC did not ask the FTT for an order compelling HMRC to disclose the documents, which is hardly surprising since a party cannot ask for a compulsory order against itself, nor should any court or tribunal make such an unnecessary order. The FTT should have dismissed both HMRC's application and Mr Mitchell's primary application because the FTT had no power to make any order under Rule 5(3)(d) either permitting HMRC to disclose the documents or preventing HMRC from disclosing the documents. Given the subsequent course of events, however, I see no objection to Whipple LJ's proposal that there be no order on the parts of HMRC's application which sought permission to disclose some Level 2B and all Level 4 documents, since the effect is the same. It is not clear to me that, in relation to the Level 1, 2A, 2C and the remaining Level 2B documents, the FTT positively ordered HMRC to disclose the documents. If it did, then I also see no objection to that order standing, even though no party applied for such an order and even though it was not necessary, because, as Whipple LJ says in paragraphs 43 and 46, the FTT would have had jurisdiction to make such an order under section 18(2)(e) and Rule 5(3)(d). As for Mr Mitchell's alternative application, the FTT should have dismissed that as being premature for the reasons explained below.

83. Although the question is academic for the reasons given above, in my opinion the FTT also erred in determining, by reference to HMRC's statement of case, that the

Level 2B and 4 documents were irrelevant. The issues have not yet crystallised, and it is difficult to be certain at this stage what documents will prove to be relevant. In my view this is a case in which the FTT should exercise its power to direct the service of statements of case by Mr Bell and Mr Mitchell in reply to HMRC's statement of case in order to ascertain what the issues are. The UT, by contrast, was correct to find that the documents were "of some potential relevance" (as the UT expressly held in relation to the Level 2B documents at [91] and impliedly held in relation to the Level 4 documents by purporting to agree with the FTT that they were "not ... of *sufficient* relevance [emphasis added]" at [95]-[96]). I would comment in relation to the Level 4 documents (documents going to Mr Mitchell's credibility) that the fact that Mr Bell probably could not obtain an order for specific disclosure of such documents does not mean that HMRC cannot disclose them voluntarily. As I have said, it is accepted that HMRC have a rational belief that such documents are potentially relevant, and in particular that they may assist Mr Bell. I also consider that the UT erred in upholding the FTT's decision as being within the FTT's discretion as to case management when, upon the UT's own analysis, the FTT's decision was predicated upon an erroneous assessment of relevance.

84. I would add three points for completeness. First, what HMRC ought to have done in this case, once they had served their list of documents in accordance with Rule 27(2) and Mr Mitchell had objected to HMRC disclosing Mr Mitchell's COP 9 documents to Mr Bell, was to invite Mr Mitchell to apply within a specified period to the Administrative Court for judicial review of HMRC's decision to disclose the documents to Mr Bell. If Mr Mitchell had applied for permission to seek judicial review, obviously HMRC should have awaited the outcome of that application. Assuming that Mr Mitchell had either made no application within the period specified by HMRC or had applied and either been refused permission or failed to obtain judicial review, HMRC could then have proceeded to disclose the documents to Mr Bell without reference to the FTT.
85. Secondly, counsel for Mr Mitchell suggested that Mr Mitchell's concern was that the documents would enter the public domain. I am sceptical that this was the real motive for his application, but in any event confidentiality of documents is no answer to an order for disclosure of documents, let alone a decision voluntarily to disclose documents. If documents contain information which is truly confidential, then that may justify the imposition of restrictions upon inspection of the documents, and potentially other measures to protect the confidentiality of the information, but that is a different issue.
86. Thirdly, as counsel for Mr Bell accepted, it remains open to Mr Mitchell to apply for an order under Rule 15(2)(b)(iii) excluding evidence on the ground of unfairness; but it will only be possible to determine such an application once the parties have clarified their cases and decided what evidence they wish to adduce. It should be noted, however, that information which is confidential (but not privileged) may still be admitted in evidence even if it was unlawfully obtained by the person seeking to rely upon it: see in particular *Imerman v Tchenguiz* [2019] EWCA Civ 908, [2011] Fam 116.

Appendix

CRCA 2005

5. Commissioners' Initial Functions

- (1) The Commissioners shall be responsible for-
- (a) The collection and management of revenue for which the Commissioners of Inland Revenue were responsible before the commencement of this section,
 - (b) The collection and management of revenue for which the Commissioners of Customs and Excise were responsible before the commencement of this section, and
 - (c) The payment and management of tax credits for which the Commissioners of Inland Revenue were responsible before the commencement of this section.

...

17. Use of Information

- (1) Information acquired by the Revenue and Customs in connection with a function may be used by them in connection with any other function.
- (2) Subsection (1) is subject to any provision which restricts or prohibits the use of information and which is contained in –
- (a) This Act,
 - (b) Any other enactment, or
 - (c) An international or other agreement to which the United Kingdom or Her Majesty's Government is party.

...

18. Confidentiality

- (1) 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.
- (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,

...

(c) Which is made for the purposes of civil proceedings (whether or not within the United Kingdom) relating to a matter in respect of which the Revenue and Customs have functions,

...

(e) Which is made in pursuance of an order of a court.

51. Interpretation

...

(2) In this Act –

(a) “function” means any power or duty (including a power or duty which is ancillary to another power or duty), and

(b) a reference to the functions of the Commissioners or of officers of Revenue and Customs is a reference to the functions conferred –

(i) by or by virtue of this Act, or

(ii) by or by virtue of any enactment passed or made after the commencement of this Act.

...

(3) In this Act a reference to information acquired in connection with a matter includes a reference to information held in connection with that matter.

The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009

Overriding objection and parties’ obligation to co-operate with the Tribunal

2. – (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

...

Case management powers

5. – (1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.

...

(3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may by direction-

...

(d) permit or require a party or another person to provide documents, information or submissions to the Tribunal or a party;

...

Evidence and Submissions

15.

...

(2) The Tribunal may-

...

(b) exclude evidence that would otherwise be admissible where –

- (i) the evidence was not provided within the time allowed by a direction or a practice direction;
- (ii) the evidence was otherwise provided in a manner that did not comply with a direction or a practice direction;
- (iii) It would otherwise be unfair to admit the evidence.

Respondent's statement of case

25. – (1) A respondent must send or deliver a statement of case to the Tribunal, the appellant and any other respondent so that it is received -

...

(2) A statement of case must –

- (a) in an appeal, state the legislative provision under which the decision under appeal was made; and
- (b) set out the respondent's position in relation to the case.

...

Further steps in a Standard or Complex case

27. – (1) This rule applies to Standard and Complex cases.

(2) Subject to any direction to the contrary, within 42 days after the date the respondent sent the statement of case (or, where there is more than one respondent, the date of the final statement of case) each party must send or deliver to the Tribunal and to each other party a list of documents-

- (a) of which the party providing the list has possession, the right to possession, or the right to take copies; and
- (b) which the party providing the list intends to rely upon or produce in the proceedings.

(3) A party which has provided a list of documents under paragraph (2) must allow each other party to inspect or take copies of the documents on the list (except any documents which are privileged).