[2014] UKUT 0062 (TCC)

Appeal number FTC/004/2014

Disclosure of documents in a tax appeal – third party disclosure – circumstances in which the Upper Tribunal will allow appeal in respect of exercise of case management powers by the First-tier Tribunal

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Appellants**

- and -

(1) INGENIOUS GAMES LLP
(2) INSIDE TRACK PRODUCTIONS LLP
(3) INGENIOUS FILM PARTNERS 2 LLP

Respondents

TRIBUNAL: The Honourable Mr Justice Sales

Sitting in public at The Royal Courts of Justice, Rolls Building on 24.1.14

Malcolm Gammie QC & Ruth Hughes, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants

David Milne QC & Richard Vallat, instructed by Weil, Gotshal & Manges, for the Respondents

DECISION

Introduction

1. This is an appeal by HMRC against an order of Judge Sinfield, sitting in the First-Tier Tribunal (Tax Chamber) ("the FTT"), made after a hearing on 11 October 2013, dismissing applications by HMRC seeking disclosure of documents by the Respondents (respectively, "Ingenious Games", "ITP" and "IFP2"), third party disclosure orders and adjournment of the hearing to determine the Respondents' appeals to the FTT against certain closure notices issued by HMRC. The appeal is brought with permission granted by the Upper Tribunal (Judge Berner). The hearing of the Respondents' appeals has been listed in the FTT to commence on 10 March 2014, with a time estimate of five weeks.

2. HMRC's applications for third party disclosure orders related to documents held by Pathé Productions Ltd and Pathé Features Ltd (together, "Pathé") and by Channel Four Ltd (acting by its Film Four division), who had dealt with ITP and IFP2 in relation to various transactions relevant to the appeals. Judge Sinfield refused these applications. HMRC have only appealed this part of Judge Sinfield's decision in relation to the disclosure sought from Channel Four. They do so on a very narrow basis, namely that (they say) Judge Sinfield overlooked a significant difference in the position adopted by Pathé, on the one hand, and by Channel Four, on the other. HMRC contend that Pathé objected to the disclosure sought from them, whereas Channel Four did not.

3. On the hearing in the Upper Tribunal, it was common ground that if the appeal against the refusal to order significant additional disclosure to be given by the Respondents were allowed, the hearing in the FTT would have to be adjourned.

4. After hearing argument on the appeal, I indicated the outcome of the appeal, with reasons to follow. The appeal in relation to the further disclosure sought from the Respondents is allowed, with the consequence that the appeal against the part of Judge Sinfield's order refusing an adjournment is also allowed. The appeal in relation to the third party disclosure is dismissed. Judge Sinfield correctly understood the respective positions adopted by Pathé and Channel Four and his judgment in relation to this part of the case was within the scope of his case management powers.

5. This judgment sets out the reasons for my decision.

Factual background

6. Ingenious Games, ITP and IFP2 are members of a family of limited liability partnerships promoted by Ingenious Media Holdings plc. There are eight such partnerships involved in conjoined appeals to the FTT against relevant closure notices ("the appellant partnerships"). Each of the appellant partnerships is involved in

promoting and managing investments by their members in the production of films or (in the case of Ingenious Games) video games. Between them, the partnerships have been involved in the production of large numbers of films and games, and have also been involved in considering very many film projects which were not taken forward and some others which were commenced but then later abandoned.

7. In relation to the tax affairs of the appellant partnerships and their members in the relevant periods between 2002 and 2011, issues arise regarding the nature of the activities carried on by the partnerships. The partnerships maintain that their activities constituted the carrying on of a trade, which would have the result that they and their members are entitled to claim substantial reliefs in respect of tax due. HMRC dispute that the activities of the partnerships constituted the carrying on of a trade and dispute that expenses incurred in the course of their business related wholly and exclusively to the carrying on of any trade. Issues also arise regarding the proper accounting treatment of items in the profit and loss accounts of the appellant partnerships.

8. The closure notices issued by HMRC in relation to the affairs of the appellant partnerships give effect to HMRC's conclusions, after investigation of those affairs, that the appellant partnerships were not at the relevant times carrying on a trade.

9. The tax in issue in the proceedings is said to be of the order of £1 billion. On any view, this is major tax litigation.

10. I found myself hampered on the appeal by the absence of witness statements from either HMRC or the Respondents to explain factual matters relevant to HMRC's disclosure applications, such as the extent of access by HMRC thus far in the course of their investigations to documents in the possession of the Respondents, the reasons why HMRC did not have access to all relevant documents held by the appellant partnerships in the course of those investigations before they issued the closure notices, the extent of the as yet undisclosed documents held by the appellant partnerships, the extent of the efforts made thus far by the appellant partnerships to comply with existing directions in the appeals and the extent of the burden upon or prejudice which would be suffered by the appellant partnerships should they be ordered to give disclosure at this stage. I think the Judge was also hampered by the absence of clear evidence to explain these matters. Nonetheless, after spending some time at the hearing in the Upper Tribunal examining the extracts from correspondence and file notes which were put before me and obtaining assistance from counsel, speaking from their own knowledge of the case or on the basis of instructions, a reasonably clear factual picture emerged, as follows.

11. The appellant partnerships were involved in the production of a substantial number of films and games, and were involved in a still larger number of film projects which were considered but not taken forward (Mr Milne QC for the Respondents told me that there were some 200 such projects in which ITP was involved, and overall some 500 such projects in which the appellant partnerships were involved). When HMRC came to investigate the affairs of the appellant partnerships (after giving notice of the investigation in late 2004), both HMRC and the appellant partnerships

were concerned to make the investigation as manageable and cost-effective as possible.

12. To that end, the parties agreed that there should be a collaborative approach which would focus at the investigation stage on a sample of films and games which were thought to be reasonably representative of the activities of the appellant partnerships. At a meeting early on in the investigation, as recorded in a file note, HMRC agreed to restrict their initial review of documents to a selection of films, and thereafter would be able to see to what extent they needed to review all the documents for the remaining films and would revert to the appellant partnerships as necessary. This was a sensible and pragmatic approach to the investigation which suited both sides. It was not agreed that the investigations would necessarily be confined to this limited sample, since things might emerge which required other avenues of inquiry to be pursued; nor was it agreed that any appeal against decisions by HMRC in respect of the tax affairs of the appellant partnerships would be confined to examination of the position just in relation to the films and games in the sample.

13. During the course of the investigation, the sample of films and games was expanded, but the basic arrangement remained the same. For example, at a meeting on 27 October 2011, HMRC sounded a note of caution about the use of the sample methodology, stating that whilst there were resource and cost savings for both sides from using that methodology, "if cases were to proceed to litigation then it would be necessary to adduce the contentions and arguments to the facts and evidence, i.e. factual dependent and not by analogy."

14. A large amount of documentary material relating to the sample films and games was provided to HMRC. HMRC's investigations took a considerable time and eventually, in 2012, the appellant partnerships pressed them for a decision in respect of all their tax affairs on the basis of the material disclosed up to that point in time. The appellant partnerships wished to achieve clarity in relation to the tax affairs of themselves and their members, and to be able to appeal if HMRC took decisions adverse to them.

15. HMRC issued a closure notice in respect of Ingenious Games on 9 February 2012. On 9 November 2012, ITP and IFP2 applied for closure notices to be issued by HMRC. By that stage, HMRC considered that they had sufficient information in relation to the sample films and games in the relevant tax periods to enable them to make the decision to issue closure notices in respect of the affairs of ITP and IFP2 on 30 November 2012. In relation to each of them, HMRC rejected its claim that it had been carrying on a trade in the relevant period. HMRC adopted the same position in relation to the other appellant partnerships and issued similar closure notices in respect of them. The appellant partnerships issued appeals against the closure notices to the FTT.

16. On about 24 October 2012, the appellant partnerships, which were at that stage represented by Deloitte LLP, applied to the FTT for directions. They proposed that ITP and IFP2 should stand as lead cases, with certain films and games to be treated as

specimen representative examples. By letter dated 1 February 2013, Deloitte LLP proposed "that the evidence be limited to a sample of films for each lead case", and identified a list of specimen films. HMRC replied by letter dated 8 February 2013, to say that they would consider the proposed list of films, which might require adjustment in future; that the appeal of Ingenious Games should be heard at the same time as the appeals by ITP and IFP2; and that in their view it was not possible to provide an accurate estimate of the time required to hear the appeals, since that "can only come at a later stage, once the extent of the transactions to be covered in the appeals has been clarified and the extent of witness evidence (both factual and expert) is known."

17. The directions hearing in the appeals took place before the FTT (Judge Sinfield) on 12 February 2013. At that hearing Mr Jolyon Maugham (who did not appear before Judge Sinfield at the disclosure hearing in October 2013) appeared for the appellant partnerships and Mr Gammie QC (who appeared before Judge Sinfield in October 2013 and before me on the disclosure application) appeared for HMRC. This is of significance, because to understand the position arrived at between the parties up to the hearing on 12 February 2013 I have relied on the account given by Mr Gammie in his skeleton argument for the Upper Tribunal on the present appeal. On instructions, Mr Milne accepted for the purposes of the appeal that this should be taken to be an accurate account.

18. As explained by Mr Gammie, the position arrived at prior to the directions hearing was this:

(i) HMRC had always agreed to issue closure notices on the basis that only a sample of film transactions had been enquired into;

(ii) HMRC were not prepared to agree the appellant partnerships' proposal that evidence be limited to a sample of film transactions;

(iii) Nevertheless, HMRC were prepared to work with the appellant partnerships to ensure that appropriate documentation was available at the hearing, in particular to avoid duplication of identical or substantially similar contractual documentation by agreeing sample transactions;

(iv) Because the scope of the film transactions that would be considered at the appeals was not agreed and fluid, this meant that it was not at that time possible or appropriate for HMRC to request Civil Procedure Rules style disclosure (of the kind one would expect to see in ordinary civil litigation) in respect of the transactions of the appellant partnerships. To have done so would have been contrary to HMRC's agreement at sub-paragraph (iii) above; but

(v) HMRC would want to seek further disclosure given that its enquiries had been conducted on a sample basis and the appeal hearing might range over the appellant partnerships' transactions generally.

19. I was not shown any ruling of the FTT on these points or the directions to be made. As I understand it, there was a general discussion at the hearing and the parties were left to draft a minute of order in the light of that discussion. After further debate

between the parties, directions were eventually issued by the FTT on 10 May 2013 ("the Directions"). The Directions designated all the appeals as complex cases which were to be case managed together with a view to their being heard, if possible, by one Tribunal at a single hearing.

20. By paragraph 3 of the Directions, the appeal of ITP was designated as the lead case in respect of common and related issues of fact and law raised by the appeals of three other Inside Track partnerships from the group of appellant partnerships. By paragraph 4, IFP2 was similarly designated the lead case in relation to the appeals of another two Ingenious Film Partnerships from the group of appellant partnerships.

21. Paragraph 9 of the Directions gave liberty to HMRC or the appellant partnerships, if they came to believe that the appeals gave rise to an issue of fact or law that is not common or related to those of the lead cases, to give notice of that issue and to apply for directions in relation to it, and that so far as possible this should not prejudice the timetable set out in the Directions (which were directed to achieve a hearing in the first half of 2014). Paragraph 10 provided for HMRC to notify the appellant partnerships whether any additional specimen transactions should be included as part of the live appeals, beyond the films listed in the Directions (three films for ITP – "Girl with a Pearl Earring", "Wimbledon" and "Blackball"; six films for IFP2 – "Happy Go Lucky", "The Golden Compass", "Avatar", "Hot Fuzz", "Stardust" and "Life of Pi"; and two games for Ingenious Games – "Urban Chaos 2" and "Colin McRae Rally 2007"). By these paragraphs, the FTT and the parties explicitly recognised that there might well be change in the scope of the matters requiring to be examined and resolved at the hearing of the appeals.

22. Paragraph 12 of the Directions provided for HMRC to serve Statements of Case in the lead appeals on 3 June 2013; paragraph 14 provided for ITP, IFP2 and Ingenious Games to serve their Statements of Case on 26 July 2013; and paragraph 15 provided for HMRC to serve any Statement of Case in Reply on 23 August 2013. The Statements of Case were to be the formal pleaded statements of the cases of the parties to be presented on the appeals. Since those pleadings were to follow the Directions, at some time in the future, the parties must have appreciated that the scope of disclosure, factual witness evidence and expert witness evidence required might well have to be adapted to take account of the pleaded issues in the appeals as revealed in those pleadings.

23. Paragraph 16 of the Directions provided for HMRC to serve a list of witnesses of fact to be called by them, and a summary of their evidence and a summary of any expert evidence to be relied on by 23 August 2013 (i.e. in line with the timing for any Statement of Case in Reply).

24. Paragraph 17 of the Directions provided for ITP, IFP2 and Ingenious Games, on the one hand, and HMRC, on the other, to provide "copies of all documents on which they intend to rely in connection with [the lead appeals]" on 27 September 2013. It should be noted that this paragraph reflected the usual default rule which applies in tax appeals, which provides that, "subject to any direction to the contrary",

each party to an appeal must, within 42 days after close of pleadings by way of exchange of Statements of Case, provide a list of the documents which it "intends to rely upon or produce in the proceedings": see rule 27 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules").

25. This default rule makes considerable sense in the usual type of case, where HMRC will have used their extensive statutory powers of investigation at the stage of inquiry into a taxpayer's affairs and thus will have seen all relevant documents in the taxpayer's possession by the time an appeal is launched. In such a case, it would be disproportionate and unnecessary to require either the taxpayer or HMRC to list out and then allow inspection of all documents in their possession which are relevant to the appeal. The adoption of this type of formula in the Directions in the present appeals, however, created a problem. That is because, by reason of the agreed, limited approach to disclosure at the investigation stage, HMRC had not already seen or had a chance to inspect all the documents which might be relevant to determination of the issues arising on the appeals.

26. The Directions went on to make provision for service of full witness statements by ITP, IFP2 and Ingenious Games on 15 November 2013, and for exchange of expert reports on 6 December 2013.

27. HMRC later sought to add "Max Payne" (a project in which IFP2 was originally involved, but then abandoned) to the list of specimen films for IFP2. In due course, at the hearing before Judge Sinfield in October 2013, he ruled that "Max Payne" could be included in the list of specimen films for particular consideration in the appeals.

28. By letter dated 1 March 2013, written by reference to the draft version of the Directions which had been considered at the directions hearing in February 2013, HMRC notified the appellant partnerships that they did not agree to limit the appeals to the specimen transactions set out in paragraph 10 of the draft Directions. HMRC wrote:

> "The appeals require the Tribunal to reach a view on the Appellants' overall activities in the years in question, having regard to the totality of their transactions. It does not therefore seem appropriate to limit the appeals to a particular subset of the transactions carried out. HMRC accordingly give notice that they require all the Live Appellants' transactions to be included as part of the live appeals. A schedule is attached setting out HMRC's understanding of all the films/games in question.
>
> In the course of preparing the case for trial, HMRC will endeavour to work with you and your clients to limit the amount of documentation to go before the tribunal and to avoid unnecessary duplication of material. However, HMRC do not consider that limiting the appeals to specified transactions is a satisfactory approach to the issues that the Tribunal will have to consider or an

appropriate means of limiting the materials by reference to which the Tribunal must reach its decision. …"

29. Deloitte LLP replied by letter dated 11 April 2013, to say:

> "We agree with you that our clients' appeals require the Tribunal to reach a view on the Appellants' overall activities in the years in question, having regard to the totality of the transactions, and it is our clients' intention to provide extensive witness evidence in relation to the lead partnerships to enable this to be done. However, we believe that it will be helpful to the Tribunal, and will enable the Hearing to be conducted efficiently, if a number of transactions are considered in more detail than others. Indeed, as you will know from the volume of documentation that you considered in relation to only a few transactions in the course of your enquiries, it would simply be unmanageable to have all transactions considered in the same level of detail, and we do not imagine that the Tribunal will wish to be taken to each and every one. You will recall also that, at the Directions Hearing on 12 February 2013, Judge Sinfield agreed that it would be sensible to limit a detailed consideration of the transactions to an agreed sample.
>
> Although your letter of 1 March suggests that you wish disclosure of at least some documents in relation to every transaction, we understand from our Counsel that it is not your intention to request full disclosure for each one, but instead to identify one or two additional transactions for full disclosure after you have drafted your Statements of Case. We should be grateful if you would confirm that this is the case, and if it is, we shall await hearing from you in due course in relation to the additional transactions. If you believe that you need some (but not full) disclosure in relation to all the other transactions then perhaps you could indicate the extent of this disclosure so that our clients can consider your request and whether or not it is manageable."

30. This correspondence left the position up in the air regarding what might ultimately be required by way of disclosure and evidence to allow the FTT to decide the matters to be determined at the hearing of the conjoined appeals fairly and with full relevant information. Both parties were looking to an appeal hearing which would resolve all the outstanding tax issues in respect of all the appellant partnerships, but no clearly defined and fully particularised procedure to achieve that outcome had been finally agreed. The issues to be determined in relation to each appellant partnership included questions regarding whether its activities constituted the carrying on of a trade, whether expenses incurred in the course of its activities were incurred wholly and exclusively for the purposes of such trade and whether the profits and losses recorded by it were in accordance with UK generally accepted accounting practice. While the parties recognised that there would be some transactions which could be focused on as providing good general guidance across the range of transactions and activities to be reviewed on the appeals, they were each in effect reserving the right to introduce further evidence and materials to resolve any additional issues which might

arise and require examination in relation to transactions other than the specimen transactions, so that the FTT could eventually determine all the appeals "having regard to the totality of the transactions" (in the words of Deloitte LLP).

31. In May 2013, after the Directions were promulgated, there was further correspondence, in which the appellant partnerships pressed HMRC to give disclosure of documents which they had obtained from third parties which might be relevant to the appeals. By letter dated 21 May 2013, Deloitte LLP said:

> "We are not seeking to circumvent either the directions or the rules. We are simply seeking fairness and equality of arms: just as our clients are providing you with all relevant material in response to your requests (not merely material on which our clients intend to rely) so, we suggest, you should be supplying our clients with all relevant documents you have obtained from third parties.
>
> We appreciate that the requirement for lists of documents, both under the default provisions of the rules and under our agreed directions, only refer to documents on which the parties seek to rely. That does not, however, restrict the Tribunal's power to order wider disclosure of relevant documents under Rule 16 of the Tribunal Rules. Similarly, the fact that lists of documents will be exchanged later in the process does not prevent us asking for documents at an earlier stage. …"

32. This reinforces the impression that both sides recognised that, notwithstanding the limited effect of paragraph 17 of the Directions, it might well be necessary for further disclosure to be agreed, or ordered by the FTT if necessary, in order to ensure that there was a fair hearing of the appeals. On 11 July 2013, the appellant partnerships issued an application for disclosure of documents held by HMRC. HMRC agreed to give disclosure of this material in a letter dated 19 August 2013.

33. On 26 June 2012, HMRC issued an application for third party disclosure of documents held by Pathé and Channel Four, who had been involved in film projects which were relevant to the appeals. This application was resisted by the appellant partnerships. They refused to release Pathé and Channel Four from confidentiality obligations to which they were subject.

34. Meanwhile, at a time when the Ingenious Games appeal was on foot (that appeal had been commenced well before the other appeals, in relation to the relevant closure notice which had been issued on 9 February 2012), HMRC had made an application to the FTT for disclosure of documents and information in respect of Ingenious Games and another company, using their powers of investigation under Schedule 36 to the Finance Act 2008. At the hearing of that application on 22 August 2012 and confirmed by written decision dated 25 September 2012, the FTT refused the application. This was on the basis that it was not appropriate for HMRC to seek to exercise its investigatory powers now that an appeal had been launched and the FTT was seized of those proceedings. Instead, the FTT held that the correct course was for

HMRC to make an application for disclosure in that appeal, under rule 16 of the Rules.

35. HMRC accepted this ruling. After the other appeals of the appellant partnerships were commenced, HMRC gave an undertaking to similar effect in relation to investigation of their affairs as well, by letter dated 1 March 2013, stating that "any formal requests for information will be made by way of Tribunal directions". The FTT's decision and HMRC's acceptance of it foreclosed any other means for HMRC to obtain access to documents held by the appellant partnerships which HMRC had not inspected in the course of their limited investigation but which might be relevant to determination of the issues on the appeals, other than by making an application for disclosure in those appeals.

36. In about July 2013, Weil, Gotshal and Manges LLP ("WGM") took over from Deloitte LLP as the solicitors for the appellant partnerships. WGM asked for an extension of time for service of the Statements of Case of ITP, IFP2 and Ingenious Games until early August 2013. HMRC consented to this request by letter dated 25 July 2013, while noting that this and other matters put pressure on the existing timetable and the hearing date which had then been scheduled for March 2014; that the management of the cases had proved more complex than originally contemplated at the directions hearing in February 2013; that "The tax resting on the outcome of these appeals is significant for both parties and it is in everyone's interest that they are properly prepared for hearing"; and that it might be necessary to apply for the hearing date to be rescheduled. HMRC also notified the FTT of this possibility.

37. On 2 August 2013, ITP, IFP2 and Ingenious Games served their Statements of Case. These were detailed documents which set out a range of factual claims by them in support of their case in the appeals that they had been carrying on a trade at the relevant time and that expenses incurred by them were attributable to that trade, including reference to production of a wide range of films and games (including certain projects in relation to which some work was done but which were abandoned or not pursued) other than the specimen films and games identified pursuant to the Directions.

38. Upon review of these Statements of Case, HMRC realised that they ranged over topics and areas which had not been subject to detailed review by HMRC by reference to documents in the appellant partnerships' possession during the investigation phase.

39. By letter dated 5 September 2013 to HMRC, WGM stated, "For the avoidance of doubt", that their clients' position remained that "for the purposes of understanding the structure of the Appellants' transactions, the Tribunal should only consider" the specimen transactions identified in the Directions plus two additions, "Australia" and "X-Men Origins – Wolverine"; but they went on, "Clearly, the Tribunal will have to consider further evidence to establish the volume and nature of the Appellants' overall activities." Thus ITP, IFP2 and Ingenious Games continued to recognise and assert that the appeals would have to involve investigation of the facts relating to their

general activities, beyond a strict focus on the specimen films and games; but they did not specify precisely what that would involve nor how the documents relating to those wider general activities, so far as not yet examined by HMRC, should be addressed in the proceedings.

40. By letter dated 11 September 2013 to WGM, HMRC made the point that "it appears that there are a number of documents relevant to the parties' pleaded cases that have not yet been made available to HMRC" and sought further disclosure of documents which they specified by reference to paragraphs of the Statements of Case which had been delivered. In the letter, HMRC set out its concrete proposals regarding the handling of documentary and other evidence at the appeal hearing, including its proposals for the balance to be struck between evidence about the specimen projects and the wider activities of ITP, IFP2 and Ingenious Games, as follows:

> "6. HMRC had previously considered the approach, suggested by [Deloitte LLP] in advance of the directions hearing, of selecting a sample of transactions to which (in the words of the directions) the appeals should be limited. The draft directions set out a sample that your predecessors considered suitable and allowed HMRC to expand the sample by putting forward additional films by a given date.
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> 7. In the event, HMRC did not consider such a limitation on the evidence available to the Tribunal to be appropriate. HMRC accordingly wrote to your predecessors on 1 March 2013 (copy letter enclosed) stating that such an approach was not suitable and accordingly that every film must be open to consideration. Your predecessors however, insisted that the direction remain in its same form.
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> 8. We have now considered the position further, having had the benefit of seeing your pleaded case, and now propose the following approach:
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> > (a) A small sample of transactions is selected, but only for the purposes of illustrating the contractual model before the Tribunal. For these transactions, the full set of contractual documentation will be available to the Tribunal.
> >
> > (b) However, both parties will be able to refer to other evidence in relation to any transaction in order to draw to the attention of the Tribunal any particular points that they wish to make.
>
> 9. This approach should allow the main financial model to be explored and considered in an efficient manner, whilst simultaneously permitting full submissions to be made on the case as a whole.

> 10. In line with that approach, HMRC suggest the following sample for illustrating the contractual model. … [the letter referred to a list of specimen films and games, including, in relation to IFP2, "Max Payne"]
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> 11. HMRC would be grateful if you could indicate whether or not the above approach and sample is acceptable to you. HMRC have made the below requests for documents on the basis that the above is agreed. Should this not be the case, HMRC reserve the right to make further requests. …".

41. The detailed list of the documents the disclosure of which HMRC requested was then set out. HMRC sought disclosure of documents which adversely affected the case of ITP, IFP2 and Ingenious Games or which supported HMRC's case, to be provided in addition to any documents on which ITP, IFP2 and Ingenious Games would positively seek to rely in support of their own case (which were to be provided in accordance with paragraph 17 of the Directions).

42. It should be noted that disclosure by a party of such material adverse to its own case or supportive of its opponent's case (assuming the disclosure is relevant and proportionate) would be a usual incident of litigation in ordinary civil cases, so as to ensure that each party has a fair opportunity of presenting its case by reference to all material relevant to the issues in the proceedings and so as to ensure that the court or tribunal dealing with that litigation is properly informed about the matters in dispute so as to resolve the litigation fairly as between the parties. It should also be noted that ITP, IFP2 and Ingenious Games had themselves sought such wider disclosure from HMRC, going beyond what was set out in paragraph 17 of the Directions, when requesting then issuing their application for relevant third party documents in HMRC's hands.

43. WGM replied by letter dated 13 September 2013, refusing HMRC's request for this further disclosure. WGM stated, "the reason HMRC do not have the great majority of these documents is because they have not asked for them despite the many opportunities they have had to do so …". WGM observed that this was the first time such a request for disclosure had been made and that it was not disclosure as contemplated by the Directions. They complained that ITP, IFP2 and Ingenious Games had "spent considerable time and costs over recent months reviewing thousands of documents in order to identify: (a) documents you have previously requested; and (b) relevant material on which they intend to rely …"; had HMRC's requests been made earlier, "they could have been incorporated into that exercise with a relatively small increase in time and cost"; complying with HMRC's requests at this stage "would involve substantial repetition of work and use of resources that would otherwise be devoted to compliance with the existing directions"; and that, therefore, the timing of HMRC's request "is wholly unreasonable" and it was "wholly inappropriate for HMRC to seek to extend the Appellants' disclosure obligations in this way." WGM also objected to including "Max Payne" as a specimen transaction, as proposed by HMRC.

44. WGM did not disagree with HMRC's general observation at paragraph 8 of the letter of 11 September 2013, set out above, regarding the way the appeal hearing should address the specimen transactions and the general background facts in respect of the overall activities of ITP, IFP2 and Ingenious Games. Indeed, it appears broadly to have reflected in rather more concrete terms what WGM themselves had said in their letter of 5 September. At the hearing in the Upper Tribunal Mr Gammie presented what was said at paragraph 8 of the letter of 11 September as the common position of the parties as to how the appeal hearing would proceed, and Mr Milne did not dissent from this.

45. Therefore, the basic position as explained to me regarding the relationship which is proposed for the appeal hearing between evidence about the specimen transactions and other evidence regarding the activities of the appellant partnerships, is that evidence of the formal contractual framework of all the transactions in which ITP, IFP2 and Ingenious Games were involved will be adduced by reference to the specimen transactions alone (treating them as representative of the formal contractual structure of the other transactions also under consideration), while each side will also be entitled to refer to any evidence about the broader activities of ITP, IFP2 and Ingenious Games and the commercial context of those activities, including, in so far as may be relevant, in relation to transactions other than the specimen transactions.

46. In view of the refusal of ITP, IFP2 and Ingenious Games to provide the further disclosure sought by HMRC, on 8 October 2013 HMRC issued its present application seeking an order under rule 5 and/or rule 16 of the Rules requiring ITP, IFP2 and Ingenious Games to give the disclosure sought. The list of the documents sought by HMRC in their letter of 11 September was annexed to the disclosure application. The text of the disclosure application set out a brief explanation, as follows:

> "3. The majority of the documents sought directly relate to matters asserted in the Appellants' Statements of Case ("the SOCs"). These broadly fall into two categories:
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> (a) Documents relating to specific assertions made in the SOCs
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> (b) Documents relating to particular transactions carried out by the Appellants that were not part of the sample of transactions which were the focus of the investigation into the Appellants' tax affairs.
>
> 4. There are also a small number of requests in relation to Ingenious Games LLP which address irregularities in the Ingenious Games LLP transaction documents and points that have arisen from material disclosed by third parties. …"

47. By way of example, the documents sought as disclosure from ITP were set out in Schedule 1 to the application as follows (similar requests in relation to IFP2 and Ingenious Games were set out at Schedules 2 and 3, respectively):

> "…

1. All documents not previously disclosed relating to the profits/losses, taxable income, and projections of taxable income and profit/loss for every film said to have been produced by ITP. This includes, but is not limited to, documents relating to the assertions in paragraphs, 2, 26 and 44 of the ITP SoC [Statement of Case].

2. All documents not previously disclosed relating to any activities carried out by Ingenious Ventures Limited ("IVL") as Operator of ITP (see paragraph 13 of the ITP SoC).

3. All documents not previously disclosed relating to any activities carried out by Ingenious Films Limited (subsequently renamed Ingenious Media Investments Limited) (company number: 03775736) ("IFL") (or any other company named as receiving an executive producer fee) in relation to any film projects with which ITP had involvement. This includes, but is not limited to, any documents relating to executive producer agreements entered into, or executive producer fees received (see paragraph 83 of the ITP SoC).

4. All documents not previously disclosed relating to IVL's "sourcing of projects" asserted at paragraph 19 of the ITP SoC, including the list of objective criteria referred to at paragraph 21 of the ITP SoC. This includes (but is not limited to) documents created prior to the incorporation of ITP.

5. All documents not previously disclosed relating to the assessment of potential projects by the staff of the Operator described at paragraph 21 of the ITP Soc including, but not limited to, minutes of the meetings of the Operator's investment committee.

6. All documents not previously disclosed relating to the activities set out at paragraph 22 of the ITP SoC.

7. All documents not previously disclosed relating to potential film productions considered but ultimately rejected including, but not limited to documents relating to the sourcing of the projects, draft transactional documents and sales estimates (see paragraph 24 of the ITP SoC).

8. All documents relating to the overspend disclosed at paragraph 58 of the ITP SoC. Including, but not limited to contractual documentation (both draft and final),

accounting documents and other documents illustrating the flow of funds, bank statements, correspondence, telephone notes and notes of meetings.

9. All correspondence between IVL and Independent Financial Advisors or investors in respect of members joining, and investing in ITP. This includes (but is not limited to) enquiries and due diligence documents and includes documents whether they were created before or after investment in ITP.

10. All documents relating to any commercial negotiation and supervision it is asserted that ITP undertook at paragraph 61 of the ITP SoC.

Correspondence

11. In relation to each of the films in the following list:

(a) all correspondence (not previously supplied), that was sent or received by or on behalf of ITP in relation to that film (including, but not limited to, all correspondence relating to the activities listed in paragraph 22 of the ITP SoC and correspondence relating to the "commercial negotiation" and supervision of sub contractors described in paragraph 61 of the ITP SoC). This includes any correspondence sent internally within the Ingenious Media Group.

(b) all correspondence (not previously supplied) that pre-dates the theatrical release of the film, between:

(i) Ingenious Ventures Limited (the company appointed as operator of ITP); or (ii) any other Ingenious group entity

and

(i) the commissioning distributor for the film, (ii) any production services company involved with the film, or (iii) any completion guarantor for that film.

This is regardless of whether or not such correspondence relates to any particular film transaction. This includes correspondence that pre-dates the incorporation of ITP."

48. HMRC also issued an application dated 4 October 2013 seeking an adjournment of the appeal hearing scheduled for March 2014, both on the footing that if the further disclosure was ordered more time would be required to examine it and also on a stand-alone basis, since it was said that in any event the expert evidence could not be got ready in time for the hearing.

49. On 11 October 2013, HMRC's three outstanding applications (for adjournment of the appeal hearing, for disclosure to be given by ITP, IFP2 and Ingenious Games and for third party disclosure to be given by Pathé and Channel Four) came before Judge Sinfield sitting in the FTT. He refused all three applications.

50. I do not think, from reading Judge Sinfield's ruling on disclosure, that the relevant background facts were explained so clearly to him as eventually they were to me. I consider that, in large part due to this, he fell into error in resolving the disclosure application made by HMRC against the Respondents.

51. HMRC now appeals to the Upper Tribunal in relation to their application for disclosure by ITP, IFP2 and Ingenious Games, for third party disclosure by Channel Four (but not in relation to Pathé) and for an adjournment of the appeal hearing.

52. Since the hearing in October 2013, substantial witness statements with exhibits have been served by the appellant partnerships.

The legal framework

53. The FTT has wide case management powers under rule 5 of the Rules. Rule 5 provides, in relevant part, as follows:

> **"5 Case management powers**
>
> (1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.
>
> (2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.
>
> (3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may by direction – …
>
> > (d) permit or require a party or another person to provide documents, information or submissions to the Tribunal or a party; …
> >
> > (h) adjourn or postpone a hearing; …"

54. Rule 16(1)(b) of the Rules provides that the FTT may order "any person to … produce any documents in that person's possession or control which relate to any issue in the proceedings."

55. The FTT's powers under these rules must be exercised in accordance with the overriding objective set out in rule 2 of the Rules, as follows:

> "**2 Overriding objective and parties' obligation to co-operate with the Tribunal**
>
> (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
>
> (2) Dealing with a case fairly and justly includes –
>
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
>
> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
>
> (d) using any special expertise of the Tribunal effectively; and
>
> (e) avoiding delay, so far as compatible with proper consideration of the issues.
>
> (3) The Tribunal must seek to give effect to the overriding objective when it –
>
> (a) exercises any power under these Rules; or
>
> (b) interprets any rule or practice direction." …

56. The proper approach for the Upper Tribunal on an appeal regarding a case management decision of the FTT is familiar and is common ground. The Upper Tribunal should not interfere with case management decisions of the FTT when it has applied the correct principles and has taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the Upper Tribunal is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of discretion entrusted to the FTT: *Walbrook Trustees v Fattal* [2008] EWCA Civ 427, [33]; *Atlantic Electronics Ltd v HM*

Revenue and Customs Commissioners [2013] EWCA Civ 651, [18]. The Upper Tribunal should exercise extreme caution before allowing appeals from the FTT on case management decisions: *Goldman Sachs International v HM Revenue and Customs Commissioners* [2009] UKUT 290 (TCC), [23]-[24].

The decision of the FTT

57. Judge Sinfield refused HMRC's application for disclosure to be given by ITP, IFP2 and Ingenious Games for reasons which appear at paras. [14]-[15] of the decision, as follows:

> "14. When exercising its power to make directions under the FTT Rules, the Tribunal must seek to give effect to the overriding objective rule 2 of the FTT Rules which is to enable the Tribunal to deal with cases fairly and justly. The concepts of fairness and justice, which apply equally to the Appellants and the Respondents, sometimes require the Tribunal to direct that a person should provide documents or information in order that the issues in proceedings may be properly considered by the Tribunal. The FTT Rules relating to the provision of information are not a general disclosure regime such as is provided by [the Civil Procedure Rules]. I consider that the FTT Rules are not intended to enable one party to make generalised requests for information from another party, or a third party, and, in my opinion, HMRC's request for information is too general.
>
> 15. I do not accept, as a general proposition, that because the burden of proof is on an appellant then it is up to the appellant to decide what to produce. In this case, however, the Tribunal had directed, in directions agreed by the parties and released by the Tribunal on 10 May 2013, the Appellants to produce the documents on which they would rely at the hearing. The requirement to disclose further documents would, in my view, be an additional burden on the Appellants that could only be justified by some special circumstance. Mr Gammie points to the assertions made by the Appellants in the Statements of Case as justifying the further disclosure but I do not accept that is sufficient to justify the additional burden and delay that would be caused. If they are to be made good, the propositions in the Statements of Case must be supported by the evidence which has been disclosed. If they are not so supported then HMRC may make appropriate submissions. Mr Gammie urged that disclosure should be ordered to enable HMRC to test the propositions in the Statements of Case but that seems to me to be tantamount to admitting that this is a fishing expedition. HMRC had the opportunity and the powers to require the Appellants to produce documents and information but decided

not to do so. In my view, it is now too late for HMRC to make such an extensive request for information merely to test the Appellants' case."

58. Judge Sinfield dismissed HMRC's application for third party disclosure for reasons set out at paras. [19]-[20] of the decision, as follows:

"19. Mr Gammie submitted that the Third Parties had refused to provide the documents in response to an informal request on grounds of confidentiality agreements with the Appellants. Mr Gammie relied on a note, prepared by an officer of HMRC, of a telephone conversation with someone from the Appellants that referred to confidentiality. Another telephone note shows that a person calling from one third party referred to confidentiality clauses and stated that they would be happy to comply if ordered to do so. The person then asked that any formal order to produce should be specific as they were short of staff and considerable resource would be needed to collate the information. There was also a letter, dated 19 July 2013, from the other Third Parties (they are associated companies) to the Tribunal, copied to HMRC. The letter objected to HMRC's application on the grounds that much of the information was in the possession of the Appellants and the Third Parties, who were not involved in the appeals, should not be asked to provide it. The letter also stated that compliance with an order to produce documents would be highly burdensome in terms of staff time and cost and there was a strong possibility that much of the documentation no longer existed or was held in achiving [sic] facilities. The letter did not refer to any confidentiality clauses.

20. In my view, where a third party objects to providing information requested by a party to an appeal, the Tribunal should only order a third party to produce documents where there are compelling reasons to do so. In some cases, such an order is little more than a formality to protect a third party from criticism or worse where there are actual or potential obligations of confidentiality. In this case, however, there are objections from all the Third Parties that the request would impose a real burden on them. The application acknowledged that the informal requests were "in fairly wide terms" and HMRC had sought a meeting to limit the time and expense. Neither the application nor Mr Gammie at the hearing suggested that the burden of time and expense had been eliminated or would be insignificant. It seems to me that the general nature of the information requested could involve the Third Parties in a great deal of time and expense in complying with any order to produce documents. In the circumstances, I

> do not consider that it would be fair or just to order the Third Parties to provide documents as requested by HMRC and I refuse the application."

Discussion

(i) The application for disclosure by ITP, IFP2 and Ingenious Games

59. HMRC submit that Judge Sinfield erred in law by (i) taking an improperly narrow approach to exercise of the powers of the FTT under the Rules to order disclosure by contrasting it with the regime for disclosure under the Civil Procedure Rules, in para. [14], and by ruling that the Rules do not enable a party to make what he described as a "generalised request" for disclosure; (ii) taking an improperly narrow approach to exercise of the powers of the FTT by ruling, in para. [15], that because the FTT had made the Directions with the limited disclosure provision in paragraph 17, referred to above, a requirement for ITP, IFP2 and Ingenious Games to disclose further documents would be an additional burden on them "that could only be justified by some special circumstance" and that HMRC's request for further disclosure amounted to an improper fishing expedition and/or that the background of the case, in which HMRC had limited its investigation by agreement with the appellant partnerships and so had not had an opportunity to examine all the relevant documents held by them, constituted a special circumstance which meant that the disclosure request was justified; (iii) ruling that HMRC's application for disclosure came too late, since they had had the opportunity to require ITP, IFP2 and Ingenious Games to produce documents at an earlier stage but decided not to do so; (iv) proceeding on an incorrect understanding of the nature of HMRC's case, as set out at para. [9] of the decision, because HMRC's disclosure application was not limited to the film and game projects which had been the subject of inquiry at the investigation stage, but extended to other matters which were relevant in light of the way in which the parties proposed the appeal hearing should be conducted and the claims made by ITP, IPF2 and Ingenious Games in their Statements of Case; (v) proceeding on the basis of an incorrect understanding of the position which existed at the time of the directions hearing in February 2013 and when the Directions were made; (vi) over-estimating the burden on ITP, IFP2 and Ingenious Games if they were ordered to give further disclosure and giving insufficient weight to the prejudice to HMRC if their application for further disclosure was refused.

60. In my judgment, HMRC have established that the Judge adopted an incorrect approach to the exercise of his discretion in relation to this further disclosure, failed to take relevant matters properly into account and reached a conclusion which cannot in the circumstances of this case be regarded as just, fair or in accordance with the overriding objective set out in rule 2 of the Rules.

61. Mr Milne for ITP, IFP2 and Ingenious Games submitted that the making of the Directions definitively set the framework for the disclosure obligations of the parties to the appeals, and that the Judge was entitled to rule that it was illegitimate for HMRC to seek to make wider disclosure requests at this stage in the proceedings. I do

not accept this submission. The circumstances in which the directions hearing took place and the Directions were made are set out above. At that stage, the parties could not reasonably have thought that the Directions were set in stone, particularly as regards disclosure. The appeal was at an early stage of development, both sides appreciated that HMRC had not examined all the documents in the possession of the appellant partnerships and the proper limits of disclosure in the case would inevitably have to be informed by the pleaded cases on both sides, and in particular by the Statements of Case for ITP, IFP2 and Ingenious Games which were due to be served only in about July 2013. It was predictable that when those Statements of Claim were served, HMRC would probably need to seek further disclosure to cover the matters raised in those pleadings, as did in fact happen. ITP, IFP2 and Ingenious Games had already shown, by their request for third party documents in HMRC's hands, that they did not regard paragraph 17 of the Directions as the defining word on the approach to disclosure in the case, and HMRC's position in seeking disclosure of relevant documents in the hands of ITP, IFP2 and Ingenious Games mirrored their position.

62. In my view, the Judge proceeded on an unfairly narrow view of the facts in para. [15] of the decision, when he said that HMRC had the opportunity and the powers to require ITP, IFP2 and Ingenious Games to produce the documents "but decided not to do so". The full background, as explained above, shows that the restrictions on access to documents at the investigation stage were a matter of negotiation and agreement, rather than simply a unilateral decision of HMRC taken for their own reasons. The circumstances in which the Directions were made and the approach adopted by ITP, IFP2 and Ingenious Games to disclosure thereafter showed that the parties regarded the question of disclosure as something which should be kept under review and adjusted as the outline of the case developed. HMRC did not decide that ITP, IFP2 and Ingenious Games should make the averments they did in their Statements of Case; that was their choice, and HMRC were entitled to maintain that there was a need for additional disclosure once they saw how the appellants were putting their case.

63. ITP, IFP2 and Ingenious Games do not suggest that they do not hold any further documents, beyond those inspected by HMRC during the investigation stage and any documents they propose to rely on themselves in the course of their appeals, which are relevant to the issues on the appeal. It is clear that they do hold other relevant documents. Moreover, it is entirely possible that there will be documents in that class which would be capable of undermining their case and/or of supporting HMRC's case on the appeal. Mr Milne made it clear that if further disclosure were ordered, his clients would wish to have liberty to adduce additional witness statements to address and explain the further documents to be produced.

64. As to the extent of the burden on ITP, IFP2 and Ingenious Games in having to respond to the requests for further disclosure, in his skeleton argument Mr Milne asked for HMRC to formulate their specific requests by 28 February 2014, with his clients to provide their response by the end of April 2014. There was no evidence of the extent of the burden for ITP, IFP2 and Ingenious Games in having to undertake this additional disclosure exercise, though Mr Milne told me it would be onerous and

that large numbers of documents held by them would have to be re-examined to see whether they undermined their case or assisted HMRC's case on the appeal. However, suggesting that a two month period would be sufficient to do this does not indicate that there would be any excessive or disproportionate burden on Mr Milne's clients in undertaking this task, particularly in the context of tax appeals in which £1 billion is at stake. It is, in fact, likely that ITP, IFP2 and Ingenious Games already have a good idea of the documents in their possession and their contents and relevance to the proceedings, after years of investigation of their affairs and the extensive work they have done in preparing their own cases and evidence for the appeals.

65. Mr Milne submitted that it would be unfair for the Tribunal to require his clients at this stage to undertake a further review of the documents they hold for the purpose of giving further disclosure, with the additional cost and effort that would involve. I do not accept this submission. The FTT has a power to award costs, and if at the end of the proceedings ITP, IFP2 and Ingenious Games can establish that they ought to be protected against the additional costs Mr Milne suggested they would now have to incur, that element of prejudice will be met by an award of costs in their favour. I should emphasise, however, that against the background to this litigation set out above I am far from saying that I think it likely that it will be found appropriate to make such an order. I do not consider, on the materials I have seen and the submissions I have heard, that HMRC have behaved unreasonably in relation to the question of disclosure.

66. The appellant partnerships also submit that it would be unfair for the hearing date in March 2014 to be postponed. However, there was no evidence before the FTT or the Upper Tribunal that they or their members would suffer any particular or special element of prejudice, beyond simply being left in a further period of uncertainty as to the outcome of the appeals. In my view, the interests of fairness and justice are clearly and strongly in favour of HMRC being given the opportunity to see the further relevant documents held by ITP, IFP2 and Ingenious Games which they have not yet seen, and this clearly outweighs the limited prejudice to the appellant partnerships of having the appeal hearing postponed.

67. In my judgment, the most important point on the present interlocutory appeal is that in order for the main appeal to be determined fairly and justly, in accordance with the overriding objective, HMRC should have an equal opportunity to review the further relevant documents held by ITP, IFP2 and Ingenious Games which they have not yet disclosed to HMRC and which they do not wish themselves to rely upon in the appeal. Put another way, it would be unfair and unjust for ITP, IFP2 and Ingenious Games to be able to suppress or keep from the view of HMRC and the FTT relevant documents which may be harmful to their case, as a consequence of the limitation on the extent of HMRC's inspection of documents during the investigatory stage as a result of a sensible co-operative approach to the conduct of the investigation which was agreed as being in the interests of both sides. Even allowing for some weight to be attached to the interest of avoiding delay by postponing the hearing of the appeal, scheduled for March 2014, the Judge's decision was not compatible with a proper consideration of the issues in the appeal (see rule 2(2)(e) of the Rules, set out above).

In the particular circumstances of this case, I consider that the Judge fell into error and reached a conclusion which was clearly wrong.

68. I also consider, with respect, that the Judge erred in law in the approach he formulated in paras. [14] and [15] of the decision. In my view, the Judge was wrong to hold:

> (i) in para. [14], that the Rules "are not intended to enable one party to make generalised requests for information from another party." This was an unduly narrow approach. As rule 2 makes clear, the Rules are intended to be interpreted and applied so as to enable the FTT "to deal with cases fairly and justly". If the circumstances of a case are such that comparatively wide or general orders for disclosure are necessary to enable the FTT to deal with that case fairly and justly, the Rules are intended to enable a party to make such generalised requests for disclosure. As explained above, this will be rare in tax cases, because usually HMRC will have seen the full documentation held by a taxpayer during the investigation stage, and the default disclosure provision in rule 27 of the Rules reflects this. But in the unusual circumstances of this case, the fair determination of the appeals did require the FTT to entertain and allow the request for further disclosure made by HMRC;
>
> (ii) in para. [14], that HMRC's request for information was too general and, in para. [15], that HMRC's request was "a fishing expedition". HMRC's request for documents was, in my view, properly formulated by reference to the Statements of Case for the appellants served in early August 2013. HMRC had to ask for disclosure of documents in relatively general terms, because they did not know what documents relevant to the issues pleaded in the Statements of Case the appellant partnerships might hold. They asked only for disclosure of documents relevant to the pleaded cases of ITP, IFP2 and Ingenious Games which they had not yet been shown. I do not consider that it is appropriate to characterise this as a fishing expedition. It is a request for disclosure of documents which in accordance with normal standards of justice and fairness would ordinarily be expected to be given in litigation of this complexity and value. There was not time at the hearing before me to go through HMRC's requests one by one to see if they were too wide, and it was in any event proposed that HMRC should review and so far as possible refine or reformulate their requests for disclosure to take account of the lengthy witness statements recently served for the appellant partnerships. Although Mr Milne submitted that some of the requests were too broadly formulated by usual standards of disclosure in civil litigation, he accepted that at least some of them were not. I have read the requests and would comment, on a provisional basis and noting that I have not had the benefit of detailed argument item by item, that they appear to me to be properly formulated by reference to the Statements of Case and the issues arising on the appeals. They did not strike me as unduly or improperly wide in any respect. I comment below on the one area where I did hear substantive argument (disclosure in relation to projects

considered but not taken forward or commenced but abandoned before completion); and

(iii) in para. [15], that the requirement to disclose further documents would be an additional burden on ITP, IFP2 and Ingenious Games "that could only be justified by some special circumstance" and that there was no such circumstance in this case. I respectfully consider that in putting the matter in this way the Judge departed too far from the basic approach which the FTT is required to adopt, namely to ask in accordance with rule 2 what is required to enable it to deal with a case "justly and fairly". It is fair to say that where the FTT has issued directions for trial a good reason within the overriding objective will need to be shown to justify a departure from or supplementation of those directions; but I think that to use the phrase "special circumstance" as the Judge used it in the context of his decision indicates that he considered that some higher threshold than this had to be surmounted by HMRC. Even if one takes the phrase used by the Judge to mean no more than the proper threshold, in my opinion he misapplied the proper test and erred in law by holding that HMRC could not satisfy it. According to the usual standards of justice in heavy civil litigation, such as these proceedings, it is just and fair for a party to see documents held by its opponent relevant to that opponent's pleaded case, in order to see whether they undermine that case or support the party's own case in opposition. The Judge was wrong to characterise this in pejorative terms as a "fishing expedition" and so discount it as a factor. The need to do justice between the parties was a ground which gave good and compelling reason to order the further disclosure sought by HMRC, or (using the Judge's phrase) a "special circumstance" requiring such disclosure.

69. The main argument which Mr Milne pressed to support his submission that HMRC's request for disclosure was too wide was that the request at item 7 in the schedule to the disclosure application set out at para. [47] above (documents in relation to projects which were considered but not taken forward) and other requests in relation to projects which were commenced but then abandoned were unjustified. I do not accept this.

70. At the hearing in October 2013, Mr Milne had objected to inclusion of the film "Max Payne" (a project of IFP2 which was abandoned) in the list of specimen films for examination at the hearing of the appeals, but Judge Sinfield said (para. [5] of his decision), "I accept that documents relating to a project that was terminated could be relevant to the issues in the appeal" and ruled that "Max Payne" should be included as a specimen film and that disclosure should be given of the contractual documentation in relation to it. There was no appeal by IFP2 against this part of the decision. Indeed, in my view, Judge Sinfield was clearly right that documents relating to a project that was commenced but then abandoned could be relevant to the issues in the appeal, since they may well throw light upon the nature of the activities of the appellant partnerships and whether their expenses related exclusively to the carrying on of a trade. I also consider that similar reasoning applies in relation to projects which were considered but not taken forward, as referred to in item 7 in the disclosure schedule.

71. For the reasons set out above, I allow the appeal against the part of Judge Sinfield's decision which dismissed HMRC's request for further disclosure to be given by ITP, IFP2 and Ingenious Games. In ordinary circumstances, in an appeal of this kind the Upper Tribunal would proceed to make an order itself for the disclosure to be given. However, since time did not allow for detailed consideration of the individual requests for disclosure and since HMRC is to consider refining and reformulating its requests in the light of the witness statements now received from the appellant partnerships, the parties were agreed that the appropriate course was for the Upper Tribunal simply to set a timetable in which HMRC should formulate their revised requests for disclosure and for ITP, IFP2 and Ingenious Games to provide their response. It may be that there will have to be further argument before the FTT regarding the extent of disclosure, if there is a dispute between the parties regarding HMRC's revised requests. The FTT will no doubt approach any such dispute having regard to this judgment for guidance.

72. It is clear that further disclosure, possibly substantial further disclosure, will have to be given by ITP, IFP2 and Ingenious Games. The parties agreed that, if HMRC's appeal on this aspect of the case were allowed - as it has been - the hearing of the appeal would have to be adjourned. Accordingly, I have made an order adjourning the appeal hearing to the first available date, having regard to the convenience of the parties, after 1 October 2014.

73. Before turning from this part of the appeal, I should mention two authorities relied on by Mr Gammie in support of his argument for disclosure: *Dorset Healthcare v NHS Foundation Trust v MH* [2009] UKUT 4 (ACC) and *R (Roberts) v Parole Board* [2005] UKHL 45; [2005] 2 AC 738. I do so simply to say that I did not find them particularly helpful as guides to the approach to be adopted to disclosure in the particular circumstances of the present case. Both concerned the proper approach to disclosure of documents held by a public authority in relation to a decision or proceedings affecting the rights of an individual (respectively, an NHS trust holding a patient's medical records containing confidential third party material relevant to the patient's mental health and the prison authorities in relation to a parole decision). That is a context rather different from that with which I am concerned on this appeal. The context in the tax appeal in this case is essentially similar to that in heavy civil litigation in relation to money obligations, and I prefer to state the reasons for allowing this appeal as I have done above rather than by reference to these authorities.

(ii) Disclosure by Channel Four

74. I can deal with the appeal in relation to this more shortly. It should be observed that the appeal is put on a narrow ground, namely that the Judge incorrectly conflated the position of Channel Four with that of Pathé. It was not said that he had applied the wrong test for third party disclosure - hence, HMRC brought no appeal in relation to their disclosure application in relation to Pathé. I would, however, wish to reserve judgment on whether the Judge's formulation in para. [20] of the test to be applied would always be appropriate.

75. In my view, the ground of appeal relied on by HMRC falls to be rejected. The Judge did not misunderstand Channel Four's position nor did he improperly conflate it with the position of Pathé.

76. When approached by HMRC with their request for disclosure, Pathé refused to comply with it both on the ground that it was bound by confidentiality obligations owed to the appellant partnerships and on the ground that it would be burdensome for it to comply with the request. These were the grounds of resistance taken into account by the Judge in his ruling.

77. When similarly approached by HMRC, Channel Four, in a telephone conversation on 2 April 2013, declined to comply with an informal request for information due to similar confidentiality obligations owed to the appellant partnerships, but said that it "would be happy to comply with a formal notice" (meaning an order for disclosure made by the FTT), while at the same time asking that any formal notice be made more specific as it was "short of staff and considerable resource would be needed to collate the relevant information." In context, Channel Four was not saying that it would be neutral and had no objection to an order for disclosure being made. It pointed out that it would be unwelcome, in that it would impose a considerable burden on it, but that it would of course and without question ("be happy to") comply if an order was made against it.

78. Channel Four responded to HMRC's application for an order for third party disclosure against it, by an email dated 29 July 2013. The point was again made that it would be "a fairly time-consuming exercise" to comply with an order. Channel Four went on:

> "Whilst our approach to any disclosure is neutral, and we would be happy to search for and disclose what we can if we are ordered to, [the] effect of the above logistical issues, coupled with the confidentiality clauses in the various documents … is that we feel that volunteering any information or documents (as opposed to being ordered to produce them) would put us in breach of our confidentiality obligations and would take up a considerable amount of already very scarce management time."

79. My view, in line with that of the Judge, is that although Channel Four used the word "neutral", the substance of its position was to object to disclosing the documents on the same grounds (confidentiality obligations and logistical burden) as were relied on by Pathé. Channel Four's position was to oppose the making of an order for disclosure, whilst at the same time very properly indicating that if an order were made against it, it would of course comply with that order.

80. Accordingly, I reject Mr Gammie's submission that the Judge misunderstood Channel Four's position and that he erred by applying the same reasoning in relation to Channel Four as in relation to Pathé.

Conclusion

81. As set out above, the appeal is allowed in part (in relation to the application for disclosure to be given by ITP, IFP2 and Ingenious Games and the application for an adjournment of the appeal hearing) and, as to the remainder (the application for third party disclosure from Channel Four) is dismissed.

THE HON. MR JUSTICE SALES

RELEASE DATE: 7 February 2014