



UT Neutral citation number: **[2025] UKUT 00362 (TCC)**

UT (Tax & Chancery) Case Number: UT/2025/000047

**Upper Tribunal  
(Tax and Chancery Chamber)**

*DISCLOSURE – FTT ordered disclosure of adverse documents against HMRC but did not make an equivalent order against taxpayer – rolled-up hearing of oral renewal of application for PTA and substantive appeal - whether FTT made an error of law by not making an equivalent order against taxpayer – whether general principle that disclosure should be ordered on reciprocal basis – whether FTT’s decision was within the ambit of its case management discretion – held - permission to appeal granted on two grounds, but no general principle of reciprocity such that, on basis of application as made by HMRC, FTT’s decision was within generous ambit of its case management discretion - appeal dismissed*

Hearing venue: The Rolls Building  
London  
EC4A 1NL

**Heard on:** 6 October 2025  
**Judgment date:** 23 October 2025

**Before**

**JUDGE THOMAS SCOTT  
JUDGE JEANETTE ZAMAN**

**Between**

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

Applicants/Appellants

**and**

**DUCAS LTD**

Respondent

**Representation:**

For the Applicants/Appellants: Adam Tolley KC, Howard Watkinson and Laura Inglis,  
instructed by the General Counsel and Solicitor for His  
Majesty's Revenue and Customs

For the Respondents: Christopher Stone KC and David Bedenham KC, instructed by  
Joseph Hage Aaronson & Bremen LLP

## DECISION

### INTRODUCTION

1. HMRC have applied to the Upper Tribunal (the “UT”) for permission to appeal against certain case management directions issued by the First-tier Tribunal (Tax Chamber) (the “FTT”) relating to disclosure and evidence in the appeal made by Ducas Ltd (“Ducas”). That application for permission, having been refused by the FTT, was refused on the papers by the UT.

2. HMRC applied to renew that application at a hearing, and for the hearing of that application to be heard together with the substantive appeal against the FTT’s directions. Ducas did not object to this. While such an approach is unusual, at least outside the judicial review context, as explained below, there is a need to avoid any undue delay in the case management of the substantive appeal by Ducas, and, conscious of that need, the UT heard the application and substantive appeal on that basis (which we refer to as the “rolled-up hearing”). Both parties provided skeleton arguments, served sequentially, in advance of the hearing (the “HMRC UT Skeleton” on 26 September 2025 and the “Ducas UT Skeleton” on 30 September 2025).

3. There was a transcript of the rolled-up hearing (“TS”).

4. The substantive appeal to which the case management directions (the “Directions”) relate is an appeal by Ducas against an HMRC decision dated 29 November 2024 issued under section 8 Social Security Contributions (Transfer of Functions, etc) Act 1999, imposing liability for unpaid employer national insurance contributions or NICs (the “section 8 Decision”). It is part of HMRC’s case against Ducas that, in relation to employed earners or persons deemed to be employed earners (the “Workers”) paid via Enix Services Ltd (“Enix”), Ducas has provided its customers (the “Agencies”) with fraudulent documents in connection with the purported deduction or payment of income tax and NICs in connection with the Workers. HMRC’s case is that Ducas is therefore a deemed secondary contributor for the Class 1 NICs due on the payments of earnings to those Workers pursuant to paragraph 2 of Column A and paragraph 2(b) of Column B of Schedule 3 to the Social Security (Categorisation of Earners) Regulations 1978. This allegation in relation to the provision of fraudulent documents is referred to as the “Fraudulent Documents Issue”. HMRC decided that Ducas was liable on this basis for £171,296,046.05 (subsequently amended to £171,222,823.25) for the period 6 December 2020 to 5 October 2024.

5. Ducas and HMRC both made written applications to the FTT for directions (as described in more detail below) and a case management hearing was held on 26 March 2025 (the “CMH”). The FTT gave the Directions orally at the CMH, which included that the final hearing be listed for 20 days, commencing in April 2026, directions for the service of HMRC’s Statement of Case (the “SOC”), the Reply by Ducas and any Response by HMRC and agreement of a Statement of Agreed Facts and Issues. The directions which related to disclosure and evidence were as follows:

#### **“Disclosure and evidence**

8. The Appellant’s application in respect of disclosure and evidence is granted.

9. HMRC shall serve on the Appellant their evidence on which they rely (on all issues) in this Appeal (to be presented in the form of witness statements and exhibits) by 24 July 2025. This direction is made without prejudice to any issue as to burden of proof.

10. HMRC shall provide disclosure of any documents in their possession or control which support the Appellant’s case or undermine HMRC’s case in respect of Schedule 3, Column (B), paragraph 2(b) to the Social Security

(Categorisation of Earners) Regulations 1978/1689 by 24 July 2025. Disclosure shall be given by list and provision of copy documents to the Appellant.

11. The requirement, pursuant to Tribunal Rule 27(2), that the parties file and serve Lists of Documents shall be dispensed with.

12. The Appellant shall serve on HMRC its evidence on which it relies (on all issues) in this Appeal (to be presented in the form of witness statements and exhibits) by 25 September 2025.

13. HMRC shall serve on the Appellant any evidence in reply (to be presented in the form of witness statements and exhibits) by 23 October 2025.”

6. Following an application by HMRC for, inter alia, reasons and for permission to appeal, the FTT issued its written reasons on 22 May 2025 (the “Written Reasons”) and, separately, refused permission to appeal.

7. HMRC applied to the UT for permission to appeal on 20 June 2025 (the “PTA Application”), setting out three grounds of appeal that were said (at [9] of the PTA Application) to relate to the “Heightened Disclosure Direction” which HMRC described as being the direction (at [10] of the Directions) that HMRC are under an obligation of heightened disclosure on the Fraudulent Documents Issue whereas Ducas is under no such obligation. The PTA Application was refused on the papers by Judge Scott (the “UT Papers Refusal”).

8. The grounds of appeal as expressed by HMRC are addressed further below as, notwithstanding that by the time of the rolled-up hearing the UT had issued the UT Papers Refusal, which included its understanding of the case being advanced and its reasons for refusing permission, and HMRC had subsequently served the HMRC UT Skeleton, the panel considered (although Mr Tolley did not accept) that Mr Tolley’s oral submissions at the rolled-up hearing differed markedly from HMRC’s case as it had been presented in writing. A key issue which emerged only during the rolled-up hearing was the basis on which any application for extended disclosure against Ducas had been made by HMRC to the FTT during the CMH and whether, in making any such application, HMRC relied only on what it submitted was a general principle of reciprocity that was said to be applicable to orders for disclosure. Was it the case that, as Mr Bedenham submitted at the hearing, HMRC’s position was one of “reciprocity or bust”? It is for this reason that this decision sets out in detail the procedural background to the CMH and to the rolled-up hearing, recognising that, as the issue was not identified until the hearing itself, no request had been made (by the parties or by the UT) for the FTT’s own notes of the CMH.

#### **WHEN DOES AN APPEAL LIE TO THE UT AND APPEALS AGAINST CASE MANAGEMENT DIRECTIONS**

9. An appeal to the UT from a decision of the FTT can only be made on a point of law: section 11 Tribunals, Courts and Enforcement Act 2007. HMRC must demonstrate that it is arguable that the FTT made an error of law in reaching its decision which was material to that decision. “Arguable” means an argument which carries a realistic as opposed to fanciful prospect of success.

10. The approach to be taken where an appeal is made against a case management decision has been addressed extensively, with the appellate courts emphasising the need for “extreme caution” (*Goldman Sachs International v HMRC* [2009] UKUT 290 (TCC) ([23] to [24])).

11. In *HMRC v Dettori* [2024] UKUT 12 (TCC), the UT said:

#### **“An appeal against a case management decision**

16. An appeal to this Tribunal lies only on a point of law...In addition, the direction under appeal resulted from an exercise by the FTT of its case

management powers. In the decision of the Supreme Court in *BPP Holdings v HMRC* [2017] UKSC 55 (“*BPP*”) Lord Neuberger, delivering the judgment of the Court, said this, 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 not 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 it is unjustifiable.

17. Earlier in his judgment, at [21], Lord Neuberger said:

However, it would nonetheless be appropriate for an appellate court to interfere with [the FTT’s decision], if it could be shown that irrelevant material was taken into account, relevant material was ignored (unless the appellate 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.”

12. We have applied these principles in reaching our decision.

#### **FTT RULES**

13. Rule 2(1) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the “FTT Rules”) sets out that the overriding objective of the FTT Rules is to enable the FTT to deal with cases fairly and justly, and Rule 2(3) provides that the FTT must seek to give effect to the overriding objective when it exercises any power under the FTT Rules.

14. In relation to disclosure, Rule 27 provides:

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

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

(a) of which the party providing the list has possession, the right to possession, or the right to take copies; and

(b) which the party providing the list intends to rely upon or produce in the proceedings.

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

#### **GROUND OFS OF APPEAL**

15. In the PTA Application HMRC summarised its grounds of appeal at [9] as follows:

(1) The FTT erred in law as a matter of principle in concluding, either generally or in the specific circumstances of the present case, that heightened disclosure imposed only on HMRC was appropriate. The FTT’s decision was contrary to the overriding objective and/or the essential principle of placing parties on an equal footing and ensuring, so far as practicable, that the parties are able to participate fully in the proceedings. Further or alternatively, while the FTT has a broad discretion with regards to case management

decisions, this is a decision that no reasonable Tribunal, properly directing itself as to the correct legal principles, could have taken. The FTT's decision was plainly wrong.

(2) The FTT erred in law in its reliance on *E Buyer UK Ltd v HMRC* [2017] EWCA Civ 1416[ ("*E Buyer*") and *HMRC v Smart Price Midlands Ltd & another* [2019] EWCA Civ 841 ("*Smart Price CA*") by way of support for the Heightened Disclosure Direction.

(3) The FTT also erred in law in its reliance on *Horizon Contracts Limited (in Liquidation) v HMRC* [2024] UKFTT 00348 ("*Horizon Contracts*").

16. Judge Scott refused the application for permission to appeal on the papers, setting out his reasons in the UT Papers Refusal. There is no need to summarise that decision here, save to the extent that it shows the UT's understanding of the grounds of appeal being relied upon by HMRC, which sets the context for the way in which HMRC responded in the HMRC UT Skeleton.

17. In the UT Papers Refusal Judge Scott stated as follows:

"17. Looking at the PTA Application in its entirety, it seems to me that, by all three grounds, HMRC effectively seek permission to appeal on any or all of the following bases:

(1) The FTT erred in law in ordering extended disclosure against HMRC (regardless of the level of disclosure ordered against Ducas).

(2) The FTT erred in law in not ordering extended disclosure against Ducas (regardless of the level of disclosure ordered against HMRC).

(3) The FTT erred in law in not ordering the same level of disclosure against both parties ("reciprocal disclosure")."

18. Judge Scott then stated as follows:

(1) While general disclosure ordered in the FTT will normally be reciprocal in practice, that is because disclosure is normally ordered against both parties under Rule 27, not because of some free-standing principle which would prevent a different form of order from being made against one party without it being made simultaneously against all other parties (at [22]).

(2) The purpose of extended disclosure may be equality of access to a document and the avoidance of the litigation disadvantage which would flow from unequal access, but that says nothing about the separate question of whether extended disclosure should or must be made to all parties or not at all (at [22]).

(3) HMRC have not identified any authority to support the proposition, or even assumption, that extended (CPR-style) general disclosure cannot be ordered against one party without it being ordered against all parties (at [23]).

(4) Since a general disclosure order must be informed by the overriding objective and the need for the issues in the proceedings to be properly considered by the FTT, it logically falls to be assessed on the merits on a separate basis for each party (at [23]).

19. In the HMRC UT Skeleton HMRC summarised its grounds of appeal at [14] in substantially the same terms as it had at [9] of its PTA Application. HMRC then set out its position as follows (at [23] to [24]):

(1) Contrary to [17(1)] of the UT Papers Refusal, HMRC do not contend that the FTT erred in law in ordering "heightened disclosure" against HMRC.

(2) Contrary to [17(2)] of the UT Papers Refusal, HMRC do not contend that the FTT erred in law in failing to order “heightened disclosure” against Ducas, regardless of the level of disclosure ordered against HMRC. HMRC “never asked the FTT to make any such order”.

(3) HMRC’s submission is that, having decided in Ducas’ favour that it should proceed to make orders for disclosure and evidence, the FTT erred in law as a matter of principle by failing to order the same level of disclosure against both parties in relation to the Fraudulent Documents Issue.

(4) At the heart of HMRC’s argument is the proposition that, as a matter of general principle, disclosure in the courts in civil litigation, and in the FTT in its full appellate jurisdiction, is or should be regarded as a matter of reciprocal obligation.

20. The Ducas UT Skeleton sets out Ducas’ characterisation of HMRC’s position. HMRC, according to Ducas:

(1) do not argue that the extended disclosure direction against them should not have been made by the FTT;

(2) state that they did not apply for an extended disclosure direction as against Ducas;

(3) make clear that they do not contend that the FTT erred in failing to direct “heightened disclosure” against Ducas, regardless of the level of disclosure directed against HMRC; and

(4) nonetheless contend that because the FTT acceded to Ducas’ application for extended disclosure as against HMRC, the FTT was required as a matter of law to also make the same extended disclosure direction as against Ducas (despite there being no application by HMRC) because it is a “general principle” that “disclosure...should be regarded as a matter of reciprocal obligation”.

21. At the rolled-up hearing, Mr Tolley started his submissions for HMRC by submitting that the essential question is why is it in the interests of justice and fair for Ducas not to be required to disclose adverse documents (either as a result of a search or of documents which it already knows are adverse). The premise was that the FTT has ordered extended disclosure against HMRC (which had by the time of the rolled-up hearing been provided to Ducas), and shortly Ducas is due to disclose its evidence, ie that on which it wishes to rely, but Ducas has no obligation to disclose any adverse documents.

22. It was this submission, the development of which is addressed further below, which appeared to the UT to raise an issue as to what, if any, application for disclosure had been made by HMRC to the FTT and the reasons given by HMRC to the FTT in support of any such application.

#### **PROCEDURAL BACKGROUND**

23. On 29 November 2024 HMRC obtained from the High Court freezing orders against Ducas, Enix and FL Capital Holdings Limited (the parent company of Ducas and Enix) (the “Freezing Orders”) following an *ex parte* hearing before Thompsell J. In his judgment granting the Freezing Orders, Thompsell J concluded that “there is ample evidence of dishonesty in the form of Ducas providing fraudulent documents to its customers” (*HMRC v Ducas Ltd and others* [2024] EWHC 3132 (Ch) at [13]). There have been subsequent applications and directions in relation to these orders but the Freezing Orders remain in place.

24. HMRC issued the section 8 Decision on that same date.

25. At the time that HMRC obtained the Freezing Orders and issued the section 8 Decision, HMRC had not used their statutory powers to seek to obtain documents from Ducas.

26. Ducas appealed the section 8 Decision to the FTT on 17 December 2024. In its grounds of appeal at [3(e)] Ducas states that it “denies it provided the UK Agencies with “fraudulent documents”. Further and in any event, the Agencies were at all times well aware that the Enix workers were operating through PSCs”.

27. Both parties then made case management applications to the FTT relating to the onward conduct of the appeal.

28. On 14 February 2025 Ducas applied to the FTT for directions for case management of the appeal (the “Ducas CM Application”). At [25] Ducas set out its explanation of the directions sought, which included the following:

(1) their proposed directions provide for HMRC to serve their evidence first and file and serve their skeleton argument first;

(2) such directions provide for exhibits to be served alongside the witness evidence (rather than a specific separate direction being made for disclosure). This is to achieve an expedited hearing, and reflects the fact that HMRC have already produced a substantial volume of evidence in support of the High Court application for Freezing Orders. At [25(c)], Ducas state that HMRC had suggested (in a letter of 11 February 2025 to Ducas) that CPR-style standard disclosure should be provided by both parties. Ducas said this would be inappropriate, and that given HMRC are alleging a substantial fraud, it is appropriate that HMRC should produce when serving their witness evidence documents which undermine their case or support Ducas’s case, but that there is “no warrant” for Ducas to do likewise; and

(3) a September 2025 listing was proposed.

29. HMRC made an application to the FTT on 21 March 2025 (the “HMRC CM Application”). HMRC applied for directions as to the timing of the production of HMRC’s SOC, a direction for Ducas to produce amended grounds of appeal, for HMRC to be permitted to file a Reply and for certain issues to be determined on the basis of representative sampling. HMRC stated at [15] that they resisted Ducas’ application for an expedited trial in September 2025 for reasons that would be set out in their skeleton argument and stating:

“16. HMRC therefore invite the Tribunal to direct each side to set out its case, agree the issues to be determined, and propose representative samples. At this point, both parties and the Tribunal will be able to estimate an appropriate hearing length. At a second case management hearing, the Tribunal may list the final hearing, with prompt steps to manage the case until that date, including deciding on the representative samples, directions for disclosure and witness statements.”

30. The HMRC CM Application included proposed draft directions dealing with the SOC, amended grounds of appeal, the Reply, the Statement of Agreed Facts and Issues and representative sampling, and provided for a second case management hearing and for listing information to be provided before that second hearing.

31. Both parties then provided skeleton arguments ahead of the CMH.

32. Ducas served its skeleton (the “Ducas FTT Skeleton”) on 24 March 2025. Ducas reiterated at [11] that it proposed that the hearing of the appeal be listed for September 2025, and at [12] Ducas listed its suggested further directions. Those further directions specified the date by which HMRC would serve its SOC and that HMRC would serve their evidence and

material that assisted Ducas' case or undermined HMRC's case as the next step. The remaining suggested directions addressed service of evidence by both parties, and the provision of hearing bundles and skeletons. There was no provision for Ducas to serve amended grounds of appeal in these suggested directions, and, moreover, there was no provision for Ducas to serve evidence and material that assisted HMRC's case or undermined Ducas' case.

33. The Ducas FTT Skeleton addressed the evidence each party should disclose in the following terms:

“37. The usual order (r. 27) is for both parties to produce documents on which they rely. This case differs from the norm. First, HMRC bear the burden of proving the serious allegation of fraud/dishonesty. Further, HMRC purport to have conducted extensive investigations with the Appellant's clients such that it is likely that HMRC will have access to many documents of which the Appellant is unaware. This differs from the common position in the FTT, when most if not all of the material relied upon by HMRC will have been provided by the taxpayer.

38. In those circumstances, HMRC should be required to disclose any documents that assist the Appellant's case or undermine HMRC's case (see paragraph 94 of *E Buyer UK Ltd v HMRC* [2017] EWCA Civ; [2018] 1 WLR 1524; and paragraph 53 of *HMRC v Smart Price Midlands Ltd* [2019] EWCA Civ 841; [2019] 1 WLR 5070).

39. HMRC appear to accept that they should provide disclosure as set out above, but argued in correspondence that the Appellant should be subject to the same requirement. That simply does not follow. The Appellant refers to and adopts the reasoning of the Tribunal in *Horizon Contracts Ltd v HMRC* [2024] UKFTT 348 at paragraphs 21-23.”

34. HMRC also served its skeleton (the “HMRC FTT Skeleton”) on 24 March 2025. HMRC's response to Ducas' application is set out at [8] and challenges the reasons for seeking an expedited hearing, the consequences for Ducas of the Freezing Orders and the statements which Ducas had made about the survival of its business. HMRC submitted at [9] that Ducas was seeking to railroad HMRC “into a one-sided appeal process”, and one factor cited in support of this was that Ducas “does not propose to adduce any documentary evidence” (referring to Ducas' proposed directions which made no provision for disclosure of documents except as may be exhibited to a witness statement).

35. HMRC's response to Ducas' proposed directions addressed the burden of proof (with HMRC submitting that allegations of fraud do not reverse the burden of proof on all matters) and continued:

“61. Thus, even if the Tribunal were (contrary to HMRC's submissions) to be persuaded that it is possible to list a final hearing and give all appropriate directions now, it would still not be right to dispense with directions for disclosure or to reverse the usual order of directions.

62. As set out further below, HMRC's primary position is that disclosure directions should not be issued at this juncture, until the issues to be determined have been identified and it is thereby clear what evidence is required in respect of each issue in dispute.”

36. In the context of explaining HMRC's position that the grounds of appeal were manifestly insufficient HMRC stated:

“69. Thirdly, whilst HMRC will set out their case on the provision of fraudulent documents in their Statement of Case, despite the fact that the Appellant knew what HMRC alleged (by reason of Mr Siddle's Affirmation

and HMRC's skeleton argument for the freezing injunction), the Appellant has chosen to keep its case on this issue opaque.

...

70. This is no way to progress an appeal such as the present. The Appellant cannot sensibly at the same time seek to insist on an expedited determination of its appeal and also withhold important information about its own case which is necessary to identify the issues, work out what documents and evidence will be required, and ascertain the appropriate length of the final hearing."

37. HMRC then addressed representative sampling before reverting to disclosure:

"77. This approach has the additional benefit of resolving the current disclosure dispute between the parties. The Appellant proposes removing the typical direction for Rule 27 disclosure and insists that HMRC should go first on all matters. HMRC disagree with both of these approaches. But the correct approach to disclosure, in relation to each of the issues which will ultimately arise, is not a matter that can yet sensibly be determined.

78. Once the sampling approach has been identified, each side can make submissions to the Tribunal at a return case management hearing date, as to what directions for disclosure and witness statements would be most appropriate in this case. The directions can be suitably tailored to the issues which will, by then, have crystallised."

38. HMRC then set out areas for further directions which would need to be determined at a subsequent case management hearing. These included:

"79. ...

(3) Disclosure cannot take place (on either Rule 27 or CPR-principles) until the issues between the parties have been determined. Only then can the proper basis of disclosure be ascertained and ordered. Directions as to whether there should be sequential or simultaneous exchange, and who should go first, cannot be made until the Appellant pleads its case properly and, consequently, there is sufficient clarity about the scope of the matters in dispute which will require evidence for their resolution."

39. The CMH was held on 26 March 2025, and the Directions record that Mr Stone and Mr Bedenham appeared for Ducas (as they did at the rolled-up hearing) and Mr Tolley, Ms Hicks and Ms Inglis appeared for HMRC (of whom Mr Tolley and Ms Inglis appeared for HMRC at the rolled-up hearing, as well as Mr Watkinson). The Directions were given orally at the CMH and endorsed on 2 April 2025.

40. HMRC applied to the FTT, inter alia, for reasons and permission to appeal on 16 April 2025. HMRC was thus applying for permission to appeal at a time when it did not have the FTT's written reasons for its decision. Nevertheless, that application sets out the grounds of appeal in similar terms to [9] of the subsequent PTA Application, and the reasons given are largely based on the Heightened Disclosure Direction being imposed "only" on HMRC.

41. The FTT released the Written Reasons on 22 May 2025 which included the following:

(1) In the summary of HMRC's submissions, the FTT set out at [9] that "HMRC objects to the Tribunal issuing a direction that only HMRC must disclose documents that support the Appellant or undermine HMRC's case, while the Appellant (the party accused of fraud) has no reciprocal obligation. HMRC argues that imbalance is unfair and disclosure should prevent unfair advantage or disadvantage, as a means to ensure the Tribunal has all necessary information to resolve the dispute fairly".

(2) In the summary of Ducas’ submissions, the FTT set out at [11] that “They contend that HMRC should disclose all documents they rely on and any material that assists the Appellant’s case or undermines HMRC’s case. This is justified because HMRC has conducted extensive investigations and are likely to possess documents unknown to the Appellant. The Appellant argues it should not be subject to the same disclosure standard as HMRC in this appeal.”

(3) Having referred to the relevant FTT Rules, the FTT considered the case of *E Buyer* and stated at [18] “As fraud on the part of the Appellant has been alleged in this appeal, with £171m at stake, in a complex case, of great importance to the taxpayer, I consider CPR-style disclosure is appropriate.” The FTT then referred to *Smart Price CA* and continued:

“20. The usual order under Rule 27 of the FTT Rules is for both parties to produce the documents upon which they rely. I agree with the Appellant’s submission that his case differs from the norm because HMRC bear the burden of proving the serious allegation of fraud, and following HMRC’s investigations with the Appellant’s clients, that it is likely that HMRC will have access to documents of which the Appellant is unaware. This differs from the common position, when most if not all of the material relied upon by HMRC will have been provided to them by the taxpayer. In these circumstances, I consider it to be in the interest of fairness and justice for HMRC to disclose any documents that assist the Appellant’s case or undermine HMRC’s case.

21. On the issue of whether the Appellant should also be required to disclose documents that adversely affect their own case or support HMRC’s case, I agree with the comments made in *Horizon Contracts Limited (in Liquidation) v HMRC* [2024] UKFTT 00348...

22. Although this case concerns different substantive issues, I also see no reason why it should be appropriate in this case, simply because HMRC have alleged dishonesty on the part of the Appellant, that they should be entitled to heightened disclosure from the Appellant to match their disclosure.”

(4) At [23], on the order of service of evidence, the FTT said “I consider it to be appropriate for HMRC to first serve their evidence on which they rely on all issues and that they should be afforded the opportunity to serve on the Appellant any evidence in reply, and remain at liberty to make any application for specific disclosure, should they wish to do so.”

42. The FTT refused permission to appeal on the same date on which it released its Written Reasons and HMRC then made the PTA Application to the UT.

43. In the UT Papers Refusal Judge Scott set out at [17] (as set out above) the three bases on which he considered HMRC was seeking permission to appeal, the third of which was that the FTT erred in law in not ordering the same level of disclosure against both parties, which Judge Scott termed “reciprocal disclosure”, and explained his reasons for refusal:

“22. I do not consider it to be arguable that the FTT erred in law by not applying a principle or presumption that disclosure must necessarily be reciprocal in its terms. While general disclosure ordered in the FTT will normally be reciprocal in practice, that is because disclosure is normally ordered against both parties under Rule 27, not because of some free-standing principle which would prevent a different form of order from being made against one party without it being made simultaneously against all other parties. The PTA Application refers to *Taylor v Anderton* and *Shah* as authority that “the same standard of disclosure should apply to both sides in

litigation unless there is good reason to depart from the principle”. In fact, those authorities (and others on the topic) are discussing the purpose and limits of extended disclosure (or what CPR called “standard” disclosure), and they do not support that proposition. While the purpose of extended disclosure may be equality of access to a document and the avoidance of the litigation disadvantage which would flow from unequal access, that says nothing about the separate question of whether extended disclosure should or must be made to all parties or not at all.

23. The principles applicable to disclosure in the FTT are relatively well-established, and HMRC have not identified any authority to support the proposition, or even assumption, that extended (CPR-style) general disclosure cannot be ordered against one party without it being ordered against all parties. Since a general disclosure order must be informed by the overriding objective and the need for the issues in the proceedings to be properly considered by the FTT, it logically falls to be assessed on the merits on a separate basis for each party.

...

26. Under Ground 1, HMRC argue in the alternative that the FTT erred in law in any event by not ordering extended disclosure against Ducas, as requested by HMRC.

27. I accept that such an order would have been arguably justifiable. Certain of the factors referred to in the PTA Application do not, in my opinion, carry much weight in favour of extended general disclosure against Ducas. The FTT did not refer to HMRC’s status as a public body as relevant. Nor is it arguable that the FTT failed to take into account as a factor the importance of the case to the public purse: the Decision refers as a separate factor to “£171m at stake”. I do not consider that of itself the allegation of fraud (and the High Court findings) necessitates extended general disclosure against Ducas. However, the pleadings by Ducas in relation to the knowledge of the Agencies would, in my view, be a factor pointing towards extended general disclosure.

28. However, the question of whether a direction for extended general disclosure against Ducas would have been reasonable, or whether I might have ordered it, is not the enough for permission to appeal to be granted. HMRC do not suggest that the FTT misdirected itself in law. Therefore, in order for permission to be granted I must be satisfied that it is arguable (with a realistic prospect of success) that in refusing HMRC’s application for disclosure against Ducas, the FTT took account of irrelevant factors, failed to take into account relevant factors, or reached a decision which was “plainly wrong” as being outside its generous ambit of discretion.

29. I have concluded that it is not so arguable. The FTT heard the parties over a day, with the benefit of documents, authorities and skeleton arguments. HMRC had ample opportunity to argue its case for extended general disclosure against Ducas. The FTT considered but did not accept that case.

30. I consider that it is not arguable with a realistic prospect of success that the FTT’s decision was outside the generous ambit and plainly wrong. In reaching this conclusion, I have taken into account the context, timing and nature of the FTT’s decision. The context was a package of case management directions intended to keep the appeal on track for its lengthy listing window. Those directions include a direction that HMRC serves its evidence in reply, having seen the evidence from Ducas. There is nothing to prevent HMRC at a future date from making an application to the FTT for specific disclosure, as the FTT pointed out at [23] of the Decision. As HMRC point out in the PTA

Application (at paragraph 34) the Reply was not before the FTT. Of course, the FTT would consider any such application on its merits and in light of the position and pleadings as at the time of consideration of that application.”

44. In the HMRC UT Skeleton HMRC’s submissions included at [20] that the UT Papers Refusal appeared “to have misunderstood the material circumstances” of the disclosure direction and the essential premises of the appeal. In the course of setting out their submissions on Ground 1 HMRC responded directly to some of the reasons given by Judge Scott for refusing permission as follows (with footnote 1 below being the footnote included by HMRC):

“22. The consequence of the Disclosure Direction in this case is that, in relation to the Fraudulent Documents Issue, HMRC must disclose all documents which support Ducas’ case or undermine their own, whilst Ducas, the party alleged to have provided fraudulent documents and which alleges that the Agencies were complicit, is under no obligation to disclose documents that either undermine its case or support that of HMRC (including in respect of the fraudulent documents it provided or its allegation of complicity on the part of the Agencies). That outcome is contrary both to natural justice and established legal principle, as follows.

23. Contrary to UT PTA ¶17(1) (HB/299), HMRC do not contend that the FTT erred in law in ordering ‘heightened disclosure’ against HMRC in relation to the Fraudulent Documents Issue. On the premise that any orders for disclosure were to be made at that stage, such an order was within the FTT’s broad case management discretion. Nor, contrary to UT PTA ¶17(2) (HB/299), do HMRC contend that the FTT erred in law in failing to order ‘heightened disclosure’ against Ducas, regardless of the level of disclosure ordered against HMRC (viz. that the FTT should have ordered heightened disclosure against Ducas whether or not it did so against HMRC)<sup>1</sup>. Indeed, HMRC never asked the FTT to make any such order. Rather, HMRC’s submission is (as accurately summarised at UT PTA ¶17(3) (HB/299)) that, having decided in Ducas’ favour that it should proceed to make orders for disclosure and evidence, the FTT erred in law as a matter of principle by failing to order the same level of disclosure against both parties in relation to the Fraudulent Documents Issue.

24. At the heart of HMRC’s argument is the proposition that, as a matter of general principle, disclosure in the courts in civil litigation, and in the FTT in its full appellate jurisdiction, is or should be regarded as a matter of reciprocal obligation. That reciprocal obligation furthers the overriding objective of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (“FTT Rules”) of dealing with cases fairly and justly, including by (i) ensuring that parties are placed on an equal footing and are thus able to participate fully in the proceedings, and (ii) enabling the Tribunal to determine the appeal justly, in light of all the relevant material.

25. Having decided to give directions for disclosure and evidence and ordered HMRC to provide heightened disclosure on the Fraudulent Documents Issue, the FTT should have started from the point of making a reciprocal order for heightened disclosure against Ducas. That starting point should, absent some extraordinary countervailing factor (of which there was none here, and none

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<sup>1</sup> Contrary to UT PTA ¶28 (HB/300), there was no application before the FTT for heightened disclosure against Ducas. HMRC’s position at the case management hearing was that there should be no disclosure order until after the pleadings – see HMRC’s Skeleton Argument dated 24 March 2025 at ¶¶62, 77-78, 79(1) and 79(3) (HB/188; 193).

was identified), also have been the end point. The FTT's conclusion to the contrary involved an error in principle.

26. Alternatively and in any event, in the specific circumstances of this case, on the premise that the FTT made any directions for disclosure, the FTT could rationally proceed only by ordering reciprocal heightened disclosure. HMRC necessarily made a positive case on the Fraudulent Documents Issue. But it was by the time of the CMH already apparent that Ducas intended to advance its own positive case, alleging knowledge and complicity on the part of the Agencies. Even if this could have been said to be uncertain, there was certainly no basis for assuming that Ducas would not do so. That marked imbalance of approach has produced a correspondingly skewed treatment of the parties: HMRC allege the provision of fraudulent documents and so are obliged to provide heightened disclosure; Ducas alleges knowledge and complicity on the part of the Agencies but is free to withhold documents adverse to its case, including known adverse documents."

45. In response, the Ducas UT Skeleton set out Ducas' submission that HMRC's case was "hopeless" and unarguable, submitting that HMRC's application for permission to appeal should be refused; but if permission were granted, the appeal should be dismissed. The Ducas UT Skeleton set out Ducas' characterisation of HMRC's position, including stating that HMRC had said that they did not apply for an extended disclosure direction against Ducas. Ducas' submissions included that there is no "general principle" that disclosure should be regarded as a matter of reciprocal obligation in the FTT, and that in any event (if this was being said by HMRC) it could not be said that the FTT's decision in this case was "plainly wrong".

#### **SUMMARY OF HMRC'S ORAL SUBMISSIONS IN SUPPORT OF ITS PTA APPLICATION AND WRITTEN SUBMISSIONS**

46. In his oral submissions, Mr Tolley made five points by way of overview in relation to his submission that the essential question was why is it in the interests of justice and fair for Ducas not to be required now to disclose adverse documents (either as a result of a search or of documents which it already knows are adverse), namely:

- (1) the reason given by the FTT at [22] of its Written Reasons is that it is not enough that HMRC have alleged dishonesty on the part of Ducas;
- (2) however, this is not a case of a mere allegation of fraud – it is the central premise of HMRC's case;
- (3) further, it is not a mere allegation – by the time of the CMH, HMRC had provided sufficient evidence to the High Court to obtain the Freezing Orders;
- (4) Ducas has made a positive case that it acted honestly – it is not merely putting HMRC to proof on the allegations made by HMRC; and
- (5) it is positively alleged by Ducas that the Agencies knew of and were complicit in the production of documents that stated that PAYE and NICs were being deducted and accounted for to HMRC. Ducas is putting forward what was said by Mr Tolley to be the "surprising proposition" that documents containing incorrect information (eg payslips) were provided by Ducas to the Agencies for illustrative purposes. This explanation was provided by Ducas in its Reply to HMRC's SOC on 7 May 2025 (ie after the date of the CMH); but Ducas had already stated in its grounds of appeal that the Agencies were "well aware" that the Enix Workers were operating through PSCs; and a witness statement dated 15 January 2025 of a director of Ducas in relation to the High Court proceedings had included a similar reference.

47. Mr Tolley submitted that the FTT had made three types of error in failing to direct that Ducas should give the same disclosure as HMRC:

- (1) it adopted the wrong approach in principle, in that where the same factors apply to both parties, the same result should follow. At [20] of the Written Reasons the FTT took account of the availability of documents in ordering extended disclosure against HMRC, stating “it is likely that HMRC will have access to documents of which the Appellant is unaware”; but the FTT did not consider whether Ducas might have documents which were not available to HMRC when considering whether to make an order against Ducas. This was a relevant factor and it was not applied equally to both parties;
- (2) the FTT applied different tests for disclosure against Ducas and HMRC; and
- (3) the decision took account of an irrelevant factor (that HMRC was making a mere allegation of dishonesty) and failed to take account of relevant factors. Mr Tolley submitted that when considering whether to depart from Rule 27(2), all relevant circumstances should be taken into account, and four are of particular cogency:
  - (a) the nature of the proceedings, ie what the case is about;
  - (b) the specific issues in the case and whether they are suitable for disclosure;
  - (c) the quality/extent of the case that is advanced – whether it is a mere allegation, or fully particularised; and
  - (d) the likelihood of the existence of other documents that have not already been made available. It is likely that there are documents in Ducas’ control relevant to the Fraudulent Documents Issue that HMRC does not have; HMRC had not obtained documents from Ducas by exercising its statutory powers as it had obtained the Freezing Orders and issued the section 8 Decision.

48. Mr Tolley submitted it was “quite simply wrong” ([TS/p16/19]) for Ducas to say (as they did in the Ducas UT Skeleton) that HMRC had not applied for a direction for extended disclosure against Ducas. HMRC’s position was that HMRC had communicated to Ducas before the CMH that its position was that “if an order for search-based disclosure was made against HMRC, then a reciprocal order should be made against Ducas” ([TS/p19/16-18]), and this correspondence was before the FTT. The CMH took place over a full day and decisions were taken by the FTT in stages – once the FTT, having heard from the parties, decided it would issue directions for disclosure and evidence, HMRC made an oral application for extended disclosure against Ducas at the CMH. This application was, Mr Tolley submitted, made on the premise that an order for extended disclosure was to be made against HMRC.

49. Mr Tolley reiterated that reciprocity was at the heart of HMRC’s application; but also made submissions as to the circumstances of the case which supported an order for disclosure being made against Ducas. We consider the formulation of these submissions further in the context of addressing the application made by HMRC to the FTT and the basis for such application.

50. Mr Tolley acknowledged that the FTT had expressly contemplated the possibility that HMRC might make an application for specific disclosure at a later stage, but submitted that this would be unsatisfactory for a number of reasons:

- (1) HMRC may not be able to identify from the pleaded issues and particulars of Ducas’ case the specific documents which should be sought by such an application and there is a risk that relevant documents may be missed. This risk was submitted to exist even if disclosure was sought by description of categories of documents;

- (2) Given that Ducas is making a positive case, the burden should be on Ducas to search and provide adverse documents rather than for HMRC to request disclosure; and
- (3) Ducas is due to serve its evidence shortly and the next case management hearing is listed for 26 November 2025. There is a narrow time period for a contested application for specific disclosure (and HMRC anticipates that any application would be contested).

51. HMRC asked the UT to grant permission to appeal, allow the appeal and issue its own case management direction for Ducas to produce extended disclosure on the Fraudulent Documents Issue when it produces its own evidence (the deadline for which could be extended from that currently required).

#### **DISCUSSION**

52. We must decide whether HMRC have established that the FTT made an arguable error of law in making its decision by reference to the grounds of appeal on which HMRC seek to rely and, if so, whether such appeal should be allowed or dismissed. However, the logically prior question has arisen from Mr Tolley's oral submissions as to the application which was made by HMRC to the FTT, the reasons relied upon by HMRC before the FTT and the basis on which HMRC submits that the FTT made an arguable error of law in not acceding to that application.

53. We address:

- (1) HMRC's approach to the CMH and application(s) made, including the basis on which it made any application for extended disclosure against Ducas;
- (2) whether there is a general principle of reciprocity in disclosure as relied upon by HMRC; and
- (3) the FTT's decision in the present case.

54. We have throughout taken account of the three grounds of appeal as expressed by HMRC in the PTA Application and in the HMRC UT Skeleton alongside the oral submissions made by Mr Tolley, and address our conclusions on each after the above analysis. We have taken account of Ducas' submissions, both as set out in the Ducas UT Skeleton and Mr Bedenham's oral submissions.

#### **Application(s) made by HMRC to the FTT**

55. Mr Tolley accepted for HMRC (as we consider he must) that HMRC did not make any written application to the FTT for any form of disclosure to be ordered against Ducas, either before, during or after the CMH. This was clear from the papers before us:

- (1) there is no such application in the HMRC CM Application;
- (2) no such application was made or referred to in the HMRC FTT Skeleton, in which HMRC set out its "primary position" that disclosure directions should not be issued but did not set out a secondary or alternative position in the event that the FTT acceded to Ducas' application to issue directions relating to disclosure and evidence; and
- (3) HMRC went further in the HMRC UT Skeleton and stated that "there was no application before the FTT for heightened disclosure against Ducas" (footnote 1 to [23]).

56. Indeed, the only reference which we identified to the issue of disclosure against Ducas having been raised by HMRC was in the Ducas CM Application, where at [25] Ducas referred to prior correspondence between the parties and setting out Ducas' position that it would be inappropriate for CPR-style standard disclosure to be provided by both parties.

57. Mr Tolley submitted that he made an oral application on behalf of HMRC to the FTT at the CMH for extended disclosure against Ducas. Mr Tolley apologised for HMRC's misreading of the UT Papers Refusal and how HMRC had (incorrectly) interpreted the reference therein to "regardless of the level of disclosure ordered against HMRC".

58. Mr Bedenham said that Ducas did not accept that HMRC made a "free-standing" application for disclosure before or during the CMH. He submitted that HMRC's position at the CMH was that if the extended disclosure direction was to be made against HMRC as sought by Ducas, it was not appropriate to do so on asymmetric terms. That is why the FTT took the approach it did in the Written Reasons. Mr Bedenham accepted that Mr Tolley had made submissions on disclosure at the CMH, including referring to the allegations of fraud and that Ducas was making a positive case, but submitted that they were made in the context of HMRC submitting that reciprocity was the starting-point for disclosure as a matter of principle.

59. We have, of necessity, set out the procedural background at length. The focus there is on the written applications and submissions made by the parties to the FTT. We had limited evidence as to the CMH itself; we had the FTT's Written Reasons and the subsequent submissions from HMRC (notably HMRC's application for reasons, the PTA Application and the HMRC UT Skeleton). Before considering the paragraphs of the Written Reasons relied upon by Mr Tolley, we make three preliminary observations:

(1) HMRC have not submitted in any of these written applications that they had made an application for extended disclosure against Ducas (ie a free-standing application) which the FTT had failed to consider. The opposite is the case – HMRC state in the HMRC UT Skeleton that they did not make an application for extended disclosure against Ducas. Mr Tolley confirmed at the rolled-up hearing that it was not HMRC's case that the FTT had made an error of law by failing to give reasons or on the basis of any procedural impropriety.

(2) Having said in the HMRC UT Skeleton at [20] that the UT Papers Refusal "appears to have misunderstood the material circumstances of the Directions Decision and the essential premises of the appeal", the UT would have expected HMRC to ensure absolute clarity as to their position in subsequent representations to the UT (in this case, the HMRC UT Skeleton). Unfortunately, this was not the case.

(3) The potential significance of the oral submissions made at the CMH only emerged during the rolled-up hearing. This meant that neither Ducas nor the UT had had cause to consider whether to request production of the FTT's notes of the CMH. Instead, submissions were made on behalf of both HMRC and Ducas, recognising that Mr Tolley and Mr Bedenham (as well as Ms Inglis for HMRC and Mr Stone for Ducas) had both appeared at the CMH.

60. Mr Tolley referred the UT to paragraphs of the Written Reasons which he argued supported the submission that an oral application for extended disclosure against Ducas had been made at the CMH and which showed, he submitted, that the FTT "plainly understood" ([TS/p23/5]) that such an application had been made. Addressing the paragraphs on which Mr Tolley relied:

(1) [5] and [9] are part of the summary of HMRC's submissions, and include that both parties should disclose and that HMRC objected to the FTT issuing a direction that "only HMRC must disclose". [11] is part of the summary of Ducas' submissions and states that Ducas argued it should not be subject to the same disclosure standard as HMRC. These do support a submission that HMRC was seeking disclosure from Ducas, but do not assist in the issue of whether that was sought on a reciprocal basis (ie an order could only be

made against HMRC if an equivalent order was made against Ducas) or if there was a free-standing application (or potentially something in between);

(2) [14] starts by referring to the “applications made by the parties”, and Mr Tolley emphasised the use of plural “applications”. We do not find this to be of any assistance whatsoever; both parties had made case management applications (the Ducas CM Application and the HMRC CM Application) to which the FTT had referred at [3], and a plain and natural reading of [14] is that it is referring back to these applications; and

(3) [21] addresses “the issue of whether the Appellant should also be required to disclose documents that adversely affect their own case or support HMRC’s case”. As with the summary of submissions, this (and [20] to [22] together) shows the FTT was considering an application of some form by HMRC, but not the basis on which it had been made.

61. The significantly more difficult issue for us to determine is the basis, or reasons relied upon, for the application made by HMRC to the FTT. The making of the application orally means that we have limited evidence available to assist with our assessment of this issue. During the course of Mr Tolley’s submissions, we challenged Mr Tolley as to the grounds being put forward by HMRC, with a particular emphasis on the extent to which HMRC relied solely on there being a principle of reciprocity such that, having ordered extended disclosure against HMRC, the FTT’s error of law was that it must rationally then have proceeded to order extended disclosure against Ducas. We considered that Mr Tolley’s oral submissions at the rolled-up hearing on this important issue were not entirely consistent or clear. By way of illustration:

(1) Mr Tolley described the argument about reciprocity as being “mischaracterised” by Ducas, stating “It’s never been any part of HMRC’s case that there is automatic reciprocity, that whatever order is made in one direction must necessarily be made in the other, regardless of the issue” ([TS/p31/23 to p32/1]).

(2) Mr Tolley did not accept that the HMRC UT Skeleton “majors” on reciprocity (TS/p34/14-15), referring to various paragraphs therein including [26] which states as an alternative submission that “in the specific circumstances of this case, on the premise that the FTT made any directions for disclosure, the FTT could rationally proceed only by ordering reciprocal heightened disclosure”.

(3) Mr Tolley submitted that reciprocity “should be the order of the day” ([TS/p41/25]) but in the particular circumstances of this case, there were cogent reasons to make the same order. The specific circumstances were put to the FTT.

(4) Being asked if it was HMRC’s position that HMRC made “a freestanding application” ([TS/p43/12]), Mr Tolley said “yes but on two premises” – that there were directions being made for disclosure and evidence at the time of the CMH rather than later, and that the FTT was departing from Rule 27 and ordering HMRC to make disclosure of adverse documents.

(5) Mr Tolley submitted that [21] and [22] of the Written Reasons were “addressing squarely the application that was made to the tribunal on the day”. If that is the case, reading those paragraphs, we would conclude that the submissions had been made, and were premised, on the basis of reciprocity. As Judge Scott put it at the hearing, these paragraphs, “speak for themselves” ([TS/p45/19]) – they are addressing whether or not the FTT accepts that there is a principle of reciprocity. Mr Tolley submitted that these reasons are actually addressing two things – whether you should make a differential order

against one party and not the other, and whether, in this case, it was appropriate to make differential orders.

(6) Mr Tolley confirmed that it was HMRC's submission that when they referred to the "circumstances of this case", they meant that "reciprocity is particularly appropriate" ([TS/p48/11]), rather than that extended disclosure should be granted for a reason other than the principle of reciprocity.

(7) Mr Tolley confirmed that it was at the "heart" of HMRC's appeal, that "disclosure is or should be regarded as a matter of reciprocal obligation" (TS/p53/5-7)).

62. Mr Bedenham characterised HMRC's position as being "reciprocity or bust"; and the significance of this is the way in which Mr Tolley then responded in submissions by way of reply.

63. Mr Tolley reiterated, by reference to [26] of the HMRC UT Skeleton, that HMRC were relying in the alternative on the "specific circumstances of the case" ([TS/p130/16]), and denied that it was a case of "reciprocity or bust" ([TS/p130/23-24]). Nevertheless, in an exchange with Judge Scott, Mr Tolley submitted that *the only rational decision* open to the FTT would have been to order extended disclosure against Ducas in the same terms as that ordered against HMRC and that "the generous ambit [of discretion of the FTT] was narrowed by the parameters of deciding to make an order there [and then], not later, and then by making an order for extended disclosure, whatever language you want, against HMRC on a generalised basis. Given the context of this case, the submission is that the same order [fell] to be made necessarily against Ducas. The same circumstances applied to Ducas with the same force" ([TS/p136/3-10]).

64. Having considered carefully all of the written and oral submissions which have been made by HMRC, the UT accepts that HMRC did make an oral application to the FTT at the CMH, once the FTT had decided to make disclosure directions and to make an extended disclosure direction against HMRC, for an order for extended disclosure against Ducas. However, consistently with the position initially put in writing to Ducas in January/February 2025, that application was expressed to the FTT to be on the basis and on the premise that the FTT was required to make reciprocal disclosure directions where it decided to order extended disclosure against one party.

65. The significance of all this is that submissions made by HMRC in this appeal as to the FTT having made an error of law in ordering extended disclosure only against HMRC must be assessed by reference to the way in which the application was made to the FTT by HMRC at the CMH.

### **Principles relevant to disclosure in the FTT**

66. Rule 27 of the FTT Rules, which applies to standard and complex cases, provides for parties each to provide a list of documents which that party intends to rely upon or produce in proceedings. As stated by Sales J in *HMRC v Ingenious Games LLP* [2014] UKUT 62 (TCC) ("*Ingenious Games*") at [25]:

"25. This default rule [rule 27] makes considerable sense in the usual type of case, where HMRC will have used their extensive statutory powers of investigation at the stage of inquiry into a taxpayer's affairs and thus will have seen all relevant documents in the taxpayer's possession by the time an appeal is launched..."

67. In *McCabe v HMRC* [2020] UKUT 266 (TCC) ("*McCabe*") the UT set out the principles material to determining relevance in that case, which we gratefully adopt. These included:

(1) 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 ([22]).

(2) The FTT must exercise its discretion to order additional disclosure so as to give effect to the overriding objective. That objective of dealing with a case fairly and justly includes dealing with it in a way which is proportionate ([23]).

(3) The FTT has power to order the production of any document in a person’s possession or control which relates to an issue in the proceedings ([24]). In *E Buyer*, one of the issues was whether it was an error of law by the FTT not to have displaced Rule 27 with broader CPR-style disclosure. In determining that the FTT had not so erred, Sir Geoffrey Vos C stated at [94]:

“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.”

(4) Relevance is to be assessed by reference to the issues in the case and the positions of the parties, citing *Smart Price CA* at [40]:

“Disclosure of documents is not an end in itself but a means to an end, namely to ensure that the tribunal has before it all the information which the parties reasonably require the tribunal to consider in determining the appeal. It is only one step in the overall management of the case which should, as the appeal progresses towards a substantive hearing, identify and if possible narrow the issues between the parties. The scope of the issues in contention at the trial depends in part on the legal test to be applied by the tribunal and in part on the parties’ respective positions as to which elements of that test are in contention.”

(5) A degree of caution must be exercised in drawing from the decision of Sales J in *Ingenious Games* principles of general application regarding disclosure; whereas the guidance in the subsequent Court of Appeal decisions in *E Buyer* and *Smart Price CA* was of broader general application ([28]).

(6) In considering an application for disclosure the test of whether a document is potentially probative of one of the issues is a sensible approach. As the Court of Appeal observed in *Smart Price CA*, the test must be applied by reference to the issues in the case. This does not mean the issues in some abstract or generalised sense, but the issues and asserted facts as identified from each party’s pleaded case ([33]).

(7) The starting point in the FTT in a complex, high-value case may be that a document which is relevant (in the broadest sense) should be disclosed unless there are good reasons to the contrary, but that is only a starting point. On an application for disclosure, the tribunal will need to consider the degree of potential relevance of the document and whether there is a need for disclosure in order to enable a fair determination of the issues to take place. Further, in taking into account the overriding objective, what might amount to “good reasons” for refusing to order disclosure of documents that are relevant are likely to differ depending on whether a document is materially adverse to a party’s case or merely a background document or one which might lead to a train of enquiry ([37]).

#### ***A principle of reciprocity in the FTT?***

68. HMRC submitted that there is a general principle of reciprocity in respect of disclosure obligations in both the FTT and the courts in civil litigation, with this being said to be at the “heart” of HMRC’s argument (at [24] of the HMRC UT Skeleton).

69. We look first at the position in the FTT.

70. Mr Tolley sought in particular to rely on *Ingenious Games, HMRC v Smart Price Midlands Ltd* [2017] UKUT 465 (TCC) (“*Smart Price UT*”), *Mitchell v HMRC* [2023] EWCA Civ 261 (“*Mitchell*”) and *Ellis v HMRC* [2022] UKUT 254 (TCC) (“*Ellis*”) in support of this proposition, each of which we consider below.

71. Mr Tolley referred to Sales J’s consideration of the “default rule” in *Ingenious Games* and why it made “considerable sense” as set out by Sales J at [25], but submitted that, as Sales J acknowledged, the default rule becomes problematic in cases where HMRC have not in fact had the opportunity to see all the relevant documents in the taxpayer’s possession. Mr Tolley relied on Sales J’s conclusion at [67] that:

“...in order for the main appeal to be determined fairly and justly, in accordance with the overriding objective, HMRC should have an equal opportunity to review the further relevant documents held by ITP, IFP2 and Ingenious Games which they have not yet disclosed to HMRC and which they do not wish themselves to rely upon in the appeal. Put another way, it would be unfair and unjust for ITP, IFP2 and Ingenious Games to be able to suppress or keep from the view of HMRC and the FTT relevant documents which may be harmful to their case, as a consequence of the limitation on the extent of HMRC’s inspection of documents during the investigatory stage as a result of a sensible co-operative approach to the conduct of the investigation which was agreed as being in the interests of both sides.”

72. Mr Tolley emphasised that by the time this appeal was heard by Sales J, HMRC had agreed to give general disclosure to the taxpayers on a CPR-style basis and HMRC was seeking the equivalent order against the taxpayers, submitting that Sales J’s reasoning was that unfairly the FTT’s decision to refuse to order disclosure against the taxpayers had generated an outcome which produced an inequality of approach.

73. Whilst Sales J noted at [42] that the taxpayers had sought wider disclosure from HMRC when applying for relevant third party documents in HMRC’s hands, we do not accept that this decision is supportive of any general principle of reciprocity. As noted in *McCabe*, the decision is very fact-dependant, and Sales J’s reasoning emphasises that, in the context of the approach (which had been agreed between HMRC and the taxpayers) to disclosure in respect of a specimen of film and games investments during HMRC’s investigation, HMRC had not obtained documents relating to other investments outside of that sample in circumstances where the taxpayers subsequently served pleadings which included reference to films and gains other than the specimen films previously identified. His statement at [67] must be read in that context.

74. Mr Tolley referred to the decision in *Smart Price UT*, where at [44] the UT said:

“[W]e regard Rule 27 Disclosure as a starting point or default position which applies unless the Tribunal is persuaded that something else is, in the circumstances of the appeal, just and fair. However, it is no more than that. The rule expressly provides that its provisions are “subject to any direction to the contrary”. Where the FTT, in the exercise of its discretion, decides that it should depart from this starting point to enable it to deal with the case justly and fairly, it is entitled to do so...”

75. We agree with this statement of principle, as did Mr Bedenham for Ducas. However, it is the broadest possible acknowledgement of the FTT’s discretion to direct that “something else” is just and fair in the circumstances of a particular appeal. There is nothing in this which supports a conclusion that that “something else” requires reciprocal orders for disclosure.

76. Mr Tolley submitted that when the FTT departs from the default disclosure rule in Rule 27, the requirements of fairness and justice are always paramount, by reference to the UT's decision in *Ellis*:

"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 r27 of the Rules has been set aside, the fair determination of the case may require such further disclosure."

77. We agree that this statement of principle is particularly apt in the present case. However, neither the decision in *Ellis*, nor the particular paragraph above on which Mr Tolley relies, support a conclusion that the fair determination requires reciprocal orders be made.

78. Mr Tolley also relied on the judgment of Whipple LJ in *Mitchell* (acknowledging that the discussion of the powers and discretion of the FTT was *obiter* but submitting that it was highly authoritative). At [61] Whipple LJ addressed the error which had been made in that case by the FTT. The first two reasons given were particular to the facts of that case (being based on the documents being held by HMRC and the application being made by one taxpayer for disclosure of documents held in respect of a second taxpayer). It is Whipple LJ's third reason which is of general importance:

"61.... Thirdly, in determining what approach to disclosure it should apply, the FTT appears to have lost sight of the overriding objective which requires the FTT to ensure that the proceedings are fair and just. The FTT did not engage with HMRC's case that fairness required disclosure of Level 2B and 4 Disputed Documents to Mr Bell because they had the potential to assist his appeal. The FTT limited the scope of disclosure going to credibility, when credibility is necessarily a general concept, and was an obvious line of argument for Mr Bell. The FTT suggested that Mr Bell could make an application for specific disclosure in due course, but that was not realistic given that he did not know what was in the Level 2B and 4 Disputed Documents. The point which the FTT should have had in mind was that rule 27(2) provided only the starting point for disclosure, but the rule is flexible and can be varied in appropriate circumstances to meet the fairness and justice of the case. That was the point made by the Court of Appeal in *Smart Price Midlands* [2019] 1WLR 5070 (see para 6 above). In many cases before the FTT that starting point is adequate as an end point too, because HMRC and the taxpayer already have all the documents which relate to the dispute. But this case was different, because it involved two appellants with apparently divergent cases, in circumstances where HMRC held documents relating to the tax affairs of one of them, which documents could have real significance to the other. The FTT needed to consider whether the scope of disclosure should be broadened to something closer to the standard rule under the CPR."

79. This passage does not support a general principle of reciprocity; indeed, the reference to the rule being flexible and being varied in appropriate circumstances to meet the fairness and justice of the case in fact support a conclusion that there is no rigid rule which requires that extended disclosure should be ordered reciprocally. We regard such a conclusion as self-evident. HMRC's approach would not take account of the availability of relevant documents, the need for proportionality, or facts relevant to a particular party.

### *A principle of reciprocity in civil litigation?*

80. HMRC submit that symmetric disclosure is “the starting point in civil litigation”, although they (necessarily) acknowledge that the court does have a broad discretion to make alternative disclosure orders. We have considered the cases on which Mr Tolley relies as well as the provisions in the CPR to which we were referred. While the CPR does not apply in the FTT, it has been repeatedly recognised that the principles it contains may be a useful guide to the exercise of the FTT’s discretion under the FTT Rules.

81. In *Taylor v Anderton* [1995] 1 WLR 447, Sir Thomas Bingham MR at page 462B, pre-CPR, where the MR considered the meaning of the expression “disposing fairly of the cause or matter” and said:

“The purpose of the rule is to ensure that one party does not enjoy an unfair advantage or suffer an unfair disadvantage in the litigation as a result of a document not being produced for inspection. It is, I think of no importance that a party is curious about the contents of a document or would like to know the contents of it if he suffers no litigious disadvantage by not seeing it and would gain no litigious advantage by seeing it. That, in my judgment, is the test.”

82. This reasoning has been approved and applied post-CPR, including by Munby LJ and Pill LJ in *Shah v HSBC Private Bank (UK) Ltd* [2011] EWCA Civ 1154 (at [53] and [58] respectively).

83. In *Alame v Shell Plc* [2024] EWCA Civ 1500, at [81] Stuart-Smith LJ referred to two aspects of the “inequality of arms” in that litigation, one of which was that there was “a major inequality in access to information”, as evidence submitted by the claimants suggested that the defendants had “considerable quantities of relevant information” that was not available to the claimants. Stuart-Smith LJ (in a paragraph specifically endorsed by Bean LJ at [102]) addressed the process of disclosure at [82]:

“82. What, then, should be the approach that the Court should take? The short answer is that all of its steps should be informed by the overriding objective and, in particular, by the Court's obligation to ensure that the parties are on an equal footing and can participate fully in the proceedings. In that regard, I agree that in cases where there is a significant asymmetry of information between a claimant and a defendant "the process of disclosure is one of the most powerful tools available for achieving justice"; and that "if the scope of disclosure is too tightly confined by the specific facts that the claimant has already been able to plead, the claimant may simply be unable to obtain the material that it needs to plead and make out its case": see *Ventra Investments Ltd v Bank of Scotland* [2019] EWHC 2058 (Comm) at [37]-[38]. These observations were made in the context of an action alleging fraud and misconduct; but I take them to be of general application: see, for example, the similar approach of Coulson J (as he then was) in the context of procurement disputes: *Roche Diagnostics Ltd v Mid Yorkshire Hospitals NHS Trust* [2013] EWHC 933 (TCC) at [20](a) and (b).”

84. These authorities are discussing the purpose and limits of extended disclosure (or what CPR called standard disclosure). They neither address nor support the proposition that the same standard of disclosure should apply to both sides in litigation unless there is good reason to depart from that principle. While one purpose of extended disclosure may indeed be equality of access to a document and the avoidance of the litigation disadvantage which would flow from unequal access, that says nothing about the separate question of whether extended disclosure should or must be made to all parties or not at all. We do not accept Mr Tolley’s

suggestion that a principle of reciprocal disclosure is a “necessary implication” of these and other pronouncements.

85. We do not find that HMRC’s submissions on symmetric disclosure are borne out by the relevant rules, whether CPR 31 (disclosure in civil proceedings other than small claims and those in Business and Property Courts) or CPR PD 57AD (disclosure in the Business and Property Courts).

86. CPR 31.5(3) provides that, before the first case management conference, each party must serve a report which describes what relevant documents may exist and states which of the directions under (7) or (8) are to be sought. CPR 31.5(7) then provides:

“(7) At the first or any subsequent case management conference, the court will decide, having regard to the overriding objective and the need to limit disclosure to that which is necessary to deal with the case justly, which of the following orders to make in relation to disclosure -

- (a) an order dispensing with disclosure;
- (b) an order that a party disclose the documents on which it relies, and at the same time request any specific disclosure it requires from any other party;
- (c) an order that directs, where practicable, the disclosure to be given by each party on an issue by issue basis;
- (d) an order that each party disclose any documents which it is reasonable to suppose may contain information which enables that party to advance its own case or to damage that of any other party, or which leads to an enquiry which has either of those consequences;
- (e) an order that a party give standard disclosure;
- (f) any other order in relation to disclosure that the court considers appropriate.”

87. We consider that this makes it completely clear that the regime is inherently flexible, and that there is no longer a default disclosure order, let alone one which applies reciprocally (as sub-paragraphs (b) and (e) expressly permit asymmetric orders). That standard disclosure is no longer the default position was confirmed by Birss J in the Patents Court (at a time when such proceedings were still subject to the CPR 31 regime) in *Positec Power Tools v Husqvarna AG* [2016] EWHC 1061 (Pat). At [21], having referred to CPR 31.5(7), Birss J said:

“Two things emerge from this. First is the reference to the overriding objective and the need to limit disclosure to that which is necessary to deal with the case justly. This helps to focus the court’s mind on the task to be undertaken. Second, and critically, is that the effect of this provision is that standard disclosure is one of six options. Counsel for Husqvarna submitted that this meant that standard disclosure was not the default option any more. I agree. The Chancery Guide, para 17.35 makes the same point. As the Chancery Guide states, careful consideration should be given to the alternatives to standard disclosure.”

88. In the Business and Property Courts, paragraph 2.4 of CPR PD 57AD sets out that the court will be concerned to ensure that disclosure is directed to the issues in the proceedings and that the scope of disclosure is not wider than is reasonable and proportionate in order fairly to resolve those issues. A party wishing to seek disclosure of documents in addition to or instead of “Initial Disclosure” must request “Extended Disclosure” which involves using one of various Models A to D in respect of each of the issues in the case. It is clear from paragraph 8.3 that the court may impose asymmetric disclosure obligations:

“8.3 The court may order that Extended Disclosure be given using different Disclosure Models for different Issues for Disclosure in the case. It is important that there is moderation in the number of Models used and the way in which they are applied to the Issues for Disclosure so that the disclosure process that will follow, using the Models and the Issues for Disclosure, will be practical. In the interests of avoiding undue complexity the court will rarely require different Models for the same set or repository of documents. The court may also order that Extended Disclosure be given by only one party, or that different Models are to apply to each party’s Disclosure on a particular Issue for Disclosure. In some cases, it may be appropriate, practical and proportionate for different Models to be applied to different types of documents (e.g. one Model for physical documents and another Model for electronic documents).”

### ***Conclusions on reciprocity***

89. We do not consider that the authorities to which we were taken support a conclusion that, as a matter of general principle, where an order for extended disclosure is made against one party, an equivalent order in respect of that issue must or should then be ordered against the other party (or parties).

90. Such a principle is not evidenced in appeals before the FTT or in civil litigation. There is no general principle of reciprocity. Nor do we consider that it would be appropriate for us to endorse such a principle; as we have explained, an order for disclosure is to be informed by the circumstances of a particular party against the background of the primary pleaded issues, not by the order made against the other party or parties.

91. To the extent that Ground 1 is based on a submission that, having ordered extended disclosure against HMRC, the FTT erred in law by not recognising that extended disclosure must then be ordered against Ducas to reflect a general principle of reciprocity, we find that there is no such general principle of reciprocity and accordingly there was no error of law.

92. As Ground 3 of its appeal, HMRC submitted that the FTT further erred in law in its reliance on *Horizon Contracts*. Since the only reliance placed on that decision by the FTT was in the course of reaching its decision not to accept HMRC’s proposition that, as matter of principle, the default position was reciprocity, it follows that that gave rise to no error of law.

### ***FTT’s reliance on E Buyer and Smart Price CA***

93. HMRC submit as a separate ground of appeal (Ground 2) that the FTT erred in law by relying on *E Buyer* and *Smart Price CA* to support the extended disclosure order against HMRC.

94. The reasons given by HMRC in support of this ground were addressed in the UT Papers Refusal and, whilst we have taken account of the submissions made in the HMRC UT Skeleton, the UT agrees with the reasoning set out therein, namely:

“33. In relation to *Ebuyer*, the PTA Application points out various factual differences between that case and this appeal. It records that the Court of Appeal did not order extended disclosure against HMRC, and that the Court of Appeal “did not decide that there were circumstances in which any such heightened disclosure should apply only to HMRC”. HMRC state that, in any event, the facts that fraud was not alleged against the taxpayer itself, and that HMRC had gathered material relevant information are “entirely different” from the present case. HMRC say that the issue in this case is not constructive knowledge but actual knowledge and control of relevant documents. Finally, say HMRC, unlike *Ebuyer*, Ducas has been ordered to preserve all relevant documents by the freezing injunction.

34. In considering these points, it is necessary to look at the reliance in fact placed by the FTT on *Ebuyer* in the Decision. It is hardly surprising that the FTT should refer to *Ebuyer* and *Smart Price* in deciding an application for extended disclosure. They are leading authorities in relation to the FTT's powers in that context. At [17] the FTT quoted a passage from the Court of Appeal's decision which referred specifically to various factual issues and ended by stating:

If fraud or dishonesty had been alleged, there is, as I have said, authority for the proposition that CPR-style disclosure would have been appropriate, but all that is alleged here is knowledge of a fraud, not direct dishonest participation in a fraud.

35. At [18], The FTT then stated that "as fraud on the part of the Appellant has been alleged in this appeal, with £171m at stake, in a complex case, of great importance to the taxpayer, I consider CPR-style disclosure is appropriate".

36. There was no error of law, arguable or otherwise, in the FTT considering this passage, and then setting out its conclusion at [18]. Far from making any of the errors asserted by HMRC, the FTT showed that it was fully aware of the factual differences, in particular as to the allegation of direct fraud. It clearly did not rely on factual similarities with the facts in *Ebuyer*. It did not refer to or rely on *Ebuyer* in relation to whether or not to order reciprocal disclosure. Rather, it referred to the allegation of fraud in this case (engaging the statement set out above at the closing sentence of [94] of *Ebuyer*), and factors in common with the "third reason" given by the Upper Tribunal, which was described by the Court as "the most important". The preservation of documents was not a factor referred to in *Ebuyer*, but the FTT did not say or indicate that it was.

37. I do not consider it arguable that the FTT made any error of law by reference to what is said in the Decision relating to *Ebuyer*.

38. In relation to *Smart Price*, The PTA Application again refers to the issue and jurisdiction in that case. It then describes the Court of Appeal's rationale for ordering extended disclosure against HMRC. HMRC state that the case was "entirely different", because (1) this case is a full merits appeal, (2) this case concerns fraudulent documents in the control of Ducas, and (3) the High Court has accepted that HMRC have produced prima facie evidence of fraud. It is said that the FTT also erred because *Smart Price* does not justify one-way extended disclosure.

39. Starting again with the Decision, it is clear that the FTT was aware of the nature of the jurisdiction in that case; it refers to it specifically in the opening words of [19] and it is referred to in the paragraph quoted. The FTT then sets out a passage from *Smart Price* which is clearly relevant to its decision in relation to disclosure against HMRC. That passage refers to a justification for extended disclosure against HMRC in appeals "where HMRC have access to many documents of which the applicant may be unaware".

40. The FTT states at [19] that it has "considered" *Smart Price*, and at [20] accepts Ducas' submission that extended disclosure should be ordered against HMRC in the interests of fairness and justice as "this case differs from the norm because HMRC bear the burden of proving the serious allegation of fraud, and following HMRC's investigations with the Appellant's clients...it is likely that HMRC will have access to documents of which the Appellant is unaware".

41. None of the arguments under Ground 2 in relation to Smart Price are made out. The FTT was aware that in Smart Price the jurisdiction of the FTT was different. The other points raised by HMRC relate to the case for disclosure against Ducas/reciprocal disclosure, and the FTT did not rely on or refer to Smart Price in that context. At [20], in reaching its decision to order extended disclosure against HMRC it is not arguable that the FTT took into account an irrelevant factor, failed to take into account a relevant factor, or reached a conclusion which was plainly wrong.

42. Further, in relation to the FTT's consideration of both Ebuyer and Smart Price, the relevance of those cases derives not from any detailed comparison with the facts of this appeal, but in the judicial discussion of principles relevant to extended disclosure as contrasted to Rule 27 disclosure."

95. Moreover, HMRC rely on Ground 2 to challenge the heightened disclosure obligation which was imposed on HMRC, albeit emphasising the "one-way" nature of that obligation, and we consider that this is immaterial to the real challenge being made by HMRC which is to the absence of a reciprocal disclosure obligation being imposed on Ducas.

96. We have concluded that Ground 2 does not identify an arguable error of law in the FTT's case management decision and we therefore refuse permission to appeal under Ground 2.

**Extended disclosure direction against Ducas regardless of direction made against HMRC?**

97. HMRC emphasised why in their submission it would have furthered the overriding objective for the FTT to have ordered extended disclosure against Ducas in relation to the Fraudulent Documents Issue.

98. We can see that there are good reasons in this case which could have justified the FTT making an order for extended disclosure against Ducas in respect of the Fraudulent Documents Issue. In particular, this would have assisted in ensuring that the FTT hearing the substantive appeal would have before it all documents which are relevant to the pleaded issues in order to make findings on critical issues of fact.

99. However, we must resist the temptation to determine this appeal on the basis of an application which HMRC could have made to the FTT but did not, or on the basis of reasoning which HMRC could have advanced to the FTT but did not, or on the basis of arguments which could have been raised in this appeal but were not. This appeal is not a "do-over", and it is for the FTT and not the UT to case manage Ducas' appeal.

100. We take account of the basis on which the oral application was made to the FTT, and in particular HMRC's emphasis on the principle of reciprocity and the premise of its oral application. The Written Reasons show that the FTT engaged with the case as presented to it; and Mr Tolley acknowledged that the reasoning at [21] and [22] was a response to HMRC's case.

101. The context of the CMH is also significant, namely that the FTT was considering a package of case management directions, of which the disclosure directions formed only one part, intended to keep the appeal on track for its lengthy listing window.

102. Finally, the FTT expressly contemplated at [23] of the Written Reasons that HMRC were at liberty to make an application for specific disclosure, and we observe that they remain at liberty to do so.

103. We should not interfere with a case management direction simply because we might have reached a different conclusion. We must assess whether the decision was outside the generous ambit of the FTT's case management discretion or plainly wrong, in all the circumstances of

this case. We do not consider that the Directions were outside the generous ambit of the FTT's case management discretion or were plainly wrong.

**DISPOSITION**

104. For the reasons given above:

- (1) Ground 2 is unarguable, and permission to appeal on that ground is refused; and
- (2) permission to appeal on Ground 1 and Ground 3 is granted, but HMRC's appeal on Ground 1 and Ground 3 is dismissed.

**JUDGE THOMAS SCOTT  
JUDGE JEANETTE ZAMAN**

**UPPER TRIBUNAL JUDGES**

**Release date: 23 October 2025**