UT Neutral citation number: **[2022] UKUT 00254 (TCC)**

UT (Tax & Chancery) Case Numbers: **UT/2021/000135 & 136**

Upper Tribunal

(Tax and Chancery Chamber)

Hearing venue: **The Royal Courts of Justice,**

Strand, London WC2

Hearing date: **13 June 2022**

Decision Date: **21 September 2022**

Before:

JUDGE ASHLEY GREENBANK

JUDGE RUPERT JONES

Between:

PAUL ELLIS (1)

NORTH YORKSHIRE PROPERTIES LIMITED (2)

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S

REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Michael Firth, Counsel, instructed by Reynolds Porter Chamberlain LLP

For the Respondents: Howard Watkinson and Marika Lemos, Counsel, instructed by the General Counsel and Solicitor for His Majesty's Revenue and Customs

DECISION

Introduction

1. The Appellants appeal against a direction made by the First Tier Tribunal ("FTT") in a written decision dated 13 April 2021 (the "FTT Decision") following a case management hearing which took place by video on 13 October 2020.

2. HMRC made an application on 2 June 2020 for the Appellants to disclose a wide range of material to HMRC in relation to ongoing substantive appeals, the details of which are set out below. The FTT granted the application and made a disclosure direction, the precise terms of which are set out below but were summarised at [4] of the FTT Decision. The direction required the Appellants to disclose material to HMRC including:

> (1) hard copy and electronic documents held by the Appellants relating to the day-to-day operations, management, financial and tax affairs of six relevant companies;
>
> (2) documents held by the Appellants relating to the personal affairs of Mr Darren Broadbent, a business associate of the first Appellant, Mr Paul Ellis; and
>
> (3) correspondence, held by the Appellants, between any of Mr Ellis, Mr Broadbent and a firm called Craggs & Co. which represented both of them, in respect of an investigation by HMRC under HMRC Code of Practice 9 ("COP 9").

3. The Appellants, with the permission of the FTT judge, appeal to the Upper Tribunal against the FTT's disclosure direction. The Appellants submit that the FTT erred in law in making the direction in three ways.

> (1) The FTT erred by admitting and relying on a letter from a liquidator of one of the companies, RSM Restructuring Advisory LLP ("RSM"), which was produced on the evening before the hearing (12 October 2020) which stated that the liquidator had not given copies of material to HMRC. This letter was relied upon by HMRC to counter the Appellants' argument that HMRC were already in possession of the material they sought through disclosure.
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> (2) The FTT erred in failing to address and take into account whether HMRC had been aware since January 2018 of the existence of the documents and material held by Mr Ellis in relation to which they sought disclosure.
>
> (3) The FTT erred in granting the disproportionately wide and unfocussed disclosure application.

4. We are grateful to all counsel for their written and oral submissions: Mr Watkinson leading Ms Lemos for HMRC, and Mr Firth for the Appellants.

The background - the substantive appeals

5. The substantive appeals before the FTT challenge various decisions of HMRC. The proceedings concern both direct and indirect taxes and arise out of the operation by Mr Ellis, and Mr Broadbent, of a group of property development companies, referred to as the "Skelwith" companies, over a period of several years. Within the substantive appeals, some £18 million in tax and penalties is at stake. On any view, this is high-value and complex litigation.

6. The various appeals arise from a verification by HMRC of the VAT return of Skelwith (Leisure) Limited ("SLL") for the 05/14 period, which led HMRC to allege that the Skelwith companies had been making false claims to input tax repayments on a large scale. On 23 July 2014, an HMRC officer visited SLL in relation to that verification, only to be told that all of SLL's business records had been destroyed. This event led to a COP 9 investigation into the affairs of Mr Ellis and Mr Broadbent.

7. Brief details of the relevant appeals are set out below:

   i) TC/2016/05431 and TC/2017/00427 – appeals by Mr Ellis against personal liability notices ("PLNs") served on him in respect of alleged deliberate VAT inaccuracies relating to the affairs of three Skelwith companies of which he and Mr Broadbent were directors (the "VAT PLN appeals").

   ii) TC/2017/01924 – an appeal by the second Appellant, North Yorkshire Properties Limited ("NYPL"), which was formerly known as Skelwith Properties Ltd, in respect of PAYE income tax and national insurance contributions ("NICs") on alleged extractions of value by Mr Ellis from NYPL (the "PAYE and NICs appeal").

   iii) TC/2018/02515 – an appeal by Mr Ellis in respect of assessments, closure notices and decisions in respect of income tax and NICs on alleged extractions of value by him from Skelwith companies of which he and Mr Broadbent were directors (the "employment income appeal").

8. The appeals have been joined to be case managed and heard together.

9. In relation to the VAT PLN appeals, Mr Ellis appeals against PLNs totalling £15.3m notified to him as director of three companies: SLL, Skelwith Leisure (Raithwaite) Ltd ("SLRL"), and Skelwith Leisure (Raithwaite Cottages) Ltd ("SLRCL") under Paragraph 19(1) of Schedule 24 to the Finance Act 2007. The PLNs made Mr Ellis liable for 50% of various penalties issued to those companies for rendering VAT returns that HMRC allege contained deliberate and concealed inaccuracies. HMRC also notified Mr Ellis's co-director, Mr Broadbent, of PLNs making him liable for the other 50% of the penalties. Mr Broadbent did not appeal against the PLNs.

10. The issues likely to be decided by the FTT on the VAT PLN appeals are, in summary:

   i) Were SLL, SLRL and SLRCL's VAT returns inaccurate and did such inaccuracies amount to, or lead to, a false or inflated claim to repayment of tax?

   ii) Were such inaccuracies deliberate and concealed?

iii) Were the deliberate and concealed inaccuracies attributable to Mr Ellis as a director of the companies?

iv) Were the penalty amounts as attributed to Mr Ellis correct?

11. The burden of proof will be on HMRC in the VAT PLN appeals to establish that there was an inaccuracy leading to a potential loss of revenue, that this was brought about by the deliberate and concealed action of the three companies, and that the deliberate action was attributable to Mr Ellis as a director of them.

12. In the PAYE and NICs appeal, NYPL appeals against determinations in respect of PAYE income tax under-deducted for the period from 6 April 2011 to 5 April 2015 and decisions in respect of NICs arising in the same period in respect of income received by Mr Ellis and Mr Broadbent.

13. In the employment income appeal, Mr Ellis appeals against various directions, discovery assessments, closure notices and decisions arising from what HMRC say is employment income that he received from the six companies over the four tax years 2011/12 – 2014/15 that was not treated as such for PAYE and NICs purposes. The PAYE in issue is £1,680,710 and the Class 1 NICs at stake total £110,570.02.

14. In both the PAYE and NICs appeal and the employment income appeal, the positions of NYPL and Mr Ellis are that the sums consequent upon which the income tax and NICs are said to be due, are "loans", so no income tax, PAYE income tax or NICs are due. That issue remains to be decided by the FTT.

Procedural history in the substantive appeals

15. It will assist our explanation if we set out some of the procedural history of these appeals. This information is either recorded in the FTT Decision or was before the FTT at the hearing of the application.

16. HMRC issued an information notice under Schedule 36 Finance Act 2008 to Mr Ellis on 17 October 2016 requiring him to provide (amongst other things) all business and accounting records, including, but not limited to, all business correspondence relating to SLL and SLRCL. On 4 November 2016, HMRC issued a further information notice requiring similar information in relation to SLRL. Mr Ellis provided some material in response to those notices.

17. In a letter dated 16 January 2018, and in advance of filing an amended notice of appeal in relation to the VAT PLN appeals, Mr Ellis's then adviser, Mr Tom Roseff of Armstrong Watson LLP, wrote to HMRC to "update [them] on the key findings we have identified to date in the course of our work collating evidence to support Mr Ellis' position (the intention being to ensure that [they] have access to the information we would seek to present at the Tribunal)". In that letter, he states:

> "Subsequent to our engagement we have reviewed the available information to which Mr Ellis has access. This predominantly comprises extracts from the company's financial records and copies of email correspondence extracted from back-up versions of company hard drives (we understand that these hard drives were seized by the administrators appointed by HMRC such that you have access to these records, albeit may not have undertaken a detailed review)."

18. On 31 January 2018, Mr Roseff submitted an amended notice of appeal to the FTT which included revised grounds of appeal on behalf of Mr Ellis. The amended notice contains the following statement (at paragraph 10):

> "10. The administrators of the Skelwith companies seized the companies' books and records following their appointment. Mr Ellis has not had access to these records subsequent to this date."

19. On 20 June 2019, at HMRC's request, the FTT set down directions for the substantive appeals to be heard on 11 May 2020. The FTT was persuaded to set a fixed date for the hearing before the exchange of evidence to enable the lead HMRC officer, Mr Reilly, to give his evidence in the appeals before he was to be made redundant. Those directions included the following:

> "The parties should note that, very exceptionally, the Tribunal agreed to fix the date of the hearing before the evidence was exchanged. Therefore, the parties and their witnesses are expected to keep the three weeks commencing on 11 May 2020 free of all other commitments. Applications for postponement of the hearing on the grounds that the hearing date is inconvenient are unlikely to be allowed. Applications for extensions of time to comply with these directions are also unlikely to be allowed as extensions might mean the appeal is not ready for hearing by 11 May 2020."

20. The FTT also made a direction to dispense with the requirement under Rule 27 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Rules") for the parties to serve lists of documents that they relied upon in support of their respective cases. This was on the basis that these documents would be exhibited to the parties' witness statements.

21. HMRC were directed to provide their evidence by 27 September 2019. In the event, they sought and were granted two extensions for two weeks. The original date for the Appellants' evidence was 29 November 2019, but in a case management hearing on 17 January 2020, the FTT granted the Appellants an extension for serving their witness evidence to 7 February 2020.

22. The Appellants' evidence, including the witness statements of Mr Ellis and, a colleague, Mr Martin Chambers, was sent to HMRC by 7 February 2020. The two witness statements included references to material which had not been provided to HMRC in response to the information notices. In particular, Mr Ellis's statement refers to Mr Ellis and Mr Chambers undertaking a "large-scale interrogation" of information available to them, including "old emails" and "documents that had been left in the old office… including Darren's divorce paperwork" (FTT Decision [12]). Mr Chambers's statement confirms that he had access to, but had only partially exhibited, emails from Mr Broadbent's email account (FTT Decision [13]).

23. The FTT recorded further evidence that was given by Mr Ellis at the hearing regarding access to a portable computer hard drive (FTT Decision [14]-[15]):

> 14. Mr Ellis's evidence before me is that his colleague, Mr Chambers, has a portable hard drive ("the Hard Drive"). The Hard Drive contains copies of files that were on Darren Broadbent's computer which was located at 4 Tudor Court, being the offices of SLL and SLRCL. In 2015 Mr Chambers "took a dump off" Mr Broadbent's computer, and had copied onto the Hard Drive all the files that he could. Mr Ellis says that the Hard Drive contains an "image" of Mr Broadbent's computer, and that the emails and related documents exhibited to his witness statement in the main proceedings were contained on the Hard Drive.

15. Mr Ellis's evidence before me is that he has had access to the Hard Drive since 2015, but he did not look at it until mid-2017. He only looked at it following advice that he had received from Armstrong Watson LLP to undertake a further review of all documents to which he had access. When he spoke to Mr Chambers about Armstrong Watson LLP's advice, Mr Chambers suggested that he should review the files on the Hard Drive. Mr Ellis's evidence was that when he was served with Schedule 36 Notices in 2016, he was not aware that the Hard Drive might contain relevant information, and so did not look for the Hard Drive when responding to those notices.

HMRC's application for disclosure

24. On 10 March 2020, HMRC wrote to the Appellants asking them voluntarily to provide copies of documents falling within a widely drafted request. Essentially, HMRC asked for copies of all emails and electronic communications in some way related to the Skelwith companies as well as all documents related to Mr Ellis's and Mr Broadbent's personal expenditure and affairs.

25. The justification for this request, as set out in the correspondence, was that HMRC were not previously aware that the Appellants had access to such documents and HMRC had not been given access to them. HMRC stated in their letter of 10 March 2020:

> "It is clear from the Appellants' evidence that Mr Ellis has access to a large reservoir of documents and electronic material that are relevant to the matters in issue in this appeal, from which various elements have been cherry picked, with the remainder not being hitherto disclosed by the Appellants.
> …
> "[3] In providing the evidence that they have provided, the Appellants have demonstrated that they are in possession of a large volume of documentation (including electronic records) relating to the issues in dispute and which have not been disclosed to the Respondents.
> …
> [6]…The totality of Messrs. Ellis and Broadbent's emails relating to the business of the companies has not been disclosed. This material is plainly relevant to the matters in issue in this appeal."

26. At the same time, HMRC informed the Appellants that HMRC were of the view that the hearing of the substantive appeals in May 2020 would have to be vacated. HMRC submitted an adjournment application on 13 March 2020.

27. On 14 May 2020, the Appellants' representatives, Reynolds Porter Chamberlain LLP ("RPC"), replied suggesting that HMRC had been aware of the existence of the documents sought since at least 16 January 2018, stating:

> "On 16 January 2018, Tom Roseff of Armstrong Watson (on behalf of the Appellants) liaised with Mr Reilly [of HMRC] and informed him of the existence of relevant email correspondence which tended to support the Appellants' position. That letter is attached. You have known about the presence of this information for over two years and have had access to it."

28. In their letter of 14 May 2020, RPC also asked HMRC to confirm whether they had access to the hard drives taken by the liquidators:

> "Please explain whether you continue to have access to the companies' hard drives taken by the liquidators and if not, why not. This is the same source as is currently available to Mr Ellis. We will then respond substantively to your specific requests."

29. HMRC did not respond to this point but submitted an application for disclosure to the FTT on 2 June 2020. In that application, HMRC repeated their position that they had not had access

to the documents they sought and had been unaware of their existence until the Appellants' witness evidence was submitted. Relevant paragraphs from HMRC's application are set out below:

> "27. It is clear from the Appellants' evidence that Mr Ellis has access to a large reservoir of documents and electronic material that are relevant to the above main matter in issue in this appeal (whether the deliberate and concealed inaccuracies were attributable to Mr Ellis), from which various elements have been cherry picked, with the remainder not being hitherto disclosed by the Appellants."
>
> "33. Despite these reviews, Mr Ellis has not disclosed either the entirety of his email accounts, or the entirety of the relevant documentation in his possession, such that a proper assessment can be made of what they show in relation to issue (i)."
>
> "45. Secondly, as to the timing of disclosure, this is the first time in the course of the proceedings that Mr Ellis has disclosed that he has access to the significant reservoir of documents and electronic material that he plainly has access to."
>
> "There is nothing unusual in requesting the disclosure of material after the service of witness evidence that reveals the existence of that material."

30. In their response to HMRC's disclosure application, the Appellants requested that HMRC address the question as to whether HMRC had access to information from the liquidators. Their response included the following paragraph:

> "12. The Appellants asked the Respondents on 14 May 2020 whether they continue to have access to the records obtained from the liquidators (which the Appellants understand include the copies of four computer hard disks and the phones of all employees present at the time the offices were visited in June 2015, as well as paper documents) – see attachment. No response has ever been provided. The Appellants now request that the Respondents address this point in a witness statement supporting their application. This should set out the full information which the Respondents have had and have access to."

31. HMRC did not submit any witness evidence disagreeing with the Appellants' assertion (or indeed, any witness evidence at all) regarding whether they already had access to the evidence sought by way of disclosure.

32. However, in his skeleton argument dated 6 October 2020 for the case management hearing, which was listed for 13 October 2020, Mr Watkinson, counsel for HMRC, submitted:

> "60. As to the complaint that the Respondents actually have the material sought in their possession; they do not. The Appellants assert that the Respondents *"have a copy of the hard disk of a number of Skelwith computers"*. They do not.
>
> 61. Plainly if the Respondents held this material then they would not be asking for it. The relevant Liquidators have not made any electronic material covered by the draft order available to HMRC."

33. In his skeleton argument, dated 8 October 2020, Mr Firth, counsel for the Appellants, objected to the application on four main grounds:

> (1) that HMRC had had access to the documents of which they sought disclosure since June 2015;
>
> (2) that HMRC had been aware that the Appellants had access to a back-up of email correspondence since January 2018 but waited until two months before the trial was due to begin to request disclosure and there was no good reason for that delay;

(3) that HMRC's application was an abuse of process and pursued for an illegitimate reason; and

(4) that granting HMRC's application would be disproportionate and contrary to the overriding objective.

In particular, Mr Firth invited the FTT to draw an adverse inference from HMRC's failure to address the issue as to whether HMRC already had access to the material requested in the application for disclosure and asserted that HMRC's failure to address the issue was "a manifest and egregious breach" of its duty of candour.

34. On 12 October 2020 (the day before the hearing, on 13 October), HMRC sent an email to the FTT, copying the Appellants, at 18:25:

> "Please see the attached correspondence received this evening from RSM, the provisional liquidators of SLL and SLRC, to which reference will be made at the hearing tomorrow (13 Oct)."

35. The attached letter from RSM, the provisional liquidators of SLL and SLRC, was dated 12 October 2020 and said:

> "I write further to your requests for documentation in respect of the Companies.
>
> On our appointment as Provisional Liquidators, a number of sites associated with the Companies were attended and electronic devices were uplifted that contained company records. In respect of this information, I can advise the following:
>
> • The electronic information that is held by the Joint Liquidators in respect of the Companies is held across a number of electronic devices. For the information to be reviewed, these will all need to be processed and analysed individually.
> • We are unable to say for certain what electronic material we do and do not hold at this time.
> • HMRC have not been given access to the electronic records that we hold.
> • HMRC have not been given copies of the electronic records that we hold.
> • The electronic information is currently held in RSM's London office. Due to the significant amount of information held, processing the electronic information into a format and carrying out searches on the information is likely to be a time intensive and significantly costly exercise."

The hearing on 13 October 2020

36. At the hearing on 13 October 2020, Mr Watkinson, for HMRC made an application to admit the RSM letter dated 12 October 2020 in evidence. Mr Firth objected to the admission of the RSM letter on behalf of the Appellants. He submitted that no explanation was given by HMRC regarding: (i) the timing of the correspondence from RSM, (ii) the timing of HMRC's email to the FTT or (iii) the background to how this letter had been obtained. He submitted that: no application to admit the RSM letter had been made; no witness statement identifying or referring to the document had been served; HMRC had not provided the "requests for documentation" which RSM had received from HMRC and which were referred to in the first paragraph of RSM's letter dated 12 October 2020; and HMRC had still not addressed the Appellants' letter of 16 January 2018.

37. Nonetheless, the FTT admitted the RSM letter following an exchange with counsel which is recorded in the transcript of the hearing (see pp.3–6). In the exchanges with Mr Firth, the FTT judge observed amongst other things: that there were no directions for the provision of evidence for the purposes of the disclosure application; that there did not need to be an application to admit evidence within the context of a case management application; that the letter was relevant evidence that HMRC did not already have the material they sought by way

of disclosure; that the FTT was not bound by the strict rules of evidence; that it was not the hearing of the substantive appeal; and that any criticism of the form or content of the evidence contained in the letter, and its reliability, could be considered when considering the weight to be attached to it.

38. It might be inferred from these exchanges with counsel that the FTT admitted the RSM letter for these reasons but there was no express adoption of the points in its oral or written rulings.

39. The judge gave preliminary and final oral rulings on admitting the letter during the hearing (pp.5-6 of the transcript):

> "My initial reaction, and I have not yet made a final decision, is to admit the letter and give it such weight as I think appropriate. And the questions you [Mr Firth] have raised as to its provenance and the other issues are absolutely legitimate ones, and ones I would expect you to make submissions in relation to, and Mr Watkinson to respond to them. But I do not think that it is appropriate for me not to admit the letter at all. And the view I take from the *Martin* case is that that is exactly what Judge Mosedale did. She admitted the letters and then she commented on the reliability of contents. It is not that the letters were not-- were excluded, it is just that she then placed very little weight on them, and that is the issue here. I am going to admit the letter, but then I am going to consider the appropriateness of the content and the weight I should place upon it in the circumstances that you have set out, and those are all legitimate questions for you to ask. On that basis, perhaps we go back to Mr Watkinson and his application. Thank you, Mr Firth.
>
> …
>
> Right. Mr Firth, Mr Watkinson, I am going to confirm what I just said, which is I am going to admit this letter. I am going to place what weight on it I think appropriate, and if Mr Firth wants to make submissions in relation to the content and the provenance, as it were, of the letter, that is absolutely open to him, and no doubt Mr Watkinson you will then either anticipate them or you will respond to them."

40. In its written reasons for making the disclosure direction dated 13 April 2021, the FTT addressed the admission of the RSM letter as follows (FTT Decision [3]):

> "3. In addition Mr Watkinson sought to admit a letter from RSM Restructuring Advisory LLP ("RSM" - provisional liquidators of Skelwith (Leisure) Limited in liquidation ("SLL") and Skelwith Leisure (Raithwaite Cottage) Limited in liquidation ("SLRL")) to HMRC dated October 2020. Mr Firth objected to the introduction of the letter on the grounds that it was late, no reason for its delay was given, and it was not supported by any witness evidence. Mr Watkinson submitted that the letter was introduced in order to rebut the submission made in Mr Firth's skeleton that HMRC has had access to the documents in respect of which the disclosure is sought. I decided that I would admit the letter in evidence, giving it such weight as I considered appropriate."

41. Again, there were no reasons expressed for admitting the letter - only the conclusion, which the judge had expressed orally, that it would be admitted with appropriate weight being given.

42. The FTT went on to rely on the RSM letter to determine one of the factual disputes between the parties. It accepted (FTT Decision [32]) that HMRC did not already have the material it sought and had not been provided with it by RSM:

> "32. I believe the statements in RSM's letter, notwithstanding Mr Ellis's evidence to the contrary. RSM are a reputable firm of accountants and insolvency practitioners. As provisional liquidators they are

officers of the court and have a duty to act impartially. And most importantly, they have no reason not to tell the truth in their letter."

The disclosure direction and the FTT Decision

43. Having heard submissions from counsel and evidence from Mr Ellis, the FTT reserved its decision on the application for disclosure.

44. The FTT issued its decision on 13 April 2021. It granted the application and made a direction for disclosure in the terms sought by HMRC. The directions stated:

> IT IS DIRECTED as follows
>
> 1. "The Companies" referred to in these Directions are:
> (1) Skelwith (Leisure) Ltd;
> (2) Skelwith Leisure (Raithwaite) Ltd
> (3) Skelwith Leisure (Raithwaite Cottages) Ltd
> (4) Skelwith Group Ltd
> (5) North Yorkshire Properties Ltd (previously Skelwith Properties Ltd); and
> (6) Skelwith Leisure (The Keep) Ltd.
>
> 2. By 31 May 2021 the Appellants are to produce to the Respondents, to the extent that they are in the possession, custody or control of the Appellants, either
> (1) the following categories of documents to the extent that they have not previously been disclosed, which includes any electronic or hardcopy "backups" of the material:
> (a) All emails to which Mr Ellis is a party to in relation to the day-to-day operations, management, and financial and tax affairs of the Companies and his personal expenditure;
> (b) All other electronic communications exchanged between Messrs. Ellis and Broadbent relating to the day-to-day operations, management, and financial and tax affairs of the Companies (including but not limited to: text messages, WhatsApp exchanges or any other electronic messaging service);
> (c) All emails to which Mr Broadbent is a party in relation to the day-to-day operations, management, and financial and tax affairs of the Companies and his personal expenditure;
> (d) All other emails in relation to the day-to-day operations, management, and financial and tax affairs of the Companies;
> (e) All other documents, either in hard copy or electronic form, relating to the day-to day operations, management, and financial and tax affairs of the Companies; and
> (f) All other documents relating to Mr Broadbent's personal affairs; or
>
> (2) The portable hard drives (or other electronic media) which were used to make copies of the data stored on the computers and other electronic equipment used by the Companies (including those used by Mr Broadbent and Mr Ellis), together with the software used by the Appellants to search that data, in order that the Respondents can make copies of such hard drives (or other electronic media) and software, and then return the hard drives (or other media) to the Appellants.
>
> 3. By 31 May 2021 the Appellants are to produce to the Respondents, to the extent that they are in the possession, custody or control of the Appellants, and not yet disclosed, all correspondence between any of Mr Ellis, Mr Broadbent and Craggs & Co. in respect of the COP 9 process including (but not limited to) any documents in respect of which privilege must be taken to have been waived, including any electronic or hardcopy "backups" of the correspondence.

The FTT's reasons for granting the disclosure application

45. In the FTT Decision dated 13 April 2021, it gave reasons for making the disclosure direction and granting HMRC's application. It recorded (at FTT Decision [8] and [45]) that there was no dispute before the FTT that the material sought by HMRC was relevant, important to the proceedings and in the possession, custody or control of the Appellants. The FTT found that the material sought to be disclosed was of central relevance to the issues in the appeal (FTT Decision [49(1)]).

46. The FTT found as facts that:

> (1) HMRC had issued information notices to Mr Ellis in late 2016 (FTT Decision [10]);
>
> (2) Mr Ellis had exhibited documents to his witness statement and referred to electronic material in his witness statement that was not previously disclosed to HMRC, either in the course of the inspection of records held by the joint liquidators, or in response to the information notices (FTT Decision [12]); and
>
> (3) the disclosure sought under HMRC's application related to documents within the scope of the information notices and should have been provided in 2016 (FTT Decision [42]).

47. The FTT also found that:

> (1) HMRC had not, and did not have, access to the documents sought by the disclosure order, and therefore there was no abuse of process in making the application (FTT Decision [32] and [34]);
>
> (2) the Appellants and their representatives must have reviewed all, or virtually all, of the material sought by the disclosure application in preparing the Appellants' witness statements (FTT Decision [35]);
>
> (3) the case was a complex and high value matter (FTT Decision [36]); and
>
> (4) because lists of documents were dispensed with, the first time that HMRC saw the documents relied upon by the Appellants was when the Appellants served their witness evidence (in February 2020) (FTT Decision [43]).

48. The FTT's conclusion was that the application for disclosure was responsive to the Appellants' evidence, was not a "fishing expedition", did not "reset the litigation", and did not give HMRC "a second bite of the cherry." The FTT stated as follows at [44]:

> "I also find that the disclosure application is neither a "fishing expedition", nor does it "reset" the litigation. Nor I do consider that it gives HMRC a "second bite of the cherry". I find that the application is responsive to the evidence submitted by the Appellants, and it is in the interests of fairness and justice that HMRC are able to test the credibility of that evidence by reference to the entirety of the "reservoir" of documents and information held by the Appellants, and not merely by reference to the relatively limited number of documents exhibited to their witnesses' statements. It is neither fair nor just that the Appellants should be able to utilise elements from this reservoir without having given HMRC access to the entire reservoir so that they can verify whether the Appellants have indeed been "cherry picking" and to enable HMRC to test the credibility of the Appellants' evidence – in particular that Mr Ellis is innocent, and it is Mr Broadbent who was responsible for the defaults. I find that HMRC would suffer an unfair disadvantage (or the Appellants an unfair advantage) if HMRC are denied access to the material on the Hard Drive."

49. The FTT echoed this finding (at FTT Decision [49(2)]):

> "The appeal cannot be fairly determined without it, since the credibility of the Appellants' evidence, and the assertions upon which those items are based, can only be tested in the context of all of the relevant material. As Mr Ellis's witness statement contains general assertions as to his day-to-day involvement in the companies, it is not possible to test his evidence without HMRC having access to all of the relevant material;"

50. At [45] the FTT found that, to the extent that the categorisation of documents for the purpose of disclosure under the Civil Procedure Rules was relevant in the FTT, the documents sought by the disclosure application fell within categories (1) and (2) of those listed in paragraph 31.6.3 of the White Book being: (1) the Appellants' own documents (documents on which the Appellants relied in support of their contentions in the proceedings); and/or (2) adverse documents (documents which to a material extent adversely affected the Appellants' case or supported HMRC's case).

The scope and proportionality of the disclosure direction as granted by the FTT

51. At [48] the FTT found that the directions for disclosure were widely drawn as an inevitable consequence of the wide-ranging nature of the material exhibited to Mr Ellis's witness statement, and at [49(4)] because HMRC did not know exactly what was on the portable hard drive.

52. At [50] the FTT found that the disclosure directed was proportionate, especially given the amounts in issue and the complexity of the matters that needed to be resolved. The FTT gave the Appellants the alternative option of providing HMRC with the portable hard drive and the software that was used to search it to reduce the burden on the Appellants of complying with the disclosure direction.

The grounds of appeal

53. As noted above, the Appellants were granted permission to appeal the FTT's disclosure direction on three grounds which Mr Firth advanced:

> Ground 1: The FTT erred in admitting and relying on the RSM letter.
> Ground 2: The FTT erred in failing to address and take into account whether HMRC had been aware since January 2018 of the existence of the documents in relation which they sought disclosure.
> Ground 3: The FTT erred in granting the extraordinarily wide and unfocussed disclosure application.

54. Each ground is directed at a different issue and a different reason why the disclosure application should have been refused:

> Ground 1: whether HMRC already had access to the documents, such that the disclosure application should be refused.
>
> Ground 2: whether a good reason for the late timing of the disclosure application had been provided.
>
> Ground 3: whether the scope of the disclosure application, as it was drafted, meant that it should not be granted.

55. On granting permission to appeal to the Upper Tribunal on 5 July 2021, the FTT stayed the directions issued.

Ground 1 – the FTT erred in admitting the RSM letter

The Appellants' submissions

56. Mr Firth submitted that the FTT erred in law admitting the RSM letter dated 12 October 2020 for six reasons.

(i) No application to admit by HMRC, no reasons given and no evidence in support

57. In seeking to admit evidence at an extremely late stage he argued that HMRC failed to:

a) warn the Appellants that the evidence was coming;
b) serve the evidence as soon as possible;
c) make a proper application to admit the evidence, including explaining why it was so late;
d) support that application with a witness statement including a sworn statement of truth;
e) support the evidence itself with a witness statement explaining what it was and the circumstances in which it had been produced;
f) produce witnesses at the hearing to answer questions.

58. He submitted that the only proper course was for the FTT to refuse to admit the letter. The prejudice to the Appellants was clear:

a) the Appellants received the letter extremely late;
b) the Appellants had no opportunity to follow it up or investigate what was said in the letter;
c) the Appellants had no opportunity to ask for and receive the correspondence preceding the letter;
d) the author of the letter did not attend to give evidence and the Appellants had no opportunity to insist that he should do so; and
e) no explanation for the lateness was given, so the Appellants had no opportunity to test the reasons for the delay because none were given and no witness evidence was provided in support.

(ii) FTT should have applied the relief from sanctions case law

59. Mr Firth argued that the FTT should have applied the relief from sanctions case law, as for example set out in *Martland v HMRC* [2018] UKUT 178 (TCC) ("*Martland*"). HMRC had no permission to submit any evidence the night before the hearing. The hearing bundle had been prepared some time before and the parties had exchanged skeleton arguments. In those circumstances, the default position was that HMRC should not have been able to rely on the evidence and they would have needed to satisfy the relief from sanctions case law in order to be entitled to do so.

60. He submitted that it cannot be right, as the FTT appears to have been of the view, that the absence of a direction dealing with evidence means that such principles are inapplicable. Absence of permission is not permission to do anything. The FTT's approach was essentially an invitation for unrestricted behaviour. There was no incentive for a party to produce and send

their evidence to the other side in good time before an application hearing if there was no consequence or detriment to ambushing the other side with that evidence the night before the hearing.

(iii) If the FTT had applied that case law it would have refused to admit the evidence

61. Mr Firth argued that if the FTT had applied the relief from sanctions case law, the only available conclusion would have been to refuse to admit the letter:

a) the delay was extreme – the letter was received at 18:25 on the night before the hearing;
b) there was no reason at all, let alone a good reason, for the delay in submitting the evidence;
c) no application was actually submitted and no witness evidence was submitted in support of the application.

62. Mr Firth submitted that HMRC had been aware that the Appellants were asserting HMRC had access to the information for many months and the Appellants had spelt out the need for witness evidence on this very point in their reply to the application on 2 July 2020. The delay caused obvious prejudice to the Appellants. The purported evidence itself was wholly unsatisfactory – it was a letter, rather than a witness statement, from a person who would not attend to give evidence. In the circumstances, HMRC's behaviour was wholly inexcusable and the letter should not have been admitted.

(iv) The document itself was such that it should not have been admitted or relied on and it was wholly unreasonable and irrational for the FTT to place decisive weight on it

63. Mr Firth submitted that a letter making contentious statements about disputed matters of fact which is not supported by a witness statement and in respect of which nobody will attend to be cross examined is not evidence that the FTT should have admitted or placed decisive weight upon.

(v) The particular circumstances of this case

64. Mr Firth submitted that HMRC had been on notice regarding the issue for months but apparently chose to do nothing about it until the night before the hearing. Poor quality evidence might be explicable where a party has to deal with a new point at the last minute, but it is unacceptable and should not be tolerated where it is an issue the party has been aware of for months and simply chosen not to deal with. If HMRC had dealt with the matter in good time, the Appellants would have had an opportunity to insist on a witness statement and that the author attend for cross-examination. The extraordinary lateness meant that this was not possible. Furthermore, there had never been any explanation as to why Mr Reilly (the HMRC Officer with conduct of the investigation) did not give a witness statement dealing with the points apparently dealt with in the RSM letter. That should have led to an adverse inference.

(vi) Absence of consideration of the correct test or provision of reasons by the FTT

65. Mr Firth argued that the FTT decided that it would admit the letter but did not identify the correct test in law for the admission of evidence and failed to give reasons for that conclusion. This was an error of law.

HMRC's submissions

66. Mr Watkinson, leading Ms Lemos, opposed the appeal on behalf of HMRC. In reply to Ground 1, he submitted that the decision to admit the RSM letter as evidence at the case management hearing and give it such weight as it saw fit was within the generous ambit of the FTT's discretion. No FTT acting reasonably would not have admitted the letter bearing in mind the allegations made by the Appellants in their skeleton argument before the FTT.

Discussion and analysis on Ground 1

67. The position in relation to appeals against case management decisions of the FTT was summarised by Sales, J., as he then was, in *HM Revenue & Customs v Ingenious Games LLP* [2014] UKUT 0062 (TCC) ("*Ingenious*") at [56] that:

> "The Upper Tribunal should not interfere with case management decisions of the FTT when it has applied the correct principles and has taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the Upper Tribunal is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of discretion entrusted to the FTT…. The UT should exercise extreme caution before allowing appeals from the FTT on case management decisions (*Goldman Sachs International v HM Revenue and Customs Commissioners* [2009] UKUT 290 (TCC) at [23]-[24])."

68. In *BPP Holdings & ors v HMRC* [2017] UKSC 55 ("*BPP*"), the Supreme Court had to consider whether a barring order made by the FTT against HMRC for a failure to comply with directions was justified. Lord Neuberger said (at [33]):

> "…In the words of Lawrence Collins LJ in *Walbrook Trustee (Jersey) Ltd v Fattal* [2008] EWCA Civ 427, para 33:
>
> [A]n 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.
>
> In other words, before they can interfere, appellate judges must not merely disagree with the decision: they must consider that is unjustifiable."

69. We agree with HMRC that the decision to admit the letter of RSM at the hearing on 12 October 2020 can be characterised as a 'meta case management decision'. It was a case management decision within the hearing of an application for a disclosure direction, itself a case management application. Placing it in this perspective emphasises the point that the Upper Tribunal should be very slow to interfere with it.

70. We begin by addressing the second point made by Mr Firth on this ground; that the FTT should have applied the relief from sanctions case law in deciding whether or not to admit the letter as evidence. Mr Firth referred us to the decision of the Upper Tribunal in *Martland* in this respect. That case concerned an application for permission appeal out of time. However, the Upper Tribunal accepted that the general approach in the relief from sanctions cases (e.g. *Denton and others v TH White Limited and others* [2014] EWCA Civ 906, and *BPP*) should apply equally to such applications (*Martland* [43]). The Upper Tribunal then set out a three-stage test for considering applications for permission to appeal out of time (*Martland* [44]). In summary, that test requires consideration of: 1) whether the breach of directions or rules or

delay was significant or serious; 2) whether there was a good reason or explanation for this breach or delay; and 3) all the circumstances of the case. The balancing exercise in the third stage of this test should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected (*Martland* [45]).

71. We do not accept the submission that the relief from sanctions case law should have been applied by the FTT when deciding whether to admit the RSM letter. There was no particular breach of a direction or the Rules or any given time limit. The applicable rules for admitting the letter were those contained in Rule 15 on the admission of evidence, which has to be read in the light of Rule 2 – the overriding objective to deal with cases fairly and justly. Rule 15(2) provides that the Tribunal may—

> (a) admit evidence whether or not the evidence would be admissible in a civil trial in the United Kingdom; or
> (b) exclude evidence that would otherwise be admissible where—
> (i) the evidence was not provided within the time allowed by a direction or a practice direction;
> (ii) the evidence was otherwise provided in a manner that did not comply with a direction or a practice direction; or
> (iii) it would otherwise be unfair to admit the evidence.

72. Rule 15 is therefore essentially permissive. It provides the FTT with significant discretion in deciding whether or not to admit evidence. That discretion must be exercised judicially, in a manner which promotes the overriding objective in Rule 2. For this purpose, the FTT will need to take into account all the facts and circumstances of the case to determine whether it is just and fair to admit the evidence. This will include consideration of the timing of the production of the evidence, its relevance and significance and the detriment and prejudice to the other party in admitting the evidence – whether it is adequately able to address and respond to it.

73. Therefore, whilst we do not agree with Mr Firth that *Martland* and the breach of sanctions case law directly applies to the admission of evidence in this case, nonetheless, we accept that similar factors are likely to be considered when applying Rule 15 in the light of Rule 2 in deciding whether to admit evidence at a late stage in proceedings: the explanation for its late deployment or service; the significance or relevance of the material to the issue to be decided; and the prejudice it would cause to the other party in addressing it.

74. Further, we accept Mr Firth's sixth point does highlight a more fundamental error made by the FTT in admitting the letter of RSM. In both its oral reasons at the hearing and in its later written decision, the FTT failed to identify and apply any test in law for admitting the letter at the hearing. It failed to refer to Rules 2 or 15 or the conditions thereunder – at a minimum by reference to the overriding objective or the requirement of fairness, including prejudice to the Appellants in admitting the letter at a late stage. This was an error of law.

75. We also agree with Mr Firth about the lack of reasons given by the FTT orally and in writing. The FTT gave some indications in its oral exchange with counsel as to why it might admit the letter. During the hearing, as set out above, the FTT observed amongst other things: that there were no directions for the provision of evidence for the purposes of the disclosure application; that there did not need to be an application to admit evidence within the context of a case management application; that the letter was relevant evidence that HMRC did not

already have the material they sought by way of disclosure; that the FTT was not bound by the strict rules of evidence as applied by the High Court; that it was not the hearing of the substantive appeal; and that any criticism of the form or content of the evidence contained in the letter, and its reliability, could be considered when considering the weight to be attached to it.

76. However, in both its oral ruling and in its written decision, the FTT announced its conclusion that it would admit the letter and give it appropriate weight but gave no express reasons for doing so. The FTT's reasons for admitting the document, whether oral or written, need only have been expressed very briefly – the duty to give reasons is context specific[1]. The FTT had made a number of observations during the hearing from which its reasons for admitting the document might, at least to some extent, be inferred – some of which might have been expressly adopted as its reasons.

77. The failure to articulate any reasons for the grant of the application was an error of law, just like the FTT's failure to identify and apply the correct test in law, in particular, by failing to consider fairness or the prejudice to the Appellants of admitting the evidence.

78. Notwithstanding that these two errors of law were material in the context of the decision to admit the RSM letter, we are not satisfied that they were sufficiently material to the decision to make the disclosure direction. For the reasons that we have set out below, we do not regard the errors as having a material bearing on the outcome of the application for disclosure. Therefore, they do not justify disturbing the FTT's decision to grant the application for disclosure. This is all the more so given the generous ambit of discretion that must be afforded to case management decisions of the FTT and the caution with which this Tribunal should approach challenges to those decisions.

79. As a starting point, we bear in mind that the appeal before this Tribunal is an appeal against the decision of the FTT to grant the application for disclosure. It is not an appeal against the decision to admit the RSM letter as evidence itself. The errors of law in the FTT's decision to admit the letter relate to an element of the decision to grant the disclosure application – we accept a potentially important element – but only part of the overall decision. There is no challenge to the FTT's decision to grant the application for disclosure on the grounds that it failed to apply the correct test or that it failed to give reasons for that decision.

80. We do not regard the failure to give reasons for the decision to admit the RSM letter, or to identify the correct test for that decision both at the hearing and in its written decision, as demonstrating that the decision to grant the application for disclosure was plainly wrong or unjustifiable.

81. Furthermore, we are satisfied, for the reasons we set out below, that there were ample grounds for the FTT to reach its decision to admit the RSM letter applying Rule 15(2) in the light of the overriding objective in Rule 2.

82. In giving our reasons we answer the remaining points made by Mr Firth and accept and adopt much of the argument relied upon by Mr Watkinson.

[1] *South Bucks District Council v Porter* [2004] 1 WLR 1953 at [36]: 'Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision.'

(1) First, there was no non-compliance with any direction of the FTT, practice direction or procedural rule in HMRC seeking to admit the letter at the hearing having only served it on the Appellants on the evening before.

(a) The overriding objective at Rule 2 of dealing with cases fairly and justly includes avoiding unnecessary formality and seeking flexibility in the proceedings.

(b) There were no time limits imposed for the service of "evidence" for the application.

(c) There was no requirement for a written application to admit the letter. Under Rule 6(b) applications can be made orally during a hearing. The FTT recorded in its written decision (at FTT Decision [3]) that HMRC sought to admit the RSM letter at the hearing. The transcript records the application being made and ruled upon.

(d) There is no requirement in the Rules for any application to admit evidence to be supported by a witness statement or with oral evidence. Indeed, as the FTT remarked during the hearing, it was rare to hear oral evidence on a case management application in the FTT.

(e) The FTT can admit evidence whether or not it would be admissible in a civil trial in the UK (Rule 15(2)(a)) – it can admit a signed letter as evidence and place what weight it sees fit on it. Authorities on the admissibility of evidence in the civil courts do not assist the Appellants, nor do cases showing the exercise of the discretion by individual judges in other circumstances such as closure notice and penalty appeals. The absence of the author of the letter to give evidence to the FTT went to the issue of weight, not its admissibility.

We should stress that we do not regard the discretion and flexibility available to the FTT as an open invitation for parties to provide evidence at a late stage in the belief it will be admitted or that no sanctions will follow. The FTT will be astute to the reasonableness of the parties' conduct and the fairness of admitting evidence which is served late. It will always be required to make a fact specific decision as to whether or not to admit the evidence applying the Rules in the light of the overriding objective in Rule 2 and having regard to all the facts and circumstances of the case.

(2) Second, we have also considered whether HMRC have a good reason or reasonable explanation for the late service of the letter. In our view, the procedural history provides a reasonable explanation for the late service of the RSM letter by HMRC.

(a) Pursuant to the FTT's directions of 24 June 2019 the requirement for the parties to exchange lists of documents was dispensed with (see direction 5). Accordingly, as the FTT found (at FTT Decision [43]), the first time that HMRC saw the documents relied upon by the Appellants was when they served their witness evidence (on 7 February 2020).

(b) On 10 March 2020 HMRC made a request for disclosure based upon the contents of the Appellants' evidence. The Appellants refused the request by letter of 14 May 2020, saying that as a result of the letter of

16 January 2018 HMRC knew about the presence of information held by Mr Ellis *"and have had access to it*", describing the application as a "*fishing exercise*" and suggesting that Mr Ellis had *"access to the companies' hard drives taken by the liquidators"*.

(c) HMRC then formally applied to the FTT for a direction for disclosure on 2 June 2020. The Appellants' undated formal response to the disclosure application went little further than to assert that HMRC had "*a copy of the hard disk for a number of the Skelwith companies*" and that Mr Ellis had a back-up of one hard disk from Mr Broadbent's computer, *"which Mr Ellis is certain was among those copied by the liquidators and made available to HMRC by them"* (paragraph 13 of the response). Mr Ellis's witness statement for the disclosure application confirmed that he had access to a back-up hard drive, which was copied from Mr Broadbent's computer and contained an image of the same.

(d) By the time of the service of the Appellants' skeleton argument for the disclosure application, dated 8 October 2020, the Appellants had adopted a more aggressive position in which they asserted: that HMRC had *"engineered a pre-text for the submission of significant further evidence by themselves"*, that adverse inferences should be drawn from HMRC's failure to respond to the Appellants' assertion that HMRC already had the material, that HMRC were in *"manifest and egregious breach"* of their duty of candour, that HMRC ought to have known that the factual bases for its application *"were untrue"*, and that the application was *"made for an improper purpose"*.

(e) We accept Mr Watkinson's submission that it was as a result of the content and tone of the Appellants' skeleton argument that HMRC asked the provisional liquidators, RSM, to confirm the position on what material it had provided to HMRC. RSM did so in the letter of 12 October 2020 which confirmed that the HMRC had not been given access to, or copies of, the electronic records by the provisional liquidators. While it would have been preferable for the letter to have been provided at an earlier stage by HMRC, their conduct in providing it at a very late stage was reasonably explainable and not egregious. We are therefore satisfied it was reasonable for the FTT to have admitted the letter bearing in mind the allegations made by the Appellants in their skeleton argument before the FTT.

(3) Third, we consider the relevance and significance of the RSM letter to the disclosure application and the issue of whether HMRC already had possession of the material they sought by way of direction.

(a) It was the Appellants' assertion that HMRC already had access to the documents. It was for the Appellants to prove it in the ordinary way. While the burden is generally upon an applicant for disclosure to prove that the direction sought is necessary and proportionate, it is not a condition precedent to an application for disclosure that the applicant must prove that they do not have the material sought by first setting out all material that they have or have had access to. Indeed, in cases where vast quantities of electronic material are held, that would be impractical and disproportionate. In most cases, a party is unlikely to seek

disclosure of evidence it believes it already has. The Tribunal will be alert to cases in which an application for disclosure is made which imposes an unnecessary burden on the other party and will take that into account in deciding whether or not to grant an application.

(b) In the circumstances of this case, HMRC were therefore not required to call their own witness or provide evidence as to what material they had possession of. It was reasonable for the FTT not to draw any adverse inference from any alleged "silence" from HMRC. There was no basis for drawing an "adverse inference" in relation to the absence of evidence from Mr Reilly stating that HMRC did not have the material sought, bearing in mind (i) the contents of the RSM letter and (ii) that RSM was the best source of evidence of what had been provided to HMRC. While HMRC might have provided further details or evidence from Mr Reilly or a suitable other officer to confirm that HMRC did not have the material now sought through disclosure, they were not required to do so on the facts of this case.

(4) Finally, we consider the fairness and in particular the prejudice to the Appellants, in admitting the RSM letter at a late stage.

(a) The document was clearly relevant to an issue within the application as to whether HMRC already had possession of the material they sought. The letter was also very short – half a page in length – and the content was very simple. It was to the effect that RSM had not already provided to HMRC the material that they now sought by way of disclosure direction. The Appellants were able to make submissions as to what weight this letter (whose author was not giving any evidence nor being cross examined) should carry and whether the FTT should accept it as credible or reliable.

(b) If the Appellants were really prejudiced by the late production of the RSM letter in responding to its contents, the remedy was to apply for an adjournment (and perhaps even to apply for a witness summons for the author from RSM so that they might be examined in chief and cross examined). The FTT does not record any such application being made, let alone refused, and the transcript shows that no such application was made.

(c) Likewise, the Appellants might have made the same enquiry of RSM that HMRC made before making the assertions and allegations that they chose to make. It was RSM who had the independent evidence of what they had given to HMRC, and what they had permitted HMRC to have access to.

(d) The Appellants had not asked the provisional liquidators to confirm whether they had provided copies of any computer disks to HMRC, despite them having independent evidence of what they had given to HMRC, and what they had permitted HMRC to have access to. The tone and contents of the Appellants' skeleton argument caused HMRC to ask RSM to confirm the position. The Appellants confirmed to the FTT during the hearing that they were not asserting that the provisional liquidators were lying.

83. Further and in any event, had the FTT not admitted the RSM letter as evidence that HMRC did not have a copy of the hard drive as alleged, the remaining evidence relied on by the Appellants did not establish that HMRC had possession of the material. Mr Ellis's own evidence to the contrary amounted to nothing more than a mere belief.

84. During the hearing Mr Ellis gave oral evidence as to why he believed that HMRC already had the material that they sought by way of disclosure. However, as the FTT found (FTT Decision [32]), and as is clear from the transcript of Mr Ellis's cross-examination at the hearing of the disclosure application, the assertion that HMRC already had the material sought, and the consequential allegations of bad faith, was based only upon Mr Ellis's belief. His evidence was that HMRC must have had the information on the hard drive because they appointed the provisional liquidators of the Skelwith companies who removed the material from the offices. He believed that representatives of HMRC were present when the liquidators attended and removed the material, however he accepted he had not seen the liquidators hand over the material to HMRC.

85. For these reasons therefore, it would have been open to the FTT to reach its decision to grant the application for disclosure with or without admitting the RSM letter in evidence. Having admitted the RSM letter and heard Mr Ellis' evidence the FTT was entitled to conclude that HMRC did not already have the material it sought by way of disclosure. The weight to be put on the RSM letter was a matter for the FTT, as it recognised at [3]. Having found at [32] that the letter was from (i) a reputable third party, (ii) in the position of an officer of the court, and (iii) who had no reason not to tell the truth, the FTT preferred the contents of the RSM letter to the evidence of Mr Ellis. That was more than a reasonable approach for the FTT to take.

86. We dismiss this ground of appeal. The errors of law identified were not material to the FTT Decision.

Ground 2 – the FTT erred in failing to address and take into account of whether HMRC had been aware since January 2018 of the existence of the documents in relation to which they sought disclosure

Appellants' submissions

87. Mr Firth submitted that Ground 2 also concerned lateness and lack of a good explanation, but this time in relation to the timing of HMRC's application for disclosure itself. In their skeleton argument and at the hearing, the Appellants argued that HMRC's application for disclosure was very late and that HMRC had been aware that the hard-drive with the relevant material was in the possession of the Appellants since at least January 2018. This meant that there was no good reason for the delay in HMRC's application for disclosure dated 2 June 2020. Accordingly, the application should have been refused by the FTT.

88. The essence of Ground 2 was that the disclosure application was late because:

a) it came after the evidence stage had been completed in February 2020 and would reasonably be expected (if granted) to involve significant further exchanges of evidence;
b) on its own terms it required and asked for the postponement of a trial date that had been fixed for some time.

89. HMRC's explanation, in their application, was that the witness statements and exhibits were "the first time in the course of the proceedings that Mr Ellis has disclosed that he has access to the significant reservoir of documents and electronic material that he plainly has access to".

90. The Appellants' submission was that the January 2018 letter made this explanation untenable. HMRC did not provide any evidence in respect of this issue or, indeed, provide any factual explanation as to how the January 2018 letter did not undermine the asserted basis for the timing of the application.

91. Mr Firth submitted that the FTT was required to consider and resolve this dispute, but it did not. In its decision, it did not address the timing of the application at all, HMRC's claimed justification for that timing, or the January 2018 letter. In its decision the FTT purported to find that HMRC had not had access to the information sought (FTT Decision [34]). However, he argued that this was a separate point to the question of whether, in any event, HMRC had been aware of the hard drive since January 2018, which they plainly had been.

92. Accordingly, Mr Firth contended that the FTT erred in law because it failed to deal with and decide the key dispute on the justification for the timing of the application, failed to take into account a highly relevant consideration (that HMRC had been aware of the hard-drive of documents since January 2018 and their unsupported claims not to have been were wrong) and, in general, failed to consider and address a substantial submission made by the Appellants.

HMRC's submissions

93. In relation to Ground 2, Mr Watkinson relied on the FTT's findings that: the material sought had not previously been disclosed by the Appellants; that HMRC could not know what material would be relied upon by the Appellants until the service of their evidence; and that the application was responsive to that evidence. He submitted that these findings were sufficient to dispose of the Appellants' argument that HMRC were already aware that Mr Ellis held a hard disk containing the material from which disclosure was sought. In any event, that assertion was not made out on the evidence. Further, the application could not properly be construed as "late".

Discussion and analysis on Ground 2

94. We accept Mr Firth's submissions. The FTT did err in law by failing to address the letter from the Appellants' representative (Mr Roseff) dated 16 January 2018 in making its decision. The Appellants relied upon the wording of the letter to submit that HMRC had been aware since that time that the Appellants were in possession of the material they now sought, in particular the hard drive. The FTT did not identify the letter nor consider this issue in its decision.

95. The Appellants relied upon the January 2018 letter as a key document when submitting that they had told HMRC more than two years before that they had the material and that therefore the disclosure application was very late and should not be granted. The FTT did not address the issue despite hearing clear and opposing submissions from both parties on the topic. This was a material error of law because the January 2018 letter was relevant to deciding whether the disclosure application was made late and should therefore be refused.

96. Under section 12 of the Tribunals Courts and Enforcement Act 2007, where the Tribunal finds that the making of a decision of the FTT involved the making of an error on a point of law, the Tribunal may (but need not) set aside the decision of the FTT. We have found that the FTT Decision did involve an error of law as identified by Mr Firth and we exercise our discretion to set aside the decision on this ground. Nevertheless, we go on to re-make the decision and grant HMRC's disclosure application.

97. Having had access to the written evidence that was before the FTT and to the transcript of the hearing, we are satisfied that HMRC's application for disclosure was not "late" as suggested by the Appellants. We are also satisfied that if the FTT had properly addressed this issue, it would have reached the same conclusion. Our reasons are set out below.

98. As a starting point, we note that during the FTT hearing, Mr Watkinson made the same arguments about the wording of the 16 January 2018 letter that he made to us, which were that it did not say what the Appellants suggested it said. The relevant paragraph from the letter is set out at [17] above. We repeat it here for ease of reference:

> "Subsequent to our engagement we have reviewed the available information to which Mr Ellis has access. This predominantly comprises extracts from the company's financial records and copies of email correspondence extracted from back-up versions of company hard drives (we understand that these hard drives were seized by the administrators appointed by HMRC such that you have access to these records, albeit may not have undertaken a detailed review)."

99. Mr Firth submitted that the only natural meaning of this paragraph in the letter was that Mr Ellis had possession of the company financial records and email correspondence which were on the company hard drives which he had retained and that he retained copies of these as of January 2018. Thus, HMRC were informed of this.

100. Mr Watkinson submitted to the FTT and to us that the paragraph in the letter needed to be read carefully in order to divine its reasonable or natural meaning. We agree. First, it might appear from the paragraph in the January 2018 letter that Mr Ellis was in possession of material beyond extracts, hence the word "predominantly", but the reader is not told what that material is. HMRC were entitled to understand the letter as not being clear as to what material Mr Ellis held.

101. Secondly, Mr Watkinson submitted that the paragraph suggests that Mr Ellis has access to extracts of financial information: "extracts from the company's financial records and copies of email correspondence extracted from back-up versions of company hard drives". What was being said here, as HMRC reasonably understood it, is that Mr Ellis had access to material that had been extracted from something. That is not the same as saying that Mr Ellis has possession of all the material from which the extracts have been taken.

102. Mr Watkinson argued that the letter did not say that Mr Ellis had possession of an image of Mr Broadbent's computer, as is now said to be the case. It did not say that Mr Ellis had access to the computer systems and office files to which he referred at paragraph 355 of his witness statement dated February 2020. It did not say that the Appellants had access to Mr Broadbent's email account, which is what Mr Chambers said in his witness statement, without providing any explanation of how he had accessed it. It did not say that Mr Ellis had access to and would rely upon emails that postdate the attendance of the liquidators, which he did in the form of his emails exhibited to his witness statement.

103. We agree with Mr Watkinson. The wording of the letter is ambiguous. While Mr Firth's interpretation is one reading of the letter, there are other interpretations equally and reasonably open to the reader. HMRC were entitled to rely upon another understanding of the letter in submitting that they had not been put on notice in January 2018 nor understood that the Appellants held the material HMRC sought. They were entitled to consider that it only became clear once they received the Appellants' evidence in February 2020 that Mr Ellis had access to the material on the companies' computer systems. Hence the disclosure application was not made late but in response to that evidence.

104. Therefore, we are satisfied that HMRC was entitled to respond to the Appellants as it did: "Your witness statements are the first time that you have said you have access to this reservoir of electronic material and documents". This is not undermined by the contents of Mr Roseff's letter of January 2018. HMRC were reasonably entitled to the view that the documents relied upon by Mr Ellis and Mr Chambers in their witness statements go beyond extracts of financial records and limited extracts from the companies' hard drives. What HMRC relied upon to make the disclosure application was not demonstrably false by reference to a comparison between Mr Roseff's letter and what Mr Ellis and Mr Chambers have said in, and exhibited to, their witness statements.

105. There is a further point that was made before the FTT and at the hearing before us. Some 15 days after the January 2018 letter, on 31 January 2018, Mr Ellis filed his amended notice of appeal which was a central pleading before the FTT. The amended grounds of appeal for Mr Ellis stated at paragraph 10:

> "The administrators of the Skelwith companies seized the companies' books and records following their appointment. Mr Ellis has not had access to these records subsequent to this date."

106. This pleading, coming very shortly after the letter, implied that Mr Ellis did not have access to the relevant records that HMRC sought. HMRC were reasonably entitled to read the pleading in this way. When the letter and grounds of appeal are read together, HMRC were reasonably entitled to understand that Mr Ellis did not have access to material from the companies' records, at that time. Therefore, HMRC were reasonably entitled to the view that the disclosure that they sought only arose out of receiving the evidence in the Appellants' witness statements of February 2020.

107. Further, the pleading of 31 January 2018 does not sit easily with Mr Ellis's oral evidence given in cross examination to the FTT at the October 2020 hearing. He stated that he had a portable hard drive with an image of the hard drive which had been in existence in 2015 but he did not look at the portable hard drive until the middle of 2017. This was his explanation for not complying with the information notices served by HMRC in late 2016 for him to provide such information. However, the pleading of 31 January 2018, on one view, implies that he did not have access to the material from the companies' hard drives.

108. We are satisfied that HMRC did not know as of January 2018 that Mr Ellis had retained a copy of the hard drives, where Mr Ellis had not complied fully with the information notices and where no list of documents had been served by the parties. We find that the first time HMRC knew that the Appellants had access to the range of material which HMRC sought was after the service of their witness statements.

109. In all these circumstances, we agree with Mr Watkinson that the FTT was entitled to find (FTT Decision [12]) that the Appellants had not previously disclosed the material sought, that HMRC could not know what documents the Appellants would rely on until they served their witness evidence (see FTT Decision [43]) and that the application for disclosure was responsive to the Appellants' evidence (at FTT Decision [44]). We are satisfied that those findings would have remained the same even if the FTT had addressed and determined the arguments regarding the 16 January 2018 letter. HMRC's disclosure application was made in correspondence in March 2020, little more than a month after the Appellants' evidence was served, and formally made in June 2020, some two months thereafter. The application was not "late" in any conventional sense and we are satisfied that its timing was no bar to its being granted.

110. For these reasons, whilst we accept that there was a material error of law in the FTT's Decision and set it aside on this ground, we re-make the decision granting HMRC's disclosure application.

Ground 3

Appellants' submissions

111. Mr Firth submitted that the FTT erred in granting an extremely wide and unfocussed disclosure application. The Appellants accepted that some relevant documents may fall within the very broadly drafted categories (indeed, it would be surprising if they did not, given its breadth). Nonetheless he submitted that the direction was disproportionate and not necessary to deal with the case fairly and justly. For instance, there is no limit in the direction on:

a) The time period for which documents must be searched for and provided. By way of example, any email relating to Mr Ellis's personal expenditure is required to be disclosed without limitation as to time.
b) The relevance of the documents to the dispute. Thus, any email relating to Mr Ellis's personal expenditure, of any kind, were required to be disclosed, irrespective of whether it had any connection to the companies or the tax dispute. For instance, an Amazon order confirmation email for the purchase of anything is within the scope of the disclosure ordered.
c) The media and locations that must be searched.

112. He argued that the party that makes a disclosure request without any attempt to limit it to relevant documents should expect it to be refused. Even if the FTT had been minded to grant some disclosure, one would have expected it to examine the drafting of the request to ensure that it was, so far as reasonably possible, limited to relevant documents. The FTT failed to do this.

113. Mr Firth submitted that the test is not whether the FTT is satisfied that a class of documents sought will include some relevant documents (irrespective of what proportion of the documents required to be disclosed those relevant documents are likely to represent) but whether the applicant (HMRC) has satisfied the FTT that the materials sought (i.e. the class itself) is both relevant and necessary to deal with the case justly (*Royal Bank of Scotland Group plc v. HMRC* [2020] UKFTT 321 (TC), [56] and [75]).

114. The FTT was, accordingly, in fundamental error in deciding that all the documents for which disclosure was sought were relevant and, indeed, would fall within categories (1) and (2) as explained in paragraph 31.6.3 of the White Book (see [50] above).

115. He therefore argued that the FTT failed to address its mind to whether the disclosure request was properly formulated so as to target relevant documents in the most proportionate way (because, apparently, the FTT believed that any document falling with the classes identified would be relevant). That was a further error of law.

HMRC's submissions

116. In relation to Ground 3, Mr Watkinson argued that the FTT's fundamental decision to order disclosure was unimpeachable. The disclosure ordered was not disproportionate; its breadth was a function of the general nature of the assertions made by the Appellants in their evidence and the wide-ranging nature of the material referred to by them.

Discussion and analysis

117. We are satisfied that for the reasons given at [44] and [49] of the FTT Decision, the decision to order disclosure of the material identified was justifiable. It was entitled to find that disclosure of the categories and sources of material directed was relevant to the issues in the case and was necessary and proportionate to deal with the appeals fairly and justly.

118. Rule 5 gives the FTT, as part of its general case management powers, the power to direct a party to provide documents and information to another party. The FTT also has a specific power, under Rule 16, to order a person to "produce any documents in that person's possession or control which relate to any issue in the proceedings". When exercising a case management discretion or power, the FTT must have due regard to the overriding objective set out in Rule 2.

119. The FTT was entitled to find that the material sought was of central relevance to the case at [49(1)]. It took into account that it was applying the normal standards of fairness and justice to a high value and complex dispute. This followed the approach laid down in *McCabe v HM Revenue* [2020] UKUT 266 (TCC) at [22]-[25]:

> Principles material to determining relevance in this case
>
> 22. First, we agree with the FTT (at [26]) that since this was a "high-value complex dispute" the starting proposition was that HMRC should disclose relevant documents to Mr McCabe unless there was a good reason not to. …..
>
> 23. Second, the FTT must exercise its discretion to order additional disclosure under Rule 16 so as to give effect to the overriding objective: Rule 2(3)(a). That objective of dealing with a case fairly and justly includes dealing with it in a way which is proportionate.
>
> 24. Third, the approach of the FTT to disclosure is not determined by the Civil Procedure Rules ("CPR"). Rule 27 of the FTT Rules states that a party must (amongst 30 other things) produce a list of documents, which the other party may inspect, which that party intends to rely upon or produce in the proceedings. Importantly, that rule applies to both standard and complex cases: Rule 27(1). We have already observed that Rule 16 gives the FTT power to order the production of any document in a person's possession or control which relates to an issue in the proceedings. In *E Buyer 35 UK Ltd v HMRC* [2017] EWCA Civ 1416, one of the issues was whether it was an error of law by the FTT not to have displaced Rule 27 with what the Court of Appeal called the broader "CPR-style disclosure". In determining that the FTT had not so erred, Sir Geoffrey Vos C stated, at [94]4: It is true that this is an important case, but the 2009 Rules were made for important as well as simple cases. The plain fact is that the procedure is different in the F-tT.

> 25. Fourth, relevance is to be assessed by reference to the issues in the case and the positions of the parties…

120. We agree with the submissions of Mr Watkinson that the FTT was entitled to permit HMRC to test the credibility of the Appellants' generalised assertions in relation to important factual disputes in the appeal by reference to the full set of contemporaneous documents identified in the disclosure request. The FTT was entitled to accept HMRC's submission that the material exhibited to or referred to in the Appellants' statements had been selected by the Appellants' witnesses in support of their own case from a deeper reservoir of material that they held.

121. As a matter of principle, if the circumstances of a case require comparatively wide or general orders for disclosure to deal with it fairly and justly then the Rules permit such a request. Where material has not been revealed by the taxpayer during an investigation (such as here, where the FTT found that the material should have been produced in response to the information notices), and the default disclosure regime under Rule 27 of the Rules has been set aside, the fair determination of the case may require such further disclosure.

122. We also agree with Mr Watkinson that the FTT was entitled to find (at FTT Decision [48]–[49]) that the breadth of the disclosure sought was an inevitable consequence of (i) the wide-ranging nature of the material exhibited to Mr Ellis' witness statement, (ii) the generalised nature of the assertions made by Mr Ellis in his witness statement, and (iii) and the fact that HMRC did not know the precise contents of the hard drive held by Mr Ellis. It would be impossible and impractical to further restrict the categories or sources of material sought without having had sight of the material itself. It was all potentially relevant.

123. In this case, the categories and sources of disclosure directed, if not the specific documents themselves, were either mentioned in the witness statement or to be reasonably inferred to be relevant from the witness statements themselves. The disclosure sought was not "too broad" because the material mentioned in the Appellants' witness statements was similarly broad in range and the assertions based on it were general in nature.

124. The FTT also acted reasonably and fairly in providing an alternative form of disclosure that would produce something akin to the same result of the primary direction for disclosure but reduce the burden on the Appellants. This was for them to provide the hard drive and the software used to search it. If anything, production of the hard drive was narrower in scope than the disclosure sought since e.g. it did not involve any hard copy documents that Mr Ellis had access to, and did not involve any of his own email accounts or text messages that were not preserved on that drive. That was not giving HMRC "more disclosure than they have asked for" since it is difficult to see what material on the only hard disk that Mr Ellis admitted to having access to, that was an image of Mr Broadbent's company computer, would not have fallen within the scope of the disclosure request.

125. For the most part, the Appellants have not established that the breadth of the disclosure ordered was so plainly wrong that it must be regarded as outside the generous ambit of discretion entrusted to the FTT except in one regard.

126. We are satisfied that there is merit in one of Mr Firth's criticisms. It was neither justified nor proportionate for the FTT to make such a disclosure direction without any limit on the timescales to which the material related. As Mr Firth submitted, if there was no limit to the time periods, any material relating to the personal expenditure of Mr Ellis or Mr Broadbent since their childhoods could potentially fall within the scope of the disclosure request. This

was unjustified and disproportionate. Placing no time constraints upon the material to be disclosed amounted to a material error of law.

127. We therefore allow this ground of appeal in part. We set aside the disclosure direction and re-make it in the same terms but limited in time to material which falls within the tax periods which are the subject of the substantive appeals (namely, 11 July 2008 to 5 April 2015). This does not prevent the parties making further applications for specific disclosure as a result of the material provided.

Conclusion and Disposal

128. In summary:

(1) We dismiss the first ground of appeal as the errors of law in the FTT's decision were not material.

(2) As regards the second ground of appeal, we find that the FTT's decision to grant the application for disclosure involved a material error of law, but we re-make the decision and grant the application nonetheless.

(3) We allow the third ground of appeal in part. We set aside and re-make the disclosure direction in the same terms but limited to material falling within the time periods which are the subject of the appeals.

Signed on Original

JUDGE ASHLEY GREENBANK
JUDGE RUPERT JONES

UPPER TRIBUNAL JUDGES
RELEASE DATE: 22 September 2022