[2017] UKUT 465 (TCC)

Appeal number: UT/2017/0079

PROCEDURE – directions for disclosure of documents in an appeal against a refusal of approval under Alcohol Wholesaler Registration Scheme s16(4) FA 1994 where the FTT's jurisdiction is supervisory

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

BETWEEN:

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS

Appellant

- and -

SMART PRICE MIDLANDS LIMITED
HARE WINES LIMITED

Respondents

TRIBUNAL: MR JUSTICE HENRY CARR
JUDGE CHARLES HELLIER

Sitting in public at The Rolls Building EC4A 1NL on 25 October 2017

Jonathan Hall QC and Will Hays, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellant

David Bedenham, instructed by Rainer Hughes for the Third Respondent

DECISION

Introduction

1. With effect from 1 April 2016 section 88C(1) of the Alcoholic Liquor Duties Act 1979 has prohibited persons from selling alcohol wholesale unless they are approved by the Appellant ("HMRC") and registered under the Alcohol Wholesalers Registration Scheme ("AWRS"). It is classed as a "controlled activity" which cannot be carried out without approval from the Commissioners. Section 88C(2) provides that the Commissioners may only give approval if they are satisfied that the applicant is a fit and proper person to carry out the controlled activity. Section 88G(1) makes it an offence knowingly to contravene section 88C(1).

2. Five companies, including the Respondents, applied, separately, to HMRC to be approved and registered under the AWRS. HMRC refused their applications on the basis that they were not fit and proper persons. The refusals adversely affected the existing or proposed businesses of the Respondents. Each company appealed to the First-tier Tribunal (the "FTT").

3. The substantive appeals have yet to be heard. The FTT issued administrative directions in each appeal requiring HMRC to disclose "*all documents which were considered by [their] officer when reaching the decision*". HMRC applied to the FTT for variation of those directions and the applications were heard together on 8 May 2017. Judge Sinfield refused HMRC's applications, and made disclosure orders against HMRC. His reasons are set out in a decision dated 15 May 2017 ("the Decision"). HMRC now appeal against the Decision in the case of the First Respondent, Smart Price Midlands Limited. The First Respondent was not represented in the hearing before us, but the Second Respondent ("Hare Wines") participated in the hearing, without objection from HMRC.

The Legislative and procedural framework

4. Section 16 of the Finance Act 1994 provides that a person may appeal to the FTT against a decision to refuse approval under the AWRS. Such a decision is an "ancillary matter" for the purposes of section 16, which relevantly provides:

> "(4) In relation to any decision as to an ancillary matter, or any decision on the review of such a decision, the powers of an appeal tribunal on an appeal under this section shall be confined to a power, where the tribunal are satisfied that the Commissioners or other person making that decision could not reasonably have arrived at it, to do one or more of the following, that is to say -
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> (a) to direct that the decision, so far as it remains in force, is to cease to have effect from such time as the tribunal may direct;
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> (b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, a review or further review as appropriate of the original decision; and

> (c) in the case of a decision which has already been acted on or taken effect and cannot be remedied by a review or further review as appropriate, to declare the decision to have been unreasonable and to give directions to the Commissioners as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in future."
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> "(5) In relation to any other decisions, the powers of an appeal tribunal on an appeal under this section shall also include power to quash or vary any decision and power to substitute their own decision for any decision quashed on appeal."

5. Section 16(6) of the Finance Act 1994 provides that the burden of proof in an appeal under the section is on the appellant.

6. It follows that in an appeal under section 16(4) the FTT's jurisdiction is supervisory. In *Customs & Excise Commissioners v JH Corbitt (Numismatists) Ltd* [1980] STC 231 at 239, Lord Lane described the approach that the FTT (then the VAT Tribunal) should follow where it has a supervisory jurisdiction: the Tribunal can only review the decision if it is shown that the commissioners have acted in a way which no reasonable panel of commissioners could have acted; if they have taken into account some irrelevant matter or have disregarded something to which they should have given weight.

7. Rule 2(3) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the FTT Rules") makes clear that the FTT's powers under the Rules must be exercised in accordance with the overriding objective of dealing with cases justly and fairly. This is expressed to include, amongst other things: dealing with the case in ways which are proportionate to the importance of the case and the anticipated costs and the resources of the parties; ensuring, so far as possible, that parties are able to participate fully in the proceedings; and avoiding delay so far as compatible with proper consideration of the issues.

8. Rule 5 gives wide case management powers to the FTT. It provides for the Tribunal to regulate its own procedure, and in particular to "*permit or require a party …to provide documents to the Tribunal or a party*". Rule 15 provides for the Tribunal to give directions in relation to evidence and confers a wide discretion on the Tribunal as to the nature of the evidence taken and the weight given to it. In appeals under section 16(4) HMRC's practice is generally to provide (at least) a witness statement from the officer who made the decision, who is called as a witness and may be cross-examined at the substantive hearing; *Corbelli Wines v HMRC* (TC/2017/01690).

9. Rule 23 requires that appeals before the FTT are, on arrival, classified as either default paper, basic, standard or complex. Default paper cases are generally decided without an oral hearing; basic cases proceed to a hearing without any detailed preliminary steps other than the submission of grounds of appeal, a statement of case by HMRC, and possibly a Reply by the appellant. For Standard and Complex cases Rule 27 applies.

10. Rule 27 provides that:

"**27 Further steps in a Standard or Complex case**

(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)."

11. In this decision we use "Rule 27 Disclosure" to mean the disclosure required by Rule 27(2) in the absence of a direction to the contrary.

The approach to be applied in these appeals

12. The Decision can only be appealed on a point of law: section 11, Tribunal Courts and Enforcement Act 2007. In relation to the general approach of the courts to appeals from specialist tribunals, in *AH and others (Sudan) v Secretary of State for the Home Department (United Nations High Commissioner for Refugees intervening),* [2007] UKHL 49; [2008] 1 A.C. 678, Baroness Hale said at [30], in a passage which is apt to describe decisions of the FTT in AWRS appeals:

> "This is an expert tribunal charged with administering a complex area of law in challenging circumstances. To paraphrase a view I have expressed about such expert tribunals in another context, the ordinary courts should approach appeals from them with an appropriate degree of caution; it is probable that in understanding and applying the law in their specialised field the tribunal will have got it right: see *Cooke v Secretary of State for Social Security* [2002] 3 All ER 279, para 16. They and they alone are the judges of the facts. It is not enough that their decision on those facts may seem harsh to people who have not heard and read the evidence and arguments which they have heard and read. Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently."

13. In the cases before us, HMRC appeals from case management decisions of the FTT. The proper approach for the Upper Tribunal in such cases was set out by Norris J In *Goldman Sachs International v HM Revenue and Customs Commissioners* [2009] UKUT 290 (TCC) at [23] - [24] and applied by Sales J, as he then was, in *HM Revenue and Customs Commissioners v Ingenious Games* [2014] UKUT 62 (TC), at [56]. Norris J said that:

"23. First, I think the Upper Tribunal should exercise extreme caution in entertaining appeals on case management issues. Mr Gammie QC for HMRC drew my attention to the decision of the Court of Appeal in *Walbrook Trustee v Fattal & Others* [2008] EWCA Civ 427, not as establishing any novel proposition but as containing in paragraph 33 the following convenient statement from the judgment of Lord Justice Lawrence Collins:

> 23.1.1. "I do not need to cite authority for the obvious proposition that an appellate court should not interfere with case management decisions by a judge who has applied the correct principles and who has taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the court is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge."

24. I am clear that that principle applies with at least as great, if not greater, force in the tribunals' jurisdiction as it does in the court system."

The Decision under appeal

14. The FTT described, accurately, the substantive issue which it would ultimately have to determine at [19]:

"[19] The issue ultimately to be determined in each appeal is whether the Appellant, who bears the burden of proof, has established that HMRC's decision to refuse to approve and register the Appellant under the AWRS was a decision that no reasonable officer of HMRC could have reached. In order to do so, the Appellant must show, on the balance of probabilities, that the HMRC officer who made the decision failed to consider matters which should have been taken into account or took into account some irrelevant matters or otherwise reached a decision that was so plainly wrong that no officer of HMRC, acting reasonably, could have reached it."

15. The FTT recorded at [20] HMRC's submission that the direction requiring it to list all documents which were considered by the officer who made the decision under appeal went beyond what was normally envisaged by the FTT Rules and was inappropriate in a Standard case. They said that Rule 27, which requires the disclosure only of those documents relied on, applied to all Standard and Complex cases regardless of whether the FTT's jurisdiction was supervisory or appellate. It was a default position which should be departed from only for sufficient reason. There were no sufficient reasons in these appeals to justify departing from that position. Judge Sinfield dismissed that argument at [21] – [22]. In particular:

"[22] While the disclosure provided for by rule 27(2) may be appropriate in many appeals, there is no presumption that it must apply in all Standard and Complex cases. Whether the rule is varied in any particular appeal, as the opening words of rule 27(2) make clear it can be, is a matter for the discretion

of the FTT in that case. Any such direction is made under rule 5 of FTT Rules which provides that the FTT may, among other things, make directions in relation to the conduct of proceedings and the provision of information and documents. The use of the word "may" in Rule 5 means that it is also a matter of judicial discretion whether to make such directions. The power of the FTT to make directions under rule 5 of the FTT Rules is a case management power which must be exercised in accordance with the overriding objective in rule 2 of the FTT Rules which is to enable the tribunal to deal with cases fairly and justly."

16. At [23] - [24] Judge Sinfield set out the unfairness which, in his view, the Respondents would suffer if they did not know what material was relied on or rejected by the decision-maker at HMRC, and yet had to challenge the decision on the basis that relevant material was overlooked or irrelevant material taken into account. In a passage which is central to these appeals, he said:

"[23] In my view, the requirement in rule 27(2) to provide a list that only includes the documents on which HMRC intends to rely and produce in the proceedings is not adequate to ensure that the overriding objective is met in these appeals. In deciding whether to approve and register a person for the AWRS, HMRC look not only at the information provided by the applicant but also information gathered by HMRC. Mr Hays submitted that, if an applicant believes that the decision was wrong and appeals, the applicant should plead, with appropriate particularity, that irrelevant material has been considered and, in an appropriate case, it might be appropriate for the FTT to order disclosure of documents going to that issue. Mr Hays contended that it would be unacceptable to require disclosure of all documents on the basis of an unparticularised claim that the decision maker failed to take into account a relevant consideration.

[24] I cannot accept these submissions. In most appeals before the FTT, the appellant taxpayer might be expected to hold or, at least, be aware of the existence of all relevant materials. In these appeals, however, HMRC are likely to have material that they have gathered from various sources which is not available to the applicant for approval under the AWRS and of which the appellant has no knowledge. An unsuccessful applicant can only form a view as to whether to challenge the decision on grounds of unreasonableness if the applicant knows what matters were considered by the decision maker. If the unsuccessful applicant only knows about materials that were considered and are relied on by HMRC in support of the decision then the applicant cannot plead, with any particularity, that any other documents, information and other matters considered but not relied on should have been taken into account. The role of the FTT is to decide whether the decision under appeal was reasonable. If it is to determine that issue fairly and justly, the FTT must know not only the decision arrived at and the reasons relied on to justify it but what matters were taken into account and what matters were not taken into account by the decision maker. I consider that, without the full picture, there is a real risk that the FTT will not be able to make a fair and just determination of the reasonableness of

the decision. In my judgement, it is appropriate to require HMRC to provide a list of all documents that the officer considered in making the decision under appeal and not just a list of documents that HMRC intends to rely on in the proceedings."

17. At [26] the Judge Sinfield referred to a submission by HMRC that it should not be required to include in the lists any documents that the decision-maker had considered but concluded were irrelevant. He rejected that submission. He said:

> "If accepted, it would allow the HMRC officer whose decision is being challenged to determine what material the FTT should consider when reviewing that decision. That is not the role of the decision-maker and would risk preventing the FTT from carrying out its role properly. Mr Hays' submission was necessarily limited to cases in which the decision-maker "ultimately (and correctly) concludes that it is irrelevant" but, if the document is not disclosed, how could the correctness of the officer's opinion ever be tested?"

18. At [27], the FTT considered whether an order requiring HMRC to list, and if required to do so, produce, all documents that the decision-maker had considered would impose an unreasonable burden on HMRC's resources. It did not accept this:

> "In the case of appeals in relation to refusals of authorisation under the AWRS, the file should already contain all the materials that the decision-maker considered or a record of them and so compiling a list of such material should be a simple task. If a document that was considered as part of the decision-making process is no longer in HMRC's possession or control, it should be included in the list of documents and, if it is required to be produced, its availability can be dealt with as a separate issue.

19. At [28], the FTT considered and distinguished the case of *Soca v Namli* [2011] EWCA Civ 411. In so doing, Judge Sinfield gave guidance as to what should happen in cases where HMRC objected to disclosure of material which could be adverse to the Appellants' appeals (i.e. supported HMRC's case) on the basis that it would reveal confidential information. He noted, correctly, that HMRC had made no assertions and had produced no evidence that this would be the case in the present appeals. He went on to say that:

> "If material contains intelligence or other genuinely confidential material that could have an impact on HMRC's operations then, in my opinion, HMRC should not be required to produce it or, at least, not in unredacted form. As it was part of the material that was considered by the decision-maker and, given its nature, it is very likely to have influenced the decision, I consider that it should be included in the list of documents described in general terms, if necessary, but marked as confidential. HMRC could apply, on a case-by-case basis, to exclude such materials from further disclosure or production."

20. The FTT amended the direction for disclosure to read as follows:

> "the Respondents shall send or deliver to the Tribunal and the Appellants a list of all documents which were considered by the Respondents' officer when reaching the decision at issue in this appeal and indicating which, if any, of those documents the Respondents do not rely on in this appeal, together with any other documents which the Respondents intend to rely on in this appeal."

HMRC's first ground of appeal

21. HMRC was granted permission to appeal by Judge Berner on 19 June 2017. Its first ground of appeal is as follows:

> "(a) **The purpose of an appeal**. The Learned Judge erred in holding that an appeal triggered a disclosure obligation to enable "*an unsuccessful applicant [to] form a view as to whether to challenge the decision on grounds of unreasonableness*" (Judgment, 24). That is wrong: disclosure is ordered to facilitate the just determination of an appeal, not to enable a party to identify potential arguments on appeal. The latter would be a classic 'fishing expedition'."

22. Mr Hall, on behalf of HMRC, submitted that this approach was an error of law. It showed that the Judge had considered that, once an appellant had asserted that HMRC had left something (unspecified) out of account, then, in order for the appeal to be effective, everything had to be disclosed. He argued that the FTT's decision ignored the requirement that the onus of proof is on the Appellant and that the appeal must be brought on identified grounds. Fair disclosure is not a means for the Appellant to identify grounds of appeal and conduct a fishing expedition. The reasoning in [24] of the FTT's decision indicated the latter approach - a direction to enable the Appellant to form a view as to whether to challenge the decision, rather than disclosure in connection with a particular ground of appeal. Mr Hall said that it was not sufficient for the Appellants to include a 'boilerplate clause' in their grounds of appeal, merely asserting that irrelevant considerations were ignored and irrelevant ones taken into account.

23. If read in isolation, the sentence in the judgment relied on by HMRC lends some support to its submission. However, it is necessary to consider the entirety of the reasoning in [24] rather than a single sentence, extracted from the context in which it appears. The Judge ordered disclosure because he considered that it would not be possible for the FTT to dispose of these appeals fairly and justly unless it was aware of all material that was before the decision-maker. He considered that only then could a fair decision be made as to whether relevant material that was before the decision-maker (and which was in the Appellants' favour) was improperly disregarded; or whether irrelevant material, not referred to in the decision letter, was taken into account by the decision-maker. He directed disclosure to facilitate the just determination of the appeals, rather than as a fishing expedition to enable identification of potential arguments for the appeal. In our judgment, the Judge did not ignore the onus of proof. Indeed, he expressly referred to it.

24. As to the suggestion of a boiler-plate clause, HMRC did not address the merits of any individual ground of appeal in the five appeals. It did not suggest that any such ground was frivolous or vexatious. Nor was Judge Sinfield asked to reach this conclusion on any of the appeals.

25. Mr Bedenham, on behalf of Hare Wines, pointed out that the letter from HMRC refusing approval said that the decision-maker had "*taken the following key points into account in reaching this decision*", and then, under the heading "*Application of the Fit and Proper Criteria*", said the test had not been met based on (1) the fact that one individual had been identified as the guiding mind of the company, but gave no reason why that person's control of the company was relevant, and (2) the assertion that Due Diligence was not being credibly applied, giving details of eight transactions.

26. In its grounds of appeal to the FTT, Hare Wines has pleaded (i) that the decision letter merely sets out key points and does not make the reasons for the decision clear, (ii) that the facts do not show that the Appellant was not fit and proper, (iii) that there was no basis on which to conclude that the company had not "*got in place satisfactory due diligence procedures*", and (iv) bearing in mind that the goodwill in the Appellant's business was protected by Article 1 Protocol 1 of the Human Rights Convention, HMRC's action was disproportionate.

27. Without expressing any views as to the ultimate outcome of the appeal, there is a good arguable case that the decision letter is inadequate and incomplete, in that the reference to 'key points' begs the question of what was taken into account by the decision-maker, and what was disregarded.

28. Mr Bedenham, fairly, drew our attention to the fact that Hare Wines' Grounds of Appeal do not expressly state that relevant matters were disregarded or irrelevant matters were considered. This is in contrast to the Grounds of Appeal of Smart Price Midlands Limited, where this allegation is specifically made. But it is clear to us that questions as to what was and what was not considered by the officer are important to Hare Wines' appeal (in particular in relation to the 'key points' ground') and that the Judge was entitled to make a direction for the disclosure of those documents considered by the officer, on the basis that this was necessary for a just and fair resolution of the appeal.

29. For the reasons set out above we reject this ground of appeal.

HMRC's second ground of appeal

30. HMRC's second ground of appeal is as follows:

> "b) **The function of the FTT**. The Learned Judge erred in holding that the FTT's function was to discover "*what matters were taken into account and what matters were not taken into account*" so that it could determine whether the decision was reasonable. As is implicit from the decision, and explicit in his reasons for refusing permission, the Learned Judge justified this on the basis that the Tribunal can adopt "*an inquisitorial approach in appropriate cases*", but without explaining why this was such an

appropriate case. HMRC submit that the learning judge's approach on this was clearly flawed."

31. HMRC elaborated this argument by submitting that the inquisitorial approach may, depending on the circumstances, become necessary in various contexts: for example, to achieve equality of arms or to achieve consistency. However, in the present cases, there was no basis for adopting an inquisitorial approach. No reasons for doing so had been given by the Judge. There was nothing about the facts of these appeals that required a special approach. The Judge had erred in seeking to justify the disclosure orders on the basis that the Tribunal needed to adopt this approach.

32. An obvious problem with this ground of appeal is that the Judge did not say in the Decision that this was an appropriate case for the FTT to adopt an inquisitorial approach. Mr Hall submitted that this was implicit from paragraph [24], where he stated that unless the FTT knew what matters were taken into account and what matters were not taken into account, it could not properly discharge its obligation to determine whether the decision was reasonable. We do not accept this submission. This is a part of the Judge's explanation as to why, if the disclosure were not ordered, it would not be possible to deal with the appeals justly and fairly, in accordance with the overriding objective. In the same paragraph, he said that the role of the FTT was to decide whether the decision under appeal was reasonable. That reflects the statutory test, and does not suggest that he was adopting an inquisitorial approach.

33. Mr Hall's argument then focused upon the Judge's reasons for refusing permission to appeal. At [14] of a separate decision dated 5 June 2017, explaining why he had concluded that permission to appeal should be refused, he said:

> "14. The second ground of appeal is that I erred in holding that the FTT's function is to discover "what matters were taken into account and what matters were not taken into account" so that the FTT could determine whether the decision was reasonable. HMRC contends that the FTT's role is confined to deciding whether the grounds for making the appeal have been proved and not to conduct an enquiry for itself in order to decide whether a decision was reasonable. Again, I consider that this ground is based on a selective quotation from [24] of the Decision. Nowhere in the Decision do I say that the role of the FTT is to conduct an enquiry for itself. On the contrary, in the sentence before the one quoted from in this ground, I say:
>
> > "The role of the FTT is to decide whether the decision under appeal was reasonable."
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> That sentence makes it clear that the FTT's role is to consider the matter under appeal which must involve deciding whether the grounds of appeal have been proved. Further, I reject the contention that the FTT is precluded from adopting an inquisitorial approach in appropriate cases. Indeed, it is clear that there are many cases where such an approach is required by the overriding objective (for a useful discussion on this point

see Tribunal Practice and Procedure by Edward Jacobs, Legal Action Group, 4th Edition 2016 at 1.60 to 1.73). Accordingly, I do not accept that this ground shows any arguable error of law in my view of the FTT's function."

34. We do not consider that this passage supports HMRC's case under this ground of appeal. On the contrary, Judge Sinfield made clear that he had not decided that an inquisitorial approach should be adopted. He went on to add that in some cases an inquisitorial approach could be adopted, but this was to deal with a general assertion at [18] of the grounds of appeal which were before him that "*the tribunal's function is not to conduct an enquiry for itself in order to decide whether a decision was reasonable.*"

35. In conclusion, we do not consider that the FTT decided that it should adopt an inquisitorial approach to the Respondent's appeals, or relied on this to justify its disclosure orders. Therefore we reject HMRC's second ground of appeal.

HMRC's further arguments

36. In support of these grounds of appeal, HMRC relied upon further arguments. These arguments could be regarded as independent reasons for overturning the Decision, and we deal with them under separate headings.

The Judge applied the wrong principles in exercising his discretion to depart from the automatic disclosure provided for in Rule 27(2)

37. HMRC argued that the FTT's direction that it should disclose, in addition to those classes of documents listed in Rule 27, all documents which were considered by the officer when reaching his decision, represented a departure from the automatic disclosure contained in that rule. It accepted that the Judge had power to make a direction to the contrary; but alleged that the direction to the contrary was flawed because the Judge applied the wrong principles in exercising his discretion. HMRC submitted that for the automatic disclosure imposed by Rule 27 to be displaced, this would require a proper justification and reasons. No such reasons had been provided.

38. In this regard, HMRC relied upon the judgment of the Court of Appeal in *HMRC v Citibank* [2017] EWCA 1416 (Civ). This related to an appeal against HMRC's refusal to allow input tax credit on the basis that the taxpayer knew or should have known that its transactions were connected with fraudulent evasion of VAT. The first issue considered by the Court of Appeal was whether fraud or dishonesty was alleged against the taxpayer. It held, contrary to the view of the Upper Tribunal, that this was not the case.

39. The second issue related to the FTT"s refusal to direct "standard" CPR style disclosure. In the FTT, the Judge had said that litigation in that tribunal was intended to conform to a different model from litigation in the High Court. He said that "*rule 27 provides for the normal disclosure in a Standard or Complex case and I consider it would not be appropriate to me at this stage in the litigation to require wider disclosure*". On appeal, the Upper Tribunal held that the rules provided a wide variety

of powers to give effect to the overriding objective; it was no answer to say that the litigant was stuck with rule 27. If a reasoned case for wider proportionate disclosure was made, the FTT should consider whether it was appropriate "*without being troubled by the limited terms of rule 27*". The Upper Tribunal ordered wider disclosure than had been granted by the FTT.

40. In the Court of Appeal, Sir Geoffrey Vos C (whose reasons were adopted by Hallett LJ) analysed at [93] the Upper Tribunal's reasons for giving wider disclosure as that (a) the burden of proof was on HMRC, (b) HMRC held all the cards, and (c) this was an important and high value case in which dishonesty was alleged. He concluded that (c) was the most important consideration in the balance that the Upper Tribunal had drawn, but that it had erred in this respect. He said:

> "In these circumstances, I cannot see how [the FTT's] reasoning can be faulted. It is true that this is an important issue, but the 2009 Rules were made for important cases as well as simple ones. The plain fact is that the procedure is different in the FTT. If fraud or dishonesty had been alleged it would have been different."

There was therefore insufficient reason to displace Rule 27(2) Disclosure (see paragraph [94]), and the Upper Tribunal's judgment was set aside.

41. We were also referred to *HMRC v Ingenious Games* [2014] UKUT 62 (TC), where Sales J (as he then was) allowed an appeal against the refusal by the FTT of HMRC's application to order extensive disclosure by the taxpayer which went beyond the "*usual default rule which applies in tax tribunals*". He said:

> "[25] The default rule makes considerable sense in the usual type of case, where HMRC will have used their extensive statutory powers of investigation at the stage of enquiry into the taxpayer's affairs and they will have seen all relevant documents in the taxpayer's possession by the time the appeal is launched."

42. In that case however, there had, by arrangement, been limited disclosure by the taxpayer at the enquiry stage and "*HMRC [had] not already seen or had a chance to inspect all documents which might be relevant to the determination of the issues arising in the appeals*". He concluded at [67] that in order for the main appeal to be determined fairly and justly in accordance with the overriding objective, HMRC should have an equal opportunity to review further relevant documents held by the taxpayers which they themselves did not intend to rely upon in the appeal. It "*would be unfair and unjust for the taxpayer to be able to suppress documents which may be harmful to their case as a consequence of the approach taken to disclosure at the enquiry stage…*"

43. At [68](ii) Sales J said that HMRC's request was not a fishing expedition: HMRC sought documents relevant to the pleaded issues; and that according to the usual standards of justice in heavy civil litigation it was just and fair for a party to see documents held by its opponent relevant to the opponent's pleaded case.

44. These authorities are examples of the application of rule 27(2) which turn on their own facts. In agreement with Judge Sinfield in the Decision, we regard Rule 27

Disclosure as a starting point or default position which applies unless the Tribunal is persuaded that something else is, in the circumstances of the appeal, just and fair. However, it is no more that. The rule expressly provides that its provisions are "*subject to any direction to the contrary*". Where the FTT, in the exercise of its discretion, decides that it should depart from this starting position to enable it to deal with the case justly and fairly, it is entitled to do so, as illustrated by the *Ingenious Games* decision.

45. In the present cases, Judge Sinfield gave reasons for departing from the starting position in order to enable the FTT to deal with the appeals justly and fairly. He did not apply an incorrect test in reaching the conclusion that he did, and we reject HMRC's argument based upon Rule 27(2).

The orders for disclosure were made without regard to the facts of the individual appeals

46. HMRC pointed out that the same direction was made in all of the appeals, irrespective of their individual facts. There was no differentiation between the appeals which concerned established businesses, and the appeal in which the Appellant was proposing to trade, but had not yet started. The orders for disclosure had been made in a class of cases, irrespective of their individual circumstances.

47. In our judgment, the Judge was entitled to make the same direction in each of these appeals, in the exercise of his discretion, because they shared a common factor. The appeals are very serious matters for each of the Appellants, either because they prevent the continuance of established duty-paid businesses or restrict the Appellant's freedom to trade in a new business. In accordance with the overriding objective, the Judge was entitled to have regard to the importance of the case. He needed to ensure, so far as practical, that the parties were able to participate fully in the proceedings. The decision-maker was the only person who knew what material he or she had considered when making the decision, and it would not be possible for the FTT to dispose of these appeals fairly and justly, and for the Appellants to participate fully, without the disclosure that he ordered.

48. We recognise that a consequence of the Judge's decision is that this direction will generally be made, as a starting point, in AWRS cases. Indeed, in *Corbelli*, where HMRC had not provided disclosure equivalent to that ordered in these cases, pending the outcome of these appeals, the FTT hearing the substantive appeal stated at [431]:

> "Our view is that it is in the interest of justice and fairness for the tribunal to require such disclosure as it can only really be determined whether and to what extent the decision-maker has taken into account relevant considerations and not irrelevant ones, as required to assess whether the decision was reasonably arrived at, if the full range of materials the officer looked at are available."

49. This observation carries significant weight, as it was made by a tribunal at one of the few substantive hearings of AWRS appeals, which was very familiar with the issues that the appeal had raised. However, this may not be the end point in any

individual case, as Judge Sinfield recognised at [28] of the Decision. HMRC is entitled to apply to set aside or vary such direction on a case by case basis.

50. HMRC submitted that if the FTT's reasoning was correct, it would apply to all appeals under section 16(4). In addition, Mr Hall noted that the jurisdiction given by section 16(5) encompasses not only the supervisory jurisdiction of section 16(4) but also a wider appellate jurisdiction. He said that if extended disclosure is to be directed for section 16(4) cases then it will necessarily have to be directed for section 16(5) cases, since such cases embrace the section 16(4) supervisory jurisdiction, and thus Judge Sinfield's logic will apply for an even wider range of cases.

51. We do not accept that the Judge's decision will apply to all cases under sections 16(4) and 16(5). The FTT is required by the overriding objective to deal with cases in ways which are (amongst other things) proportionate to the importance of the case. These appeals are very important to the Appellants, for the reasons set out above and are fact dependent. Other classes of cases under section 16 may be different.

Proportionality

52. HMRC submitted that because the Judge had made orders for disclosure in a class of cases, irrespective of their facts, he could not have taken into account proportionality, as the rules require him to do.

53. We do not accept that the Judge failed to consider proportionality. On the contrary, he expressly considered whether the orders that he was making would impose an unreasonable burden on HMRC's resources, and on the material before him, decided that they would not. HMRC had the opportunity to put forward evidence at the hearing before the Judge as to why the orders for disclosure would be disproportionate, having regard to the facts of the individual cases. For example, it could have said that disclosure would cause delay and be disproportionate because of the volume of documents which would be included in its scope in any individual case. It did not do so. Such considerations are, of course relevant, and HMRC will have the opportunity to adduce such evidence in opposing orders for disclosure of this nature in the future. In the present cases, the Judge had no material before him in any individual appeal to suggest that disclosure would be disproportionate.

Public law cases

54. HMRC argued that the Decision was in stark contrast to the approach of the High Court to disclosure in the broadly comparable field of judicial review. As in the present appeals, an individual who is affected by a decision made by a public body will not have access to all of the material considered by the decision-maker. Nonetheless, HMRC submitted that it is well established that there is no general disclosure obligation in judicial review; *Tweed v Parades Commission of Northern Ireland* [2006] UKHL 53; 2007 1 AC 650 per Lord Carswell at [29] – [30].

55. It is important to recognise, as Mr Hall fairly acknowledged, that the procedural rules are different in judicial review cases from Rule 27 Disclosure. CPR PD 54A provides, in relation to judicial review, at paragraph 12.1, that "*Disclosure is not*

required unless the court orders otherwise." This is because, in most judicial review cases, an order for disclosure will not be necessary, as the claim will raise issues of law and the facts will be agreed or apparent from exhibited documents. However, in a minority of cases, judicial review applications will raise disputed issues of fact, which will require disclosure to enable a fair and just determination.

56. This was explained by Lord Bingham in *Tweed*, at [2] - [3]:

> "[2] The disclosure of documents in civil litigation has been recognised throughout common-law world as a valuable means that of eliciting the truth and thus of enabling courts to base their decisions on a sure foundation of fact. But the process of disclosure can be costly, time-consuming, oppressive and unnecessary, and neither in Northern Ireland nor in England and Wales have the general rules governing disclosure been applied to applications for judicial review. Such applications, characteristically, raise an issue of law, the facts being common ground on relevant only to show how the issue arises. So disclosure of documents has usually been regarded as unnecessary and that remains the position.
>
> [3] In the minority of judicial review applications in which the precise facts are significant, procedures exist in both jurisdictions, ... for disclosure of specific documents to be sought and ordered. Such applications are likely to increase in frequency [with the need to make decisions under the Human Rights Act] which call for a careful and accurate evaluation of the facts. But even in these cases, orders for disclosure should not be automatic. The test will be always whether, in a given case, disclosure appears to be necessary in order to resolve the matter fairly and justly."

57. Similarly, at [32] Lord Carswell, having set out the restrictive approach to disclosure previously applied in judicial review cases, said that:

> "I do consider, however, that it would now be more desirable to substitute for the rules hitherto applied a more flexible and less prescriptive principle, which judges the need for disclosure in accordance with the requirements of the particular case, taking into account the facts and circumstances. It will not arise in most applications for judicial review for they generally raise legal issues which do not call for disclosure of documents."

58. An example of a judicial review case where disclosure was required is *R(Al-Sweady) v Secretary of State for Defence (No2)* [2009] EWCA 2387 (Admin). In the Court of Appeal, Scott Baker LJ said that where there were 'hard-edged' relevant factual disputes, this represented an important exception to the rule excluding the court from substituting its own view in judicial review cases [18]. In that case examination of witnesses was necessary and that had the consequence that disclosure was necessary [21] - [22]. The approach to disclosure should thus be similar to that in an ordinary Queen's Bench claim. The court should scrutinise judicial review applications to ascertain if there was any critical factual issue which made disclosure

necessary in order to resolve the matter fairly and accurately, but courts should 'not be reluctant' to make such orders in suitable cases.

59. Mr Bedenham suggested that these appeals are cases in which there were hard-edged disputes of fact, which required disclosure and cross-examination to resolve. He drew attention to *Balbir Singh Gora v C&E Comms* [2003] EWCA Civ 525, which concerned a section 16(4) appeal in relation to the exercise of a discretion to restore or refuse to restore seized goods. Pill LJ recited HMRC's considered view of the jurisdiction of the FTT which was this:

> "[38(3)(e)] Strictly speaking, it appears that under s 16(4) of the 1994 Act, the Tribunal would be limited to considering whether there was sufficient evidence to support the Commissioners' finding of blameworthiness. However, in practice, given the power of the Tribunal to carry out a fact-finding exercise, the Tribunal could decide for itself this primary fact. The Tribunal should then go on to decide whether, in the light of its findings of fact, the decision on restoration was reasonable. The Commissioners would not challenge such an approach and would conduct a further review in accordance with the findings of the Tribunal."

and then said:

> "[39] I would accept that view of the jurisdiction of the Tribunal subject to doubting whether, its fact-finding jurisdiction having been accepted, it should be limited even on the "strictly speaking" basis mentioned at the beginning of paragraph 3(e). That difference is not, however, of practical importance."

60. Thus, Mr Bedenham submitted that, unlike most judicial review cases, appeals before the FTT were, in AWRS cases, concerned with factual findings. We accept this submission, which is supported by consideration of the FTT decision in the *Corbelli* case. In the circumstances, we do not consider that the judicial review approach provides a reason to interfere with the exercise of discretion by Judge Sinfield in the Decision under appeal.

61. HMRC also relied upon *Abdi and Gawe v Secretary of State for the Home Department* [1996] 1 WLR 298 where disclosure was sought of certain documents relating to a certificate given by the Secretary of State in an immigration asylum appeal. By a majority the House of Lords refused disclosure. Lord Lloyd said that the rules enacted by Parliament contained an express provision for only limited disclosure; an implied obligation to disclose more was inconsistent with that provision (314 A-B) There were reasons - speed and the existence of other safeguards - for this provision. Mr Hall said that this case indicates that once a balance has been struck by the rules it should not be displaced for a class of cases.

62. We did not find this decision of assistance to the issues that we have to resolve. There is no provision in the FTT Rules equivalent to that which limited disclosure in the asylum rules; the operation of the FTT rules is subject to the overriding objective and Rule 27 itself is expressed to be subject to directions to the contrary.

63. HMRC also relied upon *Serious Organised Crime Agency v Namli* [2011] EWCA Civ 495. This related to proceedings under the Proceeds of Crime Act 2002 in which standard disclosure under CPR Part 31.6 had been ordered. CPR Rule 31.6 (b)(ii) includes documents which adversely affect another party's case. SOCA, which received confidential information from many sources, some of which it did not intend to rely on, sought, successfully, to exclude documents falling within Rule 31.6(b)(ii) on which it would not rely in the proceedings.

64. In that case the Court accepted that the non-disclosure of documents adversely affecting SOCA's case and the delegation to SOCA of the duty of identifying such documents did not affect the fairness of the trial from the point of view of the defendants. Mr Hall argued that in rejecting the relevance of this case the Judge erred by approaching the matter on an all or nothing basis, and that the effect of the Judge's order is that irrelevant material will needlessly have to be disclosed; in the latter context he said that the Judge failed to take in to account HMRC's duty of candour in the appeal and the professional obligations of the Solicitor's Office.

65. We do not consider that this case established a general proposition that it is wrong to order disclosure of such documents, in circumstances where the decision making process is a key factual issue in the proceedings. Rather it establishes that it is not unfair to exclude them from disclosure if the circumstances so permit. As the Judge noted at [28] the application in *Namli* was made because SOCA did not wish to disclose materials in order to protect its confidential sources of information and HMRC has not suggested that any of the documents in issue in these appeals are or contain confidential information. Further, there was no evidence before him that there was material adverse to any Appellant's case on which HMRC would not rely, nor was there evidence that the disclosure of irrelevant material would place a greater burden on HMRC than its identification and exclusion. We reject the suggestion that the Judge failed to have regard to HMRC's duty of candour and the professional duties of those acting for HMRC, as he expressly referred to the duty of candour at [31]. Nonetheless, in all the circumstances, he decided to make the directions for disclosure.

66. It was, in our view, within the margin of discretion afforded to the Judge to make a direction which required such material to be disclosed. When such directions are made in the future, an opportunity must be provided for HMRC, as was done in the present appeals, to apply to exclude documents depending upon the facts of the case. If, in any of the present cases, the Judge's directions would require disclosure of confidential information, he has indicated at [28] the procedure that can be adopted by HMRC to deal with this.

67. Mr Hall also argued that the effect of the Judge's directions will be to act as a brake on HMRC's staff conducting comprehensive investigations because investigators will be reluctant to consider sensitive documents if they know that they will have to be disclosed (or withheld only if a complex procedure is followed). That would not be in the public interest.

68. We do not consider that the Judge's directions can be impugned on this basis. The discretion afforded by the Rules is required to be exercised with the objective of dealing with cases justly and fairly. There was no evidence before the Judge to support the adverse consequences in relation to HMRC's activities in the way suggested by Mr Hall.

Conclusion

69. In spite of the very attractive arguments of Mr Hall, we do not consider that this is a case where we should interfere with the wide margin of discretion afforded to the Judge in making case management decisions to direct disclosure. Indeed, we consider that on the information before him, the Judge was entitled to reach the decision that he did. When directions of this nature are made in AWRS cases, HMRC will have the opportunity to apply to vary or set aside such directions on a case by case basis, for example, by adducing evidence to show that such an order would be disproportionate, or would require disclosure of confidential sources. In the present appeals (and the appeals heard with them in the FTT), HMRC did not present any such material.

70. Therefore, we dismiss these appeals.

MR JUSTICE HENRY CARR
JUDGE CHARLES HELLIER

JUDGES OF THE UPPER TRIBUNAL
RELEASE DATE: 6 December 2017