Neutral Citation Number: [2019] EWCA Civ 841
Case No: A3/2019/0415

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)
(Henry Carr J and Judge Hellier)
[2017] UKUT 465 (TCC)
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)
(Fancourt J and Judge Hellier)
[2018] UKUT 419 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL
16/05/2019

B e f o r e :

LORD JUSTICE McCOMBE
LORD JUSTICE NEWEY
and
LADY JUSTICE ROSE

Between:
COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Appellants

- and –

(1) SMART PRICE MIDLANDS LIMITED
(2) HARE WINES LIMITED

Respondents

Case No: A3/2019/0415

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)
(Fancourt J and Judge Hellier)
[2018] UKUT 419 (TCC)

Between :
COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Appellants

- and –

(1) Gardner Shaw UK Limited
(2) Gardner-Shaw (London) Limited

Respondents

(3) Best Price Retail & Wholesale Limited
(4) Drinks 4 Less (UK) Limited
(5) Casa Di Vini Limited
(6) Harp Wines & Spirits Ltd
(7) Hare Wines Ltd
(8) Dhillons Brewery Ltd
(9) London Cash & Carry Ltd
(10) Magicspellbrewery Limited

Jonathan Hall QC and Will Hays (instructed by General Counsel and Solicitor to HM Revenue and Customs) for the Appellants
David Bedenham (instructed by Rainer Hughes) for the Respondents
Hearing date : 27 March 2019

HTML VERSION OF JUDGMENT

Lady Justice Rose:

1. These two appeals raise the issue of the extent of disclosure of documents that should be provided by the Appellants ('HMRC') when a trader who has been refused approval for the operation of a wholesale alcohol supply business challenges that refusal before the First-tier Tribunal. The Respondents in these appeals ('the Traders') have all been refused approval on the grounds that they are not fit and proper persons to operate a business selling alcohol. As the proceedings in which these appeals arise currently stand, the disclosure ordered is in terms that:

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

2. I shall refer to that disclosure direction as the "global disclosure direction".

3. The Traders argue that the global disclosure direction is necessary to give them a real chance of understanding why their applications were refused and so to be able to prove that the refusal was wrong. HMRC complain that the global disclosure direction is too broad and imposes an onerous burden on them to supply documents many of which are irrelevant to the issues likely to be raised in the appeals.

4. Two judgments of the Upper Tribunal have upheld the global disclosure direction as an appropriate first step in the management of these appeals. In the first judgment, the Upper Tribunal dismissed HMRC's appeal against a refusal to vary the FTT's order. I shall refer to those proceedings as the *Hare Wines* appeal. In the second judgment, the Upper Tribunal allowed the Traders' appeal against a decision of the FTT acceding to an application by HMRC to narrow the global disclosure direction. I shall refer to those proceedings as the *Gardner Shaw* appeal.

The Alcohol Wholesale Registration Scheme

5. The registration regime for wholesale suppliers of alcohol ('AWRS') was introduced by the insertion of Part 6A into the Alcoholic Liquor Duties Act 1979 ('ALDA') by section 54 of the Finance Act 2015. The history and operation of the AWRS were described in detail by this court in *R (ABC Ltd) v*

Revenue and Customs Commissioners [2017] EWCA Civ 956, [2018] 1 WLR 1205. Part 6A makes the selling of liquor wholesale on or after the point at which excise duty is payable a controlled activity. Section 88C ALDA prohibits a business with a UK establishment from carrying on a controlled activity otherwise than in accordance with an approval given by the Commissioners under that section. Section 88C(2) provides:

> "(2) The Commissioners may approve a person under this section to carry on a controlled activity only if they are satisfied that the person is a fit and proper person to carry on the activity."

6. An approval may be made subject to conditions or restrictions and can be revoked at any time for reasonable cause: see section 88C(3) and (5) ALDA. It is a criminal offence to trade without approval. HMRC maintain a register of approved wholesalers and as from 1 April 2017, anyone purchasing alcohol from a wholesaler who is not approved commits a criminal offence if he knows or ought to have known of the absence of approval.

7. The Wholesaling of Controlled Liquor Regulations 2015 (SI 2015/1516) made under ALDA provide by regulation 4(4) that:

> "If the Commissioners refuse an application for approval they must notify the person who made the application of that fact and give the reasons for the refusal."

8. There is no requirement in the Regulations that the Commissioners provide the trader with any documents supporting the decision to refuse approval. An appeal to the tribunal against a refusal of approval lies under section 16(4) of the Finance Act 1994:

> "(4) In relation to any decision as to an ancillary matter, or any decision on the review of such a decision, the powers of an appeal tribunal on an appeal under this section shall be confined to a power, where the tribunal are satisfied that the Commissioners or other person making that decision could not reasonably have arrived at it, to do one or more of the following, that is to say—
>
> (a) to direct that the decision, so far as it remains in force, is to cease to have effect from such time as the tribunal may direct;
>
> (b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, a review or further review as appropriate of the original decision;
>
> (c) in the case of a decision which has already been acted on or taken effect and cannot be remedied by a review or further review as appropriate, to declare the decision to have been unreasonable and to give directions to the Commissioners as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in future."

9. Section 16(6) of the Finance Act 1994 provides that it is for the appellant to show that the grounds on which any such appeal is brought have been established. Subsection (8) defines a "decision as to an ancillary matter" for the purposes of subsection (4) and that includes refusals of approval under section 88C ALDA.

10. The AWRS came into effect on 1 April 2016 and required both existing and new alcohol wholesaling businesses to apply for approval. HMRC published guidance in the form of *Excise Notice 2002: Alcohol Wholesaler Registration Scheme*, the latest version of which is dated 22 November 2018 (the 'Excise Notice'). Section 6 of the Excise Notice describes the test applied by HMRC for granting AWRS approval:

> "This means HMRC must be satisfied the business is genuine and that all persons with an important role or interest in it are law-abiding, responsible, and do not pose any significant threat in terms of potential revenue non-compliance or fraud."

11. The process described in the Excise Notice shows that HMRC's investigation of the applicant business will be extensive and wide ranging. It will involve checks of HMRC's records to ascertain whether the applicant has been compliant with its tax obligations and, in the case of a corporate body, is likely to include checks with Companies House. HMRC may consult other government departments and agencies and credit reference agencies. HMRC will also check the criminal records of applicants for any relevant convictions. They may visit the applicants' premises to examine the trading activities and ask for details about suppliers, customers, business plans, accounting and stock control systems, premises and financial viability. The Excise Notice sets out a long list of criteria against which HMRC will assess all applicants, covering not just the legal entity of the business but all partners, directors and other 'key persons', defined as those who "can be seen as one of its 'guiding minds'". The criteria include evidence of illicit trading on the part of key persons involved in the business, for example where a person has been assessed for under-declaration of tax or has been subject to penalties for wrongdoing or has had previous approvals revoked or refused or has been subject to confiscation orders and recovery proceedings under the Proceeds of Crime Act 2002. HMRC will also consider whether key persons involved in the business have any criminal convictions which are relevant, for example offences involving any dishonesty or links to organised criminal activity. It states: "HMRC will normally disregard convictions that are spent provided there are no wider indications that the person in question continues to pose a serious threat to the revenue". An unspent conviction is one that has not expired under the terms of the Rehabilitation of Offenders Act 1974. The list of criteria is described as non-exhaustive and the guidance indicates that HMRC may refuse to approve an applicant for reasons other than those listed, if they have justifiable concerns about suitability.

12. Although this is not mentioned in the Excise Notice, HMRC will send a "minded to refuse" letter to an applicant, giving the applicant an opportunity to respond to the matters set out there before a final decision is taken.

13. Section 9 of the Excise Notice sets out what happens if the application for approval is refused. A dissatisfied applicant can tell the person who issued the decision if he has further information or can show that HMRC have missed something. The applicant has 30 days in which he can ask for the decision to be reviewed by an HMRC officer not previously involved in the matter or he can appeal to the FTT without requesting an internal review. The right to an internal review derives from a combination of section 54(7) of the Finance Act 2015 and sections 15A to 15F of that Act. If the applicant asks for an internal review, HMRC will complete the review within 45 days. If the applicant still wants to appeal to the tribunal after the HMRC review has been completed, he has 30 days from the date of the review decision letter to do so.

Appeals against refusals of approval

14. A challenge to HMRC's decision to refuse AWRS approval is brought by notice of appeal in accordance with rule 20 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (S.I. 2009/273) ('the FTT Rules'). The first step is for the appellant to send a notice of appeal to the FTT setting out the grounds for bringing the appeal. Under rule 23, the FTT then allocates the appeal to one of four categories: Default Paper, Basic, Standard or Complex. The categorisation of the appeal determines to some extent the procedure to be following in managing the case. All the appeals we are concerned with were allocated to the Standard category. Not later than 60 days after the date on which the notice of appeal is sent to them, HMRC must send a statement of case to the Tribunal and the appellant: rule 25. This must "set out the respondent's position in relation to the case". Rule 27 then provides:

> "**Further steps in a Standard or Complex case**
>
> 27.—(1) This rule applies to Standard and Complex cases.
>
> (2) Subject to any direction to the contrary, within 42 days after the date the respondent sent the statement of case (…) 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)."

15. Thus where rule 27(2) applies, the disclosure given is the same for both parties and is limited to the documents on which they intend to rely in the proceedings.

16. The FTT has wide case management powers to be exercised subject to the overriding objective, set out in rule 2 of the FTT Rules, of enabling the tribunal to deal with cases fairly and justly. This includes dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties. It also includes "avoiding unnecessary formality and seeking flexibility in the proceedings" and avoiding delay. Rule 5(2) provides that the FTT may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction. Rule 5(3)(d) provides that the FTT may permit or require a party to provide documents, information or submissions to the tribunal or a party. Rule 6 provides that the FTT may give a direction on the application of one or more of the parties or on its own initiative.

The case law on the FTT's supervisory jurisdiction

17. Although appeals against refusal of approval under the AWRS are a relatively new jurisdiction for the FTT, there are other statutory provisions which confer a supervisory jurisdiction upon the FTT, or its predecessor the VAT Tribunal, to review the reasonableness of HMRC decisions rather than conduct a full merits appeal of those decisions. The nature of the test to be applied by the FTT in such cases was described by the House of Lords in *Customs & Excise Commissioners v JH Corbitt (Numismatists) Ltd* [1981] AC 22 and was not in dispute here. The tribunal's supervisory power is to consider whether the appellant has shown that the Commissioners had acted in a way in which no reasonable panel of Commissioners could have acted; if they had taken into account some irrelevant matter or had disregarded something to which they should have given weight. A similar test was applied in *Lindsay v Customs and Excise Commissioners* [2002] 1 WLR 1766 in the context of a decision by the Commissioners to seize a car that the appellant had been driving when he was found to be smuggling substantial quantities of cigarettes and tobacco through the Shuttle control zone at Calais. In upholding a decision that the forfeiture of the car was a disproportionate interference with the appellant's rights under the Human Rights Act 1998 to the peaceful enjoyment of his possessions, the Court of Appeal in *Lindsay* held that the Commissioners had failed to have regard to all material considerations, namely that the imported items were for the use of family and friends and not for commercial purposes. HMRC also drew our attention to the decision of this court in *John Dee Ltd v Customs and Excise Commissioners* [1995] STC 941. That case concerned a requirement imposed by HMRC that the taxpayer company provide security as a condition of continuing to make VAT taxable supplies. Neill LJ, with whom Roch and Hutchison LJJ agreed, held that counsel for the taxpayer had rightly conceded that where it is shown that even if the additional material which had wrongly been discounted had been taken into account, the decision would inevitably have been the same, the tribunal can dismiss the appeal.

18. The nature of the exercise carried out by the FTT in an appeal under section 16(4) of the Finance Act 1994 was considered further in *Balbir Singh Gora v Customs and Excise Cmrs* [2003] EWCA Civ 525, [2004] QB 93 ('*Gora*'). The appeals in *Gora* arose from the seizure of alcoholic liquor by customs officers who were not satisfied that duty had been paid correctly. The officers also seized the car in which the alcohol had been transported. One issue before the tribunal had been whether the jurisdiction and powers of the tribunal in hearing an appeal under section 16(4) against a refusal to restore the appellants' property were sufficient to satisfy the requirements of article 6 of the European Convention on Human Rights, in particular the right to peaceful enjoyment of possessions conferred by article 1 of the First Protocol to the Convention. The perceived inadequacy of the tribunal's jurisdiction arose where the appellant challenged the factual findings on which the Commissioners' decision to refuse to restore goods was based. The Commissioners accepted in *Gora* that the tribunal's role would be to satisfy itself that the primary facts upon which the Commissioners had based their decision were

correct. The tribunal would not be limited to considering only whether there had been sufficient evidence to support the Commissioners' findings. The tribunal would then go on to decide whether, in the light of its findings of fact, the decision was reasonable. Counsel for HMRC in *Gora* submitted that the Commissioners would then conduct any further review they were directed to undertake in accordance with the findings of the tribunal. Pill LJ accepted that view of the jurisdiction of the tribunal: see [39] of his judgment with which Chadwick and Longmore LJJ agreed. He held that in the light of the Commissioners' acceptance that the tribunal would have that role, the tribunal's jurisdiction and powers did satisfy the requirements of article 6.

19. In the present appeals, although Mr Bedenham (appearing for the Traders) did not assert that the Traders' human rights had been infringed by the refusal of approval under the AWRS, HMRC accepted that the *Gora* principle applied. Thus, the role of the FTT in these appeals will be to decide for itself any disputed primary facts on which HMRC's decision was based and then consider whether the refusal to grant approval was one which a reasonable officer could make on the basis of the facts as found.

20. More recently in *CC&C v HMRC* [2015] 1 WLR 4043 at [15] and [16], Underhill LJ noted that the fact that the criterion for the tribunal's intervention is formulated in terms of unreasonableness "reflects the fact that the management of the excise system is a matter for the administrative discretion of HMRC". In his view, that is because decisions such as whether a registered owner remains a fit and proper person to trade in duty-suspended goods (being the particular scenario in issue in that case) are ones which HMRC "are peculiarly well-fitted to judge, since it requires what is necessarily to some extent a subjective – albeit evidence-based – assessment of such matters as the attitude of the trader and its principal employees to due diligence issues and their sensitivity to the risk of becoming involved, albeit unintentionally, in unlawful activities". He continued that "this careful calibration of the powers" of the tribunal under section 16(4) "plainly represents a deliberate balance between HMRC's need to take effective management decisions in relation to excise matters and the interests of those affected by such decisions."

21. There have as yet been few substantive decisions on appeals against AWRS refusals. However, the decision of the FTT in one such appeal, *Giuseppe Corbelli and Pietro Corbelli t/a Corbelli Wines v HMRC* [2017] UKFTT 615 (TC) ('*Corbelli*') was relied on by Mr Bedenham as illustrating the potential disruption that can arise where limited disclosure by HMRC at an early stage means that further documents have to be disclosed during the course of the trial. HMRC in that case had disclosed documents limited to those required by rule 27(2) of the FTT Rules. The FTT recounts in the decision how it became clear from the oral evidence of the decision-maker given at trial that not all the material he had relied on had been disclosed by HMRC: [445]. The FTT agreed with the strong criticisms made by appellant about the conduct of the decision-maker in that case and held that HMRC had failed to apply the fit and properness test correctly: [330]. At the hearing, HMRC had accepted that some of the matters relied on were not in fact relevant to the decision. It was not possible to say whether if those irrelevant matters had been left out of account the decision would have been the same: [334]. At the end of their long judgment, the tribunal dealt with applications to admit documents that were clearly relevant and produced very late by HMRC without any real justification for the previous failure: [428]. This had led to the need for some juggling of the trial timetable. Ultimately the appeal was allowed.

The *Hare Wines* appeal

22. The court was not provided with the decision letters, grounds of appeal or statements of case for all the Traders though a helpful summary was provided of the main bases of refusal and the grounds of appeal for each of the Traders. The fullest set of papers before the court related to the application for approval by Hare Wines.

23. Hare Wines was incorporated in 2014 and so was already in business as an alcohol wholesaler when the requirement for approval under the AWRS came into effect. It is wholly owned by Mr Kulwant Hare but he is not currently a director of the company. Hare Wines applied for approval on 10 March 2016. HMRC visited Hare Wines' premises in October and December 2016 and questioned the two directors and Mr Hare. On 10 February 2017 HMRC sent Hare Wines a minded to refuse letter. The letter is signed by Ola Onanuga, a Higher Officer at HMRC. The grounds in the minded to refuse letter

were set out in detail under three headings. The first heading was that there were connections between the business or key persons in the business with other known non-compliant or fraudulent businesses. In support of this ground, the minded to refuse letter listed a series of letters, usually referred to as 'tax-loss letters', sent to Hare Wines between January and October 2016 by which HMRC had advised Hare Wines of a large number of transactions it had been party to and which had in fact resulted in substantial loss of public revenue amounting cumulatively to over £200,000. The second heading referred to evidence of illicit trading or that "key persons involved in the business have been previously involved in significant revenue non-compliance, or fraud, either within excise or other regimes". The letter stated that Mr Hare had been identified as the 'guiding mind' of the business. It then set out several allegations as to improper payments authorised by Mr Hare and his previous involvement in significant revenue loss through other cash-and-carry companies which went into liquidation owing substantial debts and penalties to HMRC. Under this heading another director of Hare Wines, Ms Kosiorek, was alleged to have substantial personal self-assessment tax outstanding and to have incurred late filing penalties which remain unpaid. She was also alleged to have been involved in other companies which owe outstanding tax, interest and penalties of many thousands of pounds. Finally under the third heading, the minded to refuse letter alleged that Hare Wines failed to carry out adequate due diligence before entering into transactions with other traders. Hare Wines was invited to make further representations by 23 February 2017.

24. Hare Wines' response to the minded to refuse letter was set out in a letter of 23 February 2017 sent by their solicitors Rainer Hughes ('the Rainer Hughes letter'). The Rainer Hughes letter runs to 21 pages and appends various supporting documents. I will pick out only a few of the points made in an apparently detailed rebuttal of the allegations in the minded to refuse letter. First, it picks up on the reference on page 2 of the minded to refuse letter to key persons having previously been involved in "non-compliance or fraud". It states that this "is a clear reference to spent convictions". Rainer Hughes points out that the convictions referred to or being taken into account were spent under the Rehabilitation of Offenders Act 1974 and asserts that HMRC ought not to take them into account and indeed ought not to be referring to them at all. Secondly, the Rainer Hughes letter challenges HMRC's reliance on the tax loss letters. They describe such letters as warnings which cannot be appealed to the FTT.[1] Rainer Hughes say that the tax loss letters, at the very highest, merely warn the trader that it may have been caught up in a chain of supply with questionable origin. The tax loss letters should not therefore be taken to imply that Hare Wines is itself knowingly involved in any wrongdoing. Indeed, Rainer Hughes point out that in no case have HMRC subsequently refused Hare Wines an input tax credit in relation to the invoices in these transactions. So it does not appear that HMRC believe that Hare Wines was itself involved in fraud or that it knew or ought to have known that the transactions were part of a fraud. They say there is no evidence that Hare Wines continued to purchase from these traders after receiving the tax loss letters. Thirdly, as to Ms Kosiorek, they assert, and append correspondence which they say shows, that HMRC have acknowledged that in fact there are no sums outstanding. The Rainer Hughes letter, finally, asserts that HMRC have had a prejudiced and biased attitude towards Mr Hare and the companies he has been involved in. It is said that this "policy of victimisation" stems from a number of judicial review proceedings that Mr Hare and his companies have brought against HMRC. They assert that a number of traders have been granted AWRS status despite having received tax loss letters and despite having large amounts of assessed tax outstanding.

25. On 20 March 2017 HMRC sent two letters. The first was sent directly to Hare Wines and constitutes, as I understand it, the decision to refuse approval ('the Refusal letter'). The Refusal letter is again signed by Ola Onanuga. It states that having considered Hare Wines' representations the application was refused with effect from 31 March 2017. The Refusal letter says: "I have taken the following key points into account in reaching this decision". It then states that the "fit and proper criteria test" has not been met because Mr Kulwant Hare has been identified as a guiding mind of the business. It sets out the evidence relied on to show that Mr Hare is indeed the guiding mind despite not being a director of the company. But there is no explanation in the Refusal letter as to why his involvement means that Hare Wines is not a fit and proper person. None of the matters raised in the minded to refuse letter is set out in the Refusal letter. The second reason given is that Hare Wines' due diligence policy "is not being credibly applied". Examination of business records confirmed that Hare Wines carried out eight transactions with a company called Axhet Ltd with a cumulative value of about £19,000 between August and November 2016 but that due diligence was carried out only in December 2016. There is no

mention of the tax loss letters, of Ms Kosiorek or any of the many other allegations made in the minded to refuse letter.

26. The Refusal letter sent to Hare Wines enclosed "for ease of reference" a copy of a second letter HMRC sent on 20 March 2017 addressed to Rainer Hughes. The second letter (the 'HMRC Response letter') is signed by Edward Fyle, not Ola Onanuga. It runs to 12 pages and includes lengthy citation from legislation and case law and an answer, expressed in combative and at times sarcastic tones, to at least some of the points made in the Rainer Hughes letter. Focusing on the points I have already picked out, there is a long passage dealing with the relevance of spent convictions. It states in terms that spent convictions are "a relevant circumstance to be considered as part of HMRC's assessment". It states further that "In the instant case, the Applicant's failure to disclose information about his convictions (whilst spent) was a material factor leading to the rejection of his application". There is no mention in the HMRC Response letter of the tax loss letters listed in the minded to refuse letter. There is also no mention of Ms Kosiorek although there is a brief reference to one of the companies that had been referred to in the minded to refuse letter as a company with which she was connected and which owed money.

27. Hare Wines lodged its appeal against the refusal of approval with the FTT on 23 March 2017. The grounds of appeal complain that the Refusal letter does not make clear the reasons for the refusal but rather simply sets out certain 'key points' that are said to have been taken into account. Hare Wines disputes the allegations set out in the Refusal letter and disputes that the facts alleged mean that it is not a fit and proper person.

28. On 11 April 2017, the FTT invited Hare Wines and HMRC to agree case management directions. This was at a point earlier than that contemplated by rule 27(2) of the FTT Rules because HMRC had not yet served their statement of case. Directions were agreed between the parties on 18 April 2017 including a direction about disclosure:

> "2. **Documents and information**: Not later than 8 June 2017:
>
> a. The Appellants shall send or deliver to the Tribunal and the Respondents a list of documents in their possession or control on which the Appellants intend to rely in connection with the appeal;
>
> b. The Respondents shall send or deliver to the Tribunal and the Appellants a list of all documents which were considered by the Respondents' officer when reaching the decision at issue in this appeal together with any other documents on which the Respondents intend to rely in connection with this appeal;
>
> c. Each party shall provide to the other party copies of any documents on that list which have not already been provided to the other party;
>
> d. Each party shall send or deliver to the Tribunal and the other party a statement detailing whether witnesses are to be called and, if so, their names;"

29. Although those directions were agreed, the officers dealing with the *Hare Wines* appeal then found out that other HMRC representatives were challenging the making of a disclosure direction in those terms in other AWRS appeals. HMRC therefore sought to withdraw their agreement. On 25 April 2017 HMRC issued an application to vary the disclosure direction to limit it to a direction that each party provide "a list of documents in its possession or control which that party intends to rely upon or produce in connection with the appeal" and then to deliver copies of those documents on that list.

30. On 25 May 2017 HMRC lodged their statement of case in the *Hare Wines* appeal pursuant to rule 25 of the FTT Rules. The statement of case ranged far beyond the matters set out in the Refusal letter. Under the heading "Factual background" HMRC recited certain matters said to have been "confirmed" by Mr Hare and Ms Kosiorek when questioned during HMRC's visits. For example, it is said that Mr Hare owns 33% of a cider company although the statement does not indicate whether this is regarded as a matter for concern or not. The Statement of Case refers to the purchases made by Hare Wines from Axhet Ltd before due diligence was carried out. It also refers to other problems with Hare Wines' due

diligence folders, arising from the detailed review prior to HMRC's second visit to the premises. It refers to the tax loss letters and to events that post-date the minded to refuse letter. Section D of the Statement of Case is headed "The Decision" and states that Hare Wines' due diligence checks into its trading counterparts were "wholly inadequate, for the reasons stated above" and that Mr Hare was identified as a person playing a key role and had previously been involved in significant non-compliance "for the reasons set out above".

31. In section G of the Statement of Case HMRC respond to the first ground of appeal. They state that in coming to their conclusion that Hare Wines was not a fit and proper person "HMRC broadly relied upon the following reasons". In those reasons they include that Ms Kosiorek has been a director of companies which had outstanding tax liabilities. They refer again to the tax loss letters and to a pre-assessment letter issued after the minded to refuse letter had been sent. In answer to the complaint in the Grounds of Appeal that the Refusal letter does not make clear the reasons for the decision, HMRC respond:

> "The 'minded to' letter sets out in great detail the reasons why refusal was being considered. The [Refusal] letter refers to the failure to meet the 'fit and proper' test on the basis of the inadequate due diligence and that Kulwant Hare was a guiding mind and did not meet the 'fit and proper' criteria for the reasons set out above. The Respondents contend that they provided the Appellant with adequate reasons for the decision".

32. HMRC's application of 25 April 2017 in the *Hare Wines* appeal to vary the agreed disclosure direction was heard by Judge Sinfield on 8 May 2017 along with applications relating to similar disclosure directions in four other cases including Smart Price's appeal. In his judgment reported at [2017] UKFTT 411 (TC) ('*Hare Wines FTT*'), Judge Sinfield recorded that HMRC objected to the direction that HMRC list all documents which were considered by the HMRC officer when reaching the decision in issue in the appeal because it required them to disclose (a) documents that were not taken into account because the decision-maker concluded that they were irrelevant to the decision, and (b) documents which were adverse to the applicant's case but on which HMRC did not propose to rely in connection with the appeal: see [16]. The judge rejected HMRC's submission that as a matter of principle, disclosure should be limited to that required by rule 27(2) of the FTT Rules unless there were exceptional circumstances. He held that while the disclosure provided for by rule 27(2) may be appropriate in many appeals, there is no presumption that it must apply in Standard and Complex cases. Judge Sinfield said:

> "23. In my view, the requirement in rule 27(2) to provide a list that only includes the documents on which HMRC intends to rely and produce in the proceedings is not adequate to ensure that the overriding objective is met in these appeals. In deciding whether to approve and register a person for the AWRS, HMRC look not only at the information provided by the applicant but also information gathered by HMRC. …
>
> 24 … In most appeals before the FTT, the appellant taxpayer might be expected to hold or, at least, be aware of the existence of all relevant materials. In these appeals, however, HMRC are likely to have material that they have gathered from various sources which is not available to the applicant for approval under the AWRS and of which the appellant has no knowledge. An unsuccessful applicant can only form a view as to whether to challenge the decision on grounds of unreasonableness if the applicant knows what matters were considered by the decision maker. If the unsuccessful applicant only knows about materials that were considered and are relied on by HMRC in support of the decision then the applicant cannot plead, with any particularity, that any other documents, information and other matters considered but not relied on should have been taken into account. The role of the FTT is to decide whether the decision under appeal was reasonable. If it is to determine that issue fairly and justly, the FTT must know not only the decision arrived at and the reasons relied on to justify it but what matters were taken into account and what matters were not taken into account by the decision maker. I consider that, without the full picture, there is a real risk that the FTT will not be able to make a fair and just determination of the reasonableness of the decision. In my judgement, it is appropriate to require HMRC to provide a list of all documents that the officer considered in making the

decision under appeal and not just a list of documents that HMRC intends to rely on in the proceedings."

33. He did not accept that the proposed disclosure exercise would place an unreasonable burden on HMRC's resources. There should already be a file containing all the material the decision-maker considered or a record of the documents considered so compiling a list should be a simple task. Counsel had raised the issue of disclosure of materials which would reveal confidential sources of information. The judge noted that HMRC had not suggested that any of the documents in issue in the appeals before him contained such confidential information. Where such material did exist, he held that HMRC should not be required to produce that or at least not in unredacted form: [28]. However:

> "As it was part of the material that was considered by the decision maker and, given its nature, it is very likely to have influenced the decision, I consider that it should be included in the list of documents described in general terms, if necessary, but marked as confidential. HMRC could apply, on a case-by-case basis, to exclude such material from further disclosure or production".

34. Judge Sinfield varied the direction at paragraph 2.2 of the relevant orders to the form of the global disclosure direction:

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

35. HMRC appealed against the *Hare Wines FTT* decision. That appeal was dismissed by the Upper Tribunal (Henry Carr J and Judge Hellier) on 6 December 2017: [2017] UKUT 465 (TCC) ('*Hare Wines UT*'). The Upper Tribunal rejected a number of criticisms of the FTT's judgment that are not pursued in this court. They noted at [27] that, without expressing any views as to the ultimate outcome of the appeal, there was a good arguable case that the Refusal letter was inadequate and incomplete because "the reference to "key points" begs the question of what was taken into account by the decision-maker, and what was disregarded." The Upper Tribunal found that questions as to what was and what was not considered by the officer were important in these appeals, in particular in relation to the 'key points' ground. The judge was entitled to make a direction for the disclosure of those documents considered by the officer on the basis that this was necessary for a just and fair resolution of the appeal.

36. The Upper Tribunal then considered the submission that the judge had applied the wrong principles in exercising his discretion to depart from the automatic disclosure provided for in rule 27(2). They referred to the judgment of Sir Geoffrey Vos C in *E Buyer UK Ltd v HMRC, HMRC v Citibank NA* [2017] EWCA Civ 1416 ('*E Buyer*') and to the judgment of Sales J (as he then was) in *HMRC v Ingenious Games* [2014] UKUT 62 (TC). The Upper Tribunal said:

> "44. These authorities are examples of the application of rule 27(2) which turn on their own facts. In agreement with Judge Sinfield in the Decision, we regard Rule 27 Disclosure as a starting point or default position which applies unless the Tribunal is persuaded that something else is, in the circumstances of the appeal, just and fair. However, it is no more that. The rule expressly provides that its provisions are "subject to any direction to the contrary". Where the FTT, in the exercise of its discretion, decides that it should depart from this starting position to enable it to deal with the case justly and fairly, it is entitled to do so, as illustrated by the *Ingenious Games* decision.
>
> 45. In the present cases, Judge Sinfield gave reasons for departing from the starting position in order to enable the FTT to deal with the appeals justly and fairly. He did not apply an incorrect test in reaching the conclusion that he did, and we reject HMRC's argument based upon Rule 27(2)."

37. The Upper Tribunal held that the judge had been entitled to make the same direction in each of the appeals because the appeals shared a common factor. They were very serious matters for each of the appellants. In accordance with the overriding objective, the judge was entitled to have regard to the importance of the case to ensure so far as practical that the parties were able to participate fully in the proceedings: [47].

> "The decision-maker was the only person who knew what material he or she had considered when making the decision, and it would not be possible for the FTT to dispose of these appeals fairly and justly, and for the Appellants to participate fully, without the disclosure that he ordered."

38. On the question of proportionality, the Upper Tribunal noted that HMRC had had the opportunity to put forward evidence at the hearing before the judge as to why the orders for disclosure would be disproportionate. HMRC had not done so. The Upper Tribunal then considered the contrast between the breadth of the global disclosure direction and the approach of the High Court to disclosure in the broadly comparable field of judicial review. The Upper Tribunal concluded that it was within the margin of discretion afforded to the judge to make the global disclosure direction, indeed they considered that on the information before him he was entitled to do so. When such directions were made in the future, HMRC would be given the opportunity to exclude documents, depending on the facts of the case.

39. The Upper Tribunal refused permission to appeal but permission was granted in the *Hare Wines* appeal by Lewison LJ. In his reasons for granting permission, Lewison LJ stated that the widespread implications of the Upper Tribunal's approach and the desire of HMRC for authoritative guidance on the proper approach to disclosure in AWRS appeals justified consideration of the appeal by the full court. That was a compelling reason for the court to consider the correct approach. He imposed the condition that HMRC would pay the Traders' costs of the appeal in any event. In the light of that, I approach this appeal on the basis that this court should in this instance consider not simply whether the disclosure order made following *Hare Wines FTT* was within the judge's margin of discretion but rather should determine what the appropriate order for disclosure should be in these cases.

Discussion

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.

41. As to the test to be applied, I have already considered section 16(4) of the Finance Act and the 'gloss' put upon it by *Gora*. Any particular AWRS appeal might or might not raise issues of primary fact for the tribunal to decide. There may be factual disputes about whether misconduct relied on by HMRC to justify the refusal of approval actually took place or conversely whether exonerating conduct on which the trader wishes to rely actually took place in the manner that the trader claims. There may be appeals in which there are no disputes of primary fact and the argument rather is whether the HMRC officer could reasonably have arrived at the decision to refuse approval on the facts as agreed between the parties. Some appeals may be limited to the question whether conditions or restrictions could have been imposed sufficient to protect the revenue so that refusal of approval was unreasonable and disproportionate. The extent to which it is useful for everything on HMRC's files on the appellant trader to be available to the tribunal at trial will differ greatly in those different appeals. HMRC argue that the trend in civil proceedings in recent years has been to reduce the amount of disclosure ordered. I would prefer to say that the trend has been to ensure that disclosure is more closely related to the issues in dispute in the proceedings.

42. What then is the appropriate disclosure regime in these AWRS appeals? Mr Hall QC argued that disclosure should be limited to that required by rule 27(2) of the FTT Rules. He referred to the judgment of Sir Geoffrey Vos C in *E Buyer* as authority for the proposition that the FTT Rules have

been enacted for important as well as simple cases and that the rule provided a procedure for disclosure in the FTT which was intended to be different from that which applied in civil litigation generally: see [93] and [94]. However, a number of alternative disclosure models were discussed at the hearing; standard disclosure under the Civil Procedure Rules, disclosure in judicial review cases and the special procedure for disclosure in appeals to the Upper Tribunal in financial services cases.

43. Mr Bedenham accepted that standard disclosure under CPR r 36.1 did not extend as widely as the global disclosure direction. The scope of standard disclosure was considered by this court in *Serious Organised Crime Agency v Namli and another* [2011] EWCA Civ 1411 ('*Namli*'). In that case, Master Leslie had directed the parties to give standard disclosure in accordance with CPR r 31.6. This required SOCA to disclose:

    i) by r 31.6(a) the documents on which it relies;

    ii) by r 31.6(b)(i) documents that adversely affect its own case;

    iii) by r 31.6(b)(ii) documents that adversely affect another party's case;

    iv) by r 31.6(b)(iii) documents which support another party's case.

44. SOCA's witness stated that in the course of carrying out the disclosure exercise, it had established that it held highly confidential communications from UK intelligence and crime prevention agencies on which it did not wish to rely. The material was only relevant as adversely affecting the defendant's case, it did not adversely affect SOCA's case so that withholding such material would not prejudice the defendants. Stanley Burnton LJ (with whom Carnwath LJ and Sir Robin Jacob agreed) held that the documents fell within CPR r 31.6(b)(ii). The application of that provision was not limited to multi-party cases but covered documents adverse to the defendant's case. In other words, the reference to "another party" included the opposing party in a two party case, even where the disclosing party did not wish to rely on those documents. The judge commented that it was not immediately obvious why such documents were included in standard disclosure; perhaps those formulating the rule did not have in mind the possibility that a party might not want to rely on documents adverse to his opponent's case: [18]. However, the words of the rule were clear and the power in CPR r 31.5 for the court to limit disclosure rendered any contrived or forced or purposive interpretation unnecessary.

45. The court in *Namli* went on to consider whether the judge had nonetheless been right to exercise his discretion to limit disclosure to exclude the documents. The defendants had put forward four reasons why they wanted to see the material. Those arguments are similar to the submissions made by the Traders in these appeals:

    i) The first was that SOCA "had been a judge in its own cause" in assessing relevance and concluding that the material was only adverse to the defendants and did not affect SOCA's case. That was true but, Stanley Burnton LJ said, "that is the way disclosure works under our procedural rules". The assessment made by the litigant as to relevance is determinative unless or until another party puts evidence before the court demonstrating that that assessment has been wrong or unreliable.

    ii) The second was that the documents might lead to a train of inquiry that may lead to information or documents helpful to the defendants' case. That argument was unsustainable because documents that are only relevant in that sense are not within standard disclosure.

    iii) The third was that without wider disclosure the defendants would not be able fully to assess the strengths and weaknesses of their case. The judge held that the court is concerned with the fairness of the trial and that "if the documents are not to be relied on at trial, the fairness of the trial from the point of view of the defendants will be unaffected": [36].

    iv) Finally he rejected the submission that SOCA was under a separate duty to disclose the documents.

46. The court in *Namli* therefore held that the judge had been right to exercise his discretion to limit disclosure having regard to the overriding objective, including the saving of expense and the need not to take up unnecessary court resources by requiring SOCA to make applications for public interest immunity in respect of the documents. They upheld a direction that each party give disclosure of documents that (i) he relies on; (ii) adversely affect his own case; (iii) support another party's case and (iv) he is required to disclose by any relevant practice direction.

47. The scope of standard disclosure in a similar factual situation was considered in *Shah and another v HSBC Private Bank (UK) Ltd* [2011] EWCA Civ 1154, [2012] Lloyd's Rep FC 105 ('*Shah*'). In that case the court was considering whether to direct the defendant bank to disclose in the course of standard disclosure the names of the bank employees who had reported suspicions of money laundering to the bank's nominated officer. The names of the employees were clearly known to the nominated officer on whose reasons the bank relied to defend the claim but had been redacted from the documents disclosed by the bank. Coulson J had approached the question of relevance by quoting from the pre-CPR judgment of Sir Thomas Bingham MR in *Taylor v Anderton* [1995] 1 WLR 447 where the Master of the Rolls had 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 will gain no litigious advantage by seeing it. That, in my judgment, is the test."

48. Lewison LJ stated at [23] of *Shah* that given that the avowed intention of the framers of the CPR was to reduce the scope of discovery in civil actions, it was dangerous to apply pre-CPR statements of the test of relevance. The word "relevant" does not appear in CPR r 31.6 and is a summary of, not a substitute for, the categories of documents set out in the rule. Since the names were not information on which the bank wished to rely and there was no positive "case" being put forward by the claimant which might be supported by the additional disclosure, the only possible category into which the names could fall was that they might be information that adversely affected the bank's case. The names might reveal that the sources were people with some ulterior ill will against the claimant leading them falsely to report a suspicion of money laundering. This suggestion was rejected as speculative on the facts put forward by the claimant. Lewison LJ concluded that the more he listened to the explanation of why the claimant wanted the names, the more convinced he became that this was a fishing expedition: [49]. He held that disclosure should not be required. Pill LJ agreed with the result but did not agree that the judge had been wrong to rely on the statement of Sir Thomas Bingham MR in *Taylor v Anderton*. That was, he held, still the rationale for the rule as to disclosure. Munby LJ agreed with Pill LJ on this point, that the purpose of CPR r 31.6 was "to ensure that there is no unfair advantage or unfair disadvantage, no litigious disadvantage and no litigious advantage". The difference was that these questions are now to be assessed not by reference to the pre-CPR test of relevance but by reference to the requirements of the new rule: [53].

49. The second model referred to by the parties was disclosure in judicial review proceedings, pursuant in particular to the public authority's duty of candour: see *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53, [2007] 1 AC 650. Mr Hall QC argued that if the Tribunal considered that rule 27(2) disclosure was inadequate, HMRC would not object to a disclosure order which requires HMRC to disclose all documents that (a) were taken into account in making the decision, and (b) were not taken into account and which suggest that the appellant is fit and proper. This would, Mr Hall submitted, mirror HMRC's litigation duty, although he accepted that the analogy with the judicial review jurisdiction was not exact. The importance of focusing in judicial review proceedings on the validity of the reasons given for the decision under challenge was stressed in *R v Secretary of State ex p London Borough of Islington and the London Lesbian and Gay Centre* [1997] JR 121. Dillon LJ referred to what was described as the "terminus argument" namely that where the case for judicial review is put on the basis that the decision challenged is so unreasonable that the decision-maker must be taken to have taken irrelevant matters into account or to have failed properly to consider the relevant matters or to have erred in some other way, then one need only look at the decision itself to see whether it is unreasonable. That argument had been accepted by the court in the earlier case of *R v*

Secretary of State for Home Affairs ex parte Harrison [1997] JR 113 where the court had rejected an application for disclosure of all documents which had been before the decision-maker on the basis that the application was a fishing expedition. Dillon LJ said that it was dangerous to apply that conclusion in every case, since many judicial review cases focus on the fairness of the procedure by which the decision was reached. But he held that since there was nothing to support the applicant's suspicion that the Minister had been biased by his disapproval of homosexual activity, there was no basis for going behind the statement made in an affidavit that that had not formed any part of the reasons for the decision.

50. Thirdly, reference was also made to the disclosure regime in Schedule 3 to the Tribunal Procedure (Upper Tribunal) Rules 2008 (S.I. 2008/2698). This applies to appeals against certain decisions of the Financial Conduct Authority or other financial regulators. The procedure provides for the applicant to start proceedings by lodging a reference notice stating: "the issues that the applicant wishes the Upper Tribunal to consider". In response, the regulator sends a statement of case setting out all the matters and facts upon which the respondent relies to support the referred action. According to paragraph 4(3) of Schedule 3:

> "(3) The respondent must provide with the statement of case a list of—
>
> (a) any documents on which the respondent relies in support of the referred action; and
>
> (b) any further material which in the opinion of the respondent might undermine the decision to take action."

51. The applicant under Schedule 3 then sends a reply which sets out the grounds on which the applicant still relies, all the matters in the respondent's statement of case which are disputed and the reasons for disputing them. There is then the procedural step called "secondary disclosure" by the respondent. Paragraph 6 of Schedule 3 provides that after the applicant's reply has been sent, if there is any further material which might reasonably be expected to assist the applicant's case as apparent from the applicant's reply and which has not already been listed, the respondent must provide a list of such further material. The term "further material" is defined in paragraph 1 of Schedule 3 as follows:

> ""further material" means—
>
> (a) in a single regulator case, documents which—
>
> (i) were considered by the respondent in reaching or maintaining the decision to give the notice in respect of which the reference has been made; or
>
> (ii) were obtained by the respondent in connection with the matter to which that notice relates (whether they were obtained before or after giving the notice) but which were not considered by it in reaching or maintaining that decision;
>
> but does not include documents on which the respondent relies in support of the referred action;"

52. That disclosure regime is in some ways broader than the global disclosure direction and in some ways narrower. It is broader because the further material includes material *obtained* by the respondent even if not *considered* by it in reaching or maintaining the decision. It is narrower in an important respect because there is no requirement that further material that supports the regulator's case but which is not relied on by the regulator need be disclosed. This is the effect of the rules because, although the definition of "further material" would appear by itself to include additional material supporting the regulator's case, the phrase "further material" is only used in the Schedule in a context where it is immediately qualified by being limited to material which in the opinion of the respondent might undermine the decision to take action or assist the applicant's case: see para 4(3)(b), para 4A(6)(b) and para 6(1) of the Schedule. That is the case even though the tribunal's jurisdiction may be a merits based jurisdiction when considering the reference. The apparent width of the definition of "further material" is also cut back by para 7 of the Schedule which provides for exceptions to the need to list documents.

53. Having considered these different models of disclosure and the FTT's task in these appeals, my conclusion is that disclosure from HMRC limited to that required by rule 27(2), would not be not sufficient in these AWRS appeals, even as a starting point. I do not accept that *E Buyer* is authority for the proposition that something exceptional is required for that rule to be displaced. The Chancellor's comment was made in the context of an appeal against a case management decision by the FTT to limit disclosure to the documents on which HMRC wished to rely to refuse input VAT deduction in respect of specified transactions alleged to be part of an MTIC fraud. The focus of the inquiry in such a case is much narrower than the wide ranging assessment of fitness and properness involved in the present appeals. The Chancellor said that wider disclosure such as standard disclosure would have been appropriate had fraud or dishonesty been alleged rather than simply knowledge of the fraud. Further, Hallett LJ noted in *E Buyer* that the order being challenged was expressed by the FTT judge as the one appropriate at that stage of the litigation. I agree with the conclusion of the FTT and Upper Tribunal in these appeals that where HMRC have access to many documents of which the applicant may be unaware, it is vital that the appellant trader have access to any exonerating material in the hands of HMRC. These cases are different from the more common appeals against a tax assessment where most if not all the material considered is provided to HMRC by the tax payer.

54. I also reject HMRC's proposal that disclosure be ordered on the basis of documents "taken into account" by the decision-maker. As a practical matter, the border between documents "taken into account" on the one hand and those which have been "considered" by the decision-maker on the other hand is too uncertain and is bound to lead to disputes. HMRC appear content with the former but object strongly to the latter because they construe the "considered" test as encompassing everything which the decision-maker looked at, even if it was immediately dismissed as irrelevant. I have set out above the description in the Excise Notice of the wide range of files and sets of records both within HMRC and held by other Government agencies or taxpayers that may be consulted in the assessment of any individual application for approval. It appears that there is no division within HMRC's procedures between those officers investigating the circumstances of the applicant and its key persons and those officers then tasked with taking the initial decision. There is no handing over of a file limited to those documents that should be taken into account by the decision-maker unless there is an internal review. In those circumstances I do not regard HMRC's alternative test as workable in practice or correct in principle.

55. On the other hand, I do not regard it as appropriate in these appeals to order disclosure of everything the decision-maker considered when deciding to refuse approval. That might be necessary if the tribunal were required to assess the fitness and properness of the trader afresh, taking into account all the potential factors listed in the Excise Notice. Here, the task of the tribunal is to consider whether the appellant trader has established that no reasonable officer could refuse approval because of the conduct relied on by HMRC in the decision to refuse approval, having regard to (a) the extent to which HMRC continues to rely on that conduct in its statement of case to defend the appeal; (b) any exonerating conduct relied on by the trader; (c) whether any disputes of primary facts relevant to that conduct are resolved by the tribunal in favour of the party asserting that the facts are well founded; and, where the issue is raised, (d) whether any conditions or restrictions short of refusal could have adequately protected the revenue. In the light of that, documents adverse to the appellant that do not relate to the misconduct on which HMRC relies are not relevant.

56. In my judgment, HMRC should give what corresponds to standard disclosure under the CPR but with the same qualification as the Court accepted in the *Namli* case, that is excluding documents which are not relied on and which are entirely adverse to the applicant's case. If disclosure is generally to be given on that basis, it does not seem to me helpful for disclosure to take place before the stage at which it is envisaged by rule 27(2). That rule contemplates that disclosure will take place after the Refusal letter has informed the trader of "the reasons" for the refusal, the notice of appeal under rule 20 has set out the appellant's grounds for bringing the appeal and HMRC have served the statement of case setting out their position in relation to the case. If all that happens as it should, the FTT should be in a position to invite the parties to agree directions for disclosure on the standard basis, having regard to the areas of dispute emerging after those three procedural steps. Although section 16(4) of the Finance Act provides that the tribunal is reviewing the decision taken by the Commissioners or other person, in practice the tribunal is reviewing the robustness of those arguments on which HMRC chooses to rely in defending the appeal. By analogy, in *Shah* Coulson J at first instance had commented that the redaction

of the informants' names made it more difficult for the bank itself to show, for example, that a number of different people within the bank had reported suspicions to the nominated officer. Lewison LJ said that withholding the names was the bank's 'forensic choice' – if the bank had made it more difficult for itself to prove its own case, it must live with the consequences. In AWRS appeals too, HMRC may include a large number of allegations of misconduct in a refusal decision. In the light of the grounds of appeal, however, they may decide to abandon some allegations and limit the statement of case to fewer instances of misconduct. HMRC will have in mind, of course, the public interest in ensuring that unsuitable people are not approved. If they are confident that a few egregious instances will be sufficient to convince the tribunal that the decision to refuse was reasonable, HMRC may well decide for reasons of proportionate cost and ease of presentation to rely on particular instances. Although the applicant then bears the burden of proof as to the grounds of its appeal, the identity of the points it must challenge is defined by the combination of the refusal reasons, the grounds of appeal and the statement of case. HMRC may ultimately regret having abandoned certain of its reasons, if the appellant's case on the points before the tribunal turns out to be stronger than HMRC anticipated. As Lewison LJ said, that is their forensic choice and they must live by it.

57. I accept that from an administrative point of view, it may make sense for the FTT to devise a disclosure direction which can be made by the tribunal at an early stage in the life of these appeals. We were told by HMRC that several thousand businesses applied for approval when the AWRS came into effect, a large proportion of applications were refused and there are up to 100 live appeals currently before the FTT. Many of the appeals were expedited because of the uncertainties for existing businesses which will have to close if their appeals against refusal are not successful. But if the FTT's aim in bringing the disclosure exercise forward was to save time and shorten the overall proceedings, that is not how it has turned out.

58. In any event, even an order made after the statement of case has been served is necessarily a first step. That points in favour of adopting a conservative approach rather than an expansive approach to disclosure. Too much disclosure by one party imposes a significant burden not only on that disclosing party but also on the opposing party who has to incur the time and cost of its legal team sifting through and commenting on documents which may have no bearing on the points on which either party intends to rely. The tribunals considering these cases have recognised that the FTT's procedure allows for HMRC to apply to vary the initial disclosure direction. It also allows for the trader to seek further disclosure by category or by seeking specific disclosure as the case develops, for example if it becomes clear from the statement of case that there are still disputes of primary fact. As this court said in *North Shore Ventures Ltd v Anstead Holdings Inc* [2012] EWCA Civ 11, disclosure is a continuing process which is part of case management: [42].

59. I turn then to consider the appropriate order for this court to make in the *Hare Wines* appeal. Unfortunately this appeal has progressed in a way which makes it difficult at this stage to order disclosure that is tailored, even in a broad brush way, to the matters in dispute between the parties. The main problem is the opacity of the reasons given for the refusal of approval. If what happened in the *Hare Wines* appeal is at all typical of HMRC's process in determining applications, it reveals a chaotic decision-making process which is almost bound to generate appeals and create case management problems in any tribunal proceedings. I agree with the comment of the Upper Tribunal in *Hare Wines UT* that the Refusal letter is inadequate and incomplete. The obligation placed on HMRC in regulation 4(4) of the Wholesaling of Controlled Liquor Regulations 2015 is to give 'the reasons' not the 'key points' for the refusal. The applicant should be able to understand the reasons for the refusal of the application from the refusal letter as a self-standing document. The relationship in the *Hare Wines* appeal between the Refusal letter and the HMRC Response letter both sent on 20 March 2017 is not explained. The Refusal letter is from Ola Onanuga, who is presumably the decision-maker for the purposes of the global disclosure direction. It states simply that one ground for the refusal is that Mr Hare is involved as the guiding mind of the business but does not say anything about why his involvement is objectionable. The Refusal letter does not expressly incorporate everything in the HMRC Response letter and it does not say whether Ola Onanuga has seen or considered all the information that was available to Edward Fyle who wrote the HMRC Response letter. It is entirely unclear to me, for example, whether the tax loss letters have been relied on by Ola Onanuga as part of the reason why Hare Wines is not fit and proper, or whether Mr Hare's spent conviction has played any part in the decision to refuse as asserted by Mr Fyle but not mentioned in Refusal letter.

60. This confused position has made it difficult for Hare Wines properly to formulate its grounds of appeal and has then been compounded by HMRC's statement of case. That document appears in one section simply to replicate the brief reasons given in the Refusal letter but in a later section raises a host of other points without explaining in some cases whether and why HMRC have apparently rejected the arguments put forward in the Rainer Hughes letter.

61. If HMRC's defence of the appeal were limited to the wrongdoing described in the Refusal letter, namely that Hare Wines entered into eight transactions with Axhet Ltd before carrying out the necessary due diligence, then it may be that disclosure should be limited to documents relating to Hare Wines' dealing with that supplier, if, indeed, those transactions are disputed as a matter of fact. HMRC may well be eager to disclose a great deal of documentation about Ms Kosiorek's tax affairs, or due diligence failings other than in relation to Axhet Ltd, or the tax loss letters and argue that they are relying on that to defeat Hare Wines' appeal. I note that HMRC say in their written submissions for this appeal that irrespective of whether the decision-maker's evidence is that he relied on Mr Hare's spent conviction in reaching his decision "it is HMRC's intention to rely on that fact during the FTT proceedings as demonstrating that Hare Wines is not fit and proper". Given that the spent conviction is not mentioned in the Refusal letter there is, as I have said, a prior question whether HMRC are entitled to rely on that and other matters and so whether Hare Wines should be put to the expense of examining that disclosure. It seems to me better to resolve that procedural point before any disclosure exercise takes place.

62. Further, until that question is resolved, it is difficult to know how Hare Wines can comply with the direction made. Hare Wines is directed to disclose the documents on which it intends to rely in connection with the appeal. If, for example, no misconduct on the part of Ms Kosiorek is relied on by HMRC or if the tax loss letters have now been abandoned as forming part of the reasons for refusal (as appears from the Refusal letter and the statement of case), Hare Wines does not need to rely on any documents to refute any such allegations.

63. Turning finally to the appropriate disposition of the *Hare Wines* appeal, it follows from the reasoning above that the global disclosure direction cannot stand. It also follows that there is some work to be done on clarifying the scope of the issues in the *Hare Wines* appeal before it is appropriate to make any order for standard disclosure. I do not know how far that situation is replicated in the refusal decisions of the other Traders involved in these appeals. Disclosure is not a cure for a lack of clarity in HMRC's case. In my judgment the safest course is therefore to allow the appeal, quash the global disclosure direction and remit the appeals to the FTT for further directions.

The *Gardner Shaw* appeals

64. Given that I have found that the global disclosure direction was not an appropriate direction to make in these appeals at the stage at which it was made, I can deal with the *Gardner Shaw* appeals more shortly. The global disclosure direction had been made by the FTT in each of these 10 appeals but the proceedings, including HMRC's compliance with the direction, were stayed pending HMRC's appeal against *Hare Wines FTT*. That appeal was dismissed on 6 December 2017 in *Hare Wines UT*. HMRC applied for a further stay in these 10 appeals, pending the outcome of their application to the Court of Appeal for permission to appeal against *Hare Wines UT*. On 20 June 2018 Judge Mosedale refused to continue the stay in the *Gardner Shaw* appeals: see [2018] UKFTT 313 (TC). HMRC then applied for a variation to the global disclosure direction to exclude from disclosure any document that was considered sensitive by HMRC and did not either support the appellant's case or adversely affect HMRC's case.

65. Judge Mosedale considered first whether she had jurisdiction to amend the direction given that (a) the legality of the global disclosure direction had been the subject of an unsuccessful appeal to the Upper Tribunal and was now on appeal to the Court of Appeal, and (b) the application was supported by evidence which could have been produced to Judge Sinfield when hearing HMRC's original application to vary the FTT's directions in the *Hare Wines* appeal or at the hearing for the continuation of the stay. She referred to the tribunal's apparently unfettered discretion under rule 5(2) of the FTT Rules to amend any direction made. She also referred to the case of *Tibbles v SIG plc* [2012] EWCA Civ 518 ('*Tibbles*') discussing how that discretion should be exercised. She said at [17] that it was clear

from *Tibbles* that it does not matter whether the issue is seen as a question of jurisdiction or discretion; directions should only be revoked or varied where it is in the interests of justice to do so. She rejected HMRC's contention that the application to vary was the kind of application contemplated by Judge Sinfield at [28] of *Hare Wines FTT* (see [33] above). She also rejected the submission that there had been a change in circumstances; what had changed was HMRC's realisation that some of the material to be disclosed was confidential. The only basis on which HMRC could justify the variation they sought would be by showing that "the circumstances are something out of the ordinary". That was a phrase taken from *Tibbles* [39]. Judge Mosedale referred to the evidence of Mr McGee, an HMRC officer. She accepted that if the global disclosure direction were to be implemented, HMRC would need four months to produce its list of documents and the cost would be in excess of £500,000. She concluded, having regard to the likely irrelevance of much of the material covered by the global disclosure direction, that the circumstances of HMRC's application fell within "the category of being out of the ordinary, or even exceptional": [83]. She concluded:

> "84. The exercise will delay appeals which should be expedited; it will cost an extremely large sum of taxpayer's money while at the same time none of the information disclosed by it will be of any proper assistance to the appellants. It is a pointless exercise to require HMRC to disclose legally irrelevant material."

66. She therefore varied the global disclosure direction by adding the words in italics below so that it read:

> "2.2 the Respondents shall send or deliver to the Tribunal and the Appellants a list of all documents which were considered by the Respondents' officer when reaching the decision at issue in this appeal and indicating which, if any, of those documents the Respondents do not rely on in this appeal, together with any other documents which the Respondents intend to rely on in this appeal *save that the Respondents need not include a document on that list if both (a) it is considered to be sensitive by HMRC and (b) it does not support the case of the Appellant nor adversely affect that of HMRC.*"

67. The *Gardner Shaw* appellants appealed and the Upper Tribunal (Fancourt J and Judge Hellier) overturned Judge Mosedale's decision: [2018] UKUT 419 (TCC) ('*Gardner Shaw UT*'). They held that the judge was entitled to make the findings about the costs and the time needed for carrying out the exercise: [24]. But she had been wrong to consider and determine the question of relevance of the documents or to come to her own conclusion as to the best way to balance the competing interests of the parties: [29]. There was no basis on which the Judge could reasonably have concluded that the circumstances justified her in varying the order. The Upper Tribunal granted permission to appeal to this court.

68. In their judgment, the Upper Tribunal noted, correctly, at [27] that the interplay between the nature of appeals against HMRC's determination and the notions of relevance engaged when considering disclosure would be central to the argument in this court about the appropriateness of the global disclosure direction. They concluded that the fact that Judge Mosedale was persuaded that there was a more appropriate and better approach to disclosure, contrary to *Hare Wines UT*, was not capable of being a reason why exceptionally the FTT should revisit and change its earlier direction. The fact that there had been an appeal to the Upper Tribunal was a strong reason not to revisit the global disclosure direction because "[t]he interests of justice include upholding the finality of court and tribunal decisions and not undermining the appeal process": see [33]. There had been no change of circumstances and a re-hearing could not be justified on the basis that a party had belatedly put in better evidence to support its case. Approaching the matter on the basis of *Tibbles*, the Upper Tribunal concluded that there was no basis on which a judge could reasonably conclude that this was a rare instance of the unidentified, residual cases where it was appropriate for the FTT itself to vary the terms of the direction previously issued: [40].

69. I agree with that reasoning and have also concluded that the FTT was wrong to vary the global disclosure direction in the circumstances presented to the judge. I reach that conclusion although I recognise that I have concluded that the disclosure in AWRS appeals should be less extensive than the disclosure covered by Judge Mosedale's reformulation of the direction. The point in this appeal was whether the case was one in which it was appropriate for the FTT to vary its own previous direction

rather than to maintain the position where that very issue had been determined by the Upper Tribunal and was being considered by this court. The appeal against *Gardner Shaw UT* should therefore be dismissed.

70. The result of the Upper Tribunal allowing the appeal in *Gardner Shaw UT* was that Judge Mosedale's variation of the global disclosure direction was set aside so that the global disclosure direction was reinstated in full. Although the *Gardner Shaw* appeals are now dismissed, the global disclosure direction should not stand. The parties have indicated, following the circulation of the draft of this judgment, that they will agree a variation to the global disclosure direction to be made by the FTT in the *Gardner Shaw* appeals to ensure that disclosure is effected in accordance with this judgment.

Lord Justice Newey:

71. I agree.

Lord Justice McCombe:

72. I also agree.

Note 1 Tax loss letters are sometimes referred to as *Kittel* warnings meaning that HMRC is alerting the trader to the fact that the chain of supplies in which it was a link was in fact a scheme for fraudulently evading VAT. Where that is the case, those traders who can be shown to have been involved in the fraud or who knew or ought to have known of the fraud will be refused VAT input credit in respect of the sales pursuant to *Kittel v Belgian State; Belgian State v Recolta Recycling SPRL* (Joined Cases C-439/04 and C-440/04) [2006] ECR I-6161, [2008] STC 1537 and *Mobilx Ltd (in Administration) v HMRC* [2010] EWCA Civ 517. [Back]