[2020] UKUT 0029 (TCC)

Appeal number: UT/2019/0036
UT/2019/0037

PROCEDURE – Taxpayers' applications for closure notices – HMRC applying to FTT without notice for approval of third party information notices – FTT refusing to allow taxpayers to participate in third party notice hearings and staying closure notice applications – FTT's powers in "without notice" applications to approve information notices - whether FTT's decisions wrong in law

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

X LIMITED **Y LIMITED** **Z LIMITED** **17 INDIVIDUALS**	**Appellants**
-and-	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondent**

TRIBUNAL **JUDGE JONATHAN RICHARDS**
JUDGE THOMAS SCOTT

Sitting in public at The Royal Courts of Justice, Strand, London on 3 December 2019 and having considered further written submissions from the parties dated 29 December 2019 and 10 January 2020

Michael Firth, instructed by Independent Tax & Forensic Services LLP, for the Appellants

Julie Anderson, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondent

DECISION

1. The two appeals in this case arise in relation to competing applications of the appellants and HMRC. On the one hand, the three corporate appellants (the "Companies") applied under paragraph 33 of Schedule 18 of Finance Act 1998 ("Schedule 18") to the First-tier Tribunal (Tax Chamber) (the "FTT") for a direction requiring HMRC to close enquiries into the Companies' tax returns. On the other hand, HMRC applied to the FTT under paragraph 3 of Schedule 36 of Finance Act 2008 ("Schedule 36") for approval of "third party notices" requiring 17 individuals (the "Individuals") to provide information HMRC considered relevant to the Companies' tax position.

2. The Companies and the Individuals (together the "Taxpayers") are appealing the FTT's decision that they should have little participation in HMRC's application under Schedule 36. The Companies are appealing against the FTT's decision that their applications for closure notices should not be determined until after HMRC's application under Schedule 36.

The background to this appeal

3. Some aspects of the relevant background were contentious, with the Taxpayers making allegations of impropriety in relation to HMRC's conduct. In this section, we set out what is intended to be an uncontroversial and neutral account of the relevant background. We will address the relevance or otherwise of the Taxpayers' allegations as to HMRC's conduct later in this decision.

4. In 2014, HMRC opened enquiries into the tax positions of the Companies under the provisions of paragraph 24 of Schedule 18. Very broadly, the FTT's decisions record that HMRC were concerned that there had been significant "extractions" of cash from the Companies that were not accurately reflected in the Companies' records which could have led to the Companies' tax liabilities being understated.

5. The Companies became concerned at the conduct and progress of HMRC's enquiries. On 2 October 2017, they applied to the FTT for a closure notice (the "Closure Notice Application"). After that application was made, various interlocutory matters arose, including applications for disclosure. Eventually the Closure Notice Application was listed for oral hearing on 26 and 27 September 2018.

6. In parallel with the closure notice proceedings, HMRC were making efforts to obtain further information which they considered relevant to the Companies' tax positions. HMRC concluded that they needed certain information on the financial position of the Individuals (who included directors and shareholders of the Companies and their spouses). They wrote to the Individuals asking them to provide information voluntarily and the Individuals refused to do so.

7. HMRC set in motion the procedure for exercising their power to apply to the FTT under paragraph 3 of Schedule 36 for approval of third party notices that would require the Individuals to provide specified information and documents. HMRC accordingly

issued formal "opportunity letters" to the Individuals. Those opportunity letters explained the information and documents that HMRC wanted and also explained that HMRC would be applying to the FTT for approval of third party notices requiring the production of that information. HMRC then applied to the FTT for approval of such information notices (the "Schedule 36 Application").

8. On 8 May 2018, the Taxpayers applied (the "Adversarial Hearing Application") to the FTT for directions to be made in connection with the Schedule 36 Application. We will set out in detail the directions that were applied for later in this decision, but in broad summary, the directions sought would have given the Taxpayers the ability to attend a public hearing of the Schedule 36 Application, to be provided with a summary of HMRC's arguments in support of the application and to make submissions to the FTT as to why the Schedule 36 Application should not be approved (including by responding to HMRC's arguments).

9. The Closure Notice Application progressed in parallel. In June 2018, the Companies and HMRC agreed between themselves that 26 and 27 September 2018 would be suitable dates for its hearing. The FTT was able to list the hearing in accordance with the parties' agreed dates and sent the parties a notice of hearing on 19 July 2018. The FTT's notice of hearing was accompanied by a standard form "Guidance for Tribunal users on the Postponement of Hearings" which read, so far as material, as follows:

> Postponement applications must be communicated to the Tribunal at the first possible opportunity. They should be in writing and explain the reason for requesting the postponement. If the reason is medical a doctor's certificate should if possible be produced.
>
> All postponement applications will be considered by a Judge. The Judge will not normally agree to a postponement unless the reasons in the application are compelling, even if the other party consents.

10. On 10 August 2018, HMRC applied (the "Postponement Application") to postpone the hearing of the Closure Notice Application and for that application to be stayed pending determination of the Schedule 36 Application. On 21 August 2018, the Companies objected to HMRC's application.

11. On 22 August 2018, the Companies provided HMRC with a witness statement in support of the Closure Notice Application exhibiting documents and information running to 755 pages (of which 624 pages consisted of new material that HMRC had not seen before).

12. The FTT allowed HMRC's Postponement Application. It formalised that decision in directions released on 13 November 2018 that provided as follows:

> 10. The postponement application is GRANTED and the hearing postponed.
>
> 11. The closure notice applications are STAYED until determination of the [Schedule 36 Application].
>
> 12. Leave for any party to apply for the stay to be lifted or varied.

13. On 3 December 2018, Judge Poole determined the Adversarial Hearing Application on the papers. He dismissed that application and gave reasons.

14. The Companies now appeal to this Tribunal against the FTT's decision on the Postponement Application. Both the Companies and the Individuals appeal against the FTT's refusal of the Adversarial Hearing Application.

The FTT's decisions and the grounds of appeal against them

The decision on the Postponement Application

15. The FTT gave oral reasons on 26 September 2018 for allowing the Postponement Application. Those reasons were formally recorded in a written decision notice sent to the parties on 13 November 2018. It was common ground that this written decision simply committed to writing, in a more formal fashion, the FTT's oral decision and so we will structure our discussion by reference to the 13 November document.

16. In paragraph 2 of its decision, the FTT summarised aspects of HMRC's submissions (both written and oral) on the Postponement Application. In particular, the FTT recorded HMRC's submissions that:

> (1) they had received a large volume of additional material that they needed time to digest; and
>
> (2) a decision on the Schedule 36 Application was needed before the FTT could decide whether or not to direct HMRC to close their enquiries.

17. In paragraph 3 of its decision, the FTT summarised aspects of the Companies' opposition to the Postponement Application. In particular, the FTT recorded the Companies' arguments that:

> (1) HMRC had known about the Schedule 36 Application since April or May 2018 and had therefore made the Postponement Application (which was premised on the significance of the Schedule 36 Application) "late in the day", without any good reason.
>
> (2) The "core dispute" concerned the reliability of the Companies' business records and the FTT should first determine whether the business records were reliable.
>
> (3) There was "no priority between closure notice applications and information notice applications".
>
> (4) It would be wrong for HMRC to be able to "derail" a taxpayer's application for a closure notice by making an application under Schedule 36.
>
> (5) The information and documents which had been provided to HMRC were not as new as HMRC suggested or, to the extent they were new, that was because HMRC had unreasonably refused to listen to explanations of

their business records that the Companies had offered or provided over the years.

18. The FTT gave its decision in a section headed "Decision on postponement application". The FTT prefaced its discussion by saying at paragraph [4]:

> We do not agree with Mr Firth's contention that if the hearing is not postponed then the task of the Tribunal would be to determine the reliability of the Appellants' business records, from which a conclusion on the closure notice application would follow. If the closure notice applications were to be heard then the matter for determination by the Tribunal is that set out in para 33(3) sch 18 Finance Act 1998: whether the Tribunal is satisfied that HMRC have reasonable grounds for not giving a closure notice within a specified period.

19. The FTT decided that it would grant the postponement application on the basis of the volume of new material that the Companies had provided to HMRC. That then led to the question of when the Closure Notice Application should be relisted as to which the FTT said:

> 7. In terms of relisting there are two considerations. First, the new hearing date must allow a suitable time for HMRC to address the documents; as they have now had them for around four weeks, the further delay need not be lengthy.
>
> 8. More difficult is the timing of a resumption given the sch 36 applications that are pending. We consider that matters concerning whether those applications should be heard ex parte or inter partes is a question for the Judge allocated to those applications and we need not comment on those aspects. What we do need to address is whether the relisted closure notice applications hearing should be deferred until after the sch 36 applications are determined one way or the other. While we agree with Mr Firth that there is no necessary priority between closure notice applications and information notice applications, we consider that in the circumstances of the current cases, the outcome of the sch 36 applications would be an important factor in the Tribunal's consideration of the closure notice applications. After careful consideration we have decided that on balance it is more appropriate for the outcome of the sch 36 applications to be determined *before* the closure notice applications hearing is resumed. Therefore, we will stay the closure notice applications until resolution of the sch 36 applications.

20. The Companies appeal against the FTT's decision to stay the Closure Notice Application behind the Schedule 36 Application. While the Companies disagreed with the decision to postpone the hearing on 26 September 2018, they realistically accept that there was little point in seeking to appeal against that decision since that hearing date had been lost in any event. In summary, the Companies' grounds of appeal are as follows:

(1) The decision is inadequately reasoned.

(2) The FTT failed to apply case law on "relief from sanctions" in the light of HMRC's application being made late in the day.

(3) As a matter of principle, the Closure Notice Application should have been heard first (or, at the very least, the FTT should not have taken positive steps to ensure that the Schedule 36 Application was heard first) and therefore the FTT's decision was vitiated by an error of principle.

(4) The FTT took into account irrelevant considerations: in the circumstances of this case, the Schedule 36 Application would not have any important bearing on the outcome of the Closure Notice Application.

(5) The FTT's conclusion was "plainly wrong" and involved an error of principle since the logic of the FTT's position was that HMRC could always "derail" a closure notice application by applying for information notices.

(6) The FTT failed to consider highly relevant considerations. First, the FTT did not take into account the fact that an "indefinite stay" of the Closure Notice Application effectively defeated the very purpose for which the Companies were given a statutory right to apply for closure notices. Second, the FTT did not take into account aspects of HMRC's behaviour which cast doubt on whether HMRC would present matters fairly and accurately at the hearing of the Schedule 36 Application.

The decision on the Adversarial Hearing Application and the grounds of appeal against that decision

21. Paragraph [9] of the FTT's decision determining the Adversarial Hearing Application (reported at [2018] UKFTT 702 (TC)) sets out the directions that the Taxpayers were seeking in connection with the Schedule 36 Application. These can be summarised as follows:

(1) a direction that the hearing of the Schedule 36 Application should not be in private to the exclusion of the Taxpayers;

(2) a direction that the Taxpayers should be given advance notice of the date and time of the hearing;

(3) a direction that the Taxpayers should be given, no less than three working days before the hearing, a summary of the representations that HMRC proposed to make in support of the Schedule 36 Application together with a copy of documents supplied by HMRC to the FTT; and

(4) a direction that the Taxpayers should be permitted to make representations to the FTT in connection with the Schedule 36 Application.

The Adversarial Hearing Application dealt with two distinct, though related, matters. First, the Taxpayers were requesting that the Schedule 36 Application be determined at an *inter partes* oral hearing at which, as is normal for such hearings, they would have advance notice of HMRC's case and would have the opportunity to respond to it. Second, they were asking that the oral hearing should not be in private to the exclusion of the Taxpayers.

22. In paragraphs [13] to [26], the FTT summarised, in detail, the parties' competing arguments in connection with the Adversarial Hearing Application. At [22], the FTT

recorded that the Taxpayers accepted that they did not have a right to make representations on the Schedule 36 Application to the FTT, but that they were arguing that the FTT had power to permit them to do so (which it should exercise). At [26], the FTT recorded HMRC's counter argument to the effect that the decision of the Court of Appeal in *R (oao Derrin Brothers Properties Ltd & others) v A Judge of the First-tier Tribunal (Tax Chamber) and others* [2016] EWCA Civ ("*Derrin*") meant that the Taxpayers should not participate in the determination of the Schedule 36 Application to any greater extent than was expressly set out in Schedule 36.

23. The FTT decided not to make any of the directions which the Taxpayers were requesting. The core of its reasoning was set out in the following paragraphs of its decision:

> 27. Since the hearing of the Companies' applications for closure notices, I note that issues very similar to those involved in this application have been considered by the Tribunal (Judge Mosedale) in *Mr E and three corporate applicants v HMRC* [2018] UKFTT 590 (TC).
>
> 28. First, on the question of whether it was necessary or appropriate for there to have been an oral hearing of the Companies' and Individuals' application, I respectfully adopt the reasoning set out at [5] to [11] of the decision in *Mr E* and agree that no such hearing is necessary or appropriate in this case for essentially the same reasons.
>
> 29. Second, on the question of whether the Companies and/or the Individuals have the right to be given notice of, to attend and make representations at an oral hearing inter partes of HMRC's application under Schedule 36 (directions (a), (b) and (d) of the directions sought by Mr Firth's application, referred to at [9] above), I respectfully agree with the reasoning of Judge Mosedale in *Mr E*. For the reasons she gives, I agree with her that no such right exists. It is worth noting that in large part Mr Firth's case rested on the general "open justice" rule, which would (if it applied) require access to the hearing not just for the Companies and the Individuals, but also for any other member of the public who wished to attend. Given the nature of the matters to be considered at the hearing, this could not be right….
>
> 33. Third, on the question of whether the Companies and/or the Individuals should be given an advance summary of the representations that HMRC propose to make at the hearing of their Schedule 36 application, and copies of any documents supplied to the Tribunal (as referred to in proposed direction (c) referred to at [9] above), I consider this application to be largely parasitic on the issues considered above. The purpose of requesting such a summary and documents is to put the taxpayer and/or third party in a position to be able to focus their representations at the hearing upon the case being put forward by HMRC; if they are not entitled to make such representations, then the need for this material falls away. Mr Firth has not argued that this material should be provided in any event (i.e. whether or not in advance of an oral hearing), but any such argument would in my view be doomed to fail. If the Tribunal were to make such an order, it would effectively turn the streamlined "judicial monitoring" exercise intended by Parliament into a potentially lengthy adversarial process.

24. At the hearing before us, we raised with the parties the question whether the FTT was deciding either (i) that it had power to make the directions the Taxpayers were requesting but would not exercise that power in the circumstances or (ii) that the FTT simply lacked power to make the directions sought. The parties were agreed that the FTT concluded that it lacked any power to make the directions sought. On balance, we think the parties' analysis of the FTT's decision is correct since (i) the FTT expressed agreement with the decision in *Mr E* which was quite clearly made on the basis that the FTT lacked power to make similar directions, (ii) the FTT did not conduct the kind of detailed examination of the circumstances of the case that might have been expected if it thought it had a discretionary power to make the directions sought and (iii) the "keywords" section at the beginning of the decision (which the FTT would have drafted itself) indicated that the decision considers the "power of the FTT to make such directions".

25. Faced with a decision from the FTT in such stark terms, the battle lines between the parties were clearly drawn. The Taxpayers argue that the FTT was wrong to conclude that it lacked any power to make the directions sought. Accordingly, the Taxpayers ask us either to remit the matter back to the FTT so that the FTT could consider whether it should grant the directions sought or, alternatively, to remake the FTT's decision by making ourselves appropriate directions for the determination of the Schedule 36 Application. For their part, HMRC argue that the FTT was correct to decide that it lacked power to make the directions sought.

The appeal against the FTT's decision on the Postponement Application – Discussion

26. It was common ground that, when determining the Postponement Application, the FTT was making a case management decision. While Mr Firth characterised it as an "important" case management decision, and urged us to consider it in that light, he was right to recognise that the Upper Tribunal will normally be slow to interfere in the exercise of a case management discretion. That principle is well-known and is neatly encapsulated in the following explanation by the Supreme Court in *BPP Holdings Ltd v HM Revenue & Customs* [2017] UKSC 55 of the circumstances in which it is appropriate for an appellate court to interfere with the directions of the FTT:

> 21.…if it could be shown that irrelevant material was taken into account, relevant material was ignored (unless the appellant court was quite satisfied that the error made no difference to the decision), there had been a failure to apply the right principles, or if the decision was one which no reasonable tribunal could have reached.

27. The above principle applies where the challenge is to the exercise of a case management discretion. Separately, a failure to give adequate reasons can vitiate any decision, whether of a "case management" or substantive nature (see, for example, *Flannery and another v Halifax Estate Agencies Ltd* [2000] 1 WLR 377).

Ground 1 – insufficiency of reasons

28. Before turning to the criticisms that are made of the FTT's reasons, we remind ourselves of the rationale underpinning the requirement to give reasons. As Henry LJ said in *Flannery* (at page 381 of the report):

> It is not a useful task to attempt to make absolute rules as to the requirement for the judge to give reasons. This is because issues are so infinitely various….
>
> The duty [to give reasons] is a function of due process, and therefore of justice. Its rationale has two principal aspects. The first is that fairness surely requires that the parties especially the losing party should be left in no doubt why they have won or lost. This is especially so since without reasons the losing party will not know… whether the court has misdirected itself…. The second is that a requirement to give reasons concentrates the mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not.

29. That rationale then informs the scope of the duty. In *Flannery*, Henry LJ explained this point as follows (page 382 of the report):

> The extent of the duty, or rather the reach of what is required to fulfil it, depends on the subject matter. Where there is a straightforward factual dispute whose resolution depends simply on which witness is telling the truth about events which he claims to recall, it is likely to be enough for the judge (having, no doubt, summarised the evidence) to indicate simply that he believes X rather than Y; indeed there may be nothing else to say. But where the dispute involves something in the nature of an intellectual exchange with reasons and analysis advanced on either side, the judge must enter into the issues canvassed before him and explain why he prefers one case over the other.

30. The essence of the Companies' "reasons" criticism is that a decision to stay the hearing of the Closure Notice Application would have the effect of denying (or at very least delaying) the very remedy that closure notice applications were intended to provide: namely bringing to an end unduly protracted HMRC enquiries. Yet, despite apparently accepting that there was "no necessary priority between closure notice applications and information notice applications", which would have suggested that matters should lie where they fall and the Closure Notice Application should have proceeded, the FTT went on to impose a priority by directing a stay. In those circumstances, the Companies argue that clear reasons would be needed, yet the only apparent reason given was that the FTT determined "on balance" that the Closure Notice Application should be stayed behind the Schedule 36 Application, which was a conclusion, rather than a reason.

31. We reject that criticism. Having decided to postpone the hearing on 26 September 2018, a decision which is not challenged, the FTT had to consider when that hearing should be relisted. There were three realistic options available: (i) it could decide that the Closure Notice Application should be heard before the Schedule 36 Application; (ii) it could decide that the Schedule 36 Application should be heard before the Closure Notice Application or (iii) it could leave matters to pure chance.

32. The FTT was confronted with a sharp divergence of opinion as to the course it should take. The Companies' position (as recorded at [3(b)] of the FTT's decision) rested on the proposition that the material determination in both hearings was the same. The Closure Notice Application would deal with that issue by a "better" process (an *inter partes* hearing at which disputed facts could be found) and so should go first. HMRC's position (recorded at [2(e)]) was that the Schedule 36 Application should go first as its outcome would be highly relevant to the Closure Notice Application. The FTT cannot be criticised for formulating its reasons as a choice between these diametrically opposed positions.

33. The FTT clearly had in mind the parties' submissions as it summarised them in some detail. In particular, it understood that the Companies considered that the closure of HMRC's enquiries was "more than due" (see [3(f)] of the decision) and that HMRC were using the Schedule 36 Application to "derail" the Closure Notice Application (see [3(c)] of its decision). Nevertheless, "on balance" it preferred HMRC's arguments. We do not accept the Companies' submission that the FTT failed to give reasons. The decision as a whole demonstrates two essential conclusions underpinning its decision:

> (1) First, at [4], it rejected Mr Firth's submission that a hearing of the Closure Notice Application would require the FTT to make factual findings as to the reliability or otherwise of the Companies' business records. Rather, it saw the FTT's task as broader: namely to decide whether HMRC would have reasonable grounds for not giving a closure notice within a specific period. That conclusion necessarily meant it was rejecting Mr Firth's submission (recorded at [3(b)]) that the Closure Notice Application should go first so that there could be a determination of whether the business records were reliable.
>
> (2) Second, at [8], it concluded that the outcome of the Schedule 36 Application would be an important factor in the determination of the Closure Notice Application, thereby accepting HMRC's submission summarised at [3(e)].

34. By giving those reasons, to use the words of *Flannery*, the FTT engaged with the intellectual exchange the parties put before it. Its explanation that it had rejected one of the Companies' core arguments and had accepted one of HMRC's core arguments was adequate to explain why, in the context of an application it clearly found to be finely balanced, it had decided that the relisted Closure Notice Application should be heard after the Schedule 36 hearing.

35. We dismiss the Companies' first ground of appeal.

Ground 2 – case law on relief from sanctions

36. The essence of the Companies' criticism under this ground is that HMRC's application for a stay was late. They had known since April or May 2018 that they were making the Schedule 36 Application, but only applied for the stay in August 2018, despite the FTT stating in its "Guidance for Tribunal Users on the Postponement of Hearings" that postponement applications must be made "at the first possible

opportunity". The Companies argue that the FTT failed to have regard to the principle that HMRC were bound to provide a good explanation for their lateness and that, when no such good explanation was forthcoming, the FTT should have refused to entertain that application. In reliance on principles explained in *HMRC v Katib* [2019] UKUT 189 (TCC), the Companies submit that the FTT erred in law in this respect.

37. The difficulty with that argument is that HMRC's application for a stay did not miss any deadline specified by statute or in any of the FTT Rules. Therefore, the only basis on which it could be said to be "late" is by reference to the FTT's Guidance for Tribunal Users on the Postponement of Hearings. That guidance (sent on 19 July 2018, the same date as the Notice of Hearing) required applications for postponement to be made "at the first available opportunity". It imposes no specific deadline for stay applications although we accept that where a party applies to stay proceedings that are already listed for hearing, that is in substance an application for a postponement as well.

38. The FTT had not, therefore, imposed any specific deadline by which HMRC needed to apply for a stay. The most the Companies could say was that, in their submission, the application was not made "at the first available opportunity" and should have been made earlier. The FTT recorded, at [3(a)] of its decision, that this was the Companies' submission. However, it made no error of law in the way it dealt with that submission. In particular, it was not obliged to follow the kind of four-step evaluation set out in *Martland v HMRC* [2018] UKUT 178 (TCC) before it could properly consider HMRC's application for a stay. There was no particular time limit that HMRC were asking, or needed to ask, the FTT to extend. Moreover, in the absence of a "hard" deadline it would not even have been possible for the FTT to perform the first stage of the evaluation in *Martland* by establishing the "length of the delay".

39. In any event, by the time the FTT came to consider the question of a stay, at the hearing on 26 September 2018, circumstances had moved on from those prevailing at the time of HMRC's application of 10 August. Most fundamentally, the FTT had decided that the hearing of the Closure Notice Application had to be postponed because of the volume of additional material that Companies had, on 21 August 2018, served on HMRC. Once the FTT had agreed with HMRC that the hearing needed to be postponed because of that new material, the question of whether to stay the Closure Notice Application arose afresh because the FTT had to decide whether that hearing should be relisted before or after the Schedule 36 Application. In those circumstances, the FTT made no error of law in deciding the question of a stay in the light of those changed circumstances rather than getting bogged down in the academic question of whether HMRC's original application on 10 August was made expeditiously or not.

40. We dismiss the Companies' appeal on Ground 2.

Grounds 3, 4 and 5 and 6

41. We will take Grounds 3, 4 and 5 together since they involve different aspects of challenge to the FTT's decision that are based in large part on the same fundamental premise. The Companies' overarching argument is that the key issue the FTT would need to consider in considering the Closure Notice Application was whether the

Companies' business records were reliable. That question, they argue, would also arise in the Schedule 36 Application since, if the Companies' business records were reliable, HMRC could not reasonably require to see information on the Individuals' financial position since the business records would be sufficient. Accordingly, the Companies submit that the accuracy of the business records should first have been considered at a contested *inter partes* hearing at which findings of fact could be made as this would be preferable, and fairer, than the same point being considered at an *ex parte* hearing at which the FTT would hear only HMRC's version of events. It follows that, in the Companies' submission, the FTT made an error of principle, took into account irrelevant considerations and reached a conclusion that was "plainly wrong" in taking a course that would allow HMRC to present its arguments on what it saw as the unreliability of the business records for the first time at an *ex parte* hearing.

42. The Companies submit that their premise, that the accuracy of the business records was the key issue to be considered in the Closure Notice Application, was common ground before the FTT and rely, in this respect, on the following extract from HMRC's application for a postponement made on 10 August 2018:

> 9. In determining the closure notice applications, it will be necessary for the Tribunal to consider whether the Respondents are justified in continuing their enquiries.
>
> 10. Key in this determination will be consideration of the evidence held by the Respondents, and the evidence which the Respondents are still seeking.
>
> 11. The Respondents submit that the core dispute between the parties is the reliability and completeness of the Applicants' business records.
>
> 12. The Respondents submit that the records retained by the Applicants are not sufficient to allow a complete check of the figures returned.

43. This extract makes it clear that HMRC regarded the "core dispute" between the parties as related to the reliability and completeness of business records. We understand why they would say that. If, as the taxpayer argued, but HMRC did not accept, the business records were reliable and complete, HMRC might reasonably be expected to complete their enquiries based on the information in those records. By contrast if, as HMRC argued but the taxpayer did not accept, the business records were either unreliable or incomplete, HMRC might legitimately argue that they could not complete their enquiries until they had <u>other</u> information on the Companies' tax position. However, by saying that the reliability and completeness of the records was the "core dispute", we do not regard HMRC as saying that this was the <u>only</u> dispute. Still less were HMRC accepting that the hearing of the Closure Notice Application should turn into a "mini trial" at which the FTT would adjudicate on whether the Companies' business records were reliable and complete or not. Rather, as HMRC noted at point 9 of the quotation, the overall question was whether HMRC could show that they were justified in continuing their enquiries.

44. Nor do we consider that the FTT would be obliged to conduct a "mini trial" on the accuracy or completeness of the business records in order to determine the Closure Notice Application. Certainly, if HMRC wanted to argue that, because the business

records were unreliable or incomplete, they needed further time to complete their enquiries, they would have to provide evidence for that assertion bearing in mind their burden of proving that they were justified in continuing those enquiries. However, they would not need to prove that the business records were actually unreliable or incomplete. The FTT might legitimately conclude, depending on the facts that, if HMRC put forward a sufficiently good case that the business records might be unreliable or incomplete, they were justified in continuing their enquiries so as to enable them to obtain further information. We therefore reject a key premise of the Companies' argument.

45. We accept that the issues to be addressed in the Closure Notice Application and the Schedule 36 Application would overlap. In the Closure Notice Application, HMRC would be seeking to establish that they were justified in continuing their enquiries. No doubt, part of the justification that HMRC would advance would be the risk of the Companies' business records being inaccurate or incomplete and the corresponding need to consider information that HMRC hoped to obtain from the Individuals under Schedule 36. In the Schedule 36 Application, HMRC would be seeking to satisfy the FTT that it should approve third party information notices on the basis that the information requested was reasonably required for the purposes of checking the Companies' tax position.

46. We quite understand why the Companies wanted the Closure Notice Application to be heard first. At such a hearing, they could give their own evidence, and make submissions to the effect that HMRC had all the information they needed to complete their enquiries. By contrast, if the Schedule 36 Application was heard first then, assuming the Adversarial Hearing Application was unsuccessful, the Companies would have much less involvement in HMRC's information-gathering process. As we will discuss later in this decision, they could have made representations to HMRC which HMRC would have been bound to put before the FTT. However, they would not be able to lead evidence. Moreover, to succeed in the Schedule 36 Application, HMRC would only need to establish that information in the third party notices was "reasonably required". To defend the Closure Notice Application, HMRC would have to go further and establish positively that the FTT should not direct a closure of their enquiries within a specified timescale.

47. The Companies therefore had a good case for asking the FTT to relist the Closure Notice Application before the Schedule 36 Application was heard. However, the fact that they had a good case does not mean that the FTT was "plainly wrong" to prefer HMRC's argument. In our judgment, it was perfectly open to the FTT to conclude that it would benefit from knowing, before deciding whether to direct HMRC to close their enquiries, whether and to what extent HMRC had been successful in the Schedule 36 Application. For example, if HMRC were not successful in persuading the FTT that the information sought relating to the Individuals was "reasonably required", that might indicate that HMRC already had sufficient information which might in turn point in favour of granting the Closure Notice Application. By contrast, if the FTT approved the information notices, the FTT could decide whether to grant the Closure Notice Application with knowledge of the extent of new information that HMRC expected to obtain, or had by that stage obtained. We reject the argument that the FTT's decision

resulted in the Closure Notice Application being subjected to an "indefinite stay". The stay was not "indefinite" as it would expire once the Schedule 36 Application was determined. Moreover, if the Companies were concerned that the hearing of the Schedule 36 Application was becoming unduly protracted, the FTT's directions gave the Companies the right to apply for the stay to be lifted.

48. The Companies counter that the outcome of the Schedule 36 Application could be of no assistance in the determination of the Closure Notice Application since, as Mr Firth put it in his skeleton argument, it would (assuming the Adversarial Hearing Application was unsuccessful) be a decision on "the disputed issue [i.e. the reliability of the Companies' business records] reached without consideration of the submissions and detailed evidence of the [Companies]". We do not accept that argument. First, as we have said, neither the Schedule 36 Application nor the Closure Notice Application would require the FTT to make any decision as to whether the Companies' business records were actually reliable or complete. Moreover, as we discuss in more detail in relation to the appeal against the decision on the Adversarial Hearing Application, the Companies would have the right to air their argument, that their business records were reliable, before the FTT in the Schedule 36 Application by making representations to HMRC which HMRC would be bound to put before the FTT. It is therefore overstating matters to say that the outcome of the Schedule 36 Application would be of no assistance. It was a matter for the FTT, when exercising its discretion, to consider how much assistance it would derive from knowing the outcome of the Schedule 36 Application.

49. The Companies also argue that the FTT failed to take into account relevant considerations which would have demonstrated that it could have "little or no confidence in the completeness and accuracy of the picture to be presented by HMRC" in the hearing of the Schedule 36 Application. The Companies base this argument on:

> (1) Assertions made in the Companies' witness evidence to the effect that HMRC's Officer Robb, who was leading HMRC's enquiries, was "incapable of understanding the way the [Companies'] business records operate".
>
> (2) Assertions to the effect that Officer Robb misled them in the course of correspondence as to the status of the Schedule 36 Application.
>
> (3) Alleged inconsistencies and inaccuracies in HMRC's witness evidence served in connection with the Closure Notice Application.

50. However, these are no more than allegations. They cannot, merely by being described as "relevant considerations", be elevated into grounds for interfering with the FTT's case management decision. The Companies urge us to make findings on these issues, but that would be quite wrong in circumstances where neither Officer Robb nor the other witnesses the Companies criticise have been given the opportunity to answer the allegations made by giving witness evidence before this Tribunal. At the stage it made its case management decisions, in the absence of clear evidence of wrongdoing on HMRC's part, the FTT was entitled to treat the Companies' criticisms as the kind of allegations that are not infrequently made by taxpayers who object to continuing HMRC enquiries.

51. In his oral submissions before us, Mr Firth criticised the FTT for not leaving to "pure chance" the question whether the Closure Notice Application or the Schedule 36 Application went first. He went as far as suggesting that we should give guidance to the FTT that, in future cases of this type, the FTT should not seek to intervene and should leave matters to pure chance. We do not agree that any general guidance is appropriate. Each case has to be considered in the light of its own particular circumstances.

52. Finally, we agree with the Companies that HMRC do not have a right to "derail" any application for a closure notice simply by applying to the FTT for approval of information notices under Schedule 36. The FTT evidently also agreed, concluding that there is "no necessary priority" between closure notice applications and information notice applications. We are satisfied that the FTT was entitled to come to the view, in the circumstances of the case before it, that HMRC were not seeking to "derail" matters and that, on the contrary, the outcome of the Schedule 36 Application would be of assistance to it in determining the Closure Notice Application.

53. In conclusion, therefore, the FTT had a difficult decision to make. All possible courses of action came with their own advantages and disadvantages. It was appropriate for the FTT to reach an "on balance" conclusion having weighed matters up. We dismiss the Companies' appeals on Grounds 3 to 6.

The appeal against the FTT's decision on the Adversarial Hearing Application – Discussion

Relevant statutory provisions and the parties' arguments on them

54. Given our conclusions as to the nature of the FTT's decision (recorded at [24] above), the key issue before us is shortly stated. We must decide whether the FTT had power to make the directions the Taxpayer was requesting. Since the FTT is a creature of statute and, unlike the courts, has no inherent jurisdiction, the scope of its power can only be deduced from the relevant primary and secondary legislation. The question, therefore, is ultimately one of statutory construction. We must determine the scope of the FTT's power from relevant primary and secondary legislation. In construing the statutory provisions, we will follow normal principles of construction which will require us, among other matters, to have regard to the purpose for which the provisions were enacted.

55. The relevant primary legislation is contained in paragraphs 2 and 3 of Schedule 36 as follows:

> **2 Power to obtain information and documents from third party**
>
> (1) An officer of Revenue and Customs may by notice in writing require a person—
>
> (a) to provide information, or
>
> (b) to produce a document,

if the information or document is reasonably required by the officer for the purpose of checking the tax position of another person whose identity is known to the officer ("the taxpayer").

…

(3) In this Schedule, "third party notice" means a notice under this paragraph.

3 Approval etc of taxpayer notices and third party notices

(1) An officer of Revenue and Customs may not give a third party notice without—

(a) the agreement of the taxpayer, or

(b) the approval of the tribunal.

(2) An officer of Revenue and Customs may ask for the approval of the tribunal to the giving of any taxpayer notice or third party notice (and for the effect of obtaining such approval see paragraphs 29, 30 and 53 (appeals against notices and offence)).

(2A) An application for approval under this paragraph may be made without notice (except as required under sub-paragraph (3)).

(3) The tribunal may not approve the giving of a taxpayer notice or third party notice unless—

(a) an application for approval is made by, or with the agreement of, an authorised officer of Revenue and Customs,

(b) the tribunal is satisfied that, in the circumstances, the officer giving the notice is justified in doing so,

(c) the person to whom the notice is to be addressed has been told that the information or documents referred to in the notice are required and given a reasonable opportunity to make representations to an officer of Revenue and Customs,

(d) the tribunal has been given a summary of any representations made by that person, and

(e) in the case of a third party notice, the taxpayer has been given a summary of the reasons why an officer of Revenue and Customs requires the information and documents.

(4) Paragraphs (c) to (e) of sub-paragraph (3) do not apply to the extent that the tribunal is satisfied that taking the action specified in those paragraphs might prejudice the assessment or collection of tax.

(5) Where the tribunal approves the giving of a third party notice under this paragraph, it may also disapply the requirement to name the taxpayer in the notice if it is satisfied that the officer has reasonable grounds for believing that naming the taxpayer might seriously prejudice the assessment or collection of tax.

Relevant features of the legislation

56. Paragraph 3(2A) of Schedule 36 is merely permissive: it provides that applications for approval **may** be made without notice. We are grateful to Mr Firth for drawing to our attention that paragraph 3(2A) was enacted in Finance Act 2009 and that the explanatory notes accompanying the draft legislation in that year's Finance Bill stated that the purpose of the provision was "to make clear that applications for approval of taxpayer or third-party notices are to be heard without the taxpayer being present". We agree with Mr Firth, however, that these explanatory notes are of little assistance in deciding whether, as a matter of statutory construction, the FTT had power to grant the Adversarial Hearing Application. HMRC have not sought to argue that the explanatory notes are of any great relevance.

57. We also note that, by providing that applications "may" be made without notice, paragraph 3(2A) of Schedule 36 acknowledges the theoretical possibility that HMRC may choose to make an application on notice. Since this appeal is concerned with an application made without notice we will confine our attention to that situation. In what follows, we should not be taken as expressing any view as to the appropriate procedure should HMRC choose to make an on notice application.

58. Since paragraph 3(2A) of Schedule 36 does not determine the procedure that the FTT should follow when HMRC make a without notice application, it is necessary to determine the scope of the FTT's power from the general scheme of relevant primary and secondary legislation. It is quite clear that paragraphs 2 and 3 of Schedule 36 set out a process that is very different from the ordinary run of a contested *inter partes* hearing that is seen in civil litigation.

59. Starting with the position of taxpayers (i.e. the persons whose tax position is being "checked", namely the Companies in the circumstances of this appeal), HMRC need involve the FTT only if that taxpayer does not consent to the issue of a third party notice (see paragraph 3(1)(a) of Schedule 36). However, even where a taxpayer has not consented (so that the requirements of paragraph 3(3) of Schedule 36 become relevant), there is no express provision at all for the FTT to take into account the taxpayer's views on whether the information notice should be approved. Rather, paragraph 3(3)(e) envisages that a taxpayer's sole right is, unless the FTT disapplies it under paragraph 3(4), to obtain, from HMRC, a summary of the reasons why HMRC require the information set out in the notice.

60. Moving to the addressees of the notice, who are to be required to provide information (the Individuals in the circumstances of this appeal), paragraph 3(3)(d) provides those persons with no right to address the FTT directly, even though they could be made subject to onerous requirements to provide information and documents. HMRC are not even expressly obliged to provide the FTT with the full text of any representations such persons make: paragraph 3(3)(d) provides that a summary suffices.

61. Those features, in our judgment, point towards the conclusion that Parliament did not intend the FTT to have the power to direct that either the Companies or the Individuals should participate in an *inter partes* determination of an application for an information notice. Put simply, if Parliament had intended the FTT to have power to

allow the Companies or Individuals to be involved in the determination, it might have been expected to legislate for something more akin to a contested *inter partes* hearing rather than a scheme of judicial monitoring in which persons in the positions of the Companies and the Individuals have no express right of participation. The clear implication of the legislation is that Parliament wished HMRC's legitimate exercise of its information-gathering powers not to be unduly delayed. That concern is made manifest in paragraphs 3(4) and 3(5): the FTT has power to disapply ordinary procedural safeguards if satisfied only that those safeguards "might" prejudice (or in paragraph 3(5) seriously prejudice) the assessment or collection of tax. We acknowledge there is no suggestion that these provisions apply in the circumstances of this appeal.

62. However, there is arguably a contrary inference. Parliament would have been aware, at the time Schedule 36 was amended so as to provide for third party notices to be approved by the FTT, that the FTT had rules of procedure contained in the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 (the "FTT Rules"). Rule 5(1) provides that, subject to the provisions of the Tribunals, Courts and Enforcement Act 2007 and any other enactment, the FTT is entitled to regulate its own procedure. Against that background, Parliament did not expressly preclude the FTT from exercising its case management power so that information notices could be considered at contested *inter partes* hearings. Therefore, while the Taxpayers expressly accept that policy considerations support a "general rule of non-participation" for persons in their position, they submit that the FTT retains power to make exceptions. Moreover, they argue that this interpretation is consistent with the constitutionally significant principles of open justice and of access to justice.

63. Given the competing inferences arising from the legislation, we will proceed to consider the correct interpretation of Schedule 36, having due regard to other authorities dealing with the scheme and purpose of the legislation and the constitutional principles which Mr Firth has identified.

Authorities relevant to the scheme and purpose of the legislation

64. As we have mentioned, the FTT drew heavily on the decision in *Mr E*. *Mr E* is a decision of the FTT and therefore not binding on us and is itself under appeal to this Tribunal. For that reason, we will not analyse the reasoning in *Mr E* and, instead, will set out the process of reasoning we have followed in coming to our conclusion.

65. In *Derrin*, the Court of Appeal identified features of the statutory scheme and, importantly, commented on the statutory purpose for those features. We have drawn the following conclusions from that authority, particularly paragraphs [67] to [72] of the judgment of Etherton LJ:

> (1) In the context of third party notices, Parliament has chosen a scheme of "judicial monitoring" rather than a "system of adversarial appeals … which could take years to resolve". That judicial monitoring scheme gives the Companies ("taxpayers" for the purposes of Schedule 36) a "very limited

scope of objection" to the issue of a third party notice ([69] of *Derrin*) and, we would add, gives the Individuals no right to address the FTT directly.

(2) The requirement on HMRC to give reasons for requiring the information to the Companies (in the role of "taxpayers") is not so that the Companies can provide representations directly or indirectly to the FTT. Rather, it is to guard against arbitrary conduct on the part of HMRC and to provide context for HMRC's application to the FTT for approval of a third party notice ([71] and [72] of *Derrin*).

(3) The purpose of the statutory scheme is to assist HMRC at the investigatory stage without providing an opportunity for persons who may be involved in fraudulent or unlawful arrangements to delay or frustrate the investigation by lengthy or complex adversarial proceedings or otherwise ([67] and [68] of *Derrin*).

66. Mr Firth sought to limit the relevance of *Derrin*. We agree with him that *Derrin* is not determinative of the issue before us since the Court of Appeal was not considering the threshold question of whether the FTT had power to make directions similar to those the Taxpayers were seeking in the Adversarial Hearing Application. However, the statements in *Derrin* as to the overall scheme of the legislation and the purpose behind it clearly command respect and in our opinion are of considerable relevance to the correct construction of Schedule 36.

67. Nor do we accept Mr Firth's submission that *Derrin* is of limited relevance because the Court of Appeal was dealing with submissions from the litigants to the effect that they had an absolute right to participate in the process by which the Schedule 36 notices were approved. In the passages we have quoted, the Court of Appeal was expressing general conclusions on the purpose behind the relevant provisions of Schedule 36. Moreover, paragraph [65] of the Court of Appeal's judgment makes it clear that the litigants accepted that their rights of participation in the process were, to a degree, limited.

68. Finally, Mr Firth is correct to note that not all of HMRC's enquiries will involve persons "involved in fraudulent or unlawful arrangements". However, that does not diminish the force of the Court of Appeal's observations in *Derrin* or suggest that their analysis should not apply to taxpayers who can be shown not to be involved in such arrangements. Parliament has decided that the system of judicial monitoring should apply in every case where HMRC wish to issue a third party notice without the taxpayer's consent. That system is not limited to cases where fraud or illegality are suspected and equally the Court of Appeal's comments are not so limited. In any event, as the Court of Appeal has stressed, the purpose of the statutory scheme is to apply at the investigatory stage. In many cases, HMRC will not know until they have made some progress in their investigations whether fraud or illegality are suspected.

69. In our judgment, the Court of Appeal's articulation of the statutory scheme and its purpose in *Derrin* points firmly in favour of the FTT having no power to direct that the Schedule 36 Application be determined at an *inter partes* oral hearing because that would give rise to precisely the risk of delay to, or obstruction of, HMRC's investigations that the legislation seeks to avoid.

70. The judgment of the Court of Appeal in *R (Morgan Grenfell Ltd) v Special Commissioner of Income Tax and another* [2001] EWCA Civ 329[1] is also important. That case concerned predecessor legislation in what was then s20(3) and s20(7) of the Taxes Management Act 1970 ("TMA 1970") which provided, so far as material, as follows:

> **20 Power to call for documents of taxpayer and others**
>
> …(3) Subject to this section, an inspector may, for the purposes of inquiring into the tax liability of any person ('the taxpayer'), by notice in writing require any other person to deliver to the inspector… such documents as are in his possession or power and as (in the inspector's reasonable opinion) contain, or may contain, information relevant to any tax liability to which the taxpayer is or may be, or may have been, subject…
>
> (7) Notices under subsection (3) above are not to be given by an inspector unless he is authorised by the Board for its purposes; and (a) a notice is not be given by him except with the consent of a general or special commissioner; and (b) the commissioner is to give his consent only on being satisfied that in all the circumstances the inspector is justified in proceeding under this section.

71. In *Morgan Grenfell*, the special commissioner was prepared to consider written representations from the taxpayer as to whether a notice should be issued under s20(3) but refused to allow the taxpayer to make oral submissions (see [49] of *Morgan Grenfell*). Blackburne J gave judgment on behalf of the whole court deciding that the special commissioner's approach was correct. The crucial passage of the court's reasoning is at [50] of the reported judgment:

> 50. It has to be remembered that a right to be heard is axiomatically worth little without knowledge of the case that has to be met. Either, therefore, the inspector's hand has in some measure to be shown, or the taxpayer must be content to make submissions in the dark. The former, it is plain, is destructive of the whole purpose of the procedure; the latter, while some taxpayers may consider it better than nothing, will create a sustained pressure for disclosure. There are only two logical outcomes if these two imperatives clash in a face-to-face hearing: one is that the taxpayer will duly learn nothing, in which case it is not easy to see what will have been achieved on his behalf that could not have been achieved in writing; the other is that the Special Commissioner's opportunity (in Mr Beloff's happy phrase) to "enjoy the benefit of advocacy" will lead to accidental disclosure by him or (more probably) the inspector of material to which Mr Beloff does not contend that the taxpayer is entitled and the disclosure of which at this stage will run counter to Parliament's purpose. That purpose, we apprehend, is in lieu of any inter partes procedure to instal the General or Special Commissioner as monitor of the exercise of the Inland Revenue's intrusive powers and to require an

[1] The House of Lords subsequently reversed the decision of the Court of Appeal on other grounds. However, their conclusions on the existence or otherwise of a "right to be heard" in connection with third party notices was not doubted and so remains authoritative.

> inspector to put everything known to him, favourable and unfavourable, before the Commissioner when seeking his consent (*R v IRC, ex parte T.C.Coombs & Co* [1991] 2 AC 283). We accept Mr Brennan's contention, therefore, that the possibility of an oral hearing is excluded by the nature of the process in question. We do not accept his further ground that to establish a discretion to hold a hearing is to invite judicial review of every decision not to do so and of every failure to extract information from the inspector or to obtain reasons from the Commissioner. It is not legitimate, as Lord Bridge said in *Leech v Deputy Governor of Parkhurst Prison* [1988] AC 533, 566, to draw jurisdictional lines on a purely defensive basis. If the power exists, the possibility of judicial review comes with it. But, for the reasons we have given, we are satisfied that the Special Commissioner was right to conclude that he possessed no such power.

72. Mr Firth rightly points out that *Morgan Grenfell* is concerned with predecessor legislation. However, s20(3) and s20(7) of TMA 1970 as then in force are clearly of very similar effect to paragraphs 2 and 3 of Schedule 36. In particular, s20(3) and s20(7) set out a similar scheme of "judicial monitoring" to that contained in paragraphs 2 and 3 of Schedule 36. Even if not formally binding, the Court of Appeal's conclusion that "the possibility of an oral hearing is excluded by the nature of the process in question" in the context of s20(3) and s20(7) should clearly command respect in the context of analogous questions on the construction of Schedule 36. Nor, for reasons that we will come to, do we accept a related argument that Mr Firth put forward, namely that case law on the interpretation of s20(3) and s20(7) of TMA 1970 sheds little light on the interpretation of Schedule 36 since Schedule 36 sets out a regime for approval by the FTT (as opposed to the Special Commissioners) and Parliament would have envisaged that the FTT could use its comprehensive case management powers to direct an *inter partes* hearing in appropriate cases.

73. Nor do we accept Mr Firth's submission that *Morgan Grenfell* is of limited relevance since it is dealing only with the narrow question of whether there could be an oral hearing. The reasoning in *Morgan Grenfell* is instructive because it indicates that the special commissioner had no power to require HMRC to become involved in a process which might, as part of the to and fro of submissions and responses, require HMRC to disclose more of their hand than the statutory scheme required or envisaged. That reasoning does not just resonate in the context of oral hearings: a process whereby the Taxpayers obtain advance sight of HMRC's submissions and have the right to comment on those submissions, with HMRC having a (written) right of reply, would run into precisely the difficulties identified in *Morgan Grenfell*. Indeed, in the Adversarial Hearing Application, the Taxpayers were seeking precisely the kind of involvement in the process that the Court of Appeal decided was excluded by the nature of the (analogous) process in s20(3) and s20(7) of TMA 1970.

74. We note that, in *R (on the application of Jimenez) v The First Tier Tribunal (Tax Chamber) and HMRC* [2017] EWHC 2585 (Admin), Charles J suggested that "it is at least arguable" that the FTT has power to make such directions. However, in his decision, Charles J acknowledged that this issue was not before the Court (since permission to appeal on that issue had been refused) and no submissions had been

advanced on it. Mr Firth placed little reliance on *Jimenez* in his submissions. Therefore, while we acknowledge that the point may be arguable, we consider that both *Morgan Grenfell* and *Derrin* strongly support the conclusion that the FTT had no power to grant the Adversarial Hearing Application and we will move to considering other arguments the Taxpayers advance in support of the FTT having such power.

Other considerations

75. Mr Firth argues that the courts have already decided that there is an exception to what might otherwise appear to be an absolute exclusion of the Taxpayers' rights to make representations to the FTT in connection with approval of a third party notice. Since some exceptions already exist, he argues that other exceptions are possible.

76. Mr Firth relied on *R v IRC ex p TC Coombs & Company* [1991] 2 AC 283. That decision, like *Morgan Grenfell*, was concerned with the predecessor legislation set out in s20(3) and s20(7) of TMA 1970. In that context, the House of Lords made some comments on the then Inland Revenue's duty to draw relevant correspondence to the attention of a special commissioner when seeking approval of a third party notice. For example, Lord Lowry said at page 305 of the report:

> I take the opportunity of stating my clear view that, when seeking a commissioner's consent under section 20(7), the revenue are absolutely bound to make full disclosure to the commissioner of all facts within their knowledge which could properly influence the commissioner against giving his consent to a section 20(3) notice. I do not by any means wish to imply that the revenue have heretofore proceeded on any other basis, but it may be worth emphasising that failure to make full disclosure will, if it comes to light, almost inevitably vitiate the consent and nullify the notice given pursuant thereto.

77. That and similar statements, Mr Firth submitted, had led to a practice under which, when applying to the FTT for approval of a third party notice, HMRC place before the FTT any correspondence they have received from the taxpayer articulating reasons why such a notice should not be given despite the taxpayer having no such right under Schedule 36. If some judge-made extensions to the rights expressly provided by Schedule 36 are possible, Mr Firth invited us to consider the possibility of other exceptions applying if, for example, there appears to be a real risk that HMRC might mislead the FTT when applying for a third party notice.

78. We do not, however, consider that the House of Lords' decision in *Coombs* provides any judge-made exception to the statutory scheme. Rather, the House of Lords was simply emphasising that any person applying for an order or direction *ex parte* inevitably has a duty to make full and frank disclosure. If HMRC, having given a taxpayer reasons why they are seeking information and documents (as required by paragraph 3(3)(e) of Schedule 36), receive representations from that taxpayer to the effect that the information is not reasonably required, we can quite see why HMRC would feel that their duty of full and frank disclosure required them to place those representations before the FTT. However, that is not the same as saying that *Coombs*

confers on taxpayers a right to make representations that is not present in the statutory provisions.

79. Mr Firth also observed that the passage from *Coombs* we have quoted makes it clear that, if HMRC obtain approval of a third party notice without making full disclosure, the third party notice is liable to be nullified. In those circumstances, he asked what possible objection there could be to the FTT making directions, if it is satisfied that there is a significant risk that HMRC will mislead it, requiring the third party notice to be approved at an *inter partes* hearing. Put another way, Mr Firth argued that, having legislated for a judicial monitoring scheme, Parliament must have intended that scheme to be effective so that the FTT could forestall any problems (and possible judicial review claims) by directing an *inter partes* process if it perceived a risk that it might be misled. However, that submission misses the point. The question is not what logical objection could be made, but whether the FTT has the requisite power. Moreover, there is always the risk that the judicial monitoring scheme might fail in particular cases. The presence of that risk does not compel the conclusion that Parliament intended the FTT to have power to substitute a different process from that provided for in the legislation. Rather, it is entirely consistent with the legislation for occasional failures of the process to be dealt with by judicial review.

80. Mr Firth submitted that there were other more proportionate means than an absolute bar on dealing with third party notices on an *inter partes* basis of dealing with HMRC's concerns about being required to show too much of their hand during an investigation. In his skeleton argument he suggested that the FTT could direct a "two-stage process". The first stage could be an *inter partes* process that deals with submissions and evidence dealing with the reliability or otherwise of the Companies' business records. The second stage could involve HMRC making *ex parte* submissions covering any confidential matters that HMRC did not wish to mention at the first stage. However, we reject that submission. Whether or not the alternative process is more proportionate (as to which we express no view), the point is that it involves precisely the kind of *inter partes* process and consequent risk of frustration to, and delay of, HMRC's enquiries that we consider to be excluded following the approach of *Derrin* and *Morgan Grenfell*.

81. In a related submission, Mr Firth relied on the constitutional right of unimpeded access to the courts as considered in *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51. He accepted that it was open to Parliament to exclude, or limit, that right in particular cases but submitted that the courts should construe statutory provisions critically so that, in appropriate cases, nothing less than express words should be regarded as sufficient to take away a right of access. We consider, however, this principle to be of little relevance to this appeal. In paragraphs 2 and 3 of Schedule 36, Parliament is not purporting to take away, or restrict, any right of access to the courts. Rather, Schedule 36 permits HMRC to take certain steps in connection with an investigation into a taxpayer's liability with the approval of the FTT as part of a judicial monitoring scheme rather than a full *inter partes* procedure. A right of access to the courts is not restricted, it is simply never granted and paragraph 3(2A) of Schedule 36 emphasises that HMRC are entitled to apply to the FTT for approval on an information notice on an *ex parte* basis. Moreover, taxpayers retain full access to the courts and tribunals if, once HMRC complete their enquiries, they make an assessment

which a taxpayer wishes to challenge. Schedule 36 neither engages, nor infringes, the constitutional right referred to in the UNISON case. Indeed, if it did, the conclusions that the Court of Appeal expressed in *Derrin* and *Morgan Grenfell* would not have been available.

Conclusion and disposition

82. We have carefully considered the Taxpayers' arguments. We recognise the force of Mr Firth's argument that Schedule 36 does not expressly deny the FTT power to make the Adversarial Hearing Directions. In those circumstances, we quite understand Mr Firth's submission that we should be wary of saying that in no circumstances does the FTT have that power as that necessarily excludes the possibility of exceptions even in deserving cases.

83. However, given the statutory provisions that Parliament has enacted and commentary from courts senior to this on those provisions, we have reached the clear conclusion that the FTT simply lacked any power to grant the Taxpayers' request that they be permitted to participate in an *inter partes* determination of the Schedule 36 Application. We accept that Parliament would have been aware of the FTT's case management powers when amending Schedule 36 to provide that applications for approval of third party notices should be made to the FTT. We also acknowledge that that Schedule 36 does not expressly set out a procedure that the FTT is obliged to follow when considering an application for approval of an information notice. There is, therefore, room for an argument that Parliament intended to leave matters of procedure to the FTT so that it retained the power to direct an *inter partes* hearing. However, we have come to the clear conclusion that, by necessary implication, the scheme of the legislation in Schedule 36 excludes the possibility of information notices being approved following an *inter partes* hearing. Since the FTT's case management powers could only apply in the context of directions that the FTT was authorised to give we do not consider that the existence of those case management powers supports the construction of Schedule 36 that the Taxpayers advance.

84. The Taxpayers have referred to what they regard as misconduct and impropriety on HMRC's part, arguing that, in the face of such actions, it was appropriate for the FTT to direct that the Schedule 36 Application be determined at an *inter partes* hearing. Since we have decided that the FTT did not have power to grant that application in any event, it is not necessary for us to reach any conclusion as to whether the Taxpayers' allegations are made out, and we will not do so.

85. It follows that the FTT was correct to conclude that the Schedule 36 Application could only be determined on an *ex parte* basis and that aspect of the Taxpayers' appeals is dismissed. During the hearing before us, the parties did not address as a separate question whether the FTT had jurisdiction to make a direction that the *ex parte* determination should be made at a public hearing. Nevertheless, it seemed to us that it did not inexorably follow from any conclusion that the FTT lacks jurisdiction to order an *inter partes* determination of a without notice application for approval under Schedule 36 that it must also lack jurisdiction to direct that any *ex parte* hearing could be in public. We therefore asked the parties for further written submissions on this

separate question, which we duly received and of which we have taken account in reaching our conclusion.

86. We see the force of HMRC's argument that the risks and factors which led the courts in *Derrin* and *Morgan Grenfell* to conclude that there was no power to order an *inter partes* procedure would tend to support the conclusion that the FTT similarly lacked power to order a public hearing. However, the well-established principle of open justice has the effect that one should not lightly assume that the FTT could **never** direct an *ex parte* hearing to be held in public. Nor do we consider that *Derrin* or *Morgan Grenfell* mandates such a conclusion. We therefore conclude that there is no absolute bar to the FTT directing that an *ex parte* hearing be heard in public. It follows that, in concluding that it did not even have the limited power to direct an *ex parte* hearing to be heard in public, the FTT made an error of law.

87. In saying that the FTT has power to direct that an *ex parte* hearing should be in public, we are by no means saying that power should be exercised routinely or even at all. We are aware that the FTT's normal practice is to direct that such hearings be held in private and we would regard that as justified unless a compelling reason is shown why the hearing should be in public. In practice, taking into account the aspects of Schedule 36 and surrounding case-law we have identified, we anticipate that it would be rare for a direction that the *ex parte* hearing should be in private to fall outside the FTT's generous ambit of discretion in the exercise of its case management powers.

88. In view of our conclusion that the FTT erred in finding that it lacked jurisdiction to make the requested direction that the hearing be in public, we set the FTT's decision aside on that point and remake it. In remaking it, we have noted that HMRC clearly do not consent to the Schedule 36 Application being heard in public. Ms Anderson's submissions at the hearing made it clear that HMRC's concern was a general one: if the hearing were held in public, the natural dialogue between them and the judge considering the application could well result in HMRC having to reveal details of their investigation that they would prefer the Taxpayers not to know. That concern was necessarily explained in general terms but that does not deprive it of force: indeed it was precisely the concern that the Court of Appeal accorded considerable weight in *Morgan Grenfell*. We understand Mr Firth's competing submission that a public hearing could serve to reassure the public that the FTT considers applications under Schedule 36 with rigour and that they are not just rubber stamping exercises. However, we consider that in this case HMRC's concerns should be given more weight. The allegations that are made about HMRC's behaviour do not, in our view, indicate a different approach: whatever the taxpayers' frustrations with HMRC, we see little risk that HMRC would mislead the FTT at a hearing of the Schedule 36 Application. Our conclusion is only reinforced by the fact that the Taxpayers will, ultimately, have a full right to a hearing in public against any decisions that HMRC make on completion of their enquiries. We therefore remake the FTT's decision so as to lead to the same overall result: the Schedule 36 Application is to be heard in private.

JUDGE JONATHAN RICHARDS
JUDGE THOMAS SCOTT

RELEASE DATE: 30 January 2020