TC06624

Appeal number: TC/2017/02919, 2017/02920, 2017/02769, 2017/02766, 2017/02903, 2017/02923, 2017/02532, 2017/02925, 2017/01042, 2017/04985.

PROCEDURE – application to vary directions while original directions under appeal in face of newly presented evidence – whether special circumstances – nature of relevant evidence in cases of 'supervisory' jurisdiction – application allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

GARDNER-SHAW UK LIMITED **Appellants**
GARDNER-SHAW (LONDON) LTD
BEST PRICE RETAIL & WHOLESALE LTD
DRINKS 4 LESS (UK) LTD
CASA DI VINI LTD
HARP WINES & SPIRITS LTD
HARE WINES LTD
DHILLONS BREWERY LTD
LONDON CASH AND CARRY LTD
MAGICSPELLBREWERY LTD

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE BARBARA MOSEDALE

Sitting in public at Taylor House, Rosebery Avenue, London on 1 August 2018

Mr D Bedenham, Counsel, for all the appellants

Mr J Hall QC and Mr W Hays, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Background

The AWRS appeals

1. The appellants' appeals (save that of Magicspellbrewery Ltd) all concern the new alcohol wholesalers registration scheme ('AWRS') which was established by s 54 Finance Act 2015 with effect from 1 January 2016. In brief, the effect of the new legislation was to require all wholesalers of duty paid alcohol to be approved by HMRC. All of the appellants made applications to HMRC under the new legislation to be approved as wholesalers of duty paid alcohol and all except Magicspellbrewery Ltd were refused. Magicspellbrewery's appeal concerned a refusal by HMRC to register it under the relevant legislation as a Class A and Class B brewer, and for the purposes of this interim hearing there is no relevant difference between it and the AWRS appellants.

2. All have appealed to this Tribunal HMRC's decision to refuse to register them under the applicable legislation. It is accepted that they all have a right of appeal and the Tribunal has 'supervisory' jurisdiction conferred on it by s 16 Finance 1994. The appeals were lodged with this Tribunal at various times, but all between the dates of January and May 2017.

History of the disclosure direction

3. Directions in all the above appeals, and other AWRS appeals, were issued without representations from any parties and all required HMRC to disclose:

> 'all documents which were considered by [HMRC's] officer when reaching the decision at issue'

4. HMRC applied for these directions to be varied in a number of AWRS appeals but its application was unsuccessful by decision of the FTT (Judge Sinfield) dated 15 May 2017. In fact, Judge Sinfield slightly varied the order to require HMRC to indicate which, of all documents ordered to be disclosed, they relied on to support the appealed decision.

5. HMRC appealed the FTT's refusal to vary the disclosure direction, but the FTT's decision was upheld by the Upper Tribunal on 6 December 2017. That is not the end of the matter as the Court of Appeal has very recently given HMRC leave to appeal.

History of the stay direction

6. All the appeals the subject of this hearing had been stayed pending the outcome of the Upper Tribunal decision. Following the Upper Tribunal's decision, HMRC then applied for a further stay pending the outcome of their application to the Court of

Appeal for permission to appeal against the Upper Tribunal decision. The appellants opposed the application. On 20 June 2018, I refused HMRC's application in the majority of the cases before me, so the directions issued by Judge Sinfield became effective.

7. While my decision to refuse the stay (at least so far) has not been challenged, the reasons for it is relevant to this application. On the one hand, it is obviously undesirable for an appeal to proceed while a case management direction is under appeal, as it risks depriving the party making the challenge of the benefit of a successful appeal and therefore rendering their appeal rights nugatory. On the other hand, these are not only expedited appeals because they will determine the appellants' right to trade in alcohol, they are appeals where there is a risk that, if the temporary AWRS licences from which they currently benefit are revoked (as there is a chance they may be), the appellants' rights of appeal will be rendered nugatory as they will have been forced to cease trading before the appeal over their right to do so is resolved. In very brief summary, I decided in the face of these competing considerations, that it was more in the interests of justice to proceed with the preparation of the appeals for substantive hearing.

8. However, as I recognised in my decision on the stay, neither party had addressed me on how long the disclosure exercise directed by Judge Sinfield would take and I asked for written submissions on this. HMRC asked for six months and provided evidence in the form of a witness statement. At the same time, HMRC applied for Judge Sinfield's directions to be varied. The application was for the direction to be qualified by the words:

> 'save that the Respondents need not include a document on that list if it is considered to be sensitive by HMRC and does not support the case of the Appellant nor adversely affect that of HMRC'.

9. The appellant objected to the application and did not accept the evidence of HMRC's witness. I called an urgent hearing to determine the matters.

The appellants

10. This hearing does not concern all the thirteen appellants which were before me in May: the appeal of Drinks Stop was left stayed; one of the other appellants has now withdrawn its appeal and another has not objected to HMRC's application. And while the application was resisted on the part of Best Price, that resistance seems otiose as the parties made a joint application for its appeal to be consolidated with its appeal against an excise duty assessment. As the excise duty assessment is stayed behind the final determination of the preliminary issue in Davison & Robinson Ltd (FTT decision [2017] UKFTT 513 (TC) but now on appeal to the Upper Tribunal), I have directed that the consolidated appeal remains stayed. Therefore, Best Price is only affected by the decision recorded in this document if a successful application to lift the stay over the consolidated appeal is made.

11. This application therefore relates to 9 appellants, only one of which (Hare Wines Ltd) was before Judge Sinfield at the hearing of HMRC's original application for variation of the directions.

Jurisdiction

12. On receiving HMRC's application to vary Judge Sinfield's direction, and before the hearing, I expressed to the parties my concerns on whether the Tribunal had jurisdiction to entertain HMRC's application. My concerns were:

> (a) The direction which HMRC sought varied was the very direction the legality of which was challenged by HMRC on an unsuccessful appeal to the Upper Tribunal and was now on appeal to the Court of Appeal;
>
> (b) HMRC's application was on the basis of evidence which it appeared could have been produced to Judge Sinfield when hearing HMRC's original application to vary the Tribunal's directions, or before me when hearing HMRC's application to continue the stay of the appeals. It looked like a second, if not third, bite of the cherry.

13. I consider jurisdiction first and then move on to consider the actual application.

14. Mr Hall's position was that there was clear jurisdiction to amend any direction: the Tribunal rules gave the Tribunal the power to do so without any fetter. In his view, it was simply a question of whether the Tribunal would exercise its discretion to do so. He considered that in this case I should exercise my discretion as:

> (a) It was not really an application for variation as Judge Sinfield had recognised that HMRC could apply on a case-by-case basis for a public interest immunity ('PII') exception to his order and that was what HMRC was applying for;
>
> (b) There was a change in circumstances due to the new evidence;
>
> (c) Except in the case of Hare Wines Ltd, this was the first application for a variation of the directions issued by the Tribunal;
>
> (d) In any event, the circumstances were such that the variation was in in the interests of justice.

15. He referred me to the case of *Tibbles v SIG plc* [2012] EWCA Civ 518 where the Court of Appeal said in respect of the CPR, which contains a power for the Courts to vary or revoke a case management order:

> [39] ….(i) despite the occasional references to a possible distinction between jurisdiction and discretion ….there is in all probability no line to be drawn between the two. The rule is apparently broad and unfettered, but considerations of finality, the undesirability of allowing litigants to have two bites at the cherry, and the need to avoid undermining the concept of appeal, all push towards a principled curtailment of an otherwise apparently open discretion….

> (ii) The cases all warn against an attempt at an exhaustive definition of the circumstances in which a principled exercise of the discretion may arise. Subject to that, the jurisprudence has laid down firm guidance as to the primary circumstances in which the discretion may, as a matter of principle, be appropriately exercised, namely normally only (a) where there has been a material change of circumstances since the order was made, or (b) where the facts on which the original decision was made were (innocently or otherwise) misstated……..
>
> (v) …. where the facts or arguments are known or ought to have been known as at the time of the original order, it is unlikely that that the order can be revisited, ….
>
> (vii) the cases considered above suggest that the successful invocation of the rule is rare. Exceptional is a dangerous and sometimes misleading word: however, such is the interest of justice in the finality of a court's orders that it ought normally to take something out of the ordinary to lead to variation or revocation of an order, especially in the absences of a change of circumstances in an interlocutory situation.

16. A similar question came before me in *DDR* [2012] UKFTT 443(TC) although, unfortunately when writing it, I was not aware of the above Court of Appeal decision issued a couple of months earlier: Mr Hall submitted that what I said in *DDR* at §§22-23 was in effect the same as in *Tibbles*, but if and to the extent it was any different, I was wrong, a proposition I can't argue with. In particular, he submitted varying an earlier case management direction was a matter of discretion and not jurisdiction.

17. I think it is clear from *Tibbles* that it does not matter whether it is seen as a question of jurisdiction or discretion. Directions would only be revoked or varied where it was in the interests of justice to do so. The most common reasons for doing so would be where:

> (a) Directions were given in the absence of representations (such directions normally expressly give the parties leave to make applications for variation, sometimes phrased as 'liberty to apply' or 'subject to objection');
>
> (b) There has been a change in circumstances. Indeed, parties to litigation frequently apply for extensions of time for compliance.

18. But these are not the only reasons why a direction might be revoked or varied and less common reasons for doing so would include:

> (a) Obvious error in law in the directions;
>
> (b) Directions given after misstatement of relevant circumstances;
>
> (c) Procedural irregularity in relation to the directions or hearing in which they were made.

19. But there may be other circumstances in which it is appropriate to revoke or vary directions; the Court of Appeal expressly chose not to use the word exceptional, but said that it must be 'something out of the ordinary' ([39(vii) cited above). I

consider whether there is anything which justifies the Tribunal exercising its discretion to vary Judge Sinfield's direction in these appeals.

(a) Had Judge Sinfield given leave for the sort of application which was the subject to this hearing?

20. I was referred to what Judge Sinfield said at §28:

> 'If material [to be disclosed] contains intelligence or other genuinely confidential material that could have an impact on HMRC's operations then, in my opinion, HMRC should not be required to produce it or, at least, not in unredacted form. 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.'

21. Mr Hall's position was that they were not seeking a variation to Judge Sinfield's direction so much as making an application which he invited them to make. They had been given 'liberty to apply'. Mr Bedenham did not agree that the application made by HMRC was the sort of application envisaged by Judge Sinfield.

22. I agree with Mr Bedenham. Paragraphs 24-28 contain Judge Sinfield's reasoning on why he made the order in the form he did, and why in particular he required HMC to list <u>all</u> documents considered in making the disputed decision: the application he envisaged was one which would permit HMRC to withhold a specific listed document on the grounds it was sensitive; what HMRC applies for here is a direction that a class of documents need not be listed at all on the grounds they lack relevance. That was precisely the sort of direction that Judge Sinfield decided not to make.

(b) change in circumstances?

23. HMRC have before me now produced witness evidence that the information they seek to withhold is (a) adverse to the appellants' case and (b) confidential. This evidence was not before Judge Sinfield: on the contrary, he records at §28 that HMRC did not allege that the material was confidential nor allege or produce evidence that it was adverse to those appellants' appeals.

24. But I agree with Mr Bedenham that that is not a change in circumstances. It was open to HMRC in the hearing before Judge Sinfield to make the assertions and lead the evidence which they have done in this hearing. The material existed at the time of the appealed AWRS decisions: it was not new and has not changed. While those representing HMRC may not in May 2017 have understood the nature of the material covered by the disclosure order, the nature of the material has not changed. Allowing HMRC to make assertions and produce evidence now which could have been done in the original hearing before Judge Sinfield falls squarely into the category

of giving them a second bite at the cherry. It would be very rare in even a case management situation for a party to be allowed a second go.

(c) first application for variation?

25. It was suggested, but not very strongly, that apart from in the case of Hare Wines Ltd, this was a first application for a variation of a direction that was made by the Tribunal without representations. Strictly, that appears to be true as, after the decision in *Hare Wines and others*, the Tribunal issued identical directions to those approved by Judge Sinfield in all other AWRS cases without asking for or receiving representations on them.

26. However, while the appellants (bar Hare Wines) before me are not the same as were before Judge Sinfield, both HMRC and the solicitors (Rainer Hughes) who represented those before Judge Sinfield and those before me proceeded on the basis that the hearing in May 2017 before Judge Sinfield was a test case for the appropriate directions. Indeed, it was for that reason all the AWRS appeals had been stayed pending the appeal in *Hare Wines.* Allowing a variation to those directions now would in practice, if not strictly in law, be a second bite of the cherry for HMRC. Doing so would undermine the use of test cases as it would suggest second and subsequent challenges to a direction could be made in grouped appeals just by changing the identity of the test appellant(s).

27. In passing, I accept Mr Hall's submission that the hearing before me for a continuation of the stay was not the appropriate time to adduce the evidence: if the appeal was to continue stayed, HMRC would have been wasting money in working on the issue of disclosure. But I do think that they should have done this work before they challenged the Tribunal's disclosure order in May 2017.

(d) something out of the ordinary?

28. That leaves HMRC with the only option to justify the variation that they seek by showing that the circumstances are something out of the ordinary. And that is what HMRC sought to do: I can only make a decision on whether they have justified being given a second bite of the cherry by considering the evidence and submissions and I proceed to do so.

The evidence

The witness

29. Mr McGee has been an HMRC officer for 38 years; since March 2017 he has been a Regional Assistant Director (a senior manager) responsible for various teams within HMRC, including the teams dealing with AWRS applications. Prior to his current position, he spent 18 years as an assistant director in HMRC's Risk and Intelligence Service ('RIS') team dealing with intelligence information supplied to HMRC. He was well-placed to explain HMRC's procedures surrounding confidential intelligence.

30. He made two witness statements; one on 5 July 2018 which was submitted in support of the application, and a second on the date of the hearing, Mr McGee having returned from holiday in order to attend the hearing which was called at short notice.

31. The written evidence was directed to the question of how much of the material ordered to be disclosed by Judge Sinfield in these cases was considered by HMRC to be confidential, and how long it would take HMRC to decide whether, despite its confidentiality, it could be disclosed without damaging the public interest, and then how long it would take HMRC to make an application for PII over the remainder. The second witness statement also addressed how much it would cost to undertake the process.

How long to disclose?

32. Mr McGee's original evidence was that due to the estimated quantity of confidential intelligence (500 items) and the necessary steps to be undertaken, the exercise would take 5-6 months to complete. On returning from holiday, HMRC having had time to look at the information in more detail during his absence and start the disclosure exercise, on discussions with his colleagues the evening before the hearing, he revised his estimate down to 3-4 months. I understood that the time estimate covered the period it would take HMRC to produce a certificate of PII in respect of each item of the 500 or so documents in respect of which HMRC decided to claim PII, but did not include the time it would take to make, or have determined, an application to the Tribunal to be excused from the obligation to disclose it.

33. Mr Bedenham challenged the evidence.

34. One of his points was that Judge Sinfield ordered disclosure in May 2017 so HMRC had had 15 months to undertake the process and did not need any time now. I thought this a bad point. The appeals had been stayed pending an appeal against the direction: it would have been a waste of costs to undertake any part of the disclosure exercise while the appeals were stayed as there was no certainty it would ever have to be carried out. The stay was lifted on 20 June 2018; so far HMRC had only had 6 weeks and I accepted Mr McGee's evidence that HMRC had actually started work on the exercise in February 2018 when the Upper Tribunal refused them permission to appeal by requiring the officers to schedule the information affected; they had continued working on the exercise since my direction of 20 June.

35. I also accepted Mr McGee's evidence on why the evidence could not be disclosed without going through a process of considering whether or not to make a PII application, which if allowed, would entitle HMRC to withhold from disclosure material because of the public interest in protecting sources of confidential intelligence for the better administration of the country. I accepted that while the officers would only ever have had access to 'sanitised' confidential information (from which the 'owner' of the information within RIS would have removed from the information indications of its source), nevertheless, sanitised intelligence reports could not just be released to the public because the persons concerned in it might be

able to identify the source and in any event the source of the information might dry up.

36. I also accepted Mr McGee's evidence on the time-consuming nature of the exercise. In order to take a view on whether a PII application in respect of each of the documents should be made, each piece of confidential information needed:

(a) To be reverse engineered to identify its source;

(b) The 'owners' of the information within HMRC needed to be consulted and consideration given to consulting the source of the information;

(c) In consultation with its lawyers, HMRC needed to consider whether the material should be withheld or partially withheld in the public interest of protecting sources;

(d) If the decision was to wholly or partially withhold it, a PII application would have to be prepared which would involve HMRC solicitors' office briefing HMRC's General Counsel and Chief Executive; they might consult external counsel during this process. The Chief Executive would then have to decide on advice whether to agree and sign the PII certificate. Only then would HMRC be in a position to make an ex parte application to the tribunal for disclosure of the material to be withheld on the basis of public interest.

37. While Mr Bedenham's position was that this process ought take no longer than a month even for 500 documents, I found Mr McGee quite credible: the process he described, for a large quantity of documents, even if no longer qutie 500, and even with the large number of officers working on it he described, would easily take 3 to 4 months. The issue was protecting HMRC's – and the government's - confidential sources of information: HMRC was bound to take it very seriously and consider each document carefully and in conjunction with its lawyers.

38. My conclusion was that if this exercise was to be undertaken, HMRC should be given 4 months to produce its list of documents.

How much would it cost to undertake the exercise?

39. Mr McGee reported internal advice he had received on the likely costs of the exercise. Assuming the confidential information was spread equally between all the appellants, the estimate was 40 hours of legal work by HMRC solicitors' office in each case. He was told the internal recharge rate was £190 per hour. For 10 appellants, that led to £76,000 in internal HMRC legal costs.

40. Mr Bedenham did not accept that the recharge rate was £190; Mr McGee could only repeat what he was told about it. My view is that £190 per hour is in line with solicitors' rates charged in the Tribunal and is realistic. I also consider 40 hours per appellant reasonable bearing in mind the nature and quantity of the work.

41. Mr McGee also estimated that some £600,000 would be spent in officers' salaries alone. As at the same time he also said some 60-65 officers were working on it full time (some 6 excise teams with RIS officers helping), this figure seemed something of an underestimate even allowing for the work being completed within 4 months.

42. Mr Bedenham did not accept that that number of officers would be needed full time but again I did not consider it unreasonable taking into account the amount and the nature of the work required. In any event, Mr McGee's estimate of £600K was enough only for some 24 officers working full time for 4 months with an average salary of £50,000 per annum.

43. McGee's estimate of total costs was in the region of £500,000-£750,000. As I understood it, that included the estimated cost of external counsel and time of HMRC's General Counsel and Chief Executive. It ought to be revised down for the reduced number of appellants, but I accepted that the exercise to be undertaken would be extremely expensive and most likely cost in excess of half a million pounds.

The use to which the confidential material is put

44. Mr Bedenham asked Mr McGee what officers would do with any confidential information they were given in relation to a taxpayer who had applied for AWRS approval. His answer, which I accept, and which not effectively challenged in any event, was that the officer would attempt to corroborate the information through investigation. If the intelligence was corroborated, and reliable evidence obtained, they could use the evidence as part of the assessment of whether the taxpayer was 'fit and proper' to be given an AWRS approval; if the intelligence could not be corroborated, it could not be used and would not form part of the 'fit and proper' assessment.

Relevant information?

45. HMRC's case, as I understood it, was that the information sought was irrelevant and both timely and costly to produce: in these circumstances I should vary the order so that it did not have to be produced.

46. Mr Bedenham did not accept that either the material sought was irrelevant, nor that HMRC should determine relevance.

What is relevant material?

47. It is well-understood that relevant material, apart from the material which the disclosing party is relying on to support its case, is material which either undermines the case of the party undertaking the disclosure exercise and/or supports the case of the other party.

48. What that means in the context of an appeal where the Tribunal has supervisory jurisdiction was a matter of some debate. With supervisory jurisdiction, the appeal will succeed if

> '... if it were shown the commissioners had acted in a way
>
> (a) in which no reasonable panel of commissioners could have acted;
>
> (b) if they had taken into account some irrelevant matter;
>
> (c) or had disregarded something to which they should have given weight.'
>
> per Lord Lane *Corbitt* [1980] STC 231 at 239

49. Relevant material would include not only everything taken into account by HMRC in reaching its decision if it should not have been, but also anything they did not take into account but should have done.

50. The example given in the hearing was of an officer reaching a decision to refuse AWRS approval for 4 reasons; 3 being disclosed in the decision letter but one not being mentioned. The one undisclosed reason was posited to be a highly prejudicial confidential intelligence report with unknown provenance (perhaps an anonymous caller accusing the appellant of excise fraud).

51. Mr Hall's view was that only material pertaining to the 3 disclosed reasons would be relevant because those were the reasons on which HMRC had chosen to defend its decision. The fourth, undisclosed reason was simply irrelevant as HMRC had not chosen to defend the decision on the basis of it.

52. Mr Bedenham considered that view patently wrong. His point was that if the officer had taken into account as a part of his decision a legally irrelevant matter (such as an unverified intelligence report), even if his evidence is that he would have come to the same conclusion had he not taken it into account, then it was a flawed decision and an appeal against it would succeed unless (per *John Dee Ltd)* it was inevitable that, even excluding the irrelevant material, a reasonable officer acting reasonably would have come to the same decision.

53. This dispute between them appeared otiose because HMRC's case was that *all* of the confidential material was legally irrelevant because it formed no part of the decision-maker's decision: it was only caught by Judge Sinfield's disclosure order because it had been considered in the decision-making process leading up to the decision to deny the AWRS but in fact formed no part of that decision. That was because, Mr Hall said, relying on Mr McGee's evidence, an officer would rely on and disclose evidence which corroborated an intelligence report, or, if unable to find any, would disregard the intelligence report when making his AWRS decision. In other words, an officer should not have made a decision that was even in part based on an uncorroborated intelligence report.

54. I agree that Mr Bedenham's formulation of legal relevance in a case involving supervisory jurisdiction is more correct. If the officer took irrelevant material (such as an uncorroborated and anonymous intelligence report) into account as a part of his

reasons for making the challenged decision, then the decision was flawed and must be set aside unless it is inevitable that the decision ought to have been the same without the irrelevant material.

55. However, if irrelevant material did form a part of the decision, it is open to HMRC to revoke the original decision and re-make the decision at any time based on just the disclosed 3 grounds. The reasonableness of the decision will then stand and fall on those 3 grounds (and any material favourable to the appellant which HMRC should have considered but didn't).

56. The limitation of the Tribunal's role to supervisory jurisdiction makes sense in cases where a discretionary decision of HMRC's is at stake: the Tribunal is a judicial body and not a body which should usurp the role given to HMRC. When given jurisdiction, it can review the legality of HMRC's discretionary decisions but it cannot re-make them. Nevertheless, supervisory jurisdiction can cause problems: if the Tribunal can only consider the reasonableness of the decision made by HMRC, it is cut out from taking into account evidence which was not known to HMRC at the time, which can be very unfair to an appellant; it is also cut out from considering informal revisions of HMRC's opinion such as where HMRC choose to support a decision on more limited evidence than used for the decision in the first place. That is wasteful as it leads to the requirement for HMRC to take a further decision, and then to a further appeal.

57. However, all that appears in these appeals to be a theoretical rather than a real problem bearing in mind the evidence that officers should not have taken uncorroborated intelligence reports into account when making their decisions. But I need to determine the principles on which relevance is to be determined if I am considering making the variation requested by HMRC. Relevant material is material which either undermines the case of the party undertaking the disclosure exercise and/or supports the case of the other party and therefore in supervisory jurisdiction cases it is relevant if it is:

(1) information on which the appealed decision was based, and which tends to support the appellant's case that the decision was unreasonable;

(2) information known to the officer who made the decision and which he did not take into account in making his decision, where that failure tends to support the appellant's case that the decision was unreasonable.

Who determines relevance?

58. Mr Bedenham's position was that Judge Sinfield had decided that it was for the Tribunal, and not HMRC, to decide whether any particular document was relevant. He referred me to §26 of his decision where he said:

> I find the submission that HMRC should not be required to include in the list of documents any documents that the decision-maker had considered but concluded were irrelevant astonishing. If accepted, it would allow the HMRC officer whose decision is being challenged to determine what materials the FTT should consider when reviewing the

> decision. That is not the role of the decision-maker and it would risk preventing the FTT from carrying out its role properly. Mr Hays' submission was necessarily limited to cases in which the decision-maker 'ultimately (and correctly) concludes that it is irrelevant' but if the document is not disclosed, how could the correctness of the officer's opinion ever be tested?

59. However, it is clear from this passage that Judge Sinfield was talking about documents relevant to the question of whether the appellant was a fit and proper person; he was not discussing relevance in the legal sense of a document which undermines HMRC's case or supports the appellant's case. The two meanings of relevant are not necessarily the same: a document which an officer decided was irrelevant to the question of fit and proper status might nevertheless be relevant to the appeal against that decision because the officer's decision to disregard the document may have been wrong.

60. As Mr Hall pointed out, the English legal system has adopted a systems of self-monitored disclosure. This was referred to by Stanley Burnton LJ in *SOCA v Namli* [2011] EWCA civ 1411:

> [33] First, it was submitted that SOCA has been judge in its own cause in determining whether the documents in question are relevant only as adversely affecting the defendant's case, and not otherwise impacting on the case of SOCA. That is true. However, that is the way disclosure works under our procedural rules. The assessment made by a litigant as to relevance (by which I mean in the present case whether the document is such as to be within the scope of standard disclosure) is determinative, unless and until another party puts evidence before the court demonstrating that that assessment has been wrong or unreliable. Normally, the party seeking further disclosure will in such circumstances make an application for specific disclosure….

61. While that case is the position in the courts, and this appeal is in a Tribunal, I see no reason for a different approach, particularly when both parties are represented by solicitors, and so can be expected to understand the legal meaning of relevance and carry out a proper disclosure exercise.

62. Mr Bedenham also said that Mr Hall had demonstrated by his submissions that he did not understand what documents would be relevant in a 'supervisory' jurisdiction case and therefore HMRC ought not be allowed to determine relevance. I do not agree: even if Mr Bedenham was right to say Mr Hall did not fully understand what classes of documents would be relevant in a legal sense (discussed above), that could be cured by guidance from the Tribunal on what relevant means in the context of supervisory jurisdiction (see §57).

Should relevance be determined before PII?

63. Mr Hall relied on the case of *SOCA v Namli* where the issue was whether SOCA was right to apply for a variation to an order for disclosure under the applicable CPR

which applied to variations or the section which applied to applications for PII material.

64. It was found that SOCA was not bound to apply for PII; it could simply apply to vary the direction to exclude irrelevant material. Stanley Burnton LJ said:

> [18] It is perhaps not immediately obvious why a party in a two-party case should be required to disclose documents that it does not seek to rely upon if their only relevance is adverse to the case of the disclosing party…….
>
> [39] It is necessary to consider what interest of the defendants would be advanced by requiring [a PII application]. In the ordinary way, public interest immunity applications are concerned with the desire of a public authority to withhold from disclosure or inspection documents that may damage its case or assist the case of other parties. In such a case, the court must weigh up the public interest in non-disclosure…against the other party's right to a fair trial. The more prejudicial a document to the case of the disclosing authority, the more likely it is that the court will refuse to accede to the application. However, if the document in question is adverse to the case of the other party, and supportive of the case of the disclosing authority, there is no weighing up to do. The court will, in such circumstances, be bound to accede to the application….
>
> [41] On this basis, I see no good reason why SOCA should be required to make its application [for PII] since to do so would not promote any legitimate interest of the defendants….

65. It seems to me that the question of relevance should be addressed before the question of public interest immunity: PII applications are costly and completely wasted if the material is irrelevant because it will not be ordered to be disclosed, and would not assist the appellants if it were.

66. *Namli* was considered by Judge Sinfield. He said (not surprisingly) that it was irrelevant because HMRC did not advance the case that the material they wished to withhold was confidential: [28]. As I have already said, HMRC put a very different case to me than they put to Judge Sinfield. I do not consider *Namli* irrelevant to this application; on the contrary, in light of the evidence adduced to me, there are clear parallels. HMRC apply for a direction that, without making a PII application, they need not disclose information that is irrelevant and considered sensitive.

67. It is true that the court's jurisdiction in *Namli* was not supervisory jurisdiction as it is in these appeals: I do not see it matters. While the question of jurisdiction may affect what material is relevant, if the information is irrelevant in the legal sense, the disclosing party should not be obliged to apply for PII.

Conclusion

68. This Tribunal has an unenviable task. It is asked to vary a direction in circumstances where the direction has already been upheld by the Upper Tribunal and

is soon to be considered in the Court of Appeal and, moreover, where the application for variation is in reality a second bite at the cherry. HMRC support it with evidence that could have been put before Judge Sinfield and I do not understand why this was not done.

69. In these circumstances, ordinarily the applicant must expect the application to be refused. And the appellants' position is that for these reasons it must be refused. But I have to consider whether it should be allowed in whole or part because the situation may be one of those rare special circumstances referred to in *Tibbles* (§19).

Conclusion on relevance

70. The effect of Mr McGee's evidence is that he expects all or virtually all of the confidential material which HMRC are ordered to disclose to be irrelevant and seeks a variation so that if it is irrelevant, they are not required to either to disclose it or apply for PII. So if I make the order applied for the material withheld will (a) be adverse to the appellants and will (b) not have formed a part of the decision which led to the denial of AWRS approval.

71. Mr Bedenham ultimately accepted that in principle material which was not part of the reasons for the officer's decision would be irrelevant but he still maintained the appellant was entitled to it: his view was that he did not accept that prejudicial - albeit unproved and inherently unreliable - material could in reality be ignored by the officer making the decision. His position was that a human being could not help but be prejudiced by it. He said he needed to know about such prejudicial material so that he could conduct an effective cross-examination and seek to persuade the Tribunal that the officer had been influenced by the prejudicial material. He could then prove the decision was unreasonable because the officer will have been shown to be biased by unproved and inherently unreliable information.

72. I do not agree that the potential for confidential intelligence reports to be used in such a challenge makes it relevant: if it is prejudicial to the appellant and did not form part of the reason for the decision, it is irrelevant in law.

73. Moreover, it amounts to fishing for evidence: without any evidence of bias, the courts should not order a party to disclose information for the purpose of allowing the other party to look for bias: Dillon LJ in *ex parte the London Lesbian and Gay Centre* (1991) page 6

> '…suspicion cannot warrant ordinary discovery of documents. Insofar as it is founded on such a suspicion, the application for discovery is a fishing expedition….'

Much the same was said in *Shah v HSBC [2011] EWCA Civ 1154* at [37-50].

74. It also became clear that Mr Bedenham's position (which I think Mr McGee agreed with) was that, having considered the 500 (now fewer) potentially confidential documents, and having undertaken the exercise discussed at §36 above, HMRC might chose to disclose a significant number without asserting PII. Mr Bedenham wanted

those documents: he accepted his clients might not require HMRC to make a PII application in respect of the other information but simply accept they would not be disclosed.

75. However, the above point remains true. If those documents are prejudicial to the appellant and formed no part of the reasons for the decision, they are legally irrelevant in law.

76. It also remains possible that Mr McGee is wrong about how officers actually use confidential information. Some of the sanitised confidential material, contrary to his understanding and instructions to officers, may have formed a part of the reasons for the refusal of some or all of the appellants' AWRS approvals. But if so, it seems to me that it is not excluded from the disclosure order by HMRC's proposed variation (§8) as such material would potentially undermine HMRC's case and/or support the appellant's case, because the officer would have relied on anonymous and unproved allegations. It would have to be disclosed or a PII application made.

Conclusion on cost

77. Carrying out the direction will involve HMRC in very significant costs: that by itself is not special circumstances. Litigation is expensive and disclosure obligations are part of the reason for that. Moreover, HMRC is the author of its misfortune in the sense that it was their failure to put before Judge Sinfield the evidence which they have now brought before me. Their failure to do so left Judge Sinfield under the impression (a) that there was no confidential information concerned (b) that the information HMRC did not wish to disclose would not be adverse to the appellant's case and (c) to the extent there was any confidential information, it would have influenced the decision maker's decision: see [28] of his decision. Leaving HMRC to bear the consequences of their error might be effective at encouraging a better approach to litigation in the future.

78. Having said all that, I cannot ignore the fact that the cost of the exercise will be around half a million pounds of public money.

79. I also cannot ignore the fact that if a significant amount of irrelevant information is disclosed, it will also involve the appellants wasting their time in dealing with it, it will significantly but unnecessarily increase the amount of documents in front of the Tribunal, and may extend the length of the hearings with challenges to witnesses over the material which would appear to be doomed to failure because the material is irrelevant.

Conclusion on time

80. Carrying out the direction will delay the hearings by at least 3 months. This is calculated as follows. HMRC say that if the disclosure direction is qualified as per their application, they will be able to make full disclosure within 3 weeks (I agree with Mr Hall it would be unwise to tie both parties to 2 weeks during the holiday period); if it is not qualified, I have accepted they will need 4 months.

81. Yet these are expedited appeals as the appellants cannot trade without AWRS approval: while the appellants have temporary approvals, they are at risk of losing them before the appeals can be concluded. Time is of the essence and it was for that reason (see §7) that I lifted the stay in these appeals.

82. Mr Bedenham does not see the appellants' insistence on the full disclosure ordered by HMRC as contrary to their own interests because he considered such disclosure should only take 4 weeks. As I don't agree with him on that, giving the appellants the full disclosure requested will (in the sense of timing) be against their own interests.

Overall conclusion

83. I am persuaded very reluctantly that this second bite at the cherry by HMRC does fall into the category of being out of the ordinary, or even exceptional: taking into account the evidence presented to me, but which was not before Judge Sinfield, I consider it very much against the interests of justice to require HMRC to carry out the full disclosure exercise ordered

84. The exercise will delay appeals which should be expedited; it will cost an extremely large sum of taxpayers' 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.

85. I direct that Judge Sinfield's direction is varied as followed:

(1) The direction as to mutual exchange of lists of documents shall be complied with no later than 5pm on 24 August 2018;

(2) The second sub-section of that direction shall be qualified by the addition of the words at the end:

> 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) does not support the case of the Appellant nor adversely affect that of HMRC

(3) The direction for mutual exchange of witness statements shall be complied with no later than 5pm on 21 September 2018;

(4) The direction for mutual exchange of listing information shall be complied with no later than 5pm on 5 October 2018.

86. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax

Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

BARBARA MOSDALE
TRIBUNAL JUDGE

RELEASE DATE: 3 AUGUST 2018