



PROCEDURE – disclosure of documents by HMRC relating to the tax affairs of one appellant to an appellant in a related appeal – s18 Revenue and Customs Act 2005 – relevance of the documents – case management decision of the FTT – appeals dismissed

**UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER**

**Appeal number: UT/2020/0030
UT/2020/0037**

BETWEEN

**(1) MARK MITCHELL
(2) PAUL BELL**

Appellants

-and-

**THE COMMISSIONERS FOR
HER MAJESTY’S REVENUE AND CUSTOMS**

Respondents

**TRIBUNAL: JUDGE JONATHAN RICHARDS
JUDGE JONATHAN CANNAN**

Sitting in public by way of remote video hearing treated as taking place at The Royal Courts of Justice, Strand, London on 20 and 21 July 2021

Julian Hickey, counsel, instructed by Levy & Levy Solicitors for the First Appellant

Barrie Akin, counsel, instructed by Hill Dickinson Solicitors for the Second Appellant

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DECISION

INTRODUCTION

1. The first appellant (“Mr Mitchell”) and the second appellant (“Mr Bell”) separately appeal against a decision of the FTT released on 30 October 2019 (“the Decision”). Mr Mitchell and Mr Bell have separate appeals before the FTT which are due to be heard together by the same tribunal. The FTT had two applications before it, which it dealt with in the course of a case management hearing:

(1) an application by HMRC dated 21 December 2018 that HMRC should be permitted to disclose to Mr Bell certain documents relating to the tax affairs of Mr Mitchell and companies connected with him;

(2) an application by Mr Mitchell dated 18 January 2019 that the same documents should be excluded from evidence at the hearing of the two appeals.

2. Mr Mitchell and Mr Bell are both shareholders in two companies, Universal Payroll Services Ltd (“Payroll”) and Universal Project Services Ltd (“Project” and together with Payroll the “Universal Companies”). HMRC considered that there were inaccuracies in the Universal Companies’ VAT returns submitted between 2010 and 2014 involving claims for input tax credit that was not due. HMRC assessed the Universal Companies to recover that input tax, and also assessed them to penalties determined on the basis that the inaccuracies were deliberate. The Universal Companies subsequently went into liquidation and have not appealed the assessments or the penalties.

3. HMRC also used their power under paragraph 19(1) of Schedule 24 to the Finance Act 2007 to give personal liability notices (“PLNs”) to Mr Mitchell and Mr Bell, making each liable to 50% of the penalties charged on the companies. Paragraph 19(1) provides as follows:

Where a penalty under paragraph 1 is payable by a company for a deliberate inaccuracy which was attributable to an officer of the company, the officer is liable to pay such portion of the penalty (which may be 100%) as HMRC may specify by written notice to the officer.

4. An “officer” for these purposes is defined by paragraph 19(3) as referring to a director, which includes by virtue of ss250 and 251 Companies Act 2006, a de facto director and a shadow director.

5. Thus paragraph 19(1) imposes two preconditions to the imposition of a PLN: first a PLN can only be imposed on an “officer” of the company concerned; second, the deliberate inaccuracy that led to the company being charged a penalty must be “attributable to” that officer. The PLNs relevant in these proceedings were given on the basis that both appellants were de facto or shadow directors of both Payroll and Project, and so were “officers” and that each company’s deliberate inaccuracy was “attributable to” both appellants. The liability of each appellant is approximately £6m. Both appellants deny that they were de facto or shadow directors.

6. On 9 May 2018, the FTT directed that the appellants’ appeals should proceed together and be heard together. It also directed HMRC to serve a combined statement of case which they did on 9 July 2018. In that statement of case, HMRC referred to investigations under Code of Practice 9 (“COP 9”) that they had made into the tax position both of Mr Mitchell and of companies that he controlled and to information that Mr Mitchell provided to them in the course of those investigations. Mr Bell wrote to HMRC to request early disclosure of some of the documents that HMRC had referred to in their statement of case, including some of the material relating to HMRC’s COP 9 investigation. On making enquiries with Mr Mitchell, HMRC ascertained that he objected to disclosure of some of these documents.

7. Meanwhile, HMRC served their list of documents on 31 October 2018. That contained references to a number of documents connected with HMRC's COP 9 investigations. However, because Mr Mitchell had objected to disclosure of certain documents referred to in their statement of case, HMRC did not provide copies of all documents on their list to Mr Bell. Instead, they made the application referred to above that they should be permitted to disclose to Mr Bell certain documents on the list. This was followed by Mr Mitchell's application that the same documents should be excluded from evidence.

8. By the time of the case management hearing, it was Mr Bell's case that Mr Mitchell was responsible for running the Universal Companies and he, Mr Bell, had no involvement. Mr Mitchell's case was that he was not responsible for running the companies, but he had made no allegation in his grounds of appeal that it was Mr Bell who was responsible. The FTT said at [53] that Mr Mitchell and Mr Bell were "blaming each other". Given the case that Mr Mitchell said he was making, we will instead use the expression "denying responsibility" as a shorthand.

THE DECISION OF THE FTT

9. The following features of the applications before the FTT were unusual:

(1) HMRC were applying for a direction that they be permitted to disclose documents to Mr Bell. Normally, disclosure applications are made by a party wishing to obtain disclosure of documents from another person. Mr Bell made no application for HMRC to be directed to disclose documents to him. HMRC made their application, at least in part, because they wanted to be sure that they were not breaching any confidentiality obligation, including their obligations under s18 of the Commissioners of Revenue & Customs Act 2005, by sending copies of documents on their list to Mr Bell.

(2) Mr Mitchell was making an application that HMRC be precluded from relying on certain documents set out in their documents list. However, at the time he made that application the only indication of how (if at all) HMRC might seek to rely on those documents came from HMRC's statement of case and the fact that the documents were included on their list. HMRC are yet to serve their witness evidence.

(3) Conceptually HMRC might wish to defend Mr Mitchell's application by asserting that the documents in question were relevant. However, if they did so by the obvious means of taking the FTT through the documents, Mr Bell would be notified of the contents of those documents which was precisely what Mr Mitchell did not want to happen. For that reason a procedure was agreed, referred to at [10] of the Decision, under which any submissions on the detailed contents of the documents would be made in private, without the attendance of Mr Bell or his advisers. That procedure was echoed in the way the FTT dealt with the specific contents of the documents in its written decision: Mr Bell received a version of the Decision that was redacted so as to remove references to the detail of the documents, with Mr Mitchell and HMRC receiving an unredacted decision.

10. Given the issue set out at [9(3)] above, the parties agreed that the documents could be divided into various generic "levels" that would enable submissions to be made on them without a need to refer to the documents themselves. Moreover, the FTT agreed to structure its decision by deciding which levels of documents should be admitted into evidence with the parties to agree after the hearing which documents fell into which level. At [37] of the Decision, the FTT described the levels of document as follows:

(1) Level 1. A section of any document which directly refers to the Universal companies or either of them (other than simply a bare mention of their name).

(2) Level 2. A section of any document which shows interaction between the Universal companies and/or either Mr Mitchell or Mr Bell. As I have said it was agreed by Mr Chapman and Mr Hickey that this sub-divided as follows:

(a) Any mention of direct interaction by either Mr Mitchell and/or Mr Bell with either or both of the Universal companies;

(b) Any mention of interaction between the Universal companies or either of them with other companies controlled or allegedly controlled by Mr Mitchell and/or Mr Bell;

(c) Any mention of interaction between Mr Mitchell and Mr Bell even if in a context outside the Universal companies.

(3) Level 3 – Any mention in a document which goes to show Mr Mitchell’s interactions with other companies which he controlled or allegedly controlled, and in particular his interactions with companies which had dealings with the Universal companies.

(4) Level 4. Anything which went to Mr Mitchell’s or Mr Bell’s credibility generally and in particular the credibility with which they presented the affairs of companies which they controlled or allegedly controlled.

11. We have seen both versions of the Decision and the hearing before us took a similar format to that before the FTT, also with the agreement of the parties. We have been able to set out our reasoning without specific reference to matters which would otherwise be confidential to Mr Mitchell and as such it has not been necessary for us to redact this decision.

12. The FTT’s decision was commendably succinct, despite the quite complicated way in which the applications fell to be considered. At [15] to [17] the FTT briefly described the documents in issue. Originally, 18 of the documents on HMRC’s list of documents were in issue, in the sense that HMRC were applying for permission to disclose them to Mr Bell. In the event, HMRC agreed that they would not themselves seek to rely on 7 of those documents or seek to disclose them to Mr Bell. Mr Bell, of course had not seen those documents but the FTT records at [16]:

16. ... Mr Akin (for Mr Bell) concurred with HMRC’s position: he did not ask for disclosure of anything HMRC had agreed with Mr Mitchell they would not rely upon.

13. HMRC produced a supplementary list of documents just before the hearing which was not the subject of submissions, save that the FTT records that the parties agreed that they would be dealt with by reference to the FTT’s decision in relation to the 11 documents remaining in issue.

14. The FTT went on to consider the legal principles applicable to the applications at [18] to [32]. In particular, the FTT noted its powers to direct disclosure and to exclude evidence under Rule 5(3)(d) and Rule 15(2)(b) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (“the Rules”).

15. The FTT also referred to s18 Commissioners for Revenue and Customs Act 2005 which makes provision for the confidentiality of certain information held by HMRC:

(1) Revenue and Customs officials may not disclose information which is held by the Revenue and Customs in connection with a function of the Revenue and Customs.

(2) But subsection (1) does not apply to a disclosure—

(a) which—

(i) is made for the purposes of a function of the Revenue and Customs, and

(ii) does not contravene any restriction imposed by the Commissioners,

(b) ...

(c) which is made for the purposes of civil proceedings (whether or not within the United Kingdom) relating to a matter in respect of which the Revenue and Customs have functions,

16. The FTT noted the following comments made by Lord Toulson in relation to this provision in *R (oao Ingenious Media Holdings plc and another) v HMRC* [2016] UKSC 54:

... I take s 18(1) to be intended to reflect the ordinary principle of taxpayer confidentiality ...to which s 18(2)(a)(i) creates an exception by permitting disclosure to the extent reasonably necessary for HMRC to fulfil its primary function.

17. The FTT then said at [23]:

23. I was not called to determine the exact boundaries of the exceptions in s 18(2) as HMRC wisely chose not to disclose to Mr Bell documents to which Mr Mitchell had objected. It was taken as read that if I admitted all or any part of those disputed documents into the hearing, they ought to be disclosed to Mr Bell. To the extent that I did not, they should not be disclosed to Mr Bell.

18. Pausing there, this passage shows that the FTT was approaching matters as if the question whether HMRC should disclose documents to Mr Bell was parasitic on the question whether HMRC should be entitled to rely on those documents as evidence so that (i) if HMRC was entitled to rely on them, they should be disclosed but (ii) if HMRC was not entitled to rely on them, they should not be disclosed. Such an approach left no room for a third possibility, namely that there were some documents that should be disclosed to Mr Bell even if HMRC were not entitled to rely on them as evidence. We return to the significance of this point when considering the detailed grounds of appeal.

19. The FTT then considered various authorities as to the meaning of relevant evidence. It identified that whilst irrelevant evidence should be excluded, not all relevant evidence should be admitted. It went on to describe the position of the parties in relation to relevant evidence as follows:

31. There may be a number of compelling reasons to exclude relevant evidence; it is often excluded if produced too late for the other party to have a proper chance to respond. But in this case, with one exception, I did not understand Mr Mitchell to be saying relevant material should be excluded nor did I understand him to put forward grounds on which it should be excluded. The relevant material might be prejudicial to Mr Mitchell (in the sense he would not wish the public to know about it), but I did not understand him to suggest it should be excluded on that basis. His position was that *irrelevant* material should be excluded as it included prejudicial material. And the parties were agreed on this.

32. The exception was, although Mr Hickey did not phrase it quite like this, that relevant material should be excluded where it was mixed up with lots of irrelevant, prejudicial material if the matter of which it was potentially probative could be proved by reliance on other documents which were already in evidence in the appeal. Mr Chapman did not agree; he considered all relevant material should be admitted whether or not necessary to prove the point; after all, the more evidence to prove a point, the more likely HMRC were to be able to prove it. I deal with this point below in context.

20. The FTT applied those principles in determining the two applications at [33] to [64]. In applying the principles, the FTT made some references to the nature of the disputed documents and the arguments of Mr Hickey for Mr Mitchell and of Mr Chapman QC then acting for HMRC. As mentioned, those references were redacted. We shall focus at this stage on what the FTT said in relation to the Levels that are the subject of the appeal to this Tribunal.

21. Level 2B documents were defined as those that mentioned some interaction between Payroll or Project and some other companies controlled, or allegedly controlled, by Mr Mitchell

or Mr Bell. Some such companies were mentioned by name in HMRC's statement of case and some were not. The FTT concluded that this distinction was important concluding, in relation to Level 2B documents:

(1) To the extent that a Level 2B document referenced companies mentioned by name in HMRC's statement of case, that document should be admitted into evidence and HMRC should disclose it to Mr Bell.

(2) To the extent that a Level 2B document referenced companies not mentioned in HMRC's statement of case, that document should neither be admitted into evidence nor disclosed to Mr Bell. The FTT said that if HMRC wanted to rely on evidence about the relationship between Mr Mitchell and other companies then they would need to amend their statement of case.

22. The FTT justified this distinction by reasoning at [47] and [48] of the Decision that the relationship with companies named in HMRC's statement of case formed part of HMRC's pleaded case, but the relationship with other companies did not. Following up on the point we have made at [18] above, the FTT therefore approached Level 2B documents by considering, in effect, whether they were relevant to HMRC's pleaded case. It did not explicitly consider whether there were Level 2B documents which should be disclosed to Mr Bell even if they did not obviously relate to the case that HMRC had pleaded.

23. Level 2C documents were those mentioning some interaction between Mr Mitchell and Mr Bell in a context outside the Universal Companies. The FTT considered that the relationship between the parties at the time was relevant since both Mr Bell and Mr Mitchell were, in their respective appeals against the PLNs seeking to downplay the extent to which they were responsible for the management of the Universal Companies. In particular, Mr Mitchell had said in a meeting with HMRC that, if either of the two appellants were "responsible" (presumably for the VAT inaccuracies), that person was Mr Bell. Evidence of the wider relationship between the parties could help to establish the accuracy of that statement. The FTT therefore applied a slightly different approach to Level 2C documents from that it had applied to Level 2B documents, concluding at [54] of the Decision that Level 2C documents were "relevant and admissible and should be admitted into the appeal and copied to Mr Bell". Whilst HMRC had not specifically pleaded a reliance on the wider relationship, the FTT considered that relationship to be relevant in circumstances where, as the FTT put it, each appellant would be blaming the other.

24. Level 3 documents concerned interactions between Mr Mitchell and companies which he alone controlled, or was said to control. The FTT applied the same reasoning as it had in relation to Level 2B concluding that these documents could only be relevant to the extent that those other companies were referred to in the statement of case. To that extent only, therefore, HMRC would be permitted to rely on Level 3 documents and were directed to disclose those documents to Mr Bell.

25. Level 4 documents were defined as any document containing anything going to Mr Mitchell's or Mr Bell's credibility generally and, in particular, the credibility with which they presented the affairs of companies which they controlled or allegedly controlled. The FTT considered that Mr Mitchell's credibility was in issue in the appeals in so far as HMRC did not accept the credibility of his evidence as to his involvement in the running of the Universal Companies. However, the FTT did not consider that his credibility was "in general" in issue and HMRC had not pleaded any case that Mr Mitchell's statements about his other tax affairs were unreliable or any case based on similar fact evidence. Nor had HMRC pleaded any particulars of fraudulent conduct on Mr Mitchell's part. Accordingly, the FTT concluded at

[64] that Level 4 material was “not relevant” with the touchstone of relevance being whether it related to HMRC’s pleaded case.

THE GROUNDS OF APPEAL

26. The FTT granted permission to appeal to Mr Mitchell and Mr Bell. The grounds on which permission was granted to Mr Mitchell may be summarised as follows:

(1) The FTT applied too broad an interpretation as to the relevance of documents. Documents in Level 2C and Level 3 were simply not capable of being relevant. It was only the conduct of the Universal Companies that was relevant to the PLNs. The conduct of other companies was “necessarily irrelevant”. Moreover, in relation to Level 2C, given the central role that HMRC’s statement of case played in setting out the issues between the parties, no reasonable tribunal could have decided that HMRC should be entitled to rely on documents for factual propositions that had not been trailed in HMRC’s statement of case.

(2) The FTT failed to recognise the inherent prejudice to Mr Mitchell in admitting the documents in Level 2C and Level 3.

27. In relation to both these grounds of appeal, Mr Mitchell says that the FTT made errors of law, either because it applied the wrong principles or because it reached a decision which no person acting judicially and properly instructed in the relevant law could have come to (see *Edwards (HMIT) v Bairstow* (1955) 36 TC 207, HL).

28. The grounds on which permission was granted to Mr Bell may be summarised as follows:

(1) The FTT was wrong to restrict the documents to be disclosed falling within Level 2B or Level 3 by reference to those relating to companies referred to in HMRC’s statement of case. Even to the extent the documents referred to other companies, they had the ability to help Mr Bell’s appeal or hinder that of Mr Mitchell and so the FTT should have directed HMRC to disclose Level 2B and Level 3 documents to Mr Bell.

(2) In a similar vein, the FTT adopted an unduly restrictive approach to the “relevance” of Level 4 documents. It looked at matters from the perspective of Mr Mitchell’s appeal by focusing on the extent to which HMRC had pleaded questions of Mr Mitchell’s credibility in their statement of case. The FTT should have concluded that, whatever the position HMRC and Mr Mitchell were taking, Level 4 material was relevant to Mr Bell’s appeal.

29. Mr Bell also argued that the FTT’s errors fell within the scope of the *Edwards v Bairstow* principle either because the FTT applied the wrong principles in determining the question of relevance, or because it reached a decision which no person acting judicially and properly instructed in the relevant law could have come to.

30. HMRC did not apply for permission to appeal against the Decision. However, in their capacity as respondents, they served a Response under Rule 24 of the Upper Tribunal Rules in which they opposed Mr Mitchell’s appeal and supported Mr Bell’s appeal. Since HMRC had not sought permission to appeal, they did not invite us to take a different approach from the FTT as to the documents that they were entitled to include on their list. They were content to abide by the limitations that the FTT had imposed in the Decision, although they did express some concern as to how the various “Levels” of documents were to be identified and whether documents on their list needed to be redacted. They did, however, support Mr Bell’s appeal and invited us to conclude that a wider category of documents should be disclosed to Mr Bell than the FTT had directed.

31. At the beginning of the hearing, we raised with the parties Mr Bell's entitlement to appeal against the Decision. Mr Bell had not made any application to the FTT for disclosure. Instead, HMRC had applied for a direction to disclose documents to Mr Bell. Neither of the applications that the FTT considered in the Decision was made by Mr Bell. Nevertheless, Mr Bell is entitled to be heard in this appeal since he is a party to the FTT proceedings and s11 of the Tribunals, Courts and Enforcement Act 2007 confers a right of appeal on any party. He clearly has an interest in the outcome of the applications made by HMRC and Mr Mitchell.

PRINCIPLES COMMON TO BOTH APPEALS

Appeals against case management decisions

32. Both appeals are against case management decisions. The position in relation to such appeals was summarised by Sales J, as he then was in *HM Revenue & Customs v Ingenious Games LLP* [2014] UKUT 0062 (TCC) at [56]:

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 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].

Relevant provisions of the Rules

33. The parties are agreed that the FTT had power, by Rule 5(3)(d) and Rule 15(2)(b) of the Rules to grant either or both HMRC's application and Mr Mitchell's application. In particular, by Rule 15(2)(b), the FTT had power to admit or exclude evidence, including power to exclude evidence that would otherwise be admissible if:

... it would otherwise be unfair to admit the evidence.

34. Rule 2 sets out the overriding objective of the Rules: to enable the FTT to deal with cases fairly and justly. By Rule 2(3) the FTT was required to seek to give effect to that overriding objective when exercising its powers under Rule 5(3)(d) and Rule 15(2)(b).

35. Rule 25(2) explains the function of HMRC's statement of case. As well as stating the legislative provisions under which the decision under appeal was made, it must set out HMRC's "position in relation to the case".

36. Rule 27 of the Rules sets out the requirement for a list of documents in the following terms:

(2) Subject to any direction to the contrary, within 42 days after the date the respondent sent the statement of case (or, where there is more than one respondent, the date of the final statement of case) each party must send or deliver to the Tribunal and to each other party a list of documents--

(a) of which the party providing the list has possession, the right to possession, or the right to take copies; and

(b) which the party providing the list intends to rely upon or produce in the proceedings.

- (3) A party which has provided a list of documents under paragraph (2) must allow each other party to inspect or take copies of the documents on the list (except any documents which are privileged)

We note that the Rule envisages that there might be multiple parties to an appeal by requiring a party to send a list of documents to “each other party” and similarly providing for “each other party” to have a right to inspect or take copies of documents appearing on a list.

The role of the pleadings

37. The FTT did not set out in detail the appellants’ grounds of appeal or HMRC’s case as set out in its statement of case. However, it clearly had these matters in mind and rightly considered that the issues on the two appeals must be defined by the appellants’ grounds of appeal and HMRC’s statement of case. Further, the question of relevance must be determined by reference to the issues on the appeal.

38. It is convenient at the outset therefore to describe the grounds of appeal submitted by Mr Mitchell and Mr Bell in support of their appeals to the FTT, and HMRC’s combined statement of case. The grounds of appeal of both appellants were brief.

39. Mr Mitchell simply stated that he did not agree with HMRC’s decisions that (i) he was a shadow director of the Universal Companies and (ii) that the VAT inaccuracies were on such a scale that he could not have been unaware of them¹.

40. Mr Bell contends that he took no active role in running the companies and was not a shadow director. HMRC have failed to establish that there was a deliberate inaccuracy in the companies’ VAT returns. He was unaware how the VAT returns were prepared, who prepared them and who submitted them. He did not provide guidance or advice and cannot be said to have acted consciously with the intent of over-claiming input tax.

41. It was also made clear to the FTT at the hearing that Mr Bell’s case was not simply that he was not responsible for running the companies, but that Mr Mitchell was responsible for running the companies. It was acknowledged that Mr Bell would be applying to amend his grounds of appeal in due course.

42. HMRC’s statement of case sets out the background to the Universal Companies, the circumstances in which they were assessed to VAT and the circumstances in which the PLNs were given to the appellants. The assessments were made on the basis that input tax had been wrongly claimed on supplies said to have been made by two companies partly owned and controlled by Mr Bell (“Margal” and “Arion” respectively). In particular, the Universal Companies did not pay for those supplies within 6 months of supply, alternatively no evidence of any supply had been provided and there were no valid VAT invoices.

43. The statement of case also refers to meetings with Mr Mitchell in the course of HMRC’s enquiry into the VAT position of the Universal Companies and to a COP 9 investigation which commenced on 7 August 2013 into the tax affairs of Mr Mitchell and companies with which he was connected. The statement of case then refers to a disclosure made by Mr Mitchell in respect of the Universal Companies in a report prepared by BDO and dated 4 December 2015.

44. HMRC set out their case that Mr Mitchell was a shadow director or de facto director of the Universal Companies at [47] of the statement of case. In particular, they rely upon:

¹ BDO had given HMRC fuller particulars of Mr Mitchell’s case in a letter dated 5 January 2018 appealing against, and requesting a review of, HMRC’s decision to issue him with a PLN. However, that letter was not referred to, or attached, when Mr Mitchell notified his appeal to the FTT. The FTT referred, at [33] of the Decision to the relative lack of detail in both Mr Mitchell’s and Mr Bell’s grounds of appeal.

(1) Various statements made by Mr John Bounds, who was the sole director of the Universal Companies, as to the circumstances in which he became a director and to the effect that Mr Mitchell made all the strategic decisions in relation to the companies.

(2) Statements made by Mr Sanjay Bansal, the Universal Companies' accountant, to the effect that he took instructions from Mr Mitchell who was an intermediary to Mr Bell.

(3) The fact Mr Mitchell signed certain company documents in 2008 and 2009 after he had formally ceased to be a director in March 2007.

(4) Mr Mitchell's relationship with the companies' bankers.

(5) Mr Mitchell's salary from the companies was comparable to that of Mr Bounds.

45. HMRC set out their case that Mr Bell was a shadow director or de facto director of the companies at [48] of the statement of case. In particular, they rely upon:

(1) All the matters referred to in [47] in connection with Mr Mitchell.

(2) Statements made by Mr Mitchell that Mr Bell made all the decisions in the companies and provided staff for the companies.

(3) Mr Bell appeared to have signed VAT returns for one of the companies in the period August 2007 to August 2009.

(4) Mr Bell's salary from the companies was comparable to that of Mr Bounds.

46. The statement of case then goes on to say at [49] and [50] why the penalties for deliberate inaccuracy should be attributed to Mr Mitchell and Mr Bell. Essentially, this was because both were shadow directors or de facto directors, and as such given the size of the inaccuracies it was inconceivable that they did not know about and deliberately procure the inaccuracies. In relation to Mr Bell, reliance was also placed on the fact that he partly owned Arion and Margal who had made the supplies on which the Universal Companies had allegedly overclaimed input tax.

MR MITCHELL'S APPEAL – DISCUSSION

47. Mr Mitchell's appeal concerned Level 2C and Level 3 documents. In the paragraphs that follow, we will explain why the FTT made no error of law in reaching the conclusions it did as regards those documents. We mention at the outset a specific point that, in our judgment, means that his appeal as regards Level 3 documents must necessarily fail.

48. The FTT decided that only Level 3 documents relating to companies controlled by Mr Mitchell that were referred to in HMRC's statement of case could be included on HMRC's list of documents. However, HMRC referred to no companies that Mr Mitchell controlled, or allegedly controlled, in their statement of case (although they did refer to companies that Mr Bell was said to control). Therefore, the FTT did not actually permit HMRC to include any Level 3 documents on their list which renders Mr Mitchell's appeal against this aspect of the FTT's decision academic.

Ground 1

49. Ground 1 is that the FTT applied too broad an interpretation as to the relevance of Level 2C and Level 3 documents. Mr Hickey acknowledged that this was a straightforward challenge on *Edwards v Bairstow* principles.

50. Given the applications before it, the FTT had to consider two separate issues. The first, which was the province of HMRC's application, was whether HMRC should be permitted to disclose certain documents on their list to Mr Bell; the second, which was the province of Mr

Mitchell's application, was whether any documents on HMRC's list should not be admitted into evidence.

51. Both parties were agreed that there was a link between these two issues in that documents permissibly included on HMRC's single list of documents served under Rule 27 should be available to both Mr Bell and Mr Mitchell. During his oral submissions, Mr Hickey clarified, in response to our questions, that he was not arguing that the FTT needed to modify its approach to Rule 27 to accommodate the fact that these proceedings involve two taxpayers with competing interests and cases. He accepts therefore that, to the extent that HMRC permissibly include documents relating to Mr Mitchell's COP 9 enquiry on their list, HMRC are entitled to provide those documents to Mr Bell. He does not argue that the FTT was obliged to temper its approach to the question whether HMRC properly included documents on their Rule 27 list by its knowledge that any documents on that list would be copied to Mr Bell. His challenge under Ground 1 is that the FTT was not entitled to conclude that certain of the documents in question were permissibly included in HMRC's list. He said that Mr Mitchell would advance precisely the same challenge, in precisely the same terms, if Mr Bell was not also party to these proceedings.

52. In most straightforward situations involving a dispute between a single taxpayer and HMRC, there may be no practical incentive to argue that particular documents should not appear on HMRC's list of documents. Most of those documents will already be known to the taxpayer. Many indeed will have been provided by the taxpayer in the course of HMRC enquiries leading up to the decision in dispute. Nevertheless, we accept that if HMRC purported to include irrelevant documents in a list of documents, the FTT has power to intervene and direct that the documents should be removed from the list. If it does so, the usual obligation in Rule 27, to provide other parties with copies of the documents, or the ability to inspect them, would fall away.

53. Mr Mitchell's first argument is that Level 2C and Level 3 documents are necessarily "irrelevant" to these proceedings because those documents, by definition, do not relate to the Universal Companies, in respect of whose tax affairs HMRC have imposed the PLN. Mr Hickey was correct to acknowledge in his oral submissions that, to succeed in this argument, he would need to establish that the FTT's decision, that the Level 2C and Level 3 documents were relevant, was "plainly wrong", to use the words of Sales J in *Ingenious Games*. The FTT correctly directed itself on the test of relevance at [25] of the Decision by quoting from the speech of Lord Steyn in *R v Randall* [2004] WLR 56, in which he said at [20]:

A judge ruling on a point of admissibility involving an issue of relevance has to decide whether the evidence is capable of increasing or diminishing the probability of the evidence of a fact in issue. The question of relevance is typically a matter of degree to be determined, for the most part, by common sense and experience....

54. In our judgment, for reasons that follow, the FTT was not "plainly wrong" to conclude that Level 2C and certain Level 3 documents were properly included on HMRC's list of documents.

55. A key issue before the FTT was whether either Mr Mitchell, or Mr Bell were shadow directors or de facto directors of the Universal Companies. Mr Hickey is correct to observe that their respective roles in the affairs of those companies was central to that question. However, he overstates matters by submitting that considerations of how Mr Mitchell and Mr Bell interacted outside the context of Payroll and Project was "necessarily irrelevant". Mr Mitchell and Mr Bell had evidently worked together at other companies. How they interacted in a context outside that of the Universal Companies (which was the subject of Level 2C documents) had the ability to cast some light on how they might have interacted in relation to

the Universal Companies. Moreover, Mr Bell's case was that it was Mr Mitchell and not Mr Bell who had responsibility for managing the Universal Companies. The FTT was entitled to conclude that the way they worked on other business ventures had the capacity to shed some light on whether Mr Bell was correct.

56. Level 3 documents had the ability to show how Mr Mitchell interacted with companies that he did control. The FTT was entitled to conclude that these documents were relevant. For example, if Mr Mitchell was "hands off" in his interactions with companies that he controlled that might call into question whether he was, as Mr Bell asserted, "hands on" in his dealings with the Universal Companies.

57. Once HMRC had put forward a cogent explanation as to the relevance of Level 2C and Level 3 documents, the FTT was entitled to conclude that the documents were sufficiently relevant to be included on their list of documents. At the early stage of proceedings at which the FTT was required to consider the question, it would have been premature for the FTT to conclude that Level 2C and Level 3 documents were "necessarily irrelevant".

58. The next strand of Mr Mitchell's arguments on Ground 1 focused on HMRC's statement of case. He submits that HMRC had not pleaded any reliance on the nature of the relationship between Mr Mitchell and Mr Bell (Level 2C) or of the way that Mr Mitchell interacted with companies that he controlled (Level 3). In those circumstances, even if it was possible to articulate a way in which the documents might be "relevant" in a broad sense, they still should not have been admitted into evidence in the absence of a sufficiently close link with HMRC's pleaded case.

59. Mr Mitchell correctly emphasised the important function that statements of case perform, in both the courts and the tribunals. In *Burns v Financial Conduct Authority* [2017] EWCA Civ 2140, Kitchin LJ, speaking of statements of case produced by the Financial Conduct Authority in proceedings in the Upper Tribunal said, at [110] that:

... statements of case perform the vital function of informing each party, and the tribunal, of the other party's case, thereby enabling them to direct their evidence and submissions to the issues identified by the statements. In particular, the respondent's statement informs the applicant of the case that he has to meet.

In *HMRC v IAC Associates* [2013] EWHC 4382 (Ch), Nugee J said at [33] that, when dealing with an application for specific disclosure, the test of relevance 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.

60. However, HMRC's statement of case was not the only articulation of a party's position that was relevant. There was also Mr Mitchell's and Mr Bell's position, set out in their grounds of appeal, to consider. Mr Mitchell's grounds of appeal notified to the FTT in particular were so brief that they gave no real indication of the kind of case he would be making. The FTT was, therefore, entitled to have regard to the explanations they gave at the hearing as to how they would be making their respective cases.

61. Mr Mitchell and Mr Bell had explained to the FTT that they were both denying responsibility or, as the FTT put it at [53], "blaming each other". Mr Bell was making a positive case that Mr Mitchell was responsible. Whether Mr Bell or Mr Mitchell were shadow directors or de facto directors would depend on the role that they had each played in the management of the Universal Companies. The separate question of whether the VAT inaccuracies were "attributable to" either or both of them might involve a consideration of their respective degrees

of involvement with the companies' decision to claim credit for input tax that was not due. All of those matters are largely within the appellants' knowledge and outside HMRC's knowledge. Therefore, to make good their case, HMRC would necessarily be relying on information that both appellants had provided to them. As part of the COP 9 investigations, Mr Mitchell had provided HMRC with information on how he said he interacted with a number of companies and on his version of his relationship with Mr Bell. That has the potential to be relevant. For example, if Mr Mitchell's account of his relationship with Mr Bell was, or could be seen as, shedding light on who was responsible for the management of the Universal Companies and who had a role in VAT compliance, that could be relevant. Similarly, his explanation of how he interacted with companies he controlled might shed some light on how he interacted with the Universal Companies.

62. It is true that HMRC had not pleaded any reliance on the relationship between Mr Mitchell and Mr Bell in their statement of case. However, neither Mr Mitchell nor Mr Bell had, in their respective grounds of appeal, explained the precise basis on which they were "denying responsibility". Since they had such little information on the nature of Mr Mitchell's and Mr Bell's grounds of appeal when they were drafting their statement of case, it would have been difficult for HMRC to plead particulars of the relationship on which they relied. It only became apparent at the hearing before the FTT that Mr Bell was making a positive case that Mr Mitchell was responsible for running the Universal Companies thereby making the wider relationship between the taxpayers of relevance. In those circumstances, it was entirely reasonable for the FTT to decide whether documents were properly included on HMRC's list by reference both to the parties' pleaded cases and also the appellants' explanations, given at the hearing, as to how they expected to advance their appeals.

63. It is also significant that, by Rule 27, HMRC's list of documents was to include those documents which they intended to "rely upon **or** produce" (our emphasis). Conceptually, HMRC might wish to "produce" documents touching on the relationship between Mr Mitchell and Mr Bell, or on the way that Mr Mitchell dealt with companies that he controlled, to challenge evidence that Mr Mitchell gave even if they were not positively relying on such documents. The FTT was therefore entitled to be cautious about excluding Level 2C and Level 3 documents at an early stage in proceedings particularly given the unspecific nature of Mr Mitchell's appeal. No error of law meeting the high threshold in *Ingenious Games* was present and we dismiss Mr Mitchell's appeal on Ground 1.

Ground 2

64. Ground 2 is that the FTT failed to recognise the inherent prejudice to Mr Mitchell in admitting the documents in Level 2C and Level 3.

65. The FTT recognised that there are circumstances where relevant evidence may be excluded, and cited what was said by Nugee J in *HM Revenue & Customs v IAC Associates* 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.

66. There is an issue on this appeal as to the extent of Mr Hickey's submission to the FTT that certain relevant evidence should be excluded. We have already quoted from paragraph [31] of the Decision in which the FTT set out its understanding that Mr Mitchell was not advancing a "fall back" argument to the effect that, even if documents were relevant, the FTT should nonetheless exercise its power under Rule 15(2)(b)(iii) of the Rules to exclude it.

67. Mr Hickey submits that the FTT misunderstood his submissions. He says that his position before the FTT was that (i) Level 2C and Level 3 documents were not relevant and therefore should not be admissible for that reason but that (ii) even if the documents were relevant, it would be unfair to admit them.

68. There is some support for Mr Hickey's submission in his skeleton argument that was before the FTT. In paragraph 1, Mr Hickey explained that Mr Mitchell opposed HMRC's direction for disclosure in respect of documents identified in Appendix 1 on the ground that:

- a) the only documents which should be disclosed to the Second Appellant and relied upon by the Respondents and/or relied upon by the Second Appellant should be those relevant to the substantive tax appeal...and further or alternatively,
- b) such documents, even if relevant (which is not accepted), should be excluded on the basis that it would be unfair to admit the documents into evidence because the material relates to the personal tax position of the First Appellant and/or companies which were provided in consequence of the First Appellant entering into a confidential Contractual Disclosure Facility ("CDF") with HMRC.

69. Later in his skeleton argument, Mr Hickey drew the FTT's attention specifically to Rule 15(2)(b)(iii) of the Rules. He pulled the strands of his written submissions together in a section of his skeleton argument headed "Part 4: Application of the law to the documents" saying:

33) In overview, on the basis of the foregoing principles, the First Appellant respectfully submits that:

- a) The information contained in the documents identified in Appendix One are not relevant to the substantive tax dispute...
- b) Alternatively, even if relevant (which is not accepted), for the material to be admitted it would only operate to the prejudice of the First Appellant by reference to the disclosure of material concerning the Code of Practice 9 civil investigation in respect of unrelated matters (which would then be available for public consumption once any FtT decision is published). The material relating to the Code of Practice 9 investigation into the First Appellant would be inherently "unfair" since it has no relevance and no probative value in respect of the dispute between the parties.

70. Paragraphs 1(b) and 33(b) of Mr Hickey's skeleton argument before the FTT are not entirely consistent. Paragraph 1(b) certainly suggests that Mr Mitchell was saying that even if they were relevant, it would be unfair to admit the disputed documents into evidence because Mr Mitchell had provided them in consequence of entering into a "confidential Contractual Disclosure Facility". By contrast, paragraph 33(b) makes no assertion that Mr Mitchell had any expectation of confidentiality. The "unfairness" referred to in paragraph 33(b) is expressed to arise because the documents in question are not relevant and of no probative value.

71. We have no way of telling how Mr Hickey's oral submissions before the FTT were framed and whether they emphasised the arguments pursued in paragraph 1(b) or the arguments pursued in paragraph 33(b). In its decision granting permission to appeal, the FTT did not say how it had interpreted Mr Hickey's arguments and no transcript of the hearing was made available to us. In those circumstances, we are not satisfied that the FTT misunderstood the arguments that Mr Hickey was making, not least since we regard paragraph [31] of the Decision as consistent with the arguments advanced in paragraph 33(b) of Mr Hickey's skeleton in which he provided an overview of the arguments that had been advanced up to that point.

72. In any event, during the hearing before us, Mr Hickey retreated somewhat from the proposition outlined in paragraph 1(b) of his FTT skeleton argument, namely that the confidential nature of the COP 9 process and contractual disclosure facility would make it unfair for the disputed documents to be admitted into evidence. In our judgment, he was right to do so. Section 7.1 of HMRC's guidance on COP 9 enquiries makes it clear that they will use information a taxpayer provides at meetings taking place under COP 9 for the purposes of assessing tax liabilities and says explicitly:

We may also seek to give evidence of this in any appeal proceedings, or disclose the information to other organisations where appropriate and lawful.

73. Therefore, even if Mr Hickey had, before the FTT, relied on an argument that it would be unfair for material emanating from HMRC's COP 9 investigations to be admitted into evidence because of Mr Mitchell's expectations of confidentiality, the FTT would have made no error of law in rejecting that argument.

74. Before us, Mr Hickey made further points about "unfairness" arguing that references to a number of additional companies in the COP 9 material would prolong the substantive preparation for the hearing. He also argued that, to the extent that COP 9 material revealed irregularities in Mr Mitchell's personal tax compliance, or that of companies with which he was connected, that was so prejudicial that the FTT should not have admitted it. We see no reference in Mr Hickey's FTT skeleton to these arguments and accordingly, we do not consider the FTT made any error of law in refusing to exclude evidence on this basis.

75. In any event, we do not consider that the FTT was obliged to conclude that allowing Level 2C or Level 3 documents onto HMRC's list would unfairly prolong the hearing. First, there were in fact no Level 3 documents (see paragraph [48] above). Second, no party had served its witness evidence, so it was not possible for the FTT to tell how much evidence would be devoted to matters to which Level 2C documents were relevant.

76. Nor was the FTT bound to conclude that the documents in question were so "prejudicial" that they had no place on HMRC's list of documents. Mr Mitchell criticised HMRC for seeking to rely on Level 2C and Level 3 documents as evidence of a "propensity" to conduct his tax affairs in a particular way without pleading any such case. He referred us to cases such as *R v P (Children: Similar Fact Evidence)* [2020] EWCA Civ 1088 as to how "similar fact evidence" should be approached. We reject that argument insofar as it relates to Level 3 documents for the simple reason that there were no such documents on HMRC's list and therefore Mr Mitchell cannot have been prejudiced by their inclusion. As regards Level 2C documents, HMRC were not being granted latitude to rely on any unpleaded "propensity" of Mr Mitchell. Rather, the FTT was entitled to conclude that HMRC should be able to rely on Level 2C documents to address the issue as to the relationship between Mr Mitchell and Mr Bell.

77. Mr Mitchell's Ground 2 is dismissed.

MR BELL'S APPEAL

78. Mr Bell's appeal relates to Level 2B, Level 3 and Level 4 documents. As can be seen from the summary of his grounds of appeal set out in paragraph 28 above, at the heart of Mr Bell's complaint is the proposition that the FTT was wrong to restrict his ability to obtain sight of these documents by limiting the extent to which documents in those categories could be included in HMRC's list of documents by reference to issues pleaded in HMRC's statement of case. Indeed, Mr Bell obtained no sight of Level 4 documents at all because the FTT decided that HMRC were not entitled to rely on any Level 4 documents as they had pleaded no case that Mr Mitchell's statements about his other tax affairs were unreliable (see [64] and the FTT's "Overall Conclusion" at the end of the Decision).

79. We have already explained in paragraphs 50 and 51 above the logically separate issues of “disclosure” and “admissibility” that the FTT needed to determine and the link that Rule 27 provided between those issues. While Mr Mitchell’s appeal focused on the admissibility aspects of the Decision, Mr Bell was concerned with the disclosure aspect for the obvious reason that he wants to obtain sight of a wider category of documents than the Decision gives him. Mr Bell deployed two broad strands of argument in support of his proposition that the FTT erred in law by failing to provide him with access to a sufficiently wide category of Level 2B, Level 3 or Level 4 documents:

(1) He argued that the FTT was wrong to restrict HMRC’s right to rely on documents falling with Levels 2B, 3 or 4 as evidence. If he succeeds with that argument, further documents would properly appear in HMRC’s list of documents served under Rule 27 and so should naturally be available to Mr Bell in accordance with Rule 27 itself.

(2) He argues that, even if the FTT was correct not to permit HMRC to include Level 2B, 3 or 4 documents that did not relate to pleaded issues, the FTT should nevertheless have directed HMRC to disclose all documents in these categories to him.

80. We start with the argument in paragraph 79(2). As we have noted, at [23] of the Decision, the FTT said expressly that the question whether Mr Bell should obtain sight of documents was co-extensive with the question whether HMRC were entitled to rely on them. We were initially concerned that in not considering whether some documents should be disclosed to Mr Bell, even if HMRC were not entitled to rely on them, the FTT might have made an error of law of the type referred to in *Ingenious*, by failing to take into account a relevant consideration. However, on reflection, we consider that the FTT made no such error.

81. We reach that conclusion for the simple reason that neither HMRC nor Mr Bell asked the FTT to consider this alternative approach. Mr Bell’s position before the FTT, as set out in Mr Akin’s skeleton arguments served before the FTT hearing, was that he supported HMRC’s application (that they be permitted to disclose documents) and opposed Mr Mitchell’s application (to preclude HMRC admitting certain documents into evidence). Mr Bell made no application of his own for disclosure. He was content to adopt a procedure under which the FTT would hear submissions in private, from HMRC and Mr Mitchell alone, as to the relevance of specific documents and that he would be bound by the FTT’s decision even though part of the hearing was in private (see [10(5)] of the Decision). The skeleton argument that Mr Akin served on behalf of Mr Bell in the proceedings before us did not seek to argue that the FTT was wrong to “take it as read”, in [23] of the Decision, that Mr Bell should not obtain any more documents than HMRC was permitted to put into evidence.

82. Before this Tribunal, Mr Bell has sought to advance the argument that the FTT was wrong to approach the question of “relevance” of Level 2B, 3 and 4 documents solely from the perspective of Mr Mitchell’s appeal. However, since he apparently agreed with the proposition, set out at [23] of the Decision, that he should obtain sight only of precisely those Level 2B, 3 and 4 documents that HMRC properly included on their list, no more and no less, his appeal must stand or fall by reference to the argument set out in paragraph 79(1) above, namely that the FTT erred in law in restricting HMRC’s reliance on documents in Levels 2B, 3 and 4.

83. We would note, however, that Mr Bell remains entitled to apply to the FTT for a direction that HMRC or Mr Mitchell disclose documents to him. In saying this, we are not of course encouraging unnecessary applications for disclosure. We are simply noting that the FTT’s decisions were on the applications before it and were made at a very early stage in proceedings. All parties have acknowledged that their respective cases are not pleaded with the particularity that might be needed. Indeed, it can fairly be said that Mr Mitchell’s case is not pleaded at all. If Mr Bell, armed with a more detailed understanding of Mr Mitchell’s and HMRC’s case, as

set out in any amended pleadings and witness statements, feels that he should proportionately be given sight of further documents, he remains entitled to make an appropriate application to the FTT.

Level 2B and Level 3 Documents

84. As we have explained in our discussion of Mr Mitchell's appeal on Level 2C documents, in the circumstances of these appeals, the FTT was entitled to conclude that documents appearing on HMRC's list could be "relevant" even if they did not relate to issues specifically pleaded in HMRC's statement of case.

85. However, it does not follow from this that the FTT made an error of law in restricting HMRC's entitlement to include Level 2B and Level 3 documents on their list by reference to matters pleaded in their Statement of Case. The FTT was entitled to require some cogent explanation of why Level 2B and Level 3 documents were relevant. That cogent explanation did not have to come solely from HMRC's statement of case. However, the absence of a reference to issues raised by those documents in HMRC's statement of case remained of potential significance.

86. There was a marked difference between Level 2C documents (on which HMRC were permitted to rely without qualification) and Level 2B and Level 3 documents (in relation to which HMRC's reliance was qualified by reference to their pleaded statement of case). As we have explained, the explanation during the FTT hearing that Mr Bell would be putting a positive case that Mr Mitchell was responsible meant that the wider relationship between them was of clear relevance, whatever case HMRC set out in their statement of case. Therefore, interactions between Mr Mitchell and Mr Bell (included within Level 2C) are of potential relevance. By contrast, there was less obvious relevance to Level 2B documents (relating to interactions between companies) and Level 3 documents (relating to interactions between Mr Mitchell and companies he controlled or allegedly controlled).

87. As we have noted, HMRC relied in their statement of case on Mr Bell's control over Arion and Margal, as a factor indicating the deliberate inaccuracies were "attributable to" Mr Bell for the purposes of his PLN. However, it was less straightforward to tell from HMRC's statement of case how interactions between the Universal Companies and other companies (Level 2B) were of relevance to Mr Mitchell's PLN. HMRC's position, as set out at [46] of the Decision, was apparently that such interactions might have the potential to shed a light on whether Mr Mitchell and Mr Bell were shadow directors or de facto directors of the Universal Companies. We consider that the FTT was quite entitled to be unconvinced by this assertion. We do not ourselves see how a mention in a document that one of the Universal Companies had simply "interacted" with a particular company obviously has any bearing on who was managing the affairs of the Universal Companies at the relevant time. Of course, mentions in documents of how Mr Bell and Mr Mitchell behaved in relation to the Universal Companies' respective businesses had the potential to be much more relevant. But Mr Mitchell's personal interactions with the Universal Companies were the province of Level 2A documents .

88. Level 3 documents were similar. These were defined as documents relating to Mr Mitchell's personal interactions "with other companies which he controlled or allegedly controlled, and in particular, his interactions with companies which had dealings with the Universal companies" (see [37] of the Decision). We do not fully understand the part of this definition beginning with "in particular". On the face of it, any document referring to Mr Mitchell's interaction with any company he controls is within the scope of Level 3, whether or not that company had dealings with the Universal Companies.

89. Level 3 documents as a class of documents were not obviously relevant. While HMRC had referred, in their statement of case, to dealings between Mr Bell and companies he

controlled, they had made no explicit reference to companies that Mr Mitchell controlled. Moreover, while Mr Bell appeared, at least from the explanation of his position provided to the FTT, to be putting in issue their dealings with each other, he was not obviously attaching material significance to their respective dealings with controlled companies.

90. Therefore, taking into account the parties' pleaded cases and the information Mr Bell provided about the conduct of his appeal Level 2B and Level 3 documents appeared to be of less relevance than Level 2C documents. That said, the FTT was entitled to conclude that these documents were of some relevance. Mr Mitchell has not appealed against the FTT's conclusion that Level 2B documents were relevant and we have already explained in paragraph [56] above a basis on which Level 3 documents were of potential relevance.

91. Therefore, Level 2B and Level 3 documents were of some potential relevance even if that relevance was not immediately obvious from the parties' pleaded cases. In those circumstances, the FTT had to decide, as a case management matter, the extent to which Level 2B and Level 3 documents could be included on HMRC's list. At one extreme, the FTT could have decided that, since the documents were all of some potential relevance, they could all be included. At the other extreme, it could have required the relevance of each Level 2B and Level 3 document to be established individually. We consider that the FTT made no error of law in taking a middle course and linking the extent to which those documents were properly included on HMRC's list of documents to the extent to which they referenced companies referred to in HMRC's statement of case.

92. Mr Bell's objection to the FTT's decision as regards Level 2B and Level 3 documents is, in effect, that he has been deprived of sight of documents that might potentially help his case or harm that of Mr Mitchell. Moreover, he complains that he has been so deprived at an early stage of the proceedings. That argument would have had more force if his, or Mr Mitchell's, cases had included more detail. However, as matters stood, Mr Mitchell and Mr Bell had given few particulars, even though factual matters relevant to the question whether they were "officers" of the Universal companies, or whether the VAT inaccuracies were "attributable to" them were within their knowledge. Mr Bell had not mentioned in his grounds of appeal to the FTT that he would be making the positive case that Mr Mitchell was responsible for inaccuracies in the Universal Companies' VAT returns. The FTT was not "plainly wrong" in declining to give Mr Bell sight of all Level 2B and Level 3 documents when Mr Bell's own pleaded case lacked some relevant details. In any event, we do not agree that Mr Bell has been permanently deprived of relevant documents. As we have explained in paragraph 83 above, he remains entitled to apply to the FTT for specific disclosure at an appropriate point.

93. We dismiss Mr Bell's appeal insofar as relating to Level 2B and Level 3 documents.

Level 4 documents

94. Level 4 documents were defined as documents that went to the credibility of either appellant generally and, in particular, the credibility with which they presented the affairs of companies they controlled or allegedly controlled. That definition, which all parties had agreed, was of some breadth. We find it difficult to see how it could be applied to a number of the documents on HMRC's list. To give just one example, item 66 on HMRC's list referred to all of Mr Mitchell's personal income tax returns from the tax years 2008-09 to 2016-17. Obviously, those returns will contain much information that has no connection at all with the Universal Companies. Might it nevertheless be said that they "went to credibility" because they could conceivably contain errors or be at odds with information that Mr Mitchell provided in the COP 9 process?

95. In our judgment, the FTT was entitled to require a satisfactory explanation of why such a potentially broad category of documents should be included on HMRC's list with the inevitable consequence that Mr Bell would obtain sight of them. The FTT referred in the Decision to HMRC's pleadings. We are prepared to accept that there are certain questions of "credibility" that do not specifically need to be pleaded not least because it is possible for a party to suggest to a witness in cross-examination that the witness is not telling the truth without needing to give advance notice of that line of cross-examination. However, the FTT's point was broader: even with the benefit of submissions made in private from HMRC, it was still not satisfied that matters of credibility were of sufficient relevance for the broad category of Level 4 documents to appear on HMRC's list and be disclosed to Mr Bell.

96. In our judgment, the FTT was entitled to take that view. We too had the benefit of submissions in private from both HMRC and Mr Mitchell on some documents that might be said to fall within Level 4. HMRC in accordance with what they considered to be their "duty of candour" pointed to some documents they considered to raise relevant questions of credibility. However, we see nothing "plainly wrong" in the FTT's conclusion that the relevance of Level 4 documents was not sufficient. We are reinforced in that conclusion by the fact that HMRC did not appeal the decision in relation to Level 4 documents.

97. Mr Bell argues that the FTT's decision on Level 4 documents cannot be reconciled with its conclusion, at [61] of the Decision, that "Mr Mitchell's credibility is to some extent in issue". We disagree. As a general matter, Mr Mitchell's credibility was of course in issue because ultimately the FTT would need to decide whether it believed his version of events that he had no involvement in the management of the Universal companies and that deliberate inaccuracies in their VAT returns were not "attributable to" him. Alternatively, it might accept HMRC's case, supported to an extent by Mr Bell, that Mr Mitchell was a shadow director or de facto director to whom the VAT errors were attributable. But the FTT's overall concern was that no sufficiently good reason had been given for the inclusion of a potentially very wide category of documents on HMRC's list in the light of the fact that those documents would inevitably need to be shared with Mr Bell.

98. In a related argument, Mr Bell argues that the Level 4 documents would have had the potential to help his case, or hinder that of Mr Mitchell. By borrowing from language used in disclosure applications, Mr Bell effectively argues that, whatever difficulties HMRC might have had in establishing the relevance of Level 4 documents in connection with their own case, the FTT should have directed HMRC to disclose the documents to Mr Bell because they had the potential to be of relevance to his case. That argument fails for two reasons. First, Mr Bell's own pleaded case lacked some relevant detail with the result that he has not established that the FTT was "plainly wrong" in not appreciating the relevance of a potentially wide category of documents to that case. Second, Mr Bell had not made any application for specific disclosure of his own. He was content for the FTT to "take it as read" that he would obtain only those documents that HMRC properly included on their list of documents, no more and no less (see [81] and [82] above).

99. We therefore dismiss Mr Bell's appeal insofar as it relates to Level 4 documents. Elsewhere in this decision, we have alluded the possibility of Mr Bell making an application to the FTT for specific disclosure, once all parties' cases are properly pleaded and witness evidence has been exchanged, if he still considers that there are documents he needs in order to advance his case. We would, however, note, that the case for specific disclosure of Level 4 documents would appear to be difficult in the light of the judgment of the Court of Appeal in *Favor Easy Management Limited v Wu* [2010] EWCA Civ 1630 to the effect that, at least in the courts to which CPR Part 31 applies, documents relating solely to credit should not normally be the subject of orders for specific disclosure.

DISPOSITION

100. Mr Bell's and Mr Mitchell's appeals are both dismissed. HMRC chose not to seek permission to appeal against the Decision. In those circumstances, we do not need to address some criticisms of the Decision that HMRC made in their written and oral submissions.

Signed on Original

JUDGE JONATHAN RICHARDS

JUDGE JONATHAN CANNAN

UPPER TRIBUNAL JUDGES

Release date: 08 October 2021