[2018] UKUT 419 (TCC)

Appeal number: UT/2018/0103-0112

PROCEDURE – appeal against variation by FTT of directions for disclosure - **Tibbles v SIG plc** ***[2012] EWCA Civ 518 applied; appeal allowed***

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

BETWEEN:

GARDNER SHAW UK LIMITED
GARDNER SHAW (LONDON) LTD
BEST PRICE RETAIL & WHOLESALE
DRINKS 4 LESS (UK) LTD
CASE DI VINI LTD
HARP WINES LTD
HARE WINES LTD
DHILLONS BREWERY LTD
LONDON CASH & CARRY LTD
MAGICSPELLBREWERY LTD

Appellants

- and -

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

TRIBUNAL: MR JUSTICE FANCOURT
JUDGE CHARLES HELLIER

Sitting in public at The Rolls Building EC4A 1NL on 20 November 2018

Jonathan Hall QC and Will Hays, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

David Bedenham, instructed by Rainer Hughes for the Appellants

DECISION

1. This is an appeal against the decision of Tribunal Judge Mosedale in the First-tier Tribunal (Tax Chamber) ("FTT") made on 3 August 2018, brought with permission of the Judge. The issue raised is whether it was proper for the Judge, on case management grounds, to revise directions about disclosure that had been given previously by the FTT, at a time when those directions had been the subject of an unsuccessful appeal by HMRC to the Upper Tribunal and a further appeal to the Court of Appeal was pending.

2. The circumstances of the underlying proceedings are set out in the decision of the Upper Tribunal just referred to – *HMRC v Smart Price Midlands Limited* [2017] UKUT 465 (TCC) – and it is not necessary to repeat them here. They concern the introduction of the so-called Alcohol Wholesalers Registration Scheme ("AWRS") with effect from 1 April 2016. The underlying appeals by the appellants are against HMRC's decision, in each case, that they are not fit and proper persons to carry on the controlled activity of wholesale trade in duty-paid alcohol. The decisions are treated as "ancillary matters" for the purposes of section 16(4) of the Finance Act 1994 and so the appeals consist of a review of the decision-making of HMRC. The issue is whether the decision is one that the decision maker could not reasonably have made. These appeals have yet to be heard in the FTT. Until 20 June 2018 they were stayed. We refer to the underlying appeals in this judgment as the "substantive appeals", to distinguish them from the procedural appeals to which we referred in para 1 above.

3. The relevant procedural history is the following.

(1) On various dates between 7 October 2016 and 4 April 2017, the first nine Appellants issued the substantive appeals to the FTT against the decision of HMRC that they were not fit and proper persons.

(2) On various dates between 4 November 2016 and 22 May 2017, the FTT issued directions for disclosure in relation to those nine appellants, which included a requirement that HMRC send a list of "all documents which were considered by the Respondent's officer when reaching the decision at issue in this appeal". There were also directions for an expedited trial in a trial window within a few months of the date of the directions. The directions included a statement that any party might "apply at any time for the directions to be amended, suspended or set aside".

(3) In the case of Magicspellbrewery Limited, the appeal was not lodged until 14 June 2017 and directions were subsequently issued in a different form on 4 November 2017.

(4) In those substantive appeals where extended disclosure directions were given before 15 May 2017, HMRC promptly applied to the FTT in each case seeking to vary the directions about disclosure of their documents. They sought a 'standard' order (in terms of rule 27(2) of the Tribunal Procedure (First-tier

Tribunal) (Tax Chamber) Rules 2009) for disclosure of those documents on which they intended to rely or that they intended to produce at the hearing of the appeal. The appellants refused to agree the proposed variation.

(5) A hearing of these applications in the case of five appellants took place on 8 May 2017 before Judge Sinfield. He dismissed HMRC's applications to vary the disclosure directions in a written decision dated 15 May 2017 ([2017] UKFTT 0411 (TC)). He gave detailed reasons why, in a case where the FTT is exercising a supervisory jurisdiction over decisions made by HMRC, a more extensive order for disclosure was necessary for the fair hearing of the appeals. Judge Sinfield's decision, at para [28], gave his reasons for concluding that any confidential material considered by the decision-maker should be included in HMRC's list of documents, marked as such, and stated that HMRC could then apply, on a case by case basis, to exclude such material from further disclosure or production.

(6) In those substantive appeals in which extended disclosure directions had not already been given, such directions for disclosure were made shortly after the decision of Judge Sinfield.

(7) HMRC did not comply with any of the disclosure directions. They notified the FTT that they were intending to appeal Judge Sinfield's decision and requested a suspension of the directions ordered pending the decision on their application for permission to appeal.

(8) On 12 June 2017, HMRC applied for permission to appeal against Judge Sinfield's decision. It was granted on about 28 June 2017.

(9) At about the same time, in each of the substantive appeals then pending, HMRC applied for a stay pending the decision of the Upper Tribunal. These applications were made on the basis that the decision of Judge Sinfield affected all the substantive appeals and/or addressed an issue that arose in respect of the substantive appeal in question and the order for directions that had been made in it. When the appellants indicated that they were not willing to proceed on an expedited basis without the disclosure that had been ordered, the FTT ordered a stay of the substantive appeals until 14 days after the Upper Tribunal's decision.

(10) On 6 December 2017, the Upper Tribunal (Tax and Chancery Chamber) issued a decision (identified in para 2 above) rejecting HMRC's appeal against Judge Sinfield's decision. The appellant in Magicspellbrewery Limited applied for the directions in its substantive appeal to be varied in accordance with the Upper Tribunal's decision.

(11) On 22 December 2017, HMRC applied for permission to appeal, on the basis that the Upper Tribunal's judgment, if correct, would justify similar directions in all AWRS appeals to the FTT.

(12) HMRC then applied in each of the substantive appeals for a further stay of the directions or the substantive appeal pending the outcome of the application. The further stays were granted.

(13) On 21 February 2018, the Upper Tribunal refused HMRC permission to appeal.

(14) The following day, HMRC applied for stays in each of the substantive appeals for a period of a month pending its decision whether or not to seek to appeal to the Court of Appeal.

(15) On 15 March 2018, HMRC applied to the Court of Appeal for permission to appeal.

(16) On 19 March 2018, HMRC applied to the FTT for a further stay of directions in all the substantive appeals until after the Court of Appeal had finally disposed of the proposed appeal.

4. On this occasion the appellants vigorously objected to any further stay. Accordingly, a hearing of HMRC's application was held by Judge Mosedale on 2 May 2018. In a written decision dated 20 June 2018, she gave detailed reasons for refusing any further stay. Her decision was made essentially on the basis that potential prejudice to the appellants in delaying a substantive determination was considerably greater than potential prejudice to HMRC in having to conduct a disclosure exercise that the Court of Appeal might later hold to be inappropriate. The Judge allowed the parties to make representations on what was a reasonable time within which HMRC should carry out and complete the disclosure exercise, making it clear that time would run from the date of the decision and that HMRC should begin the exercise immediately.

5. At the expiry of the period of 14 days within which HMRC was to make representations about what was a reasonable period of time, HMRC adduced evidence and made representations on two matters. First, that up to 6 months was needed to review documents and prepare and make any appropriate public interest immunity ("PII") application, on the basis that there were about 1,400 documents in the 11 remaining appeals of which about 500 might be "sensitive" documents. Second, HMRC applied to amend the wording of the disclosure direction to exclude "sensitive" documents that did not support the appellants' cases or were not adverse to HMRC's case. The application was made on the basis that the disclosure already ordered was disproportionate. A hearing was requested.

6. The appellants objected to the application and suggested that it was extraordinary that in the face of the decisions of the FTT and the Upper Tribunal, with a stay of the substantive appeals having been sought and refused, HMRC should now be seeking to vary the disclosure order contrary to the decisions of the FTT and the Upper Tribunal.

7. Judge Mosedale's initial reaction – in a letter written to HMRC and copied to the appellants' solicitors dated 11 July 2018 – was to doubt that she had jurisdiction to (or should) make any such order, and she directed that an urgent hearing be held to resolve the question of how much time should be allowed for compliance with disclosure, in order not to undermine the effect of her previous refusal of a further stay. She directed that HMRC had to file a skeleton argument if they wished to pursue the application for a variation of the disclosure obligation. She further indicated that, in the meantime, HMRC should be complying with the disclosure obligation.

8. The position in broad terms was accordingly this. In each of the substantive appeals, HMRC had sought to contest the disclosure that it was directed to give by the FTT. In five of the appeals, the matter was taken to a hearing and resulted in a written decision of the FTT upholding the disclosure directions given. HMRC appealed and obtained a stay of the other substantive appeals on the express basis that the decision on the appeal to the Upper Tribunal would apply in the case of all the other substantive appeals. In other words, implicitly if not expressly, the appeal to the Upper Tribunal was understood to be a test case. The understanding extended to all the appellants because the same firm of solicitors was acting for all of them. When HMRC lost the appeal, it then sought to appeal to the Court of Appeal and applied for a further stay of all the other substantive appeals on the same basis. When a further stay was refused and HMRC should have been complying with the disclosure directions, it then applied to vary those directions so as to remove from the scope of disclosure the documents that Judge Sinfield had held should be within the scope of disclosure subject only to HMRC's right to apply on a case by case basis to exclude certain intelligence or other sensitive materials from production or further disclosure.

9. The application for a variation of the disclosure directions was heard by Judge Mosedale on 1 August 2018, shortly after the Court of Appeal granted permission to HMRC to appeal the Upper Tribunal's decision. It is clear that the Judge was aware that permission to appeal had been granted. She delivered a written decision on 3 August 2018.

10. Judge Mosedale dealt first with the question of the jurisdiction of the FTT to amend any directions. She recorded HMRC's submissions that it was a discretionary matter, not a question of jurisdiction, and that discretion should be exercised in these cases because:

> (1) It was not really an application for variation, as Judge Sinfield had recognised that HMRC could apply on a case-by-case basis for a public interest immunity exception to his order and that was what HMRC were applying for;
>
> (2) There was a change of circumstances due to the new evidence;
>
> (3) Except in the case of Hare Wines Ltd, this was a first application for a variation of the directions of the FTT, and
>
> (4) The circumstances were such that the variation was in the interests of justice.

11. It is not clear whether the Judge was taken to the rule of the Tribunal Rules under which she had a discretion – if she was, she did not refer to it in her decision. The obvious candidate is rule 5(2), which states:

> "The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction."

The second part of this rule is therefore similar to rule 3.1(7) of the Civil Procedure Rules 1998, which states:

> "A power of the court under these Rules to make an order includes a power to vary or revoke the order."

12. The Judge then referred to the decision of the Court of Appeal in *Tibbles v SIG plc* [2012] EWCA Civ 518, a case under rule 3.1(7) on the circumstances in which a court might vary or revoke a previous interim decision giving directions. Having referred to earlier decisions on the rule, Rix LJ summarised the position (so far as material to the instant case) as follows in para [39]:

> "(i) Despite occasional references to a possible distinction between jurisdiction and discretion in the operation of CPR 3.1(7), there is in all probability no line to be drawn between the two. The rule is apparently broad and unfettered, but considerations of finality, the undesirability of allowing litigants to have two bites at the cherry, and the need to avoid undermining the concept of appeal, all push towards a principled curtailment of an otherwise apparently open discretion. Whether that curtailment goes even further in the case of a final order does not arise on this appeal.
> (ii) The cases all warn against an attempt at an exclusive definition of the circumstances in which a principled exercise of the discretion may arise. Subject to that, however, the jurisprudence has laid down firm guidance as to the primary circumstances in which the discretion may, as a matter of principle, be appropriately exercised, namely normally only (a) where there has been a material change of circumstances since the order was made, or (b) where the facts on which the original decision was made were (innocently or otherwise) misstated.
> (iii) It would be dangerous to treat the statement of these primary circumstances, originating with Patten J. and approved in this court, as though it were a statute. That is not how jurisprudence operates, especially where there is a warning against the attempt at exhaustive definition.
> ……..
> (vii) The cases considered above suggest that the successful invocation of the rule is rare. Exceptional is a dangerous and sometimes misleading word: however, such is the interest of justice in the finality of a court's orders that it ought normally to take something out of the ordinary to lead to variation or revocation of an order, especially in the absence of a change of circumstances in an interlocutory situation."

13. Thus, where there is no material change of circumstances and no prior misleading of the court, it will be a rare case and something unusual that could lead to the important considerations of finality and the proper use of the appeals procedure being displaced in favour of revisiting and varying or revoking an interlocutory order. We were told that the hearing before Judge Mosedale was conducted on the agreed or

assumed basis that *Tibbles* was a strongly persuasive authority on how a FTT judge should approach a comparable issue in exercise of her power under the Tribunal Rules.

14. The Judge extracted from the *Tibbles* case a proposition that "directions would only be revoked or varied where it was in the interests of justice to do so" (para [17]), and she then identified some common reasons (directions made without representation of a party; change of circumstances) and some less common reasons (error of law; misstatement of relevant circumstances; procedural irregularity) for so doing. Furthering the interests of justice is no doubt a necessary condition of exercise of the power in question, in conformity with the overriding objective in rule 2 of the FTT's rules, but it is clear from Rix LJ's judgment that it is not an adequate paraphrase of the circumstances in which the power could properly be exercised. The exercise of the power is not a broad discretionary matter but is significantly more circumscribed than that, as HMRC accepts. While the Court of Appeal was unwilling to close the list of circumstances in which it might be appropriate to allow a second bite of the cherry, such rare cases would, by definition, be ones that had not previously arisen in reported cases under the rule. They would also have to be ones in which the circumstances suggesting that a variation was just outweighed the interests of justice represented by the finality of decisions and the upholding of a proper system of appeals.

15. The Judge held, at paras [20]-[22], that, on a proper analysis, HMRC's application was not – contrary to its case – an application of the kind envisaged by Judge Sinfield that might be made on a case-by-case basis:

> "…what HMRC applies for here is a direction that a class of documents need not be listed at all on the grounds they lack relevance. That was precisely the sort of direction that Judge Sinfield decided not to make."

16. As a result of that finding, her approach to the variations sought by HMRC had to be through the *Tibbles* gateway. The Judge also rejected the argument that the evidence on which HMRC belatedly relied (as to the likely time and cost of disclosure compliance) was a change of circumstances. She observed that allowing HMRC now to rely on material that could have been deployed in the hearing before Judge Sinfield "falls squarely into the category of giving them a second bite at the cherry. It would be rare even in a case management situation for a party to be allowed to have a second go."

17. The Judge also rejected the argument that, except in the case of Hare Wines Ltd, this was a case of an application being made for the first time to vary a direction made without representations:

> "…while the appellants (bar Hare Wines) before me are not the same as were before Judge Sinfield, both HMRC and the solicitors (Rainer Hughes) who represented those before Judge Sinfield and those before

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

18. So the Judge reached the position that (a) the variation HMRC sought was one subject to the rationale of *Tibbles*, and (b) of all the circumstances touched on in the *Tibbles* case in which it might be appropriate to vary the terms of an interim order, only the undefined, residual category of something rare and "out of the ordinary" could avail HMRC on its application.

19. Pausing there, it is important to note that HMRC did not seek – in their rule 24 response to the appellants' appeal – to contend that Judge Mosedale was wrong to reach any of these conclusions. They did not identify any other ground, apart from the reasons that she gave, on which they would seek to uphold her decision. On the contrary, their response states that:

> "The Respondents resist this appeal on the basis that the decision of Judge Mosedale … was correct and her reasoning discloses no error of law."

In response to the appellants' first ground of appeal, namely that this was not a case in which the FTT could properly have invoked the residual power to vary its directions given that Mr McGee's evidence could have been adduced before Judge Sinfield, HMRC do state in their rule 24 response that it is "of note" that the argument that this evidence could have been adduced before Judge Sinfield can only have relevance in relation to the Hare Wines Ltd appeal. Subject to that observation, however, HMRC seek to affirm the Judge's decision on the basis that she correctly applied the law in *Tibbles* and exercised her discretion properly.

20. It is therefore not open to HMRC to seek to argue, as they did in their skeleton argument and at the hearing, that this was not a case that should have been approached on the basis of the *Tibbles* decision, except in the single case of Hare Wines's appeal. Nor is it open to HMRC to argue that there was indeed a change of circumstances by reason of the new evidence of Mr McGee, or that HMRC was applying for the first time to vary a direction sent out by the FTT without a hearing. These were issues that were argued and decided by Judge Mosedale against HMRC, but no notice of intention to challenge those decisions was given.

21. In any event, we would have concluded that the Judge was right to hold that the consequence of consensually treating the *Hare Wines* appeal as a test case (and in particular obtaining stays of the directions in all the other appeals on that basis, pending the appeal against Judge Sinfield's order to this Tribunal) was that HMRC

could not be heard to say that these were new applications to vary made by HMRC in different appeals for the first time and did not amount to a second attempt by HMRC to argue the same issue. To conclude the contrary would be to allow HMRC to play fast and loose with the test case procedure, obtaining the benefit of a stay of its disclosure obligations pending an appeal in another case, but then – when the appeal failed – seeking to treat the other cases as not having been governed by the appeal but as cases in which no challenge had previously been made to the disclosure directions.

22. We have also considered whether Judge Mosedale was right to conclude – as set out in para 15 above – that the application made by HMRC was not the case-by-case application that Judge Sinfield contemplated that they were entitled to make. It is clear that what Judge Sinfield directed was disclosure by list as a first stage, with confidential and sensitive material identified as such in the list; then an application on a case by case basis to exclude that material from production or further disclosure of it. What HMRC applied for was an order varying Judge Sinfield's order to exclude a sub-class of sensitive information that was considered by the decision-maker, namely those documents that were considered but were not taken into account and did not support the appellants' case. That was in derogation of Judge Sinfield's order to list such confidential documents. We therefore consider that Judge Mosedale was right to treat the application as being one to vary the direction to give disclosure, not as an application to exempt certain disclosed documents from production.

23. On what basis, then, did Judge Mosedale conclude, as she did, that this case was one of those rare cases in which something out of the ordinary justifies what would otherwise be unjustified, in terms of a litigant having a second bite?

24. The Judge proceeded to consider in detail the evidence given by Mr McGee about the time and cost of compliance with the existing directions. She found, after hearing Mr McGee cross-examined, that she should accept his evidence, as it then stood, that the disclosure process would take HMRC up to 4 months and cost it something more than £500,000. Although the appellants sought to challenge the Judge's acceptance of this evidence, on the basis that no reasonable judge could have accepted it without a detailed breakdown of time and costs as between different appeals and different personnel, we consider that this ground of appeal is unarguable. There is no error of law in the Judge's acceptance of the only factual evidence that was before her, having heard the evidence strongly challenged in cross-examination. Although the appellants find it difficult to accept that the figures advanced by Mr McGee can possibly be correct, we are unable to conclude – on the basis that the appeal was advanced before us – that no reasonable judge could have accepted that evidence.

25. We will come back shortly to the significance of that finding for the decision that the Judge made.

26. The Judge next embarked on a detailed consideration and analysis of the question of the potential relevance of the documents that HMRC sought to exclude from the scope of disclosure, and the allied questions of how relevance should be determined, by whom and whether before any PII application made by HMRC.

Relevance in this context is, as the Judge identified, a slightly slippery concept because it is capable of meaning two different things: documents that are legally relevant to the basis on which the decision of HMRC is challenged on appeal, and documents that HMRC considered relevant in making its decision. This is illustrated by the following passage from the decision at [53]:

> "HMRC's case was that *all* of the confidential material was legally irrelevant because it formed no part of the decision-maker's decision: it was only caught by Judge Sinfield's disclosure order because it had been considered in the decision -making process leading up to the decision to deny the AWRS but in fact formed no part of that decision."

27. The interplay between the nature of the appeals against HMRC's determination that each of the appellants is not a fit and proper person – a review of the reasonableness of its decision and decision-making process – and these two notions of relevance were at the heart of the decisions of Judge Sinfield and the Upper Tribunal. It will no doubt be central to the argument in the Court of Appeal about the appropriateness of orders for extended disclosure in cases where the FTT exercises a supervisory jurisdiction.

28. What we find difficult to understand is why Judge Mosedale embarked on her own consideration of the issue *de novo*, given that (a) she had decided that what was being sought was not an attempt to exclude on a case by case basis certain documents, as Judge Sinfield had provided for in his directions; (b) the general issue was the subject of a decision of the Upper Tribunal that bound the FTT; (c) the general issue would be considered again in early 2019 in the Court of Appeal, and (d) she had already found that this was not a case of a first application made by a party to proceedings to challenge a 'standard' direction issued without the parties' representations. Had it been such a case then, in exercising an original case management discretion, it would have been appropriate for her to consider how most appropriately to strike the balance between the interests of each of the parties in terms of disclosure, in accordance with the overriding objective. But this was not a case where case management directions or discretion were called for until the Judge had decided whether there were here circumstances "out of the ordinary" which justified revisiting the terms of the disclosure obligation.

29. A provisional conclusion that, on reflection, there might be a better way in which to balance the parties' competing interests while doing justice and speeding up the proceedings could not possibly be the rare, unidentified circumstances in which the court should allow a party to have a second bite at the cherry in that way. If it were, litigants would be entitled to try their luck with a different judge in relation to any case management decision, rather than appeal the decision if it was wrong in law because the first judge had exceeded the broad ambit of discretion afforded to judges making case management decisions.

30. At the start of the concluding section of her judgment, the Judge commented that she had an unenviable task:

> "[The Tribunal] is asked to vary a direction in circumstances where the direction has already been upheld by the Upper Tribunal and is soon to be considered by the Court of Appeal and, moreover, where the application for variation is in reality a second bite at the cherry. HMRC support it with evidence that could have been put before Judge Sinfield and I do not understand why this was not done.
>
> In these circumstances, ordinarily the applicant must expect the application to be refused……"

31. Despite that warning, the Judge concluded that this was "one of those rare special circumstances referred to in *Tibbles*". She appears to have reached that conclusion based on three matters. First, the fact that the additional documents sought on disclosure would be irrelevant and that the appellants were adequately protected by HMRC's acceptance that documents that supported their case were (subject to PII) to be disclosed. Second, the very substantial cost that would be involved in disclosure of the kind directed by Judge Sinfield, which, since the documents were irrelevant, would correspondingly tend to increase inappropriately the costs of all parties and the time required for the hearings. Third, the fact that disclosure as ordered would take 4 months and this would be contrary to the appellants' interests in having an early resolution of their appeals.

32. On the basis of those identified factors, the Judge concluded that it was "very much against the interests of justice to require HMRC to carry out the full disclosure exercise ordered".

33. We have already indicated that we do not agree that the fact that Judge Mosedale was persuaded that there was a more appropriate and better approach to disclosure (contrary to the decision of the Upper Tribunal) was capable of being a reason why, exceptionally, the FTT should revisit and change its earlier direction on disclosure. The appropriateness of Judge Sinfield's disclosure direction had already been reviewed by the Upper Tribunal and upheld, and was subject to a pending appeal to the Court of Appeal. The fact that there had been an appeal to the Upper Tribunal was, on the contrary, a strong reason why the disclosure direction should not be revisited by the FTT. The interests of justice include upholding the finality of court and tribunal decisions and not undermining the appeal process.

34. HMRC contended that, in view of the evidence of Mr McGee, the subject-matter of the decision that Judge Mosedale had to make proceeded on a different factual footing from the subject-matter of the appeals to the Upper Tribunal and the Court of Appeal. We do not agree that this is a legitimate distinction. The disclosure issues were the same; only the evidence before the court was different. Judge Mosedale had rejected the argument that there was any material change of circumstances. In the absence of any such change, a re-hearing cannot be justified on the basis that a party has belatedly put in better evidence to support its case. That would allow any litigant to have a second bite of the cherry by adducing better evidence that it could have adduced on the first hearing.

35. So far as the costs of the disclosure process are concerned, these were matters introduced by Mr McGee's evidence. They did not amount to any change in circumstances. All that HMRC is doing is asserting that it has now realised, since the hearing before Judge Sinfield, that the cost of the extended disclosure ordered will be greater than anticipated. It was always the case (and would have been understood by HMRC) that extended disclosure would be more onerous than 'standard' rule 27(2) disclosure. HMRC's belated realisation of the cost involved does not amount to something out of the ordinary that would justify re-visiting the directions made.

36. Moreover, although the anticipated costs are substantial, they do not strike us as in any way "out of the ordinary" for the costs of extended disclosure in eleven separate and unrelated appeals of the nature of the substantive appeals. A cost of around £50,000 per case is not so remarkable, and part of this cost would be involved in assessing documents individually even on HMRC's proposal. Disclosure is always an expensive part of any litigation. While the cost to the public purse is a matter of regret, the existence of a disclosure regime in appropriate cases is not a matter of regret but rather an important safeguard and means of achieving justice for the parties. Whether or not 'standard' disclosure or extended disclosure of the type directed by Judge Sinfield is in principle appropriate for this kind of appeal is a matter that has been considered by the Upper Tribunal and will be decided by the Court of Appeal in due course. The Judge's observation that the money is wasted because the documents are irrelevant of course depends on the answer to the underlying question, which the Upper Tribunal had resolved in favour of the appellants.

37. If the concern of Judge Mosedale was a risk that substantial costs would be incurred by HMRC that might after the Court of Appeal's decision prove to have been wasted, then the right way to deal with that risk was to weigh it against prejudice to the appellants caused by delay and decide whether or not to grant a further stay. That balancing exercise was done in the Judge's June decision (though HMRC chose not to deploy evidence of cost when making that application) and the balance came down in favour of the appellants. Despite that decision, the appellants have not had disclosure from HMRC, as they should have had by now even on HMRC's latest estimated timescale, because HMRC applied to amend the disclosure directions. The Judge had directed in June that time for complying with the disclosure directions ran from the date of her decision. That seems to us to be a further reason why, in August 2018, it was wrong to reopen the question of the appropriate disclosure directions.

38. So far as the time required for disclosure is concerned, the issue here was perceived to be the impact that disclosure would have on the expedition of the underlying appeals. The reason for the expedition direction is that the appellants' businesses are at risk of collapse if they cannot either continue or start to trade. As things stand, that risk has been mitigated by the grant of temporary approval or registration, or in some cases injunctive relief requiring HMRC to permit the appellants to trade in the short term, pending the outcome of their substantive appeals. The jurisdiction for the court to grant such relief (sparingly and in appropriate circumstances) was accepted by the Court of Appeal in *ABC Limited v HMRC* [2017] EWCA Civ 956. However, a decision of the Supreme Court on the same issue is, we

understand, expected soon. That may have the result that the interim protection that the appellants enjoy is curtailed.

39. In those circumstances, the appellants have an interest in seeking determination of their substantive appeals as early as possible. However, that is very much a concern for the appellants to address. If the imperative for an early hearing were strong enough they (or any of them) might accept the more limited disclosure that HMRC prefers to give. Instead, the appellants considered that their interests were better served by pursuing the disclosure ordered by Judge Sinfield instead of having an expedited final hearing. On any view, we cannot see that a potential delay of 4 months while disclosure is carried out, as the appellants wish it to be, can possibly amount to circumstances out of the ordinary that justify revisiting the order for disclosure. Had the order not been varied by Judge Mosedale, the 4 months for the disclosure process would have ended exactly a month before the current appeal was heard.

40. We therefore conclude that – approaching the application in accordance with the *Tibbles* criteria as the Judge did (and which HMRC must accept she was entitled to do) – there was no basis on which a judge could reasonably conclude that this was one of the rare category of unidentified, residual cases where it was appropriate for the FTT itself to vary the terms of directions previously issued. If HMRC succeeds in its appeal to the Court of Appeal then Judge Sinfield's disclosure directions will be replaced by a more limited disclosure requirement, possibly in substance the one that Judge Mosedale considered was in the interests of justice. But that will be the result of a legitimate appeal process. It was not appropriate for the FTT itself to disregard the Upper Tribunal's decision upholding the original disclosure directions and to do so on the basis of evidence that did not amount to a material change of circumstances.

41. HMRC submit that this was essentially a case management decision, where a broad margin of appreciation should be afforded to the Judge's decision. But this was not a case management decision of the kind to which that approach is adopted, where the judge has a broad discretion to exercise. As HMRC otherwise accept, the Judge's discretion was "heavily curtailed" by the principle explained in *Tibbles*. The question of whether this was one of those rare cases not falling within established exceptions justifying re-arguing a case was a narrower exercise of judgment, against the particular background of the appeal to the Upper Tribunal and the pending appeal to the Court of Appeal.

42. In any event, even if a wide margin of appreciation is to be given, we are satisfied that the Judge's conclusion was wrong to a degree that goes well beyond that generous margin. It was wrong because the Upper Tribunal had rejected HMRC's challenge to Judge Sinfield's directions and because the new material on the basis of which HMRC sought to advance its argument was not a change of circumstances but simply evidence that HMRC had not deployed previously. A desire to rely on material not previously deployed (but which could have been deployed) cannot amount to circumstances out of the ordinary such as to justify a variation of the directions previously given. Nor in any event is the evidence that was belatedly deployed of such a remarkable character as to justify in itself varying the directions.

In short, none of the reasons relied on by Judge Mosedale could reasonably have been regarded as being sufficient to vary the disclosure directions notwithstanding the decision of the Upper Tribunal and the pending appeal to the Court of Appeal.

43. We therefore find that the judge erred in law. We allow the appeal and set aside Judge Mosedale's variation of Judge Sinfield's order. Whether or not that order is to be set aside or varied is now a matter for the Court of Appeal to decide.

MR JUSTICE FANCOURT
JUDGE CHARLES HELLIER

JUDGES OF THE UPPER TRIBUNAL

RELEASE DATE: 25 January 2019