[2020] EWHC 1716 (Ch)

Claim No. RL-2018-000005
IN THE HIGH COURT OF JUSTICE **Appeal ref: CH-2020-000147**
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
REVENUE LIST (ChD)
B E T W E E N :

Date: 31 December 2020

Before :

James Pickering QC
(sitting as a Deputy High Court Judge)

- -

Between :

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS
Claimants/Respondents

- and -

(1) IGE USA INVESTMENTS LIMITED
(FORMERLY IGE USA INVESTMENTS)
(personally and in its capacity as a partner in GE Commercial & Consumer Finance Holdings Limited Partnership)
(2) GE CAPITAL INVESTMENTS
(personally and in its capacity as a partner in GE Commercial & Consumer Finance Holdings Limited Partnership)
(3) GE CAPITAL FINANCE
~~**(4) GE COMMERCIAL & CONSUMER FINANCE HOLDINGS LIMITED PARTNERSHIP**~~
(5) GE CAPITAL CORPORATION (HOLDINGS)
(6) GE (HOLDINGS)
(7) INTERNATIONAL GENERAL ELECTRIC (U.S.A.)
Defendants/Appellants

- -
- -

Thomas Bell (instructed by **PricewaterhouseCoopers LLP)** for the **Defendants/Appellants**
Gareth Tilley (instructed by **HM Revenue & Customs**) for the **Claimants/Respondents**

Hearing date: 29 June 2020

- -

APPROVED JUDGMENT

James Pickering QC (sitting as a Deputy High Court Judge):

PART I: INTRODUCTION

The matter before me

1. The matter before me is an appeal which concerns the extent of the court's jurisdiction under the Disclosure Pilot Scheme (CPR PD51U) ("**the Pilot Scheme**"). The issue, as it was described to me, is:

> "Does the court have the power to order specific disclosure when there is no agreed or approved List of Issues for Disclosure?"

2. The issue is in fact more nuanced than that but, in broad terms, the above is a useful summary of the jurisdictional question which I have to decide.

3. More specifically, on 2 June 2020 Deputy Master Nurse gave judgment dismissing an application for disclosure of specific documents pursuant to paragraph 18.1 of the Pilot Scheme holding, amongst other things, that in the absence of a List of Issues for Disclosure, the court had no jurisdiction to order such disclosure.

4. The present appeal is against that finding in relation to jurisdiction. If I agree with the Deputy Master that the court has no jurisdiction, it follows that I should dismiss the appeal and that, of course, would be the end of the matter. If, however, I disagree with the Deputy Master and allow the appeal, rather than remit the matter to a Master for

reconsideration, I am invited to exercise the jurisdiction myself and decide whether or not an order for disclosure ought to be made.

PART II: THE BACKGROUND

5. The underlying background is complex. For present purposes, however, it is necessary for me to set out the history of the matter only in the broadest terms.

The parties

6. The Appellants are a number of companies within the GE group ("**GE**").

7. The Respondents are HM Revenue & Customs ("**HMRC**"). They, of course, are the authority responsible for the collection of tax within the United Kingdom.

The Settlement Agreements

8. On about 21 December 2005, GE and HMRC entered into a series of settlement agreements ("**the Settlement Agreements**") in relation to GE's tax liability.

9. On 16 October 2018, however, HMRC sent a letter to GE rescinding (or purporting to rescind) the Settlement Agreements on the basis of misrepresentation and/or material non-disclosure.

The claim

10. A few days later, on 23 October 2018, HMRC issued the present claim against GE seeking to confirm the above rescission. The amount sought to be recovered was in the region of £650 million[1]. Statements of case were then filed and served by both parties in the usual way.

The Amendment Application

[1] Albeit, for the avoidance of doubt, that HMRC does not characterise its claim as a money claim, instead (so it says) seeking to recover the above sum through the normal tax assessment process.

11. Almost a year later, on 22 October 2019, HMRC issued an application for permission to amend their Particulars of Claim ("**the Amendment Application**"). Amongst other things, rather than relying simply on innocent misrepresentation, HMRC now wished to allege fraud. Unsurprisingly, GE denied the allegation of fraud and, moreover, resisted the proposed amendment.

The CMC

12. On the following day, 23 October 2019, a case management conference took place. At that CMC, Master Kaye made various directions. In the light of the recently made Amendment Application, these included a timetable for evidence and the setting down of that matter for a hearing.

13. In addition, the Master made a direction for disclosure as follows:

> "13. There shall be extended disclosure under paragraph 6 of the Practice Direction 51U in the form of Model D without narrative documents unless otherwise agreed between the parties or further ordered. The parties shall give disclosure by exchange of lists of documents accompanied by electronic copies in such format as may be agreed [or] ordered by 4.00 pm on 16 October 2020."

14. Following the above, the parties liaised with a view to agreeing a draft List of Issues for Disclosure (as discussed further below). It is uncontroversial, however, that not all of the proposed issues were agreed between the parties.

The Disclosure Application

15. In any event, in due course evidence was filed by both parties in relation to the Amendment Application. Importantly, however, within their evidence, HMRC referred to the fact that the case team dealing with the GE matter had on two occasions (in November 2016 and December 2017) referred the case to HMRC's Fraud Investigation Service ("**FIS**"), the specialist body within HMRC responsible for

investigating suspected taxpayer fraud, which on both occasions had declined to investigate.

16. Following the above, GE's solicitors wrote to HMRC asking for copies of the documents relating to the above referral to FIS (the "**FIS Documents**"). The basis for the request was that, in broad terms, the test which would be applied on the Amendment Application was whether the proposed new claim of fraud had a real prospect of success and that the FIS Documents would be relevant to that determination.

17. HMRC declined to produce the above documents. As a result, on 2 March 2020 GE issued an application (the "**Disclosure Application**") for:

> "An Order pursuant to paragraph 18.1 of Practice Direction 51U requiring [HMRC] within 7 days of the order arising from this application to provide specific disclosure of [the FIS Documents]".

18. On 26 May 2020, the Disclosure Application came before Deputy Master Nurse who, on 2 June 2020 handed down his reserved judgment. As indicated above, the Deputy Master dismissed the application on the basis that, in broad terms, he did not have jurisdiction to make the order sought. Recognising, however, that this was an important point in the context of a relatively new procedural code, the Deputy Master went on to grant permission to appeal to a High Court Judge stating:

> "…although as a matter of construction, it seems to me that the meaning and effect of the Disclosure Pilot is clear, and that paragraph 18 is not applicable in the circumstances of the present case, there is little if any reported authority on the application of paragraph 18. I am very doubtful whether the threshold of 'reasonable prospect of success' has been reached, but it seems to me that the combination of lack of reported authority on the point and the nature of the claim is a sufficiently compelling reason for me to be able to grant permission to GE to attempt to reverse my decision."

The Appeal

19. Pursuant to the above permission to appeal, on 15 June 2020, GE issued its appellant's notice. As part of that appellant's notice, GE sought expedition of the appeal on the basis that the Amendment Application was due to be heard on 7 July 2020 and that accordingly the appeal needed to be heard in good time before then. On 19 June 2020, the matter came before Trower J who granted expedition, following which the appeal was set down for 29 June 2020. It is that appeal which is of course before me now.

PART III: "SPECIFIC DISCLOSURE" UNDER CPR 31 AND THE PILOT SCHEME

20. As mentioned at the start of this judgment, the application was described to me as an application for "specific disclosure". It is worth at this stage, therefore, a brief consideration of the relevant provisions relating to the disclosure of specific documents under both CPR 31 and the Pilot Scheme.

Specific disclosure under CPR 31

21. It should not be forgotten that CPR 31 remains in force. The Pilot Scheme applies to most (but not all) cases in the Business and Property Courts. It does not, however, apply to other jurisdictions within the High Court and nor of course to the County Court. Further, as a pilot, it is currently in force only for a limited period of time; it was originally due to expire on 31 December 2020 and has since been extended to 31 December 2021 and may of course be further extended. The short point, however, is that while it has currently been replaced for (most) Business and Property Court cases, CPR 31 nevertheless remains very much alive.

22. Under CPR 31, "specific disclosure" undoubtedly exists as a concept. Indeed, CPR 31.12 provides:

> "**Specific disclosure…**

31.12

(1) The court may make an order for specific disclosure…

(2) An order for specific disclosure is an order that a party must do one or more of the following things –

(a) disclose documents or classes of documents specified in the order;

(b) carry out a search to the extent stated in the order;

(c) disclose any documents located as a result of that search."

23. That rule is then supplemented with CPR Practice Direction 31A which provides (with underling added):

"**Specific disclosure**

5.1 If a party believes that the disclosure of documents given by a disclosing party is inadequate he may make an application for an order for specific disclosure (see rule 31.12)…

5.4 In deciding whether or not to make an order for specific disclosure the court will take into account all the circumstances of the case and, in particular, the overriding objective described in Part 1. But if the court concludes that the party from whom specific disclosure is sought has failed adequately to comply with the obligations imposed by an order for disclosure (whether by failing to make a sufficient search for documents or otherwise) the court will usually make such order as is necessary to ensure that those obligations are properly complied with."

24. It can be seen, therefore, that CPR 31.12 can be used in two main ways:

(1) It can be used where, following an order for standard disclosure (or some other order for disclosure), a party is of the view that another party has failed to comply with its obligations under that disclosure order. That CPR 31.12 can be used in this way is obvious from the paragraphs of the Practice Direction referred to above.

(2) It can also be used, more generally, whenever a party seeks disclosure of a document or class of documents – even where there has been no non-compliance with a previous order – either because no disclosure order has yet been made or because the documents now sought fall outside any previous disclosure order.

Disclosure for specific documents under the Pilot Scheme

25. The Pilot Scheme introduced a brand new disclosure regime. In Section II, it expressly retained certain provision from CPR 31 but these did not include the rule for specific disclosure contained in CPR 31.12.

26. Nor does it contain any *direct* equivalent of CPR 31.12. It does, however, contain two important paragraphs which contain *indirect* equivalents of the two main usages for CPR 31.12 as identified in paragraph 24 above.

27. First, there is paragraph 17. This provides:

> "**17. Failure adequately to comply with an order for Extended Disclosure**
>
> **17.1** Where there has been or may have been a failure adequately to comply with an order for Extended Disclosure the court may make such further orders as may be appropriate, including an order requiring a party to—
>
> (1) serve a further, or revised, Disclosure Certificate;
>
> (2) undertake further steps, including further or more extended searches, to ensure compliance with an order for Extended Disclosure;
>
> (3) provide a further or improved Extended Disclosure List of Documents;
>
> (4) produce documents; or
>
> (5) make a witness statement explaining any matter relating to disclosure.

> **17.2** The party applying for an order under paragraph 17.1 must satisfy the court that making an order is reasonable and proportionate (as defined in paragraph 6.4)…"

28. As can be seen, the power under this provision is broadly similar to the power exercisable under CPR 31.12 for the purposes of dealing with non-compliance of a previous order for disclosure as identified in paragraph 24(1) above.

29. Then there is paragraph 18 which provides:

> "**18. Varying an order for Extended Disclosure; making an additional order for disclosure of specific documents**
>
> **18.1** The court may at any stage make an order that varies an order for Extended Disclosure. This includes making an additional order for disclosure of specific documents or narrow classes of documents relating to a particular Issue for Disclosure…"

30. This provision, therefore, gives the court the power to vary an existing order for Extended Disclosure (to be discussed below). In other words, even if there has been no non-compliance with a previous disclosure order, that pre-existing disclosure order is not set in stone - the court may vary it by, for example, making an additional order for disclosure of specific documents or narrow classes of documents. As can be seen, therefore, the power under this provision is – very broadly - similar to the more general power exercisable under CPR 31.12 as identified in paragraph 24(2) above. Notably, however, there are important differences too – not least the references in the first sentence of paragraph 18.1 to the *variation* of a pre-existing order for Extended Disclosure - and in the final sentence of paragraph 18.1 to any such additional order for disclosure of specific documents "*relating to a particular Issue for Disclosure*".

31. In short, therefore, while referring to "specific disclosure" in the context of the Pilot Scheme may, in general terms, be a useful and understandable shorthand, strictly speaking the Pilot Scheme contains two new powers under paragraphs 17 and 18 which, although superficially similar to the powers available under CPR 31.12, are

nevertheless different in some material ways. Any detailed analysis of the powers available to the court under the Pilot Scheme should accordingly reflect this.

PART IV: THE JURISDICTION ISSUE

The structure of the Pilot Scheme

32. The Pilot Scheme introduced not only a new procedural code but also a new culture. Paragraph 2.4, for example, provides:

> "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 (as defined in paragraph 6.4) in order fairly to resolve those issues, and specifically the Issues for Disclosure (as defined in Appendix 1)."

33. Broadly speaking, disclosure is now divided into Initial Disclosure and Extended Disclosure.

34. Initial Disclosure is provided for in paragraph 5. For present purposes, I need say nothing more on that.

35. Extended Disclosure is then introduced in paragraph 6. In particular, paragraph 6.3 provides:

> "Save where otherwise ordered, Extended Disclosure involves using Disclosure Models (see paragraph 8 below) after Issues for Disclosure have been identified (see paragraph 7 below). The court will only make an order for Extended Disclosure where it is persuaded that it is appropriate to do so in order fairly to resolve one or more of the Issues for Disclosure".

36. The concept of "Issues for Disclosure" is therefore a matter of importance in the context of Extended Disclosure. As indicated in the above reference, this concept of Issues for Disclosure is then developed in paragraph 7 which provides:

> "7.3 "Issues for Disclosure" means for the purposes of disclosure only those key issues in dispute, which the parties consider will need to be determined by the court with some reference to contemporaneous documents in order for there to be a fair resolution of the proceedings. It does not extend to every issue which is disputed in the statements of case by denial or non-admission."

37. The other subs-paragraphs within paragraph 7 are important too. These set out the mechanics by which the Issues for Disclosure are to be identified. One important tool in this process is the "List of Issues for Disclosure" in relation to which guidance is given in, amongst others, paragraph 7.2. In summary, the parties are to actively engage to produce a draft List of Issues for Disclosure, the purpose of which is to identify the Issues for Disclosure. The parties are then further to engage with each other with a view to agreeing which Disclosure Model (a concept explained in paragraph 8) should apply to each Issue for Disclosure. The process is of course subject to the determination of the court. If the parties cannot agree what should or should not be an Issue for Disclosure or the appropriate Disclosure Model to be applied, the court will decide. Of course, even if the parties can agree on these matters, the court will still need to be persuaded that it is appropriate to make an order for Extended Disclosure in those terms.

38. As foreshadowed above, other relevant provisions are contained within paragraphs 17 and 18. As already explained, paragraph 17 applies where "there has been or may have been a failure adequately to comply with an order for Extended Disclosure", while paragraph 18 provides that the court "may at any stage make an order that varies an order for Extended Disclosure" including "making an additional order for disclosure of specific documents or narrow classes of documents relating to a particular Issue for Disclosure".

The Deputy Master's Judgment

39. In his careful judgment, the Deputy Master reviewed the provisions of the Pilot Scheme including the various paragraphs outlined above. In particular, he said (undoubtedly correctly) at [22] that:

> "Under the Disclosure Pilot it is clear that the intention is to limit the disclosure obligation to documents relevant to the 'key issues in dispute' – therefore excluding the obligation to disclose documents relevant to every disputed issue that might appear on the face of the Statements of Case."

40. At [34], however, he then went on to state:

> "…any order for disclosure of documents… as part of, or as a variation of, Extended Disclosure, can only be of documents that are within a category of documents that are relevant to a pre-existing List of Issues for Disclosure within the particular Order for Extended Disclosure."

41. Similarly, at [35] the Deputy Master said that there was no support for the proposition that paragraph 18 "can be construed as importing into the Disclosure Pilot some form of stand-alone right to apply for specific disclosure of documents whether or not there is a pre-existing order for Extended Disclosure". After making specific reference to the final sentence of paragraph 18.1 he said:

> "In the present case unless and until there is a List of Issues for Disclosure as part of an Order for Extended Disclosure there can be no basis for an order under Paragraph 18 for specific disclosure."

42. Then summarising his view, at [38] the Deputy Master concluded:

> "In my judgment, the Disclosure Pilot is clear. There can be no order for disclosure within an Order for Extended Disclosure unless and until there exists a List of Issues for Disclosure. A List of Issues for Disclosure cannot include 'Issues' that are not issues that can be identified within the Statements of Case as they are at the date that the List of Issues for Disclosure is confirmed as an Order of the Court."

The arguments

43. Counsel for GE submitted that in carrying out the above analysis, the Deputy Master made two material errors as follows:

"(1) He wrongly treated Issues for Disclosure as being confined to the issues that can be identified within the statements of case.

(2) He wrongly conflated "*Issues for Disclosure*" and "*List of Issues for Disclosure*", when in fact they are distinct concepts."

(a) Are Issues for Disclosure limited to issues which can be identified within the statements of case?

44. At [22], the Deputy Master said:

> "It is clear from the final sentence of paragraph [7.3] of the Pilot:
>
> > '[Issues for Disclosure] does not extend to every issue which is disputed in the statements of case by denial or non-admission'.
>
> that the disclosure obligation cannot extend to issues that are not included in the Statements of Case."

45. Then at [38] he said (as set out above):

> "A List of Issues for Disclosure cannot include 'Issues' that are not issues that can be identified within the Statements of Case as they are at the date that the List of Issues for Disclosure is confirmed as an order of the court."

46. Unsurprisingly, at the hearing before me the Deputy Master's view was supported by counsel for HMRC. In his skeleton argument, and repeated in oral submissions, it was skilfully argued that "the natural reading of the definition [of Issues for Disclosure] in paragraph 7.3 in the context of paragraph 7 as a whole leads inexorably to the conclusion that Issues for Disclosure can be identified within the statements of case as a whole".

47. With respect, however, I disagree.

48. First, this is not what paragraph 7.3 (or indeed any paragraph) of the Pilot says. Paragraph 7.3 – which is of course the paragraph which defines the concept – defines "Issues for Disclosure" as (with underlining added) as "*only <u>those key issues in dispute</u> which the parties consider will need to be determined by the court with some reference to contemporaneous documents in order for there to be a fair resolution of <u>the proceedings</u>*."

49. Litigation is a war within which there can be a number of battles. The trial will generally be the final conflict and that of course will be defined by the statements of case. Along the way, however, there will often be various skirmishes which give rise to issues which fall outside the parameters of the statements of case. Issues relating to jurisdiction, service and security for costs are examples but there are plenty of others.

50. Returning to the above wording of paragraph 7.3, as can be seen, reference is made to "those key issues in dispute" and to a fair resolution of "the proceedings". Nowhere does the above wording limit the scope of Issues for Disclosure to those matters to be determined at trial and/or those issues raised in the statements of case.

51. It is right, as the Deputy Master observed, that the final sentence of paragraph 7.3 provides that Issues for Disclosure "does not extend to every issue which is disputed in the statements of case by denial or non-admission". As counsel for GE observed, however, it is a non sequitur to conclude from that, as the Deputy Master apparently did, that "the disclosure obligation cannot extend to issues that are not included in the statements of case". Indeed, just because not all issues in the statements of case are Issues for Disclosure, it does not follow that all Issues for Disclosure have to be issues in the statements of case.

52. Second, I am reinforced in this view by the decision of Hirst J in ***Rome v Punjab National Bank*** [1989] 2 All ER 136. The underlying claim related to whether or not a number of insurance policies had been validly avoided. Shortly after service, however, an issue arose as to the regularity of that service following which an application to set aside the writ was then issued. In the lead up to the hearing of the set aside application, an application was made for "discovery of particular documents" relating to the set aside application. Importantly, therefore, the issue in

relation to which disclosure was sought (in other words, as to whether or not there had been irregular service) was not an issue within the underlying claim (in other words, the claim in relation to the avoidance of the insurance policies as identified in the statements of case).

53. The relevant rules at that time (which was before even the CPR came into force) were contained in RSC 24, rules 7 and 8 which provided (with underlining added):

> "**Order for discovery of particular documents**
>
> 7. (1) Subject to rule 8, the Court may at any time, on the application of any party to a cause or matter, make an order requiring any other party to make an affidavit stating whether any document specified or described in the application or any class of document so specified or described is, or has at any time been, in his possession, custody or power, and if not then in his possession, custody or power when he parted with it what has become of it…
>
> (3) An application for an order under this rule must be supported by an affidavit stating the belief of the deponent that the party from whom discovery is sought under this rule has, or at some time had, in his possession, custody or power the document, or class of document, specified or described in the application and that it relates to one or more of the matters in question in the cause or matter.
>
> **Discovery to be ordered only if necessary**
>
> 8. On the hearing of an application for an order under rule… 7… the Court… shall in any case refuse to make such an order if and so far it is of the opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs."

54. In ***Rome***, the party resisting disclosure relied on the decision of the Court of Appeal in ***A J Bekhor & Co Ltd v Bilton*** [1981] 2 All ER 565. In that case, an application for disclosure had been made in aid of a freezing injunction. That application was refused, however, on the basis that "*matters in question in the cause or matter*" meant

matters in issue in the action itself (in other words, the underlying claim) and therefore did not include the matters solely raised by an application for freezing injunction.

55. In ***Rome***, Hirst J had no doubt that the above decision had been correctly decided in the context of a freezing injunction on the basis that the issues which arose in relation to the freezing injunction had "*no bearing at all on success or failure in the action itself*" and "*only come into play when a successful plaintiff seeks to enforce his judgment*". In his judgment, however, issues relating to jurisdiction were different. As he said at 141:

> "…a question as to the jurisdiction of the court, such as is raised in any application under Ord 12, r 8, seems to me without doubt to raise an issue in the action… Once the question is raised by the defendant as it has been here, it is incumbent on the plaintiff to establish as an essential first step in his action that service has been effected, so as to give the court the necessary jurisdiction."

56. In short, therefore, it did not matter that the issue (in that case, jurisdiction) was not a pleaded issue within the statements of case. What was important that the issue was one which arose within the action in a wider sense (which jurisdiction clearly did).

57. In my judgment, a similar approach can and ought to be adopted towards paragraph 7.3 of the Pilot which, as explained above, defines "Issues for Disclosure" as "*only those key issues in dispute which the parties consider will need to be determined by the court with some reference to contemporaneous documents in order for there to be a fair resolution of the proceedings*." In short, in my judgment, in order to be an Issue for Disclosure for the purposes of paragraph 7.3, it is not necessary for the issue to be identifiable on the face of the statements of case – instead, it is enough for that issue to be something which will need to be determined by the court in order for there to be a fair resolution of the proceedings as a whole.

58. I should add that following the hearing, I was helpfully referred to the decision of Peter MacDonald Eggers QC (sitting as a Deputy High Court Judge) in the case of ***Lonestar Communications Corporation LLC v Kaye*** [2020] EWHC 1890 (Comm). In the

relevant part of his judgment, the Deputy Judge stated as follows (with underlining added):

> "29. CPR PD 51U, paragraph 7.3 defines the Issues for Disclosure to mean "for the purposes of disclosure only those key issues in dispute, which the parties consider will need to be determined by the court with some reference to contemporaneous documents in order for there to be a fair resolution of the proceedings. It does not extend to every issue which is disputed in the statements of case by denial or non-admission". Paragraph 7.4 requires that the draft List of Issues for Disclosure provide "a fair and balanced summary of the key areas of dispute identified by the parties' statements of case and in respect of which it is likely that one or other of the parties will be seeking Extended Disclosure"
>
> 30. In ***McParland & Partners Ltd v Whitehead*** [2020] EWHC 298 (Ch); [2020] Bus LR 699, the Chancellor explained the intended operation of the Pilot Scheme for Disclosure. In particular, the Pilot Scheme is intended to apply across a wide range of cases, from the most complex and high value to the simpler and low value cases. The particular approach to disclosure, and in particular the type of Extended Disclosure, are governed by notions of reasonableness and proportionality as understood by the overriding objective. For this purpose, having regard to paragraph 6.4 of CPR PD 51U and paragraph 3 of the Chancellor's judgment, the Court should take into account the particular features of the case, including the nature and complexity of the issues, the importance of the case, the likelihood that probative documents exist and are accessible, the number of documents which would be involved in a search (if relevant), review and disclosure, the ease and expense of carrying out any search and retrieving documents, the financial position of the parties, and the manner in which the case should be managed and tried (for example, whether costs should be limited or the trial should take place expeditiously).
>
> 31. At paragraphs 44-47, the Chancellor considered the identification of Issues for Disclosure:
>
> > "44. The starting point for the identification of the issues for disclosure will in every case be driven by the documentation that is or is likely to be in each party's possession. It should not be a mechanical exercise of going through the pleadings to identify issues that will arise at trial for determination.

> Rather it is the relevance of the categories of documents in the parties' possession to the contested issues before the court that should drive the identification of the issues for disclosure …
>
> 46. It can be seen, therefore, that issues for disclosure are very different from issues for trial. Issues for disclosure are issues to which undisclosed documentation in the hands of one or more of the parties is likely to be relevant and important for the fair resolution of the claim. That is why paragraph 7.3 of PD51U provides that issues for disclosure are "only those key issues in dispute, which the parties consider will need to be determined by the court with some reference to contemporaneous documents in order for there to be a fair resolution of the proceedings" (emphasis added). Paragraph 7.3 goes on to explain, as I just have, that issues for disclosure do "not extend to every issue which is disputed in the statements of case by denial or non-admission".
>
> 47. This explanation demonstrates that, in many cases, the issues for disclosure need not be numerous. They will almost never be legal issues, and they will not include factual issues that are already capable of being fairly resolved from the documents available on initial disclosure."

32. It follows from this that the Issues for Disclosure must also be issues crystallised in the statements of case. It is not every pleaded issue which should become an Issue for Disclosure; only a key issue in dispute should be identified as an Issue for Disclosure. The identification of the Issue for Disclosure must not become tangled in a complex distillation of issues, both great and small, thrown up by the statements of case (in ***McParland & Partners Ltd v Whitehead*** [2020] EWHC 298 (Ch); [2020] Bus LR 699, at paragraph 57, the Chancellor said that "Unduly granular or complex lists of issues for disclosure should be avoided. Likewise, the models chosen should simplify the process rather than complicate it"). That said, if the relevant issue is not a pleaded issue, an issue which emerges from the parties' contrary cases in the pleadings, it cannot be formulated as an Issue for Disclosure."

59. As for ***McParland***, there is of course no question but that the dicta of the Chancellor concisely summarises the process which is to be employed when the parties are engaging to agree the Issues for Disclosure. As for ***Lonestar Communications***,

however, I respectfully disagree with the first and last sentences of paragraph 32 (as underlined) which in my judgment adopt the same non sequitur which I find the Deputy Master to have adopted in the present case.

(b) Are "Issues for Disclosure" and "List of Issues for Disclosure" distinct concepts?

60. I have already set out in some detail the important concept of "Issues for Disclosure" as defined in paragraph 7.3 of the Pilot. A separate matter, however, is the mechanics by which those "Issues for Disclosure" are to be identified. As also set out above, these mechanics are set out in the other sub-paragraphs in paragraph 7 including in particular paragraph 7.2 which introduced the important tool of the "List of Issues for Disclosure". It is worth briefly recapping the process which is then supposed to follow. In summary, the parties are to actively engage to produce a draft List of Issues for Disclosure identifying the Issues for Disclosure. The parties are then further to engage with each other with a view to agreeing which Disclosure Model should apply to each Issue for Disclosure. If the parties can agree on these matters, the court will consider the proposal and, if thought appropriate, will then approve it. If the parties are unable to agree on these matters, the court will decide.

61. In summary, therefore, it is the Issues for Disclosure which is the key concept to be borne in mind and which informs all concerned with the scope of disclosure. The List of Issues for Disclosure is no doubt an important tool in the process but it is only a tool.

62. With this in mind, I now turn to paragraphs 17 and 18 of the Pilot which, as explained earlier, contain two new powers which, although superficially similar to the powers available under the rule for specific disclosure contained in CPR 31.12, are nevertheless different in some material ways. Paragraph 17 is the power which arises where there has been a failure adequately to comply with an order for Extended Disclosure. Of more relevance for present purposes, however, is paragraph 18 which for convenience I repeat as follows:

> "**18. Varying an order for Extended Disclosure; making an additional order for disclosure of specific documents**
>
> **18.1** The court may at any stage make an order that varies an order for Extended Disclosure. This includes making an additional order for disclosure of specific

> documents or narrow classes of documents relating to a particular Issue for Disclosure…
>
> **18.2** The party applying for an order under paragraph 18.1 must satisfy the court that varying the original order for Extended Disclosure is necessary for the just disposal of the proceedings and is reasonable and proportionate…"

63. As can be seen, it involves a variation of an order for Extended Disclosure. It therefore follows that, in order for this power to arise, there must already be in place an order for Extended Disclosure.

64. It can also be seen that the disclosure must relate "to a particular Issue for Disclosure". In other words, it has to relate to an issue "which will need to be determined by the court with some reference to contemporaneous documents in order for there to be a fair resolution of the proceedings" in accordance with paragraph 7.3.

65. Importantly, however, the power is not limited or restricted by reference to the tool of the List of Issues for Disclosure. It does not matter if a List is in place or not. What does matter is that there is an existing order for Extended Disclosure[2] and that the new disclosure relates to an Issue for Disclosure.

66. This being the case, I must again respectfully disagree with the Deputy Master in the present case where he said at [35]:

> "In the present case unless and until there is a List of Issues for Disclosure as part of an Order for Extended Disclosure there can be no basis for an order under Paragraph 18 for specific disclosure."

And at [38]:

[2] During argument, I was taken to the decision of Falk J in ***Brearley v Higgs & Sons*** [2020] EWHC 376. In that case, there was no List of Issues for Disclosure due to the fact that standard disclosure had been ordered before the Pilot had come into force. In reviewing the Practice Direction, the Judge noted that because there was no order for Extended Disclosure already in place, it was arguable that strictly paragraph 18 did not apply such that the application ought to be treated as an (original) application for Extended Disclosure under paragraph 6. In either event, Falk J noted, the same principles applied and the court went on to make various orders for disclosure accordingly.

> "In my judgment, the Disclosure Pilot is clear. There can be no order for disclosure within an Order for Extended Disclosure unless and until there exists a List of Issues for Disclosure. A List of Issues for Disclosure cannot include 'Issues' that are not issues that can be identified within the Statements of Case as they are at the date that the List of Issues for Disclosure is confirmed as an Order of the Court."

The present case

67. As explained above, in the present case the Deputy Master found that he did not have jurisdiction to make a disclosure order under paragraph 18 for two reasons, namely:

(1) the disclosure sought related to matters which did not relate to issues identifiable on the face of the statements of case (but only in HMRC's draft amended statement of case), and (in any event)

(2) there was no List of Issues for Disclosure in place.

68. As for the first ground, for the reasons I have given, it seems to me that in order for there to be jurisdiction under paragraph 18 it does not matter whether the disclosure relates to an issue identifiable on the face of the statements of case; instead, it is sufficient if it relates to an issue which will need to be determined by the court in order for there to be a fair resolution of the proceedings as a whole. In the present case, the proposed amendments alleging fraud, while not yet issues identifiable on the face of the statements of case, are clearly issues which will need to be determined by the court in order for there to be a fair resolution of the proceedings as a whole – first, at the time when the court has to consider whether or not to grant those amendments and, second, if those amendments are granted, at the trial itself.

69. As for the second ground, for the reasons I have given, it seems to me that in order for there to be jurisdiction under paragraph 18 it is not necessary for there to be already in place a List of Issues for Disclosure. There does need to be in place an order for Extended Disclosure but, in the present case, there was such an order as made by Master Kaye in October 2019. It is true that following the making of that order, the parties were unable to agree the List of Issues for Disclosure but, as I have found, that

in itself does not matter. What matters is that an order for Extended Disclosure had already been made (which it clearly had)[3].

Conclusion on the jurisdiction issue

70. In conclusion, therefore, in my judgment the Deputy Master was wrong to find that he did not have jurisdiction to make a disclosure order under paragraph 18 of the Pilot. In my judgment, the court did and does have such jurisdiction.

71. I therefore allow the appeal and will go on to consider the question as to whether or not, in the circumstances of the present case, a disclosure order under paragraph 18 should in fact be made.

PART V: SHOULD A DISCLOSURE ORDER BE MADE?

72. Having concluded that I do have jurisdiction to make an order under paragraph 18.1 I now need to consider whether I should in fact do so. I remind myself that paragraph 18.2 provides that before I make any such order I must be satisfied that the order is:

> "…necessary for the just disposal of the proceedings and is reasonable and proportionate".

73. I also remind myself of the principles set out in paragraph 6.4 (which apply when an order for Extended Disclosure is being sought for the first time) which provide that in all cases:

> "…an order for Extended Disclosure must be reasonable and proportionate having regard to the overriding objective including the following factors—
>
> (1) the nature and complexity of the issues in the proceedings;

[3] Although strictly speaking not relevant for present purposes, it seems to me that if an order for Extended Disclosure had not already been made, it would still have been open to apply for disclosure of the documents sought – although in those circumstances, the application would not have been made not under paragraph 18 but instead under paragraph 6 for (original) Extended Disclosure.

(2) the importance of the case, including any non-monetary relief sought;

(3) the likelihood of documents existing that will have probative value in supporting or undermining a party's claim or defence;

(4) the number of documents involved;

(5) the ease and expense of searching for and retrieval of any particular document (taking into account any limitations on the information available and on the likely accuracy of any costs estimates);

(6) the financial position of each party; and

(7) the need to ensure the case is dealt with expeditiously, fairly and at a proportionate cost…"

74. In the present case, it seems to me clear that I ought to exercise my discretion in favour of making an order for disclosure for the following two principal reasons:

(1) **Importance:** The amount of money involved is substantial (the claim is said to be worth some £650 million). Moreover, the proposed amendment is one which seeks to allege fraud. Clearly, therefore, the proposed amendment is one which justifies a high level of scrutiny. In short, the disclosure has the potential to be highly important.

(2) **Reasonable and proportionate:** As already pointed out above, the amount of money involved is substantial. Further, HMRC have already searched for and collated the documents sought. In short, they have already done the work and incurred the costs. This being the case, the making of such an order will not involve the incurring of significant extra costs and nor can it be said that compliance would be difficult to deal with let alone oppressive. In these circumstances, so it seems to me, making the order sought is indeed reasonable and proportionate.

75. Finally, I was also reminded by counsel for the Defendants of the words of Laws LJ (in the context of a judicial review) in ***Secretary of State for Foreign and Commonwealth Affairs v Quark Fishing Ltd*** [2002] EWCA Civ 1409 at [50] that:

> "…there is… a very high duty on public authority respondents, not least central government, to assist the court with full and accurate explanations of all the facts relevant to the issue the court must decide."[4]

76. I do not suggest that the disclosure obligations of HMRC as a public body are any higher than of any other party to civil litigation, but it does seem to me that given that HMRC seek to amend to allege fraud in circumstances where their specialist fraud investigators considered the matter but apparently did not take the matter further, it is at least consistent with the above dicta that disclosure of the relevant documents should be made.

PART VI: CONCLUSION

77. In conclusion, therefore:

(1) I allow the appeal.

(2) I will make an order for disclosure under paragraph 18 of the Pilot.

78. I conclude by expressing my gratitude to both counsel and their respective instructing teams. This is a case which gave rise to numerous issues and I was greatly assisted by not only their submissions but also the helpful and practical way in which they conducted the application generally.

JPQC

December 2020

[4] See also the reference to the "*long-established practice*" of HMRC's duty of candour applying in tax appeals: ***Kyriakos Karoulla t/a Brockley's Rock v The Commissioners for HM Revenue and Customs*** [2018] UKUT 255.