[2020] UKUT 266 (TCC)

Appeal number: UT/2019/0116

PROCEDURE – FTT refusal to direct HMRC to disclose documents relating to the mutual agreement procedure with the Belgian competent authority under the UK/Belgium double tax treaty - consideration of "relevance" of documents - appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

KEVIN MCCABE **Appellant**

- and -

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

TRIBUNAL: MR JUSTICE FANCOURT
JUDGE THOMAS SCOTT

Sitting in public by way of video hearing treated as taking place in London on 29 June 2020

Julian Hickey, instructed by Mazars LLP, for the Appellant

Christopher Stone, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. Mr McCabe appeals against the decision of the First-tier Tribunal (the "FTT") reported at [2019] UKFTT 317 (TC) (the "Decision").

2. Mr McCabe had appealed to the FTT against various closure notices issued to him by HMRC, contending that he was not resident in the United Kingdom in the relevant years, or, alternatively, that he was resident in Belgium for those years as a result of the provisions of the double taxation treaty between the United Kingdom and Belgium. Mr McCabe instigated the "mutual agreement procedure" ("MAP") under that treaty. This resulted in an agreement between the UK and Belgian tax authorities that, applying the "tie-breaker" provisions of the treaty as to residence, Mr McCabe was resident in the UK for tax purposes. Mr McCabe did not accept that agreement and applied to HMRC to disclose documents relating to the application of the MAP. HMRC refused. He then applied to the FTT for a direction for disclosure. The FTT refused that application, and Mr McCabe appeals, with the permission of the Upper Tribunal, against the Decision.

Background and the Treaty

3. The substantive dispute between Mr McCabe and HMRC relates to his jurisdiction of tax residence in the years 2006-07 and 2007-08. Mr McCabe's primary contention is that he was not resident in the UK in those years. He argues in the alternative that if that contention is wrong, he was also tax resident in Belgium for those years. Where an individual is ostensibly resident in both jurisdictions, Article 4(2) of the double taxation treaty between the UK and Belgium of 1 June 1987 (as amended) (the "Treaty") contains a "tie-breaker" provision, which is intended to establish the single jurisdiction in which that person is resident for tax purposes. Mr McCabe's secondary contention in his substantive appeal is that the application of the tie-breaker results in him being resident only in Belgium for tax purposes.

4. It is helpful at this stage to set out the relevant provisions of the Treaty. The tie-breaker provision in Article 4(2) is as follows:

> (2) Where by reason of the provision of paragraph (1) of this Article an individual is a resident of both Contracting States, then his status shall be determined as follows:
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> (a) he shall be deemed to be a resident of the State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident of the State with which his personal and economic relations are closer (centre of vital interests);
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> (b) if the State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either State, he shall be deemed to be a resident of the State in which he has an habitual abode;

(c) if he has an habitual abode in both States or in neither of them, he shall be deemed to be a resident of the State of which he is a national;

(d) if he is a national of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.

5. A person who considers that the UK and/or Belgium will tax him otherwise than in accordance with the Treaty position may invoke the MAP under Article 25 of the Treaty. So far as relevant, Article 25, and Article 26 which deals with exchange of information between the two Contracting States, are as follows:

Article 25 Mutual agreement procedure

(1) Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of the Contracting State of which he is a resident. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention.

(2) The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the Convention.

Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States.

(3) The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention. They may also consult together to consider measures to counteract improper use of the provisions of the Convention.

(4) The competent authorities of the Contracting States may communicate with each other directly for the purpose of reaching an agreement in the sense of the preceding paragraphs and for the purpose of giving effect to the provisions of the Convention.

…

Article 26 Exchange of information

(1) The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws concerning taxes of every kind and description imposed by or on behalf of the Contracting States, insofar as the taxation thereunder is not contrary to the Convention. The exchange of information is not restricted by Articles 1 and 2.

(2) Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information

> obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, the determination of appeals in relation to the taxes referred to in paragraph 1, or the oversight of the above. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions.
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> Notwithstanding the foregoing, information received by a Contracting State may be used for other purposes when such information may be used for such other purposes under the laws of both States and the competent authority of the supplying State authorises such use.

6. Mr McCabe invoked Article 25 in Belgium in 2016. At some point in the first half of 2017 the procedure resulted in an agreement between the UK and Belgium under Article 4(2) that Mr McCabe was deemed to be resident in the UK. In response to a request from Mr McCabe's advisers, on 3 March 2017 the Belgian tax authority sent to those advisers an email (the "Belgian email") which contained the following paragraphs (in translation):

> The UK-CA[1] does not oppose any of the Belgian arguments which we used to support our position that Mr McCabe for the period in question (5 April 2006 to February 2014):
>
> - had a permanent home at his disposal in Belgium
> - had vital interests in Belgium, bearing in mind his close personal and economic relations with our country;
> - was normally resident in Belgium.
>
> Conversely the UK-CA cites a number of important facts and elements, on the basis of which they decide that Mr McCabe in that same period, also had a permanent home at his disposal in the UK as well as close personal and economic relations and was normally resident there. Hence, they decide that applying the so-called tie-breaker rule… Mr McCabe must be considered to be a resident of the state of which he is a citizen (sub-paragraph (c) of Article 4(2)). In view of the fact that Mr McCabe is a UK citizen he is therefore deemed to be a resident of the UK.

7. Mr McCabe subsequently sought disclosure from both competent authorities of documents and information relating to the MAP. Both Authorities refused disclosure, primarily on grounds related to confidentiality.

8. Shortly before the hearing we admitted as evidence a certified translation of a recent decision of the Belgian Council of State, issued on 2 June 2020, and certain other documents. The decision nullified the decision of the Belgian Tax Authority to refuse disclosure. We discuss this further below in relation to the issue of confidentiality.

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[1] While this decision and the FTT's decision refer on occasion to the UK and Belgian tax authorities, technically it is the "competent authority" (or "CA") of each State which is a party to the mutual agreement procedure.

The disclosure application and the arguments of the parties before the FTT

9. The application before the FTT sought disclosure of the following documents and information:

> (1) All documentation relating to the MAP and all of the documentation in the possession or power of HMRC generally including the documentation provided to HMRC by the Belgian tax authorities.
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> (2) Without prejudice to the generality of (1) above:
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> (a) All representations of the Belgian tax authorities to HMRC;
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> (b) All representations of HMRC to the Belgian tax authorities; and
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> (c) All correspondence internal to HMRC relating to the preparation and issue of (b) above (including emails, memoranda and notes of conversations) between the issuing officer and any other individual containing advice, instruction, opinion or recommendation as to the application to Mr McCabe's circumstances of Article 4(2) of the Treaty and/or the position, arguments or approach to be adopted by HMRC in response to the Belgian tax authorities.
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> (d) All advice received by HMRC in relation to (a) and (b) above.
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> (e) Specifically, Mr McCabe seeks a copy of a "position paper" that HMRC are known to have sent the Belgian tax authorities.

10. In seeking disclosure Mr McCabe argued that the Belgian email demonstrated that HMRC had adopted a position in the MAP which was significantly contradictory to the position which they were adopting in the substantive appeal to the FTT. We discuss this argument below. The reasons given by Mr McCabe for seeking the requested disclosure in these circumstances were set out in the Decision as follows:

> 14. Mr McCabe argues that, particularly in the face of this apparent inconsistency, fairness and justice require that he sees submissions that HMRC made in the course of the MAP so that he can understand the extent to which HMRC's submissions made in the course of FTT proceedings are justified.
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> 15. He emphasises that he is not seeking simply to embarrass HMRC by highlighting to the FTT the extent to which he considers HMRC took a different approach in the MAP. Conclusions reached in the MAP are, independently of any inconsistency on HMRC's part, of clear weight and relevance to the FTT proceedings, such that fairness requires he understand how those conclusions were reached. That in turn will, he submits, help the FTT understand and weigh the evidence before it.
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> 16. The force of the above points is only strengthened, in his submission, by the fact that HMRC have referred to the outcome of the MAP in their Statement of Case. The fact that HMRC attach significance to the outcome of the MAP, in Mr McCabe's submission provides a further reason why it is fair and just that he understand how the conclusions of the MAP were reached.

11. HMRC resisted disclosure before the FTT on the following grounds, set out at [18] to [21] of the Decision. First, the Belgian email did not disclose any contradictory position on the part of HMRC as alleged. Second, the documents sought would not be of "any material relevance". Third, there were reasons of public policy why disclosure should not be directed. Finally, the scope of the disclosure sought was too wide and amounted to a fishing expedition.

The FTT's approach and its decision

12. The FTT began by setting out its powers in respect of the application under the FTT Rules, as follows. Rule 5 gives the tribunal, as part of its general case management powers, the power to direct a party to provide documents and information to another party. The tribunal also has a specific power, under Rule 16, to order a person to "produce any documents in that person's possession or control which relate to any issue in the proceedings". When exercising a case management discretion or power, the tribunal must have due regard to the overriding objective set out in Rule 2.

13. The FTT set out the approach it would take as follows:

> 25. The parties were both agreed that I have the power to direct HMRC to disclose the documents Mr McCabe seeks. As regards the approach I should take to the exercise of my discretion, both parties referred to the decision of the Upper Tribunal in *HMRC v Ingenious Games LLP* [2014] UKUT 62 and to the decisions of the FTT in *Brian Kennedy v HMRC* (unpublished) and *Worldpay (UK) Limited v HMRC* [2019] UKFTT 235
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> 26. I do not consider that the parties differed greatly as to the approach that I should follow in the light of the provisions of the FTT Rules quoted above and those authorities. I have concluded that I should take the following approach:
>
> (1) This is a high-value complex dispute between Mr McCabe and HMRC. The starting proposition in a case such as this is that HMRC should disclose relevant documents to Mr McCabe unless there is a good reason not to.
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> (2) A document that is relevant to an aspect of HMRC's case as pleaded in their Statement of Case is likely to be "relevant" when considering the starting proposition set out above.
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> (3) In assessing whether there is a good reason not to direct HMRC to disclose relevant documents, I should pay regard to the overriding objective set out in Rule 2 of the FTT Rules. That will involve a consideration, and weighing up of all relevant factors. The degree of relevance may be a relevant factor in the sense that, if a document is of relatively low relevance, less will be needed to displace the starting proposition that the document should be disclosed. By contrast, if a document is of high relevance, more will be needed to displace that starting proposition.

14. Adopting this approach, the FTT decided that:

(1) The documents sought were "'relevant' in the narrow sense that HMRC refer to the MAP in their Statement of Case and those documents relate to the MAP. They are not, therefore, 'irrelevant'.": [28].

(2) However, the degree of relevance was low, as the documents would shed no light on the primary facts on which the substantive appeal would be determined.

(3) The Belgian email did not establish any *prima facie* inconsistency in HMRC's position, but even if it did that would not be of much relevance for the substantive appeal: [33].

(4) Both tax authorities objected to the disclosure sought. Those objections were not conclusive and the tribunal needed to evaluate the reasons for the objections: [43]. The reasons were primarily the need for MAP discussions to take place in confidence. There was some support for that approach in the OECD Commentary on treaties, but Article 26 of the Treaty did permit disclosure of the documents sought: [45], [49].

(5) Giving weight and respect to the views of the tax authorities, a degree of confidentiality was important, including for future co-operation between the authorities.

(6) Weighing up the degree of relevance of the material sought in light of the overriding objective against the "good, albeit not unassailable" case against disclosure presented by HMRC, the objections of the tax authorities were "a good reason" why the documents should not be disclosed, and the application should be refused: [55].

Grounds of appeal

15. Mr Hickey's skeleton argument and reply to HMRC's skeleton together ran to some 60 pages. However, Mr McCabe's grounds of appeal can in our view be summarised as follows[2]:

(1) The FTT applied the wrong test as to relevance.

(2) The FTT failed to understand why the documents sought were relevant, reaching the wrong conclusion in relation to the Belgian email and wrongly focussing on the MAP procedure.

(3) The FTT gave too much weight to the claim of confidentiality, and made errors in its analysis of the OECD's Treaty guidance on that issue.

16. We will first consider the arguments in relation to relevance and then those relating to confidentiality, before reaching our conclusion on the appeal. We preface our discussion by setting out the approach which this Tribunal should adopt in an appeal such as this.

[2] Mr Hickey's skeleton argument included a further argument that HMRC had failed in its public law duty to give reasons for the MAP decision. Even if that duty extended to the UK competent authority (Belgium being the jurisdiction in which Mr McCabe initiated the MAP), since that was not an argument for which permission to appeal was given we do not consider it in this decision.

General approach

17. As with any appeal from an FTT decision to this Tribunal, an appeal lies only on a point of law[3]. In addition, the Decision concerned an exercise by the FTT of its case management discretion. It is well established that this Tribunal will be slow to interfere with the proper exercise by the FTT of its discretion in case management decisions. The position was summarised by Sales J, as he then was, in *HMRC v Ingenious Games LLP* [2014] UKUT 0062 (TCC), at [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].

18. That is the approach which we have taken in reaching our decision.

Relevance: detailed grounds of appeal

19. Mr Hickey's skeleton argument sets out the following grounds of appeal relating to relevance:

> (1) **Ground One**: the FTT applied the wrong legal test and took too narrow a view of relevance. In particular:
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> (a) The FTT erred in its characterisation of the MAP documents as being of narrow relevance.
>
> (b) There is no legal concept of "the degree of relevance".
>
> (c) The FTT failed to attribute proper and due weight to the relevance of the MAP documents.
>
> (d) The FTT failed to apply the approach identified in *Ingenious Games* and other authorities as to the relevant factual context in which to direct disclosure.
>
> (2) **Ground Two**: The FTT erroneously directed itself to the "process" followed during the MAP rather than the substantive MAP analysis and thereby reached the wrong decision on disclosure.

[3] Section 11 Tribunals, Courts and Enforcement Act 2007.

(3) **Ground Three**: The FTT incorrectly considered that there was no *prima facie* inconsistency between the Respondents' position in the MAP and before the FTT.

(4) **Ground Four:** The FTT erroneously failed to apply the rule that material which is adverse to one of the parties should prima facie be disclosed where there is a high-value complex dispute.

Relevance: Discussion

20. When so many trees have been planted it can be hard to keep sight of the wood, but we have navigated our way through these various grounds by considering these three questions:

(1) What principles are material to disclosure of relevant documents in this case?

(2) What does "relevant" mean and can a document be of "low relevance"?

(3) Did the FTT err in its assessment of relevance?

21. We have considered these questions not in order to set out any general guidance, but only in so far as they are material to this appeal. We consider separately the issue of confidentiality.

Principles material to determining relevance in this case

22. First, we agree with the FTT (at [26]) that since this was a "high-value complex dispute" the starting proposition was that HMRC should disclose relevant documents to Mr McCabe unless there was a good reason not to. The parties would also appear to agree, up to this point.

23. Second, the FTT must exercise its discretion to order additional disclosure under Rule 16 so as to give effect to the overriding objective: Rule 2(3)(a). That objective of dealing with a case fairly and justly includes dealing with it in a way which is proportionate.

24. Third, the approach of the FTT to disclosure is not determined by the Civil Procedure Rules ("CPR"). Rule 27 of the FTT Rules states that a party must (amongst other things) produce a list of documents, which the other party may inspect, which that party intends to rely upon or produce in the proceedings. Importantly, that rule applies to both standard and complex cases: Rule 27(1). We have already observed that Rule 16 gives the FTT power to order the production of any document in a person's possession or control which relates to an issue in the proceedings. In *E Buyer UK Ltd v HMRC* [2017] EWCA Civ 1416, one of the issues was whether it was an error of law by the FTT not to have displaced Rule 27 with what the Court of Appeal

called the broader "CPR-style disclosure". In determining that the FTT had not so erred, Sir Geoffrey Vos C stated, at [94][4]:

> It is true that this is an important case, but the 2009 Rules were made for important as well as simple cases. The plain fact is that the procedure is different in the F-tT.

25. Fourth, relevance is to be assessed by reference to the issues in the case and the positions of the parties. As the Court of Appeal succinctly observed in *HMRC v Smart Price Midlands and another* [2019] I WLR 5070, at [40]:

> 40 Disclosure of documents is not an end in itself but a means to an end, namely to ensure that the tribunal has before it all the information which the parties reasonably require the tribunal to consider in determining the appeal. It is only one step in the overall management of the case which should, as the appeal progresses towards a substantive hearing, identify and if possible narrow the issues between the parties. The scope of the issues in contention at the trial depends in part on the legal test to be applied by the tribunal and in part on the parties' respective positions as to which elements of that test are in contention.

26. Mr Hickey relied extensively on certain passages in the decision of the Upper Tribunal in *Ingenious Games LLP* as setting out the principles applicable to disclosure. In particular, he sought to draw various principles applicable to this case from the following passages, at [68]:

> [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 r 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. …
>
> (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

[4] The Court of Appeal noted that different principles applied if fraud or dishonesty is alleged.

> 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 r 2 what is required to enable it to deal with a case 'justly and fairly'… 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.

27. These passages must be seen in context. In that case, it had been agreed that there would be limited disclosure at the stage of the HMRC enquiry. When the initial disclosure directions were given, both sides appreciated that HMRC had not examined all the documents in the possession of the taxpayers, and that "the proper limits of disclosure in the case would inevitably have to be informed by the pleaded cases on both sides": [61]. HMRC were entitled to maintain that there was a need for additional disclosure once they saw how the taxpayers were putting their case: [62]. Importantly, the taxpayers did not suggest that they did not hold further documents which had not been disclosed which were "relevant to the issues on the appeal": [63]. Indeed, the Tribunal concluded, at [63]:

> 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.

28. Against this background, of what the court called "the unusual circumstances of this case", a degree of caution must be exercised in drawing from the decision principles of general application regarding disclosure. The guidance we have referred to in the subsequent Court of Appeal decisions in *Ebuyer* and *Smart Price Midlands* is of broader general application. Having said that, we note that HMRC accepted as correct the Tribunal's statement that, in a case such as this appeal, it is appropriate for a party to see documents held by its opponent which are relevant to the opponent's pleaded case, in order to see whether they undermine that case.

29. Mr Hickey also relied on various statements as to the principles applicable to disclosure in *Tower Bridge GP Ltd v HMRC* [2016] UKFTT 54 (TC) and *Janet Addo v HMRC* [2018] UKFTT 530 (TC). These were both FTT decisions which turned on their facts, and we do not consider that they are authority for any generally applicable principle in a case such as this.

30. Mr Hickey submitted that there was also a rule "that material which is adverse to one of the parties should prima facie be disclosed where there is a high-value complex dispute". He relied on a separate statement in *Ingenious Games* (at [42]). In fact, that statement is expressly qualified by the assumption that the disclosure is both relevant and proportionate. With those qualifications, we do not regard the statement as setting out any "rule" or principle distinct from those we have set out above.

The meaning of relevance and whether a document can have "low" relevance

31. Bearing in mind that under Rule 27(2) of the FTT Rules a document must in any event be disclosed if a party intends to rely on or produce it in the proceedings, what is meant, in considering an application under Rule 16, by a document being "relevant"?

32. In his skeleton argument, Mr Hickey suggested that the relevance of any evidence, documentary or otherwise, falls to be determined by asking whether it is potentially probative of the facts in issue. He referred to the statement of Nugee J in *HMRC v IA Associates Ltd* [2014] UKUT 0498 (TCC), at [35]:

> …one starts with asking the question whether the evidence is admissible. It is admissible if it is relevant. It is relevant if it is potentially probative of one of the issues in the case. One then asks, notwithstanding that it is admissible evidence, whether there are good reasons why the court (or tribunal in this case) should nevertheless direct that it be excluded.

33. While Nugee J was dealing with the issue of admissibility of evidence under Rule 15, not disclosure of documents, we agree that in considering an application for disclosure the test of whether a document is potentially probative of one of the issues is a sensible approach. As the Court of Appeal observed in *Smart Price Midlands*, the test must be applied by reference to the issues in the case. This does not mean the issues in some abstract or generalised sense, but the issues and asserted facts as

identified from each party's pleaded case. Those will be the issues which must be determined by the FTT.

34. In this case, the FTT determined that the documents sought were of low relevance, for reasons we shall discuss shortly. This was an error of law, argues Mr Hickey, because "the degree of relevance" is a novel test which as matter of law does not exist. If a document is relevant, then the extent or degree of its relevance is not pertinent to the consideration by the FTT of an application for its disclosure.

35. We have no hesitation in rejecting this argument. There is clearly a substantive difference between, say, a document which is agreed to be probative of a primary fact pleaded by one of the parties and one which might possibly prompt a train of enquiry by the other party. The FTT could not discharge its duty to take into account the overriding objective if it was forbidden to distinguish between these two examples of different degrees of relevance in considering the need for and proportionality of the disclosure sought.

36. We have observed that the FTT is not bound by the CPR provisions relating to disclosure. However, the approach in cases governed by the CPR to different categories of document shows clearly that the way in which a document is relevant is material to the approach which should be taken by the court to a request for its disclosure. The following commentary from the White Book sets out the position as follows:

> 31.6.3
>
> Documents may be divided into the following four categories.
>
> (1)*The parties' own documents*: these are documents which a party relies upon in support of their contentions in the proceedings.
>
> (2)*Adverse documents*: these are documents which to a material extent adversely affect a party's own case or support another party's case.
>
> (3)*The relevant documents*: these are documents which are relevant to the issues in the proceedings, but which do not fall into categories 1 or 2 because they do not obviously support or undermine either side's case. They are part of the "story" or background. The category includes documents which, though relevant, may not be necessary for the fair disposal of the case.
>
> (4)*Train of inquiry documents*: these are documents which may lead to a train of inquiry enabling a party to advance their own case or damage that of their opponent (as referred to by Brett LJ *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co (1882–83) L.R. 11 Q.B.D. 55, CA*).
>
> Rule 31.6 provides that "standard" disclosure is limited to documents falling within categories 1 and 2.
>
> Whether a document falls into sub-paras (a) or (b) of r.31.6 is to be judged against the statements of case and not by reference to matters raised elsewhere, including in witness statements: *Paddick v*

Associated Newspapers Ltd [2003] EWHC 2991 (QB); [2003] All E.R. (D) 179 (Dec) at [11].

37. We do not suggest that the FTT must or should categorise documents in this way. The FTT has its own rules on disclosure. However, the White Book categorisation is both rational and justifiable, and it demonstrates clearly why it is appropriate for the FTT to evaluate and weigh the likely effect on the determination of the case of ordering disclosure of a document. The starting point in the FTT in a complex, high-value case may be that a document which is relevant (in the broadest sense) should be disclosed unless there are good reasons to the contrary, but that is only a starting point. On an application for disclosure, the tribunal will need to consider the degree of potential relevance of the document and whether there is a need for disclosure in order to enable a fair determination of the issues to take place. Further, in taking into account the overriding objective, what might amount to "good reasons" for refusing to order disclosure of documents that are relevant are likely to differ depending on whether a document is materially adverse to a party's case or merely a background document or one which might lead to a train of enquiry.

38. It follows that a document is capable of being relevant in a broad sense but of low relevance in that it is not potentially adverse but only part of the background, or one capable of leading to a train of enquiry, and therefore one that may not need to be disclosed in order for a fair determination of the issues to take place.

Did the FTT err in its assessment of relevance?

39. It follows from our conclusions as to the assessment of relevance that the FTT did not err in directing itself that the degree of relevance of a document was a factor to be taken into account in reaching its decision on the application. The FTT's self-direction at [25] and [26] of the Decision, set out at paragraph 13 above, therefore involved no error of law.

40. However, Mr McCabe argues that, in any event, the FTT's assessment of the relevance of the documents was wrong. First, the documents sought were highly material to the substantive appeal and were probative of the facts in issue. Second, the Belgian email showed the inconsistency in HMRC's position between the MAP and the appeal, and the FTT was wrong to decide otherwise. Third, the FTT focussed impermissibly on the MAP "process" in reaching its decision.

41. Before dealing with the argument relating to the Belgian email, the FTT set out its conclusions on this issue as follows:

> 28. I consider that the documents Mr McCabe seeks are "relevant" in the narrow sense that HMRC refer to the MAP in their Statement of Case and those documents relate to the MAP. They are not, therefore, "irrelevant". They relate to an issue that HMRC regard as of sufficient importance and relevance to warrant inclusion in their Statement of Case.
>
> 29. Having said that, I regard the degree of relevance of the documents as low. Mr McCabe's residence will, as Mr Stone correctly

> submits, depend largely on primary facts including where he spent his time in the relevant tax years and his intentions. The documents that Mr McCabe seeks will shed no light on those primary facts. At most those documents will include views on the primary facts that HMRC and the Belgian tax authorities expressed some 10 years after the end of the tax years in dispute.
>
> 30. I do not accept Mr Way's submission that the documents are likely to help the FTT to decide the primary facts, or evaluate the weight to be attached to different pieces of evidence. I also reject the submission that was advanced throughout his skeleton argument (and orally) that the documents requested "go to the root of" the residence dispute between HMRC and Mr McCabe. Of course, the FTT may be interested to see how other bodies have approached the question. But the process followed during the MAP will be very different from the process the FTT is following. The MAP involved the UK and Belgian tax authorities having a frank discussion, largely behind closed doors, of aspects of Mr McCabe's case. It heard no live evidence from Mr McCabe. By contrast, the proceedings before the FTT will be in public and Mr McCabe will have a full right to participate in the proceedings both by giving his own evidence and testing any evidence on which HMRC rely.
>
> 31. Therefore, not only are the conclusions of the MAP not binding on the FTT, they will have been reached following a very different process from that the FTT will be following. In those circumstances, I consider it unlikely that even a full understanding of why the MAP concluded as it did would be of much assistance to the FTT in undertaking its, very different, task.
>
> 32. I therefore consider that the documents requested are "relevant" in the narrow sense that they relate to a matter that HMRC have referred to in their Statement of Case. However, I regard the degree of relevance as low.

42. We agree with the FTT. The issues which will fall to be determined in the substantive appeal (apart from the amount of any liability) will be whether, during the relevant periods, Mr McCabe was resident and ordinarily resident in the UK; if he was, whether he had a permanent home in the UK; whether his centre of vital interests was in the UK or Belgium, and the location of his habitual abode.[5] HMRC makes a single reference to the outcome of the MAP in its statement of case, but does not rely on it[6] or refer to any documents relating to the MAP. There is no dispute between the parties about the initiation of the MAP or its outcome; those points are therefore not in issue in the appeal. Mr McCabe has not accepted the outcome of the MAP, and in that event is not bound by it. Again, that is not in dispute.

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[5] The issue of Mr McCabe's nationality (the final element of the waterfall in the Treaty tiebreaker) is not presently in dispute.

[6] Mr Hickey suggested that HMRC had "effectively" relied on the outcome of the MAP by referring to it, but they have not, and Mr Stone confirmed this. In fact, it is Mr McCabe who seeks to rely on the MAP process, by reference to the Belgian email and the alleged inconsistency.

43. The FTT was correct to conclude that in these circumstances the documents sought by the disclosure application would have no probative value in relation to the issues to be determined in the appeal. They would merely record or refer to the views or arguments of the respective competent authorities some years ago, in an entirely different context to that of the appeal. Those views or arguments, as the FTT rightly said, would shed no light on the primary facts which the FTT will have to determine for the years in question, on the basis of what we were told will be a substantial volume of documentary and witness evidence. Mr McCabe does not suggest that there are facts relevant to the issues to be determined in the substantive appeal which are unknown to him and which will or are likely to be contained in the documents sought.

44. Mr McCabe's objection that the FTT focussed impermissibly on the "process" of the MAP in assessing relevance in fact highlights the central fallacy in his argument. Mr Hickey's skeleton argument refers to "admissions" which must have or might have been made by HMRC during the MAP, and which Mr McCabe seeks to identify through the disclosure. The fallacy on which this is based is that something said by HMRC in the MAP could bind it in the substantive appeal. Not only could it not bind HMRC, it carries no weight in the process of determining the relevant issues in the appeal. Just as Mr McCabe is not bound by the MAP, either as to its outcome or reasoning, neither is HMRC bound by the process or negotiations which led to that outcome. In the appeal, each party will doubtless vigorously argue each point in issue, and nothing in the MAP process hinders them from doing so. In reaching a conclusion on those arguments, the FTT should place no weight on HMRC's interpretation of what was said during the process, or what HMRC decided to challenge or not challenge, and what compromises have been reached. The "process" of the MAP was rightly mentioned by the FTT because it goes to the lack of probative value of the documents sought. The MAP is not part of the appeal to the FTT; it was a collaborative process between the competent authorities of two jurisdictions, the outcome of which Mr McCabe has exercised his right not to accept.

45. As to the alleged inconsistency between the Belgian email and the position taken by HMRC in its pleadings in the substantive appeal, in so far as that is relevant to any error of law we agree with the FTT's reasons, set out at [33] to [39] of the Decision, for concluding that Mr McCabe had not made out his case. In order for the MAP conclusion to be reached, the UK did not need to prove that Mr McCabe's centre of vital interests was in the UK or that he did not have a habitual abode in Belgium. However, we consider that the FTT was somewhat generous to Mr McCabe in affording the argument the level of attention which it did. The FTT stated at [33] that it did not consider it to be of "much relevance" whether HMRC had previously taken a contradictory position in the MAP process, and expressed its conclusion, at [39], as being arrived at "even if it mattered".

46. We would go further; we consider that any such inconsistency would be immaterial for the purposes of the disclosure application. That is for the same reasons that the documents sought have no probative value. Even if HMRC had taken positions in the MAP process which differ from those it seeks to take in the substantive appeal, that is of no significance given that the MAP is a collaborative procedure intended to give effect to the terms of the Treaty. Any admission made in

order to achieve an outcome under the Treaty with which the UK competent authority was satisfied would have no probative weight in the FTT. It follows that any documentation of the paper trail underlying that would be of no assistance to the FTT in disposing of the substantive issues in the appeal on the basis of evidence of primary facts.

47. In the hearing before us, it was notable that the basis on which the documents were argued to be relevant shifted materially. Before the FTT, Mr McCabe's arguments were that in light of the apparent inconsistency in HMRC's approach, "fairness and justice" required that he see the underlying documents; that HMRC had referred to the MAP outcome in its statement of case; and, independently of any inconsistency, the documents were "of clear weight and relevance to the FTT proceedings": see [14] to [16] of the Decision. In Mr Hickey' skeleton argument, the documents were submitted to be probative. It was stated that "the reasoning in respect of the MAP decision will be probative of the facts in issue in the substantive residence appeal (particularly as to the application of Article 4 of the Treaty)".

48. However, in oral argument before us Mr Hickey laid emphasis not on the probative value, but on the submission that the documents sought might lead to a train of enquiry which could help Mr McCabe to advance his case or to challenge HMRC's case.

49. That shift is significant. The FTT did not explicitly apply the approach to categorisation of documents which is set out in the White Book. Nor did it need to for the reasons we have given. However, if one reads across that White Book approach to the FTT's reasoning, the FTT was in substance concluding that the documents were not in categories (1) or (2), but only in category (3), because they were part of the "story" or background, and therefore "relevant" only in that limited sense. The argument that they fell within category (4) was not addressed before the FTT, though it came to form a central plank of Mr Hickey's argument before us.

50. We can find no fault with the FTT's reasoning, so viewed. The facts of this case are different from those in *Ingenious Games*, where it was known that there were relevant documents which had not been disclosed, and it was "entirely possible" they fell in substance within category (2). Even if the FTT had been asked to consider the "train of enquiry" argument, we were not persuaded by Mr Hickey that any of the documents sought properly fell within this category such as arguably to have justified disclosure. This is not a train of enquiry case: all the primary facts are, necessarily, known to Mr McCabe. The possibility that the documents might, as Mr Hickey suggested, help to inform Mr McCabe how to present his case to the FTT is not enough.

51. Stepping back from the detailed reasoning of the FTT's decision as to relevance, which we have found to contain no error of law, the FTT's conclusion as to relevance was not unjust or unfair. Time taken up before the FTT in investigating what happened during the MAP process, what HMRC thought the position was and why they agreed what they agreed would be an unnecessary and disproportionate distraction from the determination of the real issues in the appeal.

52. We therefore reject the appeal relating to the grounds regarding relevance.

Confidentiality

53. Mr McCabe also appeals against the Decision on the ground that the FTT erred in law in relation to its conclusions regarding the alleged confidentiality of the MAP documents sought as being a good reason for not ordering disclosure. Importantly, he does not suggest that confidentiality was not a relevant factor in determining the application, but rather that the FTT gave that factor too much weight.

54. We have set out at [17] above the correct approach by this Tribunal to an appeal against an exercise by the FTT of its discretionary powers of case management. Applying that approach, a finding that a relevant factor was given too much weight should not prompt us to allow the appeal on this ground. It must be shown that the FTT failed to apply the correct principles, or took into account irrelevant considerations, or reached a conclusion which was so plainly wrong that it fell outside the "generous ambit of discretion" entrusted to the FTT.

55. The FTT dealt with confidentiality at paragraphs [42] to [54] of the Decision. It noted that both HMRC and the Belgian tax authorities objected to disclosure. It observed that such objection was not conclusive, so it was necessary to evaluate the reasons for the objection. Both authorities stressed the importance of the discussions forming part of a MAP taking place in confidence. The FTT found some support for that approach in the OECD Commentary on the Model Tax Treaty. It acknowledged that Article 26 of the Treaty permitted the disclosure sought, but noted that it did not compel it.

56. The FTT recognised that transparency was an important consideration, but did not consider that transparency could only be achieved if all documents prepared by competent authorities in connection with a MAP were disclosed to the taxpayer; Mr McCabe was not arguing that he did not understand the MAP decision or reasoning, but rather that he wanted to uncover the discussions which led to the decision. The FTT found that HMRC's published Litigation and Settlement Strategy did not shed much light on the particular task before it.

57. Overall, the FTT concluded that HMRC had put forward a "good, albeit not unassailable" case as to why the documents should not be disclosed. It considered that weight and respect should be afforded to the views of the tax authorities that "a degree of confidentiality is important to the proper functioning of the MAP (both between the UK and Belgium and other tax authorities) and, without that confidentiality, future co-operation between tax authorities might suffer, particularly since that point is echoed in the OECD Commentary": [54].

58. At [55], the FTT weighed up HMRC's good but not unassailable case against its conclusion that the documents were relevant but of low relevance, and in light of the overriding objective concluded that the objections of the two tax authorities set out a good reason why the documents should not be disclosed.

59. As stated at paragraph [8] above, we admitted in evidence additional items relating to the refusal of the Belgian competent authority to disclose the documents to Mr McCabe and his advisers. The first, on which Mr McCabe relies, was a certified translation of a decision of the Belgian Council of State issued on 2 June 2020 (the "Council Decision") together with a witness statement from Mr Frank Mortier, a lawyer with the Belgian firm acting as legal advisers to Mr McCabe, as to the legal effect of the Council Decision. The second, on which HMRC relies, was an exchange of correspondence between the UK and Belgian tax authorities subsequent to the Council Decision. The evidence of Mr Mortier, which we accepted, was that under Belgian law the Council Decision had the effect of nullifying *ab initio* the decision of the Belgian tax authority to refuse disclosure of the requested documents to Mr McCabe. The exchange of correspondence confirms that, notwithstanding the Council Decision, the two competent authorities will continue to resist requests from relevant taxpayers for disclosure of documents related to the MAP process, and that their policy reasons for doing so remain unchanged. The Belgian letter states that, as a result of the Council Decision, the Belgian tax authority will need to make a new decision on the disclosure request, and that "we will maintain the same position i.e. we will refuse taxpayer's request to grant access to the MAP documents again".

60. Mr Hickey submitted that the decisions in *Janet Addo* and *National Crime Agency v Abacha* [2016] I WLR 4375 demonstrated that the FTT erred in its approach to the confidentiality issue. We disagree. The FTT stated in *Janet Addo* that where an issue of confidentiality arises, it is not a bar to disclosure but must be taken into account by the tribunal and balanced against the case for disclosure. That is exactly what the FTT did here; the fact that they reached a result which Mr McCabe is unhappy with does not mean that it made any error of law. We consider that *NCA v Abacha* in fact supports the FTT's approach to Mr McCabe's application. In that case, the Court of Appeal, dealing with an application to inspect documents, set out the position as follows, at [31]:

> … while disclosure and inspection cannot be refused by reason of the confidentiality of the documents in question alone, confidentiality (where it is asserted) is a relevant factor to be taken into account by the court in determining whether or not to order inspection. The court's task is to strike a just balance between the competing interests involved--those of the party asserting an entitlement to inspect the documents and those of the party claiming confidentiality in the documents. In striking that balance in the exercise of its discretion, the court may properly have regard to the question of whether inspection of the documents is necessary for disposing fairly of the proceedings in question: see *Science Research Council v Nassé* [1980] AC 1028, especially pp 1065—1066 (Lord Wilberforce), p 1074 (Lord Edmund-Davies) and pp 1087—1088 (Lord Scarman).

61. That "just balance" fairly describes the way in which the FTT approached its task.

62. We do not consider that the Council Decision has the effect, as contended by Mr Hickey, that the objections of the Belgian tax authority regarding confidentiality are no longer a relevant factor. While we do not need to go into the detail of the Council Decision, it nullifies the decision of the Belgian tax authority to refuse disclosure

broadly on the bases that insufficient reasons were given for the decision and that it was not adequately supported by evidence. It does not reverse it. The subsequent exchange of correspondence between the two tax authorities which we have referred to makes plain that the Belgian authority intends to issue another decision refusing disclosure, presumably taking into account the flaws identified by the Council Decision. Thus, the position taken by the Belgian tax authority as to the importance of MAP negotiations remaining confidential is still material, as it was found to be before the FTT.

63. Mr Hickey made submissions that the FTT had erred in referring to sections of the OECD Commentary on the Model Treaty which relate only to treaties which (unlike the Treaty) contain provisions for a "Joint Commission". However, even if it did, that would not have materially affected the essential elements of its reasoning, as set out at paragraphs [55] to [58] above.

64. We consider that the FTT's assessment of the confidentiality issue and the weight to give it applied the correct principles and was comfortably within the ambit of its discretion in determining the application for disclosure. It is not the role of this Tribunal to decide whether we might have struck the balance in a different way.

65. The appeal on this ground is therefore not made out.

Disposition

66. The appeal is dismissed.

MR JUSTICE FANCOURT
JUDGE THOMAS SCOTT

RELEASE DATE: 21 September 2020