Neutral Citation: [2024] UKFTT 00351 (TC)

Case Number: TC09151

FIRST-TIER TRIBUNAL
TAX CHAMBER

Video hearing

Appeal references: TC/2021/02887
TC/2022/02307

APPLICATION FOR DISCLOSURE – whether proportionate – whether clear – application of overriding objective – whether reasonably required by the Tribunal to make a fair determination of the issues at a substantive hearing – no – application refused

Heard on: 5 April 2024
Judgment date: 23 April 2024

Before

TRIBUNAL JUDGE ANNE FAIRPO

Between

COOPERVISION LENS CARE LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Michael Jones KC, of counsel, and Nicholas Macklam, of counsel, instructed by ADE Tax

For the Respondents: Akash Nawbatt KC, of counsel, and Georgia Hicks, of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

1. The hearing was held on the Tribunal's video hearing platform. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Background

2. This application is made in the course of proceedings in an appeal against a determination issued by HMRC on February 2021 in respect of PAYE which HMRC considers arises in respect of a disposal of shares.

3. The appeal was made on 30 July 2021. Lists of documents were exchanged in January 2022. The directions (as amended) required that witness evidence (other than expert evidence) be exchanged in October 2022.

4. The appellant applied to the Tribunal for witness summonses in respect of three individuals in September 2022 including Mr Ricupati, an officer of the group which acquired the shares referred to in paragraph 2 above. The summonses were requested because the individuals were concerned about breaching confidentiality requirements in the absence of a Tribunal order.

5. HMRC sought to amend the requested draft order for witness summonses to require broader disclosure than that in the draft. Following a hearing in January 2023, the Tribunal refused HMRC's amendments and issued the witnesses summonses. The witness evidence was provided in accordance with the order in July 2023.

6. Following this, HMRC wrote to the appellant in November 2023 requesting additional disclosure following receipt of Mr Ricupati's witness statement. As agreement could not be reached, HMRC applied to the Tribunal for a disclosure order in December 2023. It is this application which is the subject of this decision.

General points

Application, skeleton argument and amended requested order

7. The requested disclosure which is the subject of this application has undergone some changes over time, not all of them explained. The original application was made on 7 December 2023 and contained appendices with the requested disclosures. Appendix Three contained the disclosures requested of the appellant company, in four categories.

8. After some correspondence, the application was listed for hearing. HMRC produced a skeleton argument, dated 26 March 2024 and also produced an amended draft order on the same day.

9. Their skeleton argument was clearly based on the request in Appendix Three of the application, but the disclosure requested in the amended draft order had considerable differences from the original disclosure requested in Appendix Three. HMRC stated that they had endeavoured to take into account comments made by the appellants in reply to the disclosure request in updating the draft order although it was not explained why this had not been addressed in the skeleton argument.

10. In the hearing, HMRC confirmed that they were seeking disclosure in the terms set out in the amended draft order and not on the terms of Appendix Three and their skeleton argument. The requested order for disclosure had been redrafted in an attempt to narrow the request and to specify matters as closely as possible.

11. It is somewhat unfortunate that HMRC were apparently not able to make this clear in their skeleton argument; the appellant and Tribunal were effectively required to consider a somewhat different order to that originally sought and to interpret the skeleton argument accordingly in the context of oral submisions.

Legal principles

12. The parties were generally agreed as to the relevant legal principles and case law regarding disclosure in this Tribunal.

13. In summary, the standard disclosure rule in this Tribunal is that in Rule 27 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, which requires that the parties disclose the documents which they intend to rely on or produce in the proceedings. The disclosure rules in the Civil Procedure Rules do not apply to proceedings before this Tribunal although they can provide useful guidance as to the application of the Tribunal rules in this context. There was no suggestion that the appellant had not complied with its disclosure obligations under the Tribunal Rules.

14. The Tribunal has, nevertheless, discretionary power under Rule 5(3)(d) to order a party or another person to produce documents. The approach to be taken by the Tribunal in exercising such power was summarised by Judge Staker in *Royal Bank of Scotland Group plc* [2020] UKFTT 321 (TC) from earlier cases as follows:

> "[25] 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. The trend in the case law has been to ensure that disclosure is more closely related to the issues in dispute in the proceedings. Disclosure is to ensure that one party does not enjoy an unfair advantage or suffer an unfair disadvantage in the litigation as a result of lack of access to a document. If a party suffers no litigious disadvantage by not seeing a document, it is immaterial that the party is curious about the contents of a document or would like to know the contents of it." (*Revenue and Customs Comrs v Smart Price Midlands Ltd, Revenue and Customs Comrs v Gardner Shaw UK Ltd* [2019] EWCA Civ 841, [2019] 1 WLR 5070).
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> "[26] In exercising its discretion under [Rule] 5(3)(d) of its Rules, the Tribunal must have regard to the overriding objective in [Rule] 2. An exercise of discretion to direct disclosure should be proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties ([Rule] 2(2)(a)). The question of proportionality should include an assessment of how focused the request for disclosure is, how difficult or expensive it will be to comply with it, and how relevant the information requested is." (*Tower Bridge GP Ltd v Revenue and Customs Comrs* [2016] UKFTT 54 (TC))
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> "[56] In cases where there has been no inadequate compliance with the regime of initial disclosure, or to the extent that an application for specific disclosure seeks disclosure going beyond the requirements of the initial disclosure regime, an applicant for directions for specific disclosure will need to satisfy the Tribunal:
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> (1) that the material in respect of which specific disclosure is sought is necessary to deal with the case justly: this will be the case if the party applying for specific disclosure will suffer an unfair disadvantage (or the other party an unfair advantage) in the litigation as a result of lack of access to the material; that is, it is not enough that the material is merely relevant to

> the case or that the material would fall to be disclosed under a regime of standard disclosure;
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> (2) that the material is likely to exist, and is likely to be or have been in the other party's control;
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> (3) that the material has not previously been (or is unlikely previously to have been) disclosed to the applicant for specific disclosure;
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> (4) that the material is likely to be found and disclosed if the order for specific disclosure is made and is complied with (that is, if the order for specific disclosure requires a party to make a reasonable search for material, that the search will likely lead to identification and disclosure of the material sought); and
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> (5) that the proposed order for specific disclosure would be proportionate to the importance of the case, the complexity of the issues, the importance of the material sought to a just determination of the issues in the case, and the anticipated time and costs required to comply with the proposed order."

15. I agree with the points made by Judge Staker and the following takes into account the case law summarised above.

16. Given the time that has passed since the transactions which are the subject of this appeal, HMRC also contended that it was important that all relevant documents should be before the tribunal to test the recollection of witnesses (*Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm), [2020] 1 CLC 428 at [15]-[22] which suggested that the correct approach by the court is to place "little if any reliance on witnesses' recollections of what was said in meetings and conversations and to base factual findings on inferences drawn from the documentary evidence and known or probable facts" and that the value of witness evidence lies largely in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny (at [22]).

17. Whilst this is of course true, I do not consider that it means that it adds anything to the Tribunal powers and considerations set out in the case law above. In my view, the decision in *Gestmin* provides observations designed to assist judges in commercial matters relating to disputed past events. It is a principle of caution, not a requirement to order disclosure in circumstances which go beyond the approach set out in case law.

General scope of requested order

18. HMRC requested that the appellant "carry out a reasonable and proportionate search of its databases". The appellants contended that this lacked clarity, as it was not clear what "its databases" might be. HMRC submitted that this did not lack clarity and that the qualifier "of its databases" was not even required.

19. However, that qualifier was included in the request and in my view cannot be ignored. Neither party provided a definition of the word "database", but I note that it is generally defined as "a structured set of data held in a computer, especially one that is accessible in various ways". Without the qualifier, the appellants would be required to search all of its records including those held on paper. Given the qualifier, that reasonable and proportionate search is clearly limited to a search of electronic records to the extent that they are held in a database. The request does not mean the same thing with and without the qualifier.

20. In the absence of submissions as to what amounts to a database, I do not consider that this is a particularly clear request. For example, the data representing files stored on a disk may also be stored in a way which could be described as a database at the code level, but that index and retrieval of storage at the disk/data level is accessible only to the underlying

software (in my view, the file system viewable by a user does not necessary amount to a structured set of data. We have all encountered people whose use of file systems – computerised or otherwise – cannot be said to be structured).

21. That is to say, without clearer words, it is not possible to determine whether HMRC intended this request to be limited to systems which are more likely to be known to be databases (eg: Microsoft Azure, Microsoft Access, Oracle and similar) or whether they intended it to cover systems which utilise databases without the user necessarily being aware that a database underlies the functionality (eg: Microsoft Outlook) and where the user may not have stored the data in any particularly structured way. The ambiguity would, in my view, mean that an appellant could not be certain that it had complied with an order worded in this way.

22. The appellant also contended that the search exercise would be disproportionately onerous and costly to undertake, particularly so close to the hearing date (the substantive hearing is listed for November 2024 and has so been listed since August 2023). They considered that the hearing date would be at risk if disclosure were ordered and that HMRC's contentions did not establish good reasons for the delay that would arise, in particular as some of the witnesses are relatively elderly and in poor health.

23. HMRC contended that the appellant would have undertaken most of the required searches in any case, in preparing Mr Ricupati's witness statement, and that the exercise would not be as onerous as described by the appellants.

24. Considering the arguments put forward by the parties, I note that Mr Ricupati was required by the witness summons issued to him in 2023 to disclose the documents to which he considered he would need to refer.

25. I do not agree with HMRC that this would have required a full search and, crucially, identification of all documents in a manner which would make it easy to retrieve and disclose the documents requested. There is a significant difference between, firstly, searching for and locating documents to which an individual wishes to refer and, secondly, searching for and locating all documents, including correspondence between other people which that individual might not have been copied into and might not be aware exists.

26. The first requires only that the individual remember that such a document exists and then that the specific document be searched for. It does not require, as the second would, a search and analysis of the results of an enquiry of "databases" including (and presumably primarily expecting a search of, albeit unspecified) archived emails which could run into thousands if not tens of thousands (the vast majority of which would be irrelevant, but would still need to be reviewed to determine whether they met the criteria) for the whole of 2014.

27. On balance, I consider that a disclosure exercise involving communications between an unspecified number of people (including every single person involved with the transaction at EY and the appellant's lawyers in the case of the first category of documents) would involve a significant amount of time and cost to the appellant and might well jeopardise the hearing date. This alone is not, of course, sufficient reason not to order disclosure but it is a factor to consider when considering the disclosure requests in the light of the overriding objective.

Disclosure sought

28. HMRC sought disclosure of four categories of documents, each considered below.

First category of documents

29. These were "Copies of Communications (as defined) which relate to or include any discussion in 2014 of the sale price, the structure of the sale price, the division of the sale

price as between the shareholders, and /or a separate payment for restrictive covenants". The documents requested were those dated during 2014 between any of Mr Wells, Mr Maynard, Ernst & Young, the Appellant's lawyers, and/or specified core team deal members.

30. HMRC's reason for requesting these documents was that "[t]he Appellant's case on the Market Value issue depends on establishing how the Relevant Shareholders were able to secure a higher share price than the other shareholders; whether this was as a result of market forces or otherwise. In order to determine this issue fairly, therefore, the Tribunal will need to see the communications surrounding the deal, pursuant to which [the shares were] acquired."

31. HMRC also contended that these documents were important to the determination of the question whether the appellants had been careless.

Discussion

Market value

32. The appellants' case regarding market value (in summary) is that the relevant shareholders were in a better bargaining position in comparison to other shareholders, particularly private equity shareholders who were more motivated to sell and would accept a lower price. The appellants will bear the burden of proof with regard to this issue at the substantive hearing.

33. HMRC's position on the market value issue is, in summary, that the rights attaching to the shares are all the same and so, on sale, the value of those shares was the same.

34. HMRC contended that the negotiation of the share price was central to the issues but that the documents disclosed by Mr Ricupati only related to a period after that negotiation. Although the witnesses had made reference to the negotiation, HMRC contended that this was insufficient and that the narrative needed to be able to be tested.

35. The communications requested are those between two of the shareholders (neither of whom was a private equity shareholder), adviser firms, and employees of the purchasing company.

36. In context, I do not consider that communications passing between these persons about the sale price, the structure of the sale price, the division of the sale price and the potential for payment for restrictive covenants meet the threshold for ordering disclosure. Given the nature of the parties' respective arguments in their grounds of appeal and statement of case (as amended), and the burden of proof, I do not consider that it has clearly been established that the communications described, noting particularly that these do not involve the private equity shareholders, would be reasonably required by the Tribunal (to the standard set out in case law) in order to enable a fair determination of the issues to take place to the extent that they relate to negotiation of the share price.

37. HMRC also contended that disclosure of these communications would assist in ascertaining details of an earlier proposal to make payment for restrictive covenants, which they contended had not been addressed in any of the witness statements. However, I note that Mr Maynard's witness statement includes disclosure of an offer letter which sets out a proposal that a proportion of consideration be allocated to the performance of forward-looking warranties. It was not particularly clear whether the arrangements in the offer letter are the earlier proposal referred to. However, to the extent that HMRC consider that details of earlier proposals which contained alternative consideration arrangements might shed light on the market value question, there is clearly evidence to that effect already disclosed which can be explored in cross-examination and there were no submissions as to why that evidence would not be sufficient without further disclosure.

38. In the application, HMRC stated that the reason for the request was that an email dated 30 June 2014 from the lawyers to the appellant company referred to an original proposal to make payment for restrictive covenants. HMRC's skeleton argument, produced a few days before the hearing, also states that this email is the reason for the request (paragraph 39). In the hearing, HMRC contended that the request was not based on this one email but also the fact that Mr Ricupati's exhibits only covered a short period of time and did not cover the entire period of the negotiations. That is not what is stated in either the application or the skeleton argument. Mr Ricupati's witness statement does not include evidence as to the negotiations but, instead, focusses on the PAYE Issue alone.

39. However, it was not disputed that HMRC has had a copy of that email dated 30 June 2014 since 2019. That is some years before these appeals were even brought and appears to have been provided at a point in time where presumably it was open to HMRC to request sight of these documents as part of the enquiry process. There were no submissions that anything new had arisen as a result of the witness statements that meant that HMRC had now realised the importance of the contents of that email.

40. Considering the overriding objective, noting that the parties themselves are required to assist the Tribunal in furthering this objective, and also noting the points made above regarding the scope of the request and further the fact that I do not consider that HMRC have clearly shown that the documents sought would be reasonably required by the Tribunal to make a fair determination of the issues, I do not consider that it is proportionate to require disclosure of these communications only a few months before a hearing that has been listed for some time in circumstances where HMRC have had the underlying prompt for their disclosure request for years. No explanation has been given as to why disclosure of this nature was not sought after the parties exchanged lists of documents in January 2022. This is particularly in circumstances where any postponement of that hearing date is likely to mean a delay of months, if not more than a year, in finding suitable alternative dates.

41. HMRC had contended that in making this disclosure request, they were following a point made on behalf of the appellants at an earlier case management hearing where HMRC had also (in effect) made a request for disclosure, that the sensible and proportionate thing would be for HMRC to wait and see what evidence was provided and then make specific targeted disclosure requests.

42. That case management hearing was in early 2023 and the disclosure under discussion was a very broad request by HMRC that three witness summons sought by the appellants from three individual witnesses should be amended to require that the witnesses disclose all documentation relevant to their evidence with their witness statements (rather than the usual disclosure requirement that they disclose documents on which they wish to rely). None of this explains the delay in requesting this category of information from the appellant company when the 30 June 2014 email had been known and available to HMRC some years before the case management hearing in 2023.

Carelessness

43. HMRC did not refer to the carelessness issue with regard to this category of documents in the hearing, but did include it as a reason for the request in their skeleton argument.

44. HMRC contends in its statement of case, in summary, that the appellant company had been careless in deciding not to operate PAYE on "excess consideration" which HMRC contended had been received by the vendor shareholders. It had specifically been careless:

(1) in relying on advice which had been addressed to the target company;

(2) by instructing advisers to produce a "more robust" advice;

(3) in providing the advisers with instruction to advise on the basis of discussions without providing the material documents;

(4) in relying on advice which is very short, contains no detail or analysis, and does not cite any case law;

(5) in not seeking further advice, given the value of the deal, previous advice received, the fact that the advisers were engaged by the target company and the potential exposure to tax liability;

(6) in not seeking clearance from HMRC or bringing the matter to HMRC's attention earlier.

45. The burden of proof as to carelessness will be on HMRC in the substantive hearing.

46. The appellant contends that they took advice from a relevant expert at a reputable firm to determine the position; the appellant company and its legal advisers scrutinised the advice to confirm that it accorded with their understanding. The appellant company acted on that advice.

47. In context, I do not consider that it has been established that the documents sought under this heading are reasonably required by the Tribunal to fairly determine the issue between the parties. None of the documents sought would clearly relate to the adequacy of or reliance on PAYE advice sought by the appellant company, or the instructions given to advisers. It has not been established that it would be proportionate to require the appellant to undertake an extensive search project to find such information.

48. Considering the points above, the overriding objective and noting the issues regarding the scope of the exercise required, I do not consider it appropriate to order disclosure of this category of documents.

Second category of documents

49. The second category of documents sought is described in the updated order as: "Copies of Communications (as defined) and advice relating to the structure of the deal and/or the PAYE Issue (as defined)". The documents requested are those dated during 2014 between any of Mr Wells, Mr Maynard, specific EY individuals and/or specified core team deal members.

50. HMRC contended that the structure of the deal had changed before completion so that, having originally been based on a single sale and purchase agreement, the deal was eventually completed by way of two sale and purchase agreements. The documents disclosed indicated that the advisers considered that this would support the asserted market value.

51. This latter point was raised only at the hearing: neither the original application nor HMRC's skeleton argument, produced a few days before the hearing, made reference to this contention. HMRC's skeleton argument with regard to this second category of documents refers to only the PAYE issues and EY memos referred to below and not the deal structure documents.

52. Given the lack of clear explanation as to the relevance, and why the disclosed documents are insufficient, I do not consider that it has been established that the Tribunal reasonably requires further documents relating to the deal structure in order to determine the issues at the substantive hearing.

53. The original application, and HMRC's skeleton argument had referred to this category as being communications relating to the tax implications of the acquisition and communications relating to three memos produced by EY. No reference to the deal structure

was included. The appellants contended that no good reason had been given for the changes to this in the updated order provided shortly before the hearing. HMRC contended that, with regard to the EY memos, they considered that these were covered by the request for communications relating to the PAYE Issue and so had deleted reference to them to avoid unnecessary duplication.

54. The PAYE Issue is defined as "The fact that the shareholders would receive more for their shares gave rise to a question about whether PAYE had to be operated in relation to the difference between the prices". HMRC's skeleton argument states that the documents is relevant because there were various versions of an EY memo and the terms of the advice given, the documents provided with instructions and the appellant company's response to the advice received would be material to both parties' position on carelessness.

55. HMRC contended in their skeleton argument that it was highly likely that written communications existed which had not been disclosed because Mr Ricupati was closely involved in quantifying the tax risk and seeking advice and he and Mr Finn had commented on the advice and sought a re-draft. None of this explains why HMRC are seeking disclosure of communications involving the shareholders, the EY individuals specified or indeed the core team members other than Mr Ricupati. Mr Finn is not included as a person whose communications are requested in this category of the disclosure application. In the hearing, HMRC contended that there must have been been communications in this area because one of the shareholders had requested an indemnity in respect of taxation, and the email of 30 June 2014 (referred to above) showed that there had been ongoing discussion relating to the PAYE Issue. As noted above, this email was disclosed to HMRC a number of years ago and no further disclosure was sought after lists of documents were exchanged in 2022.

56. I find that HMRC has not clearly established in the context required by case law that disclosure in this category would provide information which is reasonably required for the Tribunal to reach a fair determination of these issues. Considering the points above, the overriding objective and noting the issues regarding the scope of the exercise required, I do not consider it appropriate to order disclosure of this category of documents.

Third category of documents

57. The third category of documents sought is described in the updated order as: "Copies of Communications (as defined) relating to the PAYE Issue (as defined)." The documents requested are those dated during 2014 between Mr Ricupati and Greg Matz (CFO of the appellant.

58. HMRC contended that the two individuals whose communications were sought were the decision makers with regard to PAYE and so it was highly likely that there would be more emails between them than the single email disclosed by Mr Ricupati, sending to Mr Matz the analysis prepared by EY for the target company. HMRC contended that these communications would be relevant to the carelessness issue.

59. Mr Ricupati's witness statement states that he and Mr Matz generally discussed matters face to face. It was submitted that there had been no reply made in writing to the email referred to above.

60. I consider that HMRC's submissions amount to an assumption that there must be further written communications and an assumption that such written communications will be materially relevant to issues which the Tribunal has to decide. In these circumstances, where the witness statement does not suggest that there is any communication that would be materially relevant and reasonably required by the Tribunal to make a fair determination of the carelessness issue and no other explanation has been provided to support the contention

that there would be such communications, I consider that the request for this category of documents amounts to no more than a fishing expedition.

61. I find that HMRC has not clearly established in the context required by case law that disclosure in this category would provide information which is reasonably required for the Tribunal to reach a fair determination of these issues. Considering the points above, and considering the overriding objective, I do not consider it appropriate to order disclosure of this category of documents.

Fourth category of documents

62. The fourth category of documents sought is described in the updated order as: "Copies of Communications (as defined) relating to the PAYE Issue (as defined)." The documents requested are those dated during 2014 between Mr Ricupati and Mr Finn. The application originally requested all communications between any of Mr Ricupati, Mr Finn and the law firm advising the appellant company. The skeleton argument for HMRC repeated this request. HMRC considered that the material was likely to exist as Mr Finn and Mr Ricupati had worked closely together during the deal process and Mr Ricupati was primarily responsible for the PAYE Issue for the appellant, and they considered that the material would be relevant to the carelessness issue.

63. This is, again, a series of assumptions that material exists and that the material will be relevant and will be reasonably required by the Tribunal. The fact that Mr Ricupati "talked regularly on the phone throughout the deal" with Mr Finn and that Mr Ricupati was responsible for PAYE matters for the appellant does not mean that HMRC has established that there are written communications between these individuals that are reasonably required by the Tribunal in order to reach a fair determination of the issues.

64. Further, Mr Finn was not an employee of the appellant: he was a lawyer working for the law firm advising the appellant. In the circumstances, it is difficult to see how documents in this category of material would not be excluded from disclosure by legal professional privilege. HMRC contended that unredacted documents in this category had been disclosed; they did not identify these documents and there were no submissions that this meant that privilege had been lost in any other such material that might exist.

65. Considering the overriding objective and case law, I do not consider that it is appropriate, and further do not consider that it would in any case be proportionate, to order disclosure of this category of documents.

Conclusion

66. For the reasons set out above, and considering the overriding objective and the principles set down in case law, I do not consider that it is appropriate to order disclosure of the documents requested by HMRC. The application is refused.

Right to apply for permission to appeal

67. 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.

ANNE FAIRPO
TRIBUNAL JUDGE

Release date: 23rd April 2024