[2017] UKFTT 87 (TC)

TC05605

Appeal number: TC/2014/4560

APPLICATION under Sch 36 paragraph 3 for approval of issue of information notice to third party – whether hearing must be ex parte or whether Tribunal has discretion to order an inter partes hearing - hearing must be ex parte

FIRST-TIER TRIBUNAL
TAX CHAMBER

RE AN APPLICATION BY HMRC **Appellant**
EX PARTE JOHN ARIEL
(TRUSTEE IN BANKRUPTCY OF SIMON HALABI)

TRIBUNAL: JUDGE BARBARA MOSEDALE

Sitting in public at the Royal Courts of Justice, Strand, London on 10 January 2017

Ms J Anderson, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the appellant

Mr D Ewart QC, instructed by Taylor Wessing LLP, on behalf of John Ariel

DECISION

Background

1. Schedule 36 Finance Act 2008 ('Sch 36') paragraph 2 empowers HMRC to issue a notice to a person requiring that person to produce documents and/or provide information to HMRC about the tax affairs of another person (the taxpayer). This is referred to as a 'third party' notice because the notice is issued to someone who is not the person whose tax affairs are being investigated. Paragraph 3 provides that such a third party notice can only be issued with the consent of the taxpayer or authorisation of this Tribunal.

2. Such proceedings were commenced in this Tribunal ('the FTT') on 19 August 2014 when HMRC lodged an ex parte application under Sch 36 paragraph 3 applying to the Tribunal to authorise the issue of a third party information notice to Mr John Ariel ('the trustee'), in his capacity as trustee of the estate in bankruptcy of a Mr Simon Halabi.

3. The hearing of this application was adjourned on 25 November 2014 because the trustee had indicated to HMRC and the Tribunal that he intended to apply to the Bankruptcy Court under s 303 Insolvency Act 1986 for directions as to whether, as trustee in bankruptcy, he was liable to comply with a Sch 36 information notice with respect to information and documents which had come into his possession as such trustee.

4. A much more complete history of this matter is set out at [1-23] of Mr Justice Mann's decision of [2016] EWHC 1674 (Ch) when he heard and allowed an appeal by HMRC against the order made by the Bankruptcy Court in this matter. In short, the Registrar had directed that the trustee could not provide any documents to HMRC unless HMRC had first paid the trustee's costs of providing them and, additionally, in respect of certain documents, only if HMRC permitted the original providers of the documents to the trustee to make representations to the FTT on whether the documents should be disclosed to HMRC, and, in respect of certain other classes of documents, that he could not provide them at all.

5. As I have said, Mr Justice Mann reversed this decision. He held that the Insolvency Act did not give the Bankruptcy Court power to limit a trustee's obligation to comply with an information notice nor power to dictate the terms of an information notice not yet issued [53-61]. At [62] he pointed out that, for these reasons, it was technically wrong of, if understandable for, the FTT to have granted the adjournment mentioned at §3 above.

6. The hearing of HMRC's application for authorisation to issue the information notice nevertheless still stands adjourned in this tribunal, as the next event after Mr Justice Mann's decision, was an application by the trustee to the FTT for the hearing of HMRC's application to be inter partes. That application was the subject of the hearing on 10 January before me.

7. Such an application was not unheralded, as Mr Justice Mann had said at the end of his decision:

> [74] .... A third party notice asking a bank for (say) bank statements for a given person is one thing. A wide-ranging request of someone like a trustee in bankruptcy, who may hold a great deal of documentation in respect of which more people than the trustee in bankruptcy and bankrupt may have an interest, is another. It may well be very difficult for a fair presentation of the trustee in bankruptcy's case to take place by the mechanism anticipated in Schedule 36 in a typical without notice case because of the unusual position of the trustee (reflected in the matters which the Registrar sought to protect in her order). It seems to me that in the more complex (though not necessarily in all) cases the FTT would be much assisted by an inter partes hearing with direct submissions from the trustee. The Schedule only provides that the application may be without notice; it does not have to be. Alternatively, I do not see why the FTT should not give liberty to the trustee to apply. Although not expressly provided for, such a provision is familiar in a judicial context (which in my view an FTT application is) and would be well within the over-riding objective which the Tribunal's rules provide for. I appreciate that such techniques might be said to depart from the description of the scheme as a non-adversarial one in *Derrin* (paragraph 30), but in truth they do not do so. They enable the case of trustees (who are particularly likely to be holding information acquired from third parties) to be more safely dealt with, and reduce the chances of a challenge having to be made by judicial review, which is on any footing a cumbersome way of mounting a challenge (albeit the only one which Parliament has left open). They enable the FTT to be properly informed of matters which might not otherwise be grasped.

The hearing before me was to decide the application by the trustee, which was that, in line with what Mr Justice Mann had said, the hearing of the Sch 36 application should be inter partes.

The issue for this Tribunal hearing

8. Before the commencement of the hearing, my understanding, and Ms Anderson's, was that the trustee's position was that, firstly, the Tribunal had jurisdiction to order an inter partes hearing of HMRC's Sch 36 application, and, secondly, that the Tribunal should exercise its discretion to do so in this particular case.

9. At the hearing, however, Mr Ewart explained that he considered this inter partes hearing of the trustee's application should consider only the question of jurisdiction to order an inter partes hearing of HMRC's Sch 36 application. The trustee's position was that the exercise of that (alleged) jurisdiction was a discretionary matter to be considered by a judge in chambers taking into account the third party's written representations, and that is what he would invite the Tribunal to do if it agreed with him that the FTT had jurisdiction to order an inter partes hearing.

10. Mr Ewart did not, therefore, really address me on the question of whether, if the Tribunal had jurisdiction, it should exercise it in his client's favour, though it was clear he considered that this Tribunal would be very likely to do so bearing in mind the strong indication given by Mr Justice Mann cited above. HMRC's position, as they opposed the application, was that there was simply no jurisdiction to order an inter partes hearing.

11. So I go on to decide the question of jurisdiction; my decision on that, for the reasons explained below, makes resolution of the second question unnecessary in any event.

What was meant by an inter partes hearing?

12. The trustee's case was, as I have said, that the Tribunal had the discretion to order an inter partes hearing of an ex parte Sch 36 application. Everyone understood an 'inter partes' hearing of a paragraph 3 Sch 36 application to be a hearing of which the third party had a right to be informed and at which the third party would have a right to be heard: there was no suggestion by either party that the taxpayer would have any right to be heard. The information notice would, if issued, require compliance from the third party, not the taxpayer.

13. An inter partes hearing requires the parties to it not only to have the right to be heard but the right to hear and respond to the other party's case. Indeed, rules of natural justice requires each party to divulge its case in advance of the hearing so that the other party can be properly prepared. My understanding is that this sort of hearing was what Mr Ewart submitted the Tribunal could order in its discretion when HMRC made a Sch 36 application against a third party.

14. It follows that an inter partes hearing with the third party present would be a hearing in which the third party would have the right to be informed in advance of HMRC's case, and in particular why HMRC considered that the information and documents sought were reasonably required for the purpose of checking the taxpayer's tax position (Sch 36 paragraph 2(1)). The third party would have the right to respond to HMRC's case from an informed position.

15. This is the sort of hearing which was considered by the courts in the cases I will refer to below. I recognise, however, that there is a sort of half-way hearing, although I did not understand the trustee to seek this, under which the Tribunal could, in the presence of HMRC, hear oral representations from the third party, but give no right to the third party to be informed of nor respond to HMRC's case at all, either in advance nor by remaining in the hearing for the presentation of HMRC's case.

16. I will return to this point at the end of this decision at §§84-87, but apart from those paragraphs, the reference to an 'inter partes' hearing below is a reference to an adversarial hearing as described in §§13-14 above.

Jurisdiction

17. It is well understood and not in dispute between the parties that the Tribunal's jurisdiction is statutory: as the creation of statute, it has no inherent jurisdiction. If the Tribunal has jurisdiction to order an inter partes hearing of HMRC's Sch 36 application, such jurisdiction must have been conferred by legislation.

18. The trustee's case was that the power to call an inter partes hearing which he considered existed was conferred either or both by the Tribunal's procedural rules and/or Sch 36 itself.

The Rules

19. The Rules which govern the Tribunal's procedure are laid down by statutory instrument: The Tribunal Procedure (First Tier Tribunal) (Tax Chamber) 2009/273 ('the Rules') which were made under the Tribunals Courts and Enforcement Act 2007. Mr Ewart's position is that these Rules confer the claimed jurisdiction on the FTT. The Rules expressly permit the Tribunal to regulate its own procedure (Rule 5(1)) and contain a definition of the third party to an ex parte application made by HMRC in Rule 1(3) (where a third party is included in the definition of 'respondent' at (a)(ii)).

20. But, in my view, the Rules do not confer jurisdiction, they merely dictate the procedure to be adopted when the Tribunal exercises its jurisdiction conferred by other legislation. This is clear because the Rules are described as procedural rules and are made under a provision of that Act which expressly states that the purpose of the Rules is to govern practice and procedure in the Tribunal (s 22). Moreover, they are made under an Act which, while it creates the FTT, does not confer new jurisdiction on it (in that s 30 of the Act transfers to the FTT jurisdiction conferred by other legislation but does not and was not intended to create new jurisdiction).

21. Mr Ewart's answer to this is that whether or not the Tribunal chooses to have an inter partes hearing is a matter of procedure and not jurisdiction. I am unable to agree. If the statute which confers the relevant jurisdiction does not (expressly or impliedly) permit the jurisdiction to be exercised inter partes, then the Rules cannot grant such jurisdiction.

22. Of course, in most, perhaps all, cases where the Tribunal is granted jurisdiction to resolve a dispute between parties, its jurisdiction impliedly, even necessarily, will include jurisdiction to resolve the dispute inter partes. But where it is given a different kind of jurisdiction, it depends on the nature of the jurisdiction whether it includes jurisdiction to hold an inter partes hearing.

23. Therefore, in my view, if the trustee is to succeed, he must show that the jurisdiction for the Tribunal to hold an inter partes Sch 36 application is inherent in Sch 36 itself, as that is the statutory provision which confers the relevant jurisdiction on this Tribunal.

The nature of the Tribunal's Sch 36 jurisdiction

24. The relevant paragraph of Sch 36 reads as follows:

> **3(1)**
>
> An officer of Revenue and Customs may not give a third party notice without –
>
> (a) the agreement of the taxpayer, or
>
> (b) the approval of the tribunal.
>
> (2) An officer of Revenue and Customs may ask for the approval of the tribunal to the giving of any taxpayer notice or third party notice….
>
> (2A) An application for approval under this paragraph may be made without notice (except as required under sub-paragraph (3).
>
> (3) The Tribunal may not approve the giving of a taxpayer notice or third party notice unless -
>
> (a) an application for approval is made by, or with the agreement of, an authorised officer of Revenue and Customs,
>
> (b) the tribunal is satisfied that, in the circumstances, the officer giving the notice is justified in doing so,
>
> (c) The person to whom the notice is to be addressed has been told that the information or documents referred to in the notice are required and given a reasonable opportunity to make representations to an officer of Revenue and Customs
>
> (d) the tribunal has been given a summary of any representations made by that person, and
>
> (e) in the case of a third party notice, the taxpayer has been given a summary of the reasons why an officer of Revenue and Customs requires the information and documents.
>
> (4) Paragraphs (c) to (e) of sub-paragraph (3) do not apply to the extent that the tribunal is satisfied that taking the action specified in those paragraphs might prejudice the assessment or collection of tax.
>
> (5) Where the tribunal approves the giving of a third party notice under this paragraph, it may disapply the requirement to name the taxpayer in the notice if it is satisfied that the officer has reasonable grounds for believing that naming the taxpayer might seriously prejudice the assessment or collection of tax.

25. Sch 36 says nothing about a hearing; it neither requires one to take place nor for it to be inter partes or ex parte. Nevertheless, the trustee accepted that it had no *right* to an inter partes hearing of HMRC's application that it be issued with a Sch 36 information notice. The trustee's position, as I have said, it that it is inherent in Sch 36 that the Tribunal could order an inter partes hearing if it considered it appropriate to do so.

26. It is a question of statutory construction. Sch 36 is obviously very different to a provision conferring jurisdiction on the Tribunal to resolve a dispute between two parties: it appears to be predicated on the basis that only HMRC would make representations to the Tribunal. This is clear for a number of reasons:

(a) HMRC has the right to make the application ex parte (para 3(2A));

(b) While the taxpayer has the right to a precursor letter, he is given no right to make representations to either the tribunal or HMRC (para 3(3)(e));

(c) While the third party is given the right to a precursor letter, and the right to make representations to HMRC, it is given no right to make representations to the Tribunal (para 3(3)(c) and (d));

(d) HMRC is obliged to give to the Tribunal a summary of the third party's representations (para 3(3)(d))

(e) Safeguards, less necessary in an inter partes process, are built it: an authorised officer must agree to the giving of a third party notice before the Tribunal can approve it (para 3(3)(a)).

27. I consider that the legislation anticipated an ex parte process: the trustee is right to concede he has no right to be heard. But, as suggested by Mr Justice Mann, does the Tribunal have the power to let the third party make direct representations to it if it considers it would be helpful?

28. Apart from Mr Justice Mann's comments in the Bankruptcy Court proceedings in relation to the Sch 36 application in this case, so far as I am aware, this question has only been considered head on in two other cases. And while they reached the same conclusion, that the Tribunal could not order an inter partes hearing, neither is binding. The earliest was a Court of Appeal decision (*Morgan Grenfell* discussed below) which is not binding because it considered the predecessor legislation; the second was a recent decision of this Tribunal (my decision at [2015] UKFTT 518 (TC) *Re an application*) which is not binding as first instance. I will consider the *Morgan Grenfell* case in depth as I consider it highly persuasive. I will also refer to a more recent Court of Appeal case which considered the Sch 36 jurisdiction in general albeit not the question at issue in this application.

The s 20 TMA regime

Morgan Grenfell

29. As I have said, *R (oao Morgan Grenfell & Co Ltd) v Special Commissioners* [2000] EWHC Admin 415 concerned s 20 Taxes Management Act 1970 ('TMA') which was the predecessor legislation to Sch 36. The main issue in that case was whether an information notice could require a taxpayer to provide HMRC with documents covered by legal professional privilege, but a secondary issue was whether the Tribunal had the power to accede to the taxpayer's request to be heard at the application hearing.

30. The Tribunal (Sir Stephen Oliver) concluded that it had no jurisdiction to permit the proposed recipient to make representations at the hearing [7]. His decision was appealed to the Divisional Court presided over by Buxton LJ.

31. Buxton LJ rejected the proposed recipient's case on inter partes hearings at [41] and [47]. His reasons were that an information notice was merely a step in the process of a tax investigation and not a final determination of liability to tax: there was no obvious reason why the proposed recipient was not protected by its right to make written representations [39]. Secondly, a discretion to order an inter partes hearing necessarily brought with it an obligation on the Tribunal to justify any decision not to order an inter partes hearing, which was in conflict with HMRC's need in some cases to protect the source of their information [40]:

> [41] We are therefore not persuaded that there are cogent reasons why the requirements of natural justice entail the reading into section 20(7) of a jurisdiction to order an oral hearing, as opposed to giving the taxpayer opportunity to make ex parte submissions.

32. That decision was appealed, and Blackburne J gave the unanimous judgment of the Court of Appeal. The secondary issue on inter partes hearings was still live and it was dealt with at [47-50]. The Court of Appeal accepted the decision of the Divisional Court on this, with similar though not identical reasoning. In summary, any inter partes hearing of an application for an information notice risked compromising HMRC's investigation and could not have been intended by Parliament:

> [47] The submission that a taxpayer or adviser at risk of compulsory disclosure of confidential documents ought to have an opportunity of deflecting the application is at first sight attractive. To see why, one need go no further than Lord Loreburn LC's celebrated remark in *Board of Education v Rice* [1911] AC 179 that acting in good faith and listening fairly to both sides "is a duty lying upon everyone who decides anything". But in the same passage Lord Loreburn made clear, as other judges of high authority have done many times since, that how this is done is in principle a matter for each decision-maker: natural justice does not generally demand orality. And there is a further, small, group of cases, ... in which the exigencies of the legislative scheme make an inter partes procedure impossible.
>
> [48]What is said here by [counsel for the taxpayer] is that although the disclosure procedure is in one sense a first step which in itself determines nobody's rights or liabilities, in another and more important sense it is conclusive of the Revenue's right to invade somebody's privacy and (given our conclusions so far) to disrupt a relationship of professional confidentiality. .... Here, where it is respect for private life and correspondence under Article 8 which in issue, the impugned decision constitutes a completed invasion of the Convention right. If the court is to sanction it, as we have done, then [counsel for the taxpayer] contends that it should only be by including at least a power (he no longer says a duty) in the Special Commissioner to hear oral submissions if he thinks they may help him to reach a sound

conclusion. In this way the common law will be doing what it can and should to prevent procedural unfairness from being heaped on substantive injustice.

[49] It will be recalled that in the present case the Special Commissioner accepted written submissions from the applicants without demur. But he held that he had no power whatever to entertain oral submissions. [Counsel for HMRC] has tenaciously, and in our ultimate view successfully, defended this entrenched and in many ways unpromising position against [the taxpayer's] assault. His argument is that, both on principle and on authority, the self-evident risk of compromising the investigation shuts out any possibility of an oral procedure.

[50] It has to be remembered that a right to be heard is axiomatically worth little without knowledge of the case that has to be met. Either, therefore, the inspector's hand has in some measure to be shown, or the taxpayer must be content to make submissions in the dark. The former, it is plain, is destructive of the whole purpose of the procedure; the latter, while some taxpayers may consider it better than nothing, will create a sustained pressure for disclosure. There are only two logical outcomes if these two imperatives clash in a face-to-face hearing: one is that the taxpayer will duly learn nothing, in which case it is not easy to see what will have been achieved on his behalf that could not have been achieved in writing; the other is that the Special Commissioner's opportunity ... to "enjoy the benefit of advocacy" will lead to accidental disclosure by him or (more probably) the inspector of material to which [counsel for the taxpayer] does not contend that the taxpayer is entitled and the disclosure of which at this stage will run counter to Parliament's purpose. That purpose, we apprehend, is in lieu of any inter partes procedure to instal the General or Special Commissioner as monitor of the exercise of the Inland Revenue's intrusive powers and to require an inspector to put everything known to him, favourable and unfavourable, before the Commissioner when seeking his consent (*R v IRC, ex parte T.C.Coombs & Co [1991] 2 AC 283*). We accept [counsel for HMRC's] contention, therefore, that the possibility of an oral hearing is excluded by the nature of the process in question. We do not accept his further ground that to establish a discretion to hold a hearing is to invite judicial review of every decision not to do so and of every failure to extract information from the inspector or to obtain reasons from the Commissioner. It is not legitimate, as Lord Bridge said in Leech v Deputy Governor of Parkhurst Prison [1988] AC 533, 566, to draw jurisdictional lines on a purely defensive basis. If the power exists, the possibility of judicial review comes with it. But, for the reasons we have given, we are satisfied that the Special Commissioner was right to conclude that he possessed no such power.

33. The Court of Appeal, like the Special Commissioner and Divisional Court before it, also ruled against the taxpayer on the legal professional privilege issue: only that aspect of the decision was appealed to the House of Lords [2002] UKHL 21. The Lords overturned the Divisional Court and Court of Appeal on this point and held that an information notice did not cover privileged material. But there was no appeal

against the Court of Appeal's decision on the inter partes matter which is therefore good law at least in so far as s 20 TMA is concerned.

Comparison of s 20 to Sch 36

34. As I have said, the Court of Appeal's decision in *Morgan Grenfell* is not binding on me because it concerned predecessor legislation. The question is how persuasive it is, and that depends on how similar the new legislative regime is to the old one, and whether the same concerns apply to third party notices (at issue in this hearing) as to taxpayer notices (at issue in *Morgan Grenfell).* Does what the Court of Appeal said about taxpayer notices under s 20(1) TMA have application to Sch 36 paragraph 3 third party notices?

35. The old and new legislation on information notices are superficially very different, particularly as Sch 36 is much longer (running to over 60 paragraphs). But the relevant provisions to those at issue in this hearing seem to me very similar. I have set out s 20 in an appendix, but summarise my comments on it below.

36. By s 20 an HMRC inspector was entitled to issue (sub(1)) a taxpayer notice and (sub-(3)) a third party notice to obtain information and documents relevant to the taxpayer's tax liability. S 20(7) provided that taxpayer and third party information notices could only be given by an authorised officer of HMRC and with the consent of the Tribunal.

37. While similar, I find that s 20 was in this respect more restrictive to HMRC than Schedule 36. Schedule 36 in addition permits either taxpayer or third party information notices to be given with the consent of, and not merely by, an authorised officer (paragraph 3(3)(a)). More significantly, Sch 36 para 1 permits HMRC to issue a taxpayer notice without the consent of either an authorised officer or the Tribunal, and a third party notice just with taxpayer consent, although in either case where they do so, there is a right of appeal. Otherwise, under new or old provisions there is no right of appeal. These small changes favour HMRC and certainly do not suggest that the Court of Appeal's conclusion with respect to s 20 ex parte applications that 'the possibility of an oral hearing is excluded by the nature of the process in question' does not apply with equal force to Sch 36 ex parte applications.

38. Continuing with the comparison, where either a taxpayer or third party information notice was issued with Tribunal consent under either S 20 or Sch 36, the Tribunal had to be satisfied that in the circumstances HMRC was justified in issuing the notice (s 20(7) and Sch 36 para 3(3)(b)). There is no change here.

39. But where Sch 36 is (apparently) more restrictive to HMRC than s 20 TMA concerns rights of representation and this is potentially relevant. S 20 only provided that a summary of reasons needed to be given to the taxpayer for either type of notice (s 20(8E)); in particular, unlike Sch 36 paragraph 3(3)(c) and (d), s 20 did not require a precursor letter to be sent to the third party, nor did it require HMRC to present to the Tribunal representations made by either the taxpayer or third party.

40. However, I do not consider that this does make what was said in *Morgan Grenfell* less relevant. While the third party and taxpayer under s 20 had less explicit rights of representation than under Sch 36, *Morgan Grenfell* concerned a taxpayer whose written representations had in fact been presented to the Tribunal by HMRC. The Divisional Court and Court of Appeal clearly thought that that was within the scope of s 20, and it seems to me that Sch 36 did no more than codify a practice that had already been adopted by HMRC. Indeed, as recognised by the Court of Appeal in *Morgan Grenfell* at [50] (citing *Coombes)* (see §32 above), the right to apply for an ex parte notice carried with it on obligation on HMRC to put everything known to them, favourable and unfavourable, before the Commissioner when seeking his consent. So the obligation enshrined in Sch 36 paragraph 3(3)(d) did apply to s 20. So, in conclusion, Sch 36 does not give the third party any more right of representation than s 20.

41. It is therefore the position case that under either s 20 or Sch 36 HMRC was obliged to present to the Tribunal, and the Tribunal to consider, written representations made by the third party. So no distinction between the old and new provisions can be made on this basis, and the Court of Appeal's decision in *Morgan Grenfell* is therefore as relevant to Sch 36 as to s 20.

Morgan Grenfell and the Rules

42. Another point made by Mr Ewart was that the Special Commissioner Rules did not apply to s 20 TMA hearings and therefore, as the Tribunal's Rules referred to above do govern procedure in Sch 36 hearings, no weight could be put on the *Morgan Grenfell* decision as it looked at the s 20 position and did not consider the impact the Rules might have. But it follows from what I said at §§19-23 above, I do not agree because I have reached the conclusion that there is nothing in the Rules which could grant on this Tribunal jurisdiction to hold an inter partes hearing on a Sch 36 application if it was not given that jurisdiction by Sch 36. The Rules are not a relevant distinction between the position under s 20 and Sch 36.

Conclusion on Morgan Grenfell

43. In conclusion, I consider the Divisional Court and Court of Appeal decisions in *Morgan Grenfall* highly persuasive. There is no significant difference between the information notice regime at issue in that case and in this: the Courts considered that Parliament did not intend the Tribunal to have a discretion to permit the intended recipient of a s 20(1) notice to attend the hearing and make representations. The same reasoning leads to the same result with respect to a Sch 36 paragraph 3 third party notice. The clear intention of Parliament in enacting s 20 and the very similar provisions in Sch 36 was that the Tribunal would merely have a judicial monitoring role and that the state of HMRC's tax investigation was not to be revealed in an inter partes or in a public hearing.

44. I am aware that *Morgan Grenfell* concerned a taxpayer notice whereas this hearing concerns a third party notice: I will deal with the relevance of that distinction

below at §§60-66 but it makes more sense to do so after considering the recent Court of Appeal decision on Sch 36.

Judicial consideration of the Sch 36 regime

The Derrin case

45. The Court of Appeal considered the Sch 36 regime in ***R (oao Derrin) v FTT and HMRC*** [2016] EWCA Civ 15. It was an application by various 'taxpayers' for judicial review of Judge Berner's decision in this Tribunal to authorise the issue of information notices under paragraph 3 of Sch 36 to various third parties. While the issues in the case were not the same as in this case, in the course of its judgment the Court considered the FTT's jurisdiction under Sch 36. The FTT's jurisdiction was described as being a 'monitor' of HMRC's decision to issue the notice (see [14]).

46. *Derrin* largely concerned the rights of taxpayers to information when HMRC applied for a third party information notice. The taxpayers in that case conceded that they had no right to attend the hearing of HMRC's application. But they argued they did have a right to make representations to HMRC, which HMRC would be obliged to place before the FTT at the hearing and that, therefore, HMRC's summary of reasons to them should be sufficiently detailed to enable informed representations to be made [65]. This proposition was rejected and while doing so the Court commented on the nature of Sch 36:

> [68] The purpose of the statutory scheme is to assist HMRC at the investigatory stage to obtain documents and information without providing an opportunity for those involved in potentially fraudulent or otherwise unlawful arrangements to delay or frustrate the investigation by lengthy or complex adversarial proceedings or otherwise. It is inevitable in many cases, particularly where there are complex arrangements designed to evade tax, that at the investigatory stage it will be difficult, if not impossible, for HMRC to be definitive as to the precise way in which particular documents will establish tax liability. It is also clear that in many cases disclosure of HMRC's emerging analysis and strategy and of sources of information to the taxpayer or those associated with the taxpayer may endanger the investigation by forewarning them.
>
> [69] Those considerations explain the principal features of schedule 36 relating to the service of third party notices. In the first place, Parliament has deliberately chosen a judicial monitoring scheme rather than a system of adversarial appeals from third party notices, which could take years to resolve. ...

47. While the question in *Derrin* was different to that in *Morgan Grenfell*, the reasoning and outcome is very similar: it was Parliament's intention that taxpayers should not be fully informed about the tax investigation so (*Morgan Grenfell)* the Tribunal under s 20 could not permit an inter partes hearing and (*Derrin)* taxpayers

had no right to a detailed summary of the reasons for the Sch 36 application (see §71 of *Derrin).*

48. The Court also ruled that Sch 36

> [74]...does not expressly confer on the third party a right to make representations directly to the FTT or a right to appear before the FTT.
>
> [75] ...the third party is not given any right to appear before the FTT because, consistently with the judicial monitoring scheme rather than an adversarial one and with the limited right of objection by the third party, it is sufficient that the third party is given a right to make representations to the officer, and the officer is obliged to provide the FTT with a summary of those representations.

49. The Court was not asked to, and did not expressly consider, whether the FTT had the power to permit the third party, or even the taxpayers or other persons affected by the application, to make representations at the hearing. Mr Ewart's view was that the Court did not rule this out and there were indications that the Court considered that the FTT did have such a power.

Indications that the FTT has discretion to order an inter partes hearing?

50. I move on to consider possible indications in *Derrin* that the Court considered the FTT had a discretion to permit a third party to attend a Sch 36 application hearing.

51. In [89] of *Derrin,* the Court referred to the fact that none of the appellants had attempted to make representations 'to HMRC or the FTT'. I do not consider anything should be read into this as the end of that paragraph shows that the Court was thinking of the process under Sch 36 by which representations made to HMRC ought to be summarised by HMRC in the FTT hearing.

52. I was also referred to [118] where the Court stated that a judicial monitoring scheme 'normally' involved applications being made ex parte and heard in private, with very limited rights to participation by those affected by them. Again, I do not think anything can be read into this. It indicates no more than that the application does not have to be made ex parte. But the question here is not whether the application should have been made ex parte (as it was), but whether the Tribunal has power to order an inter partes hearing where HMRC has made an ex parte application. Even Sch 36 recognises that the application does not have to be made ex parte: paragraph 3(2A). (I note in passing that my experience is that HMRC invariably make the applications ex parte).

53. At [119] the Court noted that Judge Berner had directed that the hearing be in private and that that 'case management decision' had never been challenged. But again I do not consider this supports the trustee's case. Whether or not a hearing is in private is a very different question to whether a party is entitled to be represented at a hearing: unless expressly or impliedly limited by the statute granting jurisdiction to the FTT, the decision whether to hold a public or private hearing is simply a case management matter, as described by the Court. There is nothing in Sch 36 which in

my view expressly or impliedly restricts the right of the FTT to decide for itself whether to hold the hearing in private or not, albeit the nature of the Sch 36 jurisdiction may indicate that it is appropriate to exercise that discretion by ordering a private hearing.

54. Mr Ewart particularly relied on, for this submission, the presence of a representative of the Australian Tax Office ('ATO') in the *Derrin* hearing before Judge Berne. This is noted at [37] of the Court of Appeal's decision, and no adverse comment about this is made. Mr Ewart considered this indicated that the Court considered that the FTT did have power to permit persons other than HMRC to attend and make representations at an ex parte hearing for approval under paragraph 3 of Sch 36.

55. I do not agree that this can be read into [37]. While not relevant to this case, the *Derrin* case involved 'relevant foreign tax' under paragraph 63 of Sch 36 and HMRC's application was to give effect to the UK's international treaty obligations to assist foreign tax authorities in gathering information: in other words, HMRC made the disputed application to the FTT on behalf of the ATO and the ATO was no doubt best placed to explain to the FTT, on behalf of HMRC, why the information was required. The ATO's presence did not make it an inter partes hearing. It was an ex parte hearing, involving only those representing the interests of the applicant.

56. Lastly, at [93] the Court commented that there had been no challenge to the FTT's decision that the hearing would be ex parte and in private, possibly indicating that in its view that there was a right to make such a challenge. However, such a view is not clearly stated and the point was not, as I have said, in issue. This is not binding or even persuasive authority that the FTT has the right to order an inter partes hearing of a Sch 36 ex parte application.

Conclusions on Derrin

57. There is nothing in *Derrin* which supports the view that under Sch 36 the Tribunal has the jurisdiction in its discretion to order an inter partes hearing of an ex parte Sch 36 paragraph 3 application. On the contrary, it reiterates the view clear from cases on s 20 (such as *Coombs* mentioned below) that Parliament had deliberately chosen a judicial monitoring scheme rather than a system of adversarial appeals from third party notices.

58. Moreover, the Court relied on, and treated as good authority, the House of Lords case *R (ex parte T C Coombs and Co) v IRC* [1991] 2 AC 283 on s 20. The significance of this is that it supports my view expressed above that *Morgan Grenfell*, also a case on s 20, is highly persuasive with respect to Sch 36. Indeed, the Court in *Derrin* also cited *Morgan Grenfell* which no suggestion that it was no longer good authority.

Comparison of the position of third parties to taxpayers

59. There is a distinction between *Morgan Grenfell* and *Derrin,* on the one hand, and this case, on the other hand, because here it is a third party rather than the taxpayer which is seeking rights, whether to a discretionary inter partes hearing or to full reasons for the investigation. While *Derrin,* as here, did concern third party notices, they were challenged by the taxpayer rather than, as here, the third party.

60. The reasoning in both *Morgan Grenfell* and *Derrin* was, as I have said at §47, similar and that was that Parliament did not intend the Sch 36 process to lead to disclosure to the taxpayer of the state of HMRC's tax investigation lest it should be compromised.

61. But is that reasoning as applicable to a third party?

62. I was not referred to Rule 14 but I wondered whether it was worth considering: its gives the Tribunal the power to prohibit disclosure of information which relates to proceedings and theoretically could be used to prevent a third party, present in an inter partes application, disclosing to the taxpayer information learnt about the tax investigation (although it would presumably be useless if the inter partes hearing was heard in public). I note in passing that this Rule 14 power is normally exercised by the Tribunal where the requirement to give notice to the taxpayer is disapplied by the Tribunal under paragraph 3(4), for the very reason that otherwise the disapplication could be circumvented by the third party informing the taxpayer about the information notice.

63. But I do not consider the power contained in Rule 14 is an answer or could be used to support the trustee's case. While the desire to protect the investigation was in *Derrin* and *Morgan Grenfell* seen as being at the heart of s 20 and Sch 36's 'ex parte' nature so far as the taxpayer was concerned, so far as the third party is concerned it is clear that Parliament did not intend the third party to know anything at all about the investigation. Whereas under paragraph 3(3)(e) the taxpayer is entitled to a (brief) summary of reasons for the information notice (unless this is disapplied), the third party is never entitled to any explanation whatsoever for the information notice. Such an explanation to the third party is not required by Sch 36 and it seems to me that under s 18 Commissioners for Revenue & Customs Act 2005 ('CRCA') it might well be unlawful for HMRC to provide it.

64. This lack of entitlement by the third party to any reasons is not surprising. Parliament clearly places great importance on taxpayer confidentiality as unlawful disclosure is a criminal matter (s 19 CRCA). So Parliament could not have intended a third party, any more than the taxpayer, to know about the state of the taxpayer's tax affairs and the tax investigation into them, irrespective of whether the third party is put under an obligation not to disclose its knowledge.

65. It seems to me that the desire to protect taxpayer confidentiality is an important reason why Sch 36 is drafted as it is in respect of third parties and is at least as much a part of the reason why Parliament did not intend ex parte applications to be dealt with in a manner different to that set out in paragraph 3. In other words, taxpayer

confidentiality, as well as the desire to have effective tax investigations, was one of the main reasons why Parliament did not confer on this Tribunal a jurisdiction to call an inter partes hearing where HMRC made an ex parte application.

The Ariel case in the Bankruptcy Court

66. I have already set out in full at §7 above Mr Justice Mann's comments on the power to this Tribunal to order an inter partes hearing of an ex parte Sch 36 application. Not surprisingly the trustee relied heavily on them supporting as they do his position: to what extent are they binding or persuasive?

67. Both sides were agreed they were not binding as they did not form a part of his lordship's decision on the matter before him. There was an interesting disagreement between counsel whether his lordship's remarks were 'obiter dicta' (remarks on the law which are non-binding because they do not form a part of the decision) or merely personal comments, to which no attention should be paid and which are not afforded the respect given to dicta from a superior court.

68. I certainly do not dismiss the remarks as personal comments, but the degree of authority they command depends upon whether they were made after hearing argument on the matter they addressed. Ms Anderson, who appeared before Mr Justice Mann, said his lordship was not addressed on the matter. Mr Ewart did not dispute this. Moreover, it is clear that his lordship did not have in mind the decisions of the Divisional Court and Court of Appeal in *Morgan Grenfell.* While these decisions are not binding as they involve predecessor legislation, inevitably the failure to consider them makes his lordship's comments less persuasive.

69. In summary, it was his view that direct representations from the third party would leave the Tribunal in a better position to reach the correct answer on the application, with due consideration of its impact on the third party, and tht such an inter partes hearing was not inconsistent with the scheme of Sch 36. I move on to consider this in more detail.

The Tribunal should satisfy itself the notice is not unduly onerous

70. Both parties appeared agreed that the scheme and logic of Sch 36 was that the tribunal should not grant HMRC's application if it was unduly onerous on the third party. Ms Anderson's view was this followed because the order should apply to only 'reasonably required' information and documents; while Mr Ewart did not agree that 'unduly onerous' was the reverse side of the coin to 'reasonably required', they did both agree that it followed because, where a third party had a right of appeal (where the notice was only given with taxpayer consent), the only ground afforded to it was that the third party notice was unduly onerous (Paragraph 30(1)).

71. As was accepted in *Morgan Grenfell* at [50], a third party is likely to be more effective in its representations that the proposed notice is in whole or part unduly onerous in an inter partes hearing fully informed of the reasons why HMRC

considered the information reasonably required, than it would be making written submissions in ignorance of HMRC's reasons for requiring the information.

72. Nevertheless, contrary to Mr Justice Mann's dicta in *Ariel,* such a hearing is inconsistent with the scheme of Sch 36 for the reasons given in *Morgan Grenfell* by the Court of Appeal and referred to me above. In particular, it would require HMRC to reveal the current state of their investigation to the third party, to the possible detriment of that investigation. It would also require HMRC to reveal information about the taxpayer's tax affairs to a third party, a consideration which did not arise in *Morgan Grenfell*, but is also one which Parliament is unlikely to have intended bearing in mind the strict duty of confidentiality imposed on HMRC.

Complex cases require special consideration?

73. Mr Justice Mann was particularly concerned about the position of trustees in bankruptcy which he considered more complex than that of a different third party in a usual Sch 36 application.

74. I accept that HMRC's application in this case might well involve more complex issues than many Sch 36 applications: the trustee has already served a long witness statement with large appendices. As I have said, his concerns are (a) the risk that complying with the information notice would put him in contempt of one or more foreign courts and, (2) that the alleged very significant cost of compliance would fall on him personally as the estate is said to be insolvent.

75. Nevertheless, I consider it clear from *Morgan Grenfell* that the complexity of the third party's objections makes no difference to the jurisdiction conferred on the Tribunal, which does not include the power to call an inter partes hearing. This is also clear because the *Morgan Grenfell* case itself involved a complex issue, that of legal professional privilege, ultimately resulting in a House of Lords decision. The Court of Appeal in that case was quite clear that there was no discretion to order an inter partes hearing, as it was inconsistent with the monitoring jurisdiction conferred on the Tribunal.

Appeal rights relevant?

76. Another reason Mr Justice Mann gave was that giving the third party a right of audience would reduce the need for judicial review of the Tribunal's decision, judicial review being the only route of challenge open to the third party. His reasoning seems to be that the third party's representations are likely to more effective at influencing the Tribunal's decision in an inter partes hearing than in an ex parte hearing and therefore the third party would be less likely to challenge the decision of the Tribunal following an inter partes hearing than an ex parte hearing.

77. But in my view the potential for reducing the number of judicial reviews is not a good reason for giving the legislation an interpretation which is not obvious on its face, and, as the Court of Appeal in *Morgan Grenfell* made clear, Parliament did not intend.

Conclusion

78. The Sch 36 paragraph 3 jurisdiction conferred on the Tribunal is not to resolve a dispute as between HMRC and the potential recipient of a third party information notice: the jurisdiction is to act as a monitor in checking that, on the basis of what is known to HMRC, the requested information and/or documents are reasonably required from the third party in order to check the taxpayer's tax position. As the tribunal is merely monitoring the exercise of a power conferred on HMRC, there is no appeal. All an aggrieved third party can do is seek to judicially review either or both HMRC and the tribunal.

79. This limited jurisdiction is what Parliament chose to confer on the Tribunal and it is not open to the Tribunal to extend its jurisdiction to one suitable for the resolution of disputes.

80. As the Court of Appeal in *Morgan Grenfell* said, Parliament's clear purpose in giving the Tribunal only a limited jurisdiction was to prevent tax investigations being compromised. Investigations are likely to be compromised if when making a Sch 36 application the Tribunal had a discretion to order an inter partes hearing whether for the benefit of the third party, taxpayer, or both. Additionally, I consider, as I have said, that Parliament would not have intended the confidential handling by HMRC of a taxpayer's tax affairs to be compromised by a Sch 36 application, as it would be if the tribunal had and exercised a discretion to permit a third party to attend the hearing of the application.

81. The Court of Appeal in *Derrin* also referred to Parliament's intention in limiting the Tribunal's role to that of a monitor being to prevent compromise of the investigation. See [68]. In addition, they considered that delay would also have been a factor: an inter partes process in necessarily a longer process, particularly as there would be a right of appeal (at least from a case management decision not to order direct representations). For this reason too, Parliament did not intend the Sch 36 process to be inter partes.

82. I am really faced with the choice between the non-binding decision of the Court of Appeal in *Morgan Grenfell,* or the non-binding remarks of Mr Justice Mann in *Ariel.* I chose the former as I see no good reason why what the Court of Appeal said in respect of a taxpayer notice under s 20 does not also apply to a third party notice under Sch 36. And while Mr Justice Mann was rightly concerned with the trustee's position as recipient of a potentially onerous information notice, he does not weigh those concerns against Parliament's clear desire that HMRC should be able to conduct timely and confidential tax investigations. So I prefer the view of the Court of Appeal in *Morgan Grenfell.*

83. I conclude that the FTT has no discretion to order an inter partes hearing, under which the third party is notified of the date of, and has the right to make representations at, the hearing of HMRC's Sch 36 application.

A half-way type of hearing

84. I mentioned at the start that I took the application to refer to an inter partes hearing at which the trustee would have the right to hear HMRC's representations. I recognised that there might be a half-way position where the Tribunal had discretion to permit the trustee to make an oral address but not remain in the hearing room to hear HMRC's case.

85. That would deal with concerns on protecting the investigation and the taxpayer's confidentiality, although not with the concerns of the Court of Appeal in *Derrin* about the speed of the process. It would seem to offer the third party very little if anything above the right they have in any event to have their written representations (or at least a summary of them) placed before the Tribunal. There is very little difference between oral representations in ignorance of the other party's case, and written representations in ignorance of the other party's case.

86. Bearing in mind that I have said the interpretation of Sch 36 clearly indicates Parliament intended the tribunal only to have a monitoring role, I do not think there is any scope for interpreting para 3(3)((d), which requires HMRC merely to provide a summary of the third party representations, as giving the Tribunal having the discretion to permit oral representations from the third party even without the third party being informed of HMRC's case.

87. I also note that this possibility was briefly referred to, and rejected, by the Court of Appeal in *Morgan Grenfell* at [50].

Conclusion

88. In conclusion, I do not consider that the Tribunal has any jurisdiction in proceedings by HMRC for an ex parte third party Sch 36 notice to order an inter partes hearing nor to give the trustee the opportunity to make submissions directly to the Tribunal. It is not given such jurisdiction by Sch 36. The jurisdiction which Sch 36 confers is not one of dispute resolution but of monitoring. Neither expressly nor impliedly does it include a power to hold an inter partes hearing of any sort: to read such a power in would defeat Parliament's intention.

89. The trustee's application is dismissed. The Tribunal will now proceed to set down HMRC's application for a third party notice under paragraph 3 Sch 36 in an ex parte and in private hearing.

Footnotes

The Explanatory note to the legislation

90. A year after Sch 36 was enacted, it was amended by Finance Act 2009 to include paragraph 3(2A), set out above. The Explanatory note to this part of the FA 2009 said as follows:

> 4.Paragraph 2 inserts new paragraph 3(2A) into Schedule 36 to make clear that applications to the tribunal for approval of taxpayer or third party notices are heard without the taxpayer being present.

91. Mr Ewart's position was that, firstly, it is inaccurate as paragraph 3(2A) says 'may', and secondly, it only said that the hearings took place without the taxpayer's presence: it said nothing about the third party's presence.

92. I accept that the explanatory note is neither entirely accurate nor on point, but it does nothing to weaken the conclusion that I have reached.

Should Sch 36 ex parte hearings be in private?

93. In the hearing there was reference made to the distinction between ex parte hearings and in private hearings. The 'ex parte'/'inter partes' dichotomy refers to who has the right to be heard, the 'in private'/'in public' dichotomy refers to who has a have a right to attend the hearing. An inter partes hearing could be in private and theoretically an ex parte hearing could be in public

94. However, the reason which justifies any particular hearing being ex parte would almost certainly be defeated if the hearing was not also in private. It is clear from what was said in *Morgan Grenfell* that it is appropriate for all Sch 36 ex parte applications to be in private. The reason for the applications to be ex parte is to prevent compromise of the investigation and protect taxpayer confidentiality. Both these reasons mean that the hearing should be in private. Moreover, as the hearing is ex parte the taxpayer does not know when it will take place and effectively is prevented from attending even if the hearing was not in private. Therefore, it is inappropriate for members of the public to be permitted to attend the hearing as otherwise the taxpayer's tax affairs will be discussed in public and in the absence of the taxpayer.

95. It has always been routine in the tax tribunal for Sch 36 ex parte hearings to be directed to be in private. The authority to make an in private direction in such proceedings is delegated to the Registrar and tribunal caseworkers as it is a routine matter. The outcome of this case is that that will continue to be the position.

96. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

BARBARA MOSEDALE
TRIBUNAL JUDGE
RELEASE DATE: 17 JANUARY 2017

APPENDIX

Section 20 Taxes management Act 1970

20 Power to call for documents of taxpayer and others

(1) Subject to this section, an inspector may by notice in writing require a person—

(a) to deliver to him such documents as are in the person's possession or power and as (in the inspector's reasonable opinion) contain, or may contain, information relevant to—

(i) any tax liability to which the person is or may be subject, or

(ii) the amount of any such liability, or

(b) to furnish to him such particulars as the inspector may reasonably require as being relevant to, or to the amount of, any such liability.

(2) Subject to this section, the Board may by notice in writing require a person—

(a) to deliver to a named officer of the Board such documents as are in the person's possession or power and as (in the Board's reasonable opinion) contain, or may contain, information relevant to—

(i) any tax liability to which the person is or may be subject, or

(ii) the amount of any such liability, or

(b) to furnish to a named officer of the Board such particulars as the Board may reasonably require as being relevant to, or to the amount of, any such liability.

(3) Subject to this section, an inspector may, for the purpose of enquiring into the tax liability of any person ("the taxpayer"), by notice in writing require any other person to deliver to the inspector or, if the person to whom the notice is given so elects, to make available for inspection by a named officer of the Board, such documents as are in his possession or power and as (in the inspector's reasonable opinion) contain, or may contain, information relevant to any tax liability to which the taxpayer is or may be, or may have been, subject, or to the amount of any such liability[; and the persons who may be required to deliver or make available a document under this subsection include the Director of Savings.

(4), (5)

(6) The persons who may be treated as "the taxpayer" for the purposes of this section include a company which has ceased to exist and an individual who has died; …

(7) Notices under subsection (1) or (3) above are not to be given by an inspector unless he is authorised by the Board for its purposes; and—

(a) a notice is not to be given by him except with the consent of the tribunal; and

(b) the tribunal is to give consent only on being satisfied that in all the circumstances the inspector is justified in proceeding under this section.

(7A) A notice under subsection (2) above is not to be given unless the Board have reasonable grounds for believing—

(a) that the person to whom it relates may have failed or may fail to comply with any provision of the Taxes Acts; and

(b) that any such failure is likely to have led or to lead to serious prejudice to the proper assessment or collection of tax.

(7AB) A judge or other member of the tribunal involved in giving consent under subsection (7) above shall neither take part in, nor be present at, any proceedings on, or related to, any appeal brought—

(a) in the case of a notice under subsection (1) above, by the person to whom the notice applies, or

(b) in the case of a notice under subsection (3) above, by the taxpayer concerned,

if the judge or other member has reason to believe that any of the required information is likely to be adduced in evidence in those proceedings.

(7AC) In subsection (7AB) above "required information" means any document or particulars which were the subject of the proposed notice with respect to which the tribunal gave consent.

(8) Subject to subsection (8A) below, a notice under subsection (3) above shall name the taxpayer with whose liability the inspector (or, where section 20B(3) below applies, the Board) is concerned.

(8A) If, on an application made by an inspector and authorised by order of the Board, [the tribunal gives consent, the inspector may give such a notice as is mentioned in subsection (3) above but without naming the taxpayer to whom the notice relates; but such a consent shall not be given unless the tribunal is satisfied—

(a) that the notice relates to a taxpayer whose identity is not known to the inspector or to a class of taxpayers whose individual identities are not so known;

(b) that there are reasonable grounds for believing that the taxpayer or any of the class of taxpayers to whom the notice relates may have failed or may fail to comply with any provision of the Taxes Acts;

(c) that any such failure is likely to have led or to lead to serious prejudice to the proper assessment or collection of tax; and

(d) that the information which is likely to be contained in the documents to which the notice relates is not readily available from another source.

(8B) A person to whom there is given a notice under subsection (8A) above may, by notice in writing given to the inspector within thirty days after the date of the notice under that subsection, object to that notice on the ground that it would be onerous for him to comply with it; and if the matter is not resolved by agreement, it shall be referred to the tribunal, which may confirm, vary or cancel that notice.

(8C) In this section references to documents do not include—

(a) personal records (as defined in section 12 of the Police and Criminal Evidence Act 1984), or

(b) journalistic material (as defined in section 13 of that Act),

and references to particulars do not include particulars contained in such personal records or journalistic material.

(8D) Subject to subsection (8C) above, references in this section to documents and particulars are to those specified or described in the notice in question; and—

(a) the notice shall require documents to be delivered (or delivered or made available), or particulars to be furnished, within such time (which, except in the case of a notice under subsection (2) above, shall not be less than thirty days after the date of the notice) as may be specified in the notice; and

(b) the person to whom they are delivered, made available or furnished may take copies of them or of extracts from them.

(8E) An inspector who gives a notice under subsection (1) or (3) above shall also give to—

(a) the person to whom the notice applies (in the case of a notice under subsection (1) above), or

(b) the taxpayer concerned (in the case of a notice under subsection (3) above),

a written summary of his reasons for applying for consent to the giving of the notice.

(8F) Subsection (8E) above does not apply, in the case of a notice under subsection (3) above, if by virtue of section 20B(1B) a copy of that notice need not be given to the taxpayer.

(8G) Subsection (8E) above does not require the disclosure of any information—

(a) which would, or might, identify any person who has provided the inspector with any information which he took into account in deciding whether to apply for consent; or

(b) if the tribunal has given a direction that that information is not to be subject to the obligation imposed by that subsection.

(8H) The tribunal shall not give a direction under subsection (8G) above unless satisfied that the inspector has reasonable grounds for believing that disclosure of the information in question would prejudice the assessment or collection of tax.

(9) To the extent specified in section 20B below, the above provisions are subject to the restrictions of that section.