[2018] UKFTT 140 (TC)

TC06393

Appeal numbers:TC/2016/03334
TC/2016/06470
TC/2016/03330

PROCEDURE – inspection of documents mentioned in a witness statement – waiver of privilege – whether there should be disclosure of associated documents – separate non-compliance with a direction – appropriate sanction

FIRST-TIER TRIBUNAL
TAX CHAMBER

(1) MS MICHAELA BURNIKELL & MR KEVIN GRAHAM **Appellant**
(2) MR JAMES LANG & MRS GILLIAN LANG
(3) MS VICTORIA CARTER AND MR PETER KENNEDY

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN

Sitting in public at Taylor House, London EC1R 4QU on 9 February 2018

Mr David Bedenham instructed by Reynolds Porter Chamberlain LLP for the Appellants

Ms Barbara Belgrano instructed by HM Revenue & Customs Solicitor's Office and Legal Services for the Respondents

DECISION

Background

1. This is an application by the appellants for inspection and disclosure of documents in what are three lead cases concerning assessments to stamp duty land tax ("SDLT"). The assessments were in each case discovery assessments pursuant to paragraph 28 Schedule 10 Finance Act 2003. There is also an application by the respondents in relation to cross examination of the appellants' witnesses at the final hearing. The applications fall to be dealt with separately.

2. Directions were given on 13 January 2017 in each appeal for the hearing of a preliminary issue as follows:

> "Were the notices of assessment, issued to the [appellants], and issued pursuant to paragraph 28 of Schedule 10 to the Finance Act 2003, validly made, in particular, was at least one of the conditions referred to in paragraph 30(1)(a) of Schedule 10 to the Finance Act 2003 satisfied in the circumstances of this case?"

3. Paragraphs 28 and 30(1)(a) Schedule 10 provide as follows:

> " 28(1) If the Inland Revenue discover as regards a chargeable transaction that—
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> (a) an amount of tax that ought to have been assessed has not been assessed, or
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> (b) an assessment to tax is or has become insufficient, or
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> (c) relief has been given that is or has become excessive,
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> they may make an assessment (a "discovery assessment") in the amount or further amount that ought in their opinion to be charged in order to make good to the Crown the loss of tax.
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> (2) The power to make a discovery assessment in respect of a transaction for which the purchaser has delivered a return is subject to the restrictions specified in paragraph 30."

> " 30(1) If the purchaser has delivered a land transaction return in respect of the transaction in question, an assessment under paragraph 28 or 29 in respect of the transaction—
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> (a) may only be made in the two cases specified in sub-paragraphs (2) and (3) below, and
>
> (b) may not be made in the circumstances specified in sub-paragraph (5) below.
>
> (2) The first case is where the situation mentioned in paragraph 28(1) or 29(1) is attributable to fraudulent or negligent conduct on the part of—
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> (a) the purchaser,

(b) a person acting on behalf of the purchaser, or

(c) a person who was a partner of the purchaser at the relevant time.

(3) The second case is where the Inland Revenue, at the time they—

(a) ceased to be entitled to give a notice of enquiry into the return, or

(b) completed their enquiries into the return,

could not have been reasonably expected, on the basis of the information made available to them before that time, to be aware of the situation mentioned in paragraph 28(1) or 29(1).

(4) For this purpose information is regarded as made available to the Inland Revenue if—

(a) it is contained in a land transaction return made by the purchaser,

(b) it is contained in any documents produced or information provided to the Inland Revenue for the purposes of an enquiry into any such return, or

(c) it is information the existence of which, and the relevance of which as regards the situation mentioned in paragraph 28(1) or 29(1)—

(i) could reasonably be expected to be inferred by the Inland Revenue from information falling within paragraphs (a) or (b) above, or

(ii) are notified in writing to the Inland Revenue by the purchaser or a person acting on his behalf."

4. The appeals involve schemes implemented by the appellants to avoid SDLT on the purchase of properties. The preliminary issues concern the circumstances in which the respondents made a discovery for the purposes of paragraph 28, and when HMRC could reasonably have been expected to be aware on the basis of information available to them that an amount of SDLT that ought to have been assessed had not been assessed. The appellants contend that the respondents were not entitled to make discovery assessments. It is common ground that the dates on which the enquiry windows closed were 22 March 2010 in relation to the First Appellants, 12 August 2010 in relation to the Second Appellants and 15 May 2010 in relation to the Third Appellants. Further, the burden of proof in respect of the validity of the discovery assessments will be on the respondents.

5. The hearing of the preliminary issue will involve consideration of the following matters:

(1) The appellants' case that, as a matter of fact, 'disclosure notes' were sent to HMRC setting out the appellants' understanding of the effect of the transactions entered into for the purposes of the schemes at or about the time the land transaction returns were lodged with HMRC.

(2) The circumstances in which the respondents 'discovered' that an amount of tax that ought to have been assessed had not been assessed.

(3) Whether the respondents could reasonably have been expected to be aware, before the enquiry windows closed, that an amount of tax that ought to have been assessed had not been assessed.

6. The appellants implemented the tax avoidance schemes in different ways. To distinguish the different implementation the First Appellants have elsewhere been called the Jeepster Appellants, the Second Appellants have been called the First Hummer Appellants and the Third Appellants have been called the Second Hummer Appellants.

7. The tribunal released comprehensive case management directions for the appeals on 13 January 2017. Pursuant to those directions the parties served their witness statements pursuant to direction 5.2 by 1 September 2017. The respondents relied upon two witness statements, including a witness statement of Mr Peter Kane dated 10 July 2017. Mr Kane set out the circumstances in which he came to make the assessments. At [9] and [10] of his witness statement Mr Kane states as follows:

> " 9. Advice was sought from my advisory solicitor, Paul Kreling, who in turn instructed counsel to give a view on the efficacy of certain schemes and to draft challenge letters if counsel concluded that the schemes were susceptible to challenge. This included advice in respect of three schemes relying upon Deed of assignment, Deed of gift and combinations of the two.
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> 10. On or shortly after 1 April 2010 I received from Paul Kreling three draft challenge letters drafted by counsel at which point I came to the view that tax which should have been assessed had not, pursuant to paragraph 28(1) FA 2003, Sch 10."

8. It is these paragraphs which give rise to the appellants' application for inspection and disclosure. The appellants made an application for disclosure dated 18 August 2017 seeking disclosure by the respondents of the documents referred to by Mr Kane at [10] of his witness statement together with associated documents connected with the provision of or obtaining of those documents. At the hearing of the application, disclosure was sought of the following documents:

(1) The three challenge letters referred to in [10].

(2) The instructions to counsel who drafted the challenge letters.

(3) Documents sent to counsel with those instructions.

(4) Documents received back from counsel with the challenge letters.

(5) Any notes of advice given by counsel in conference.

(6) Any written advice given by counsel.

9. Paragraph 6.1 of the directions referred to the calling of witnesses as follows:

" **6. Calling Witnesses**

6.1 Not later than 14 days after the date for compliance with direction 5.2 [service of witness statements], each party shall confirm in writing to the other party which of the relevant witnesses are required to attend the hearing for cross examination and which of them are not required to attend on the basis that their witness statements are not contested."

10. Compliance with paragraph 6.1 of the directions was required on or before 15 September 2017. The respondents failed to comply with paragraph 6.1 and on 16 October 2017 they applied for an extension of time and confirmed in writing that the evidence of four witnesses relied on by the appellants was not agreed and requiring the attendance of those witnesses for cross examination at the hearing of the preliminary issue.

(1) Application by the Appellants for Disclosure

11. In summary, the legal basis on which the appellants put their application is as follows:

(1) All documents referred to in a witness statement should be available for inspection, by analogy with the Civil Procedure Rules, r 31.14(1)(b).

(2) In order to see those documents in context, disclosure should be given of any instructions and associated documents.

(3) Reference to the "challenge letters" in Mr Kane's witness statement was a waiver of the legal professional privilege the respondents might otherwise have had in relation to the challenge letters and any instructions and associated documents.

(4) In any event, Mr Kane was relying on the challenge letters to make good the respondents' case as to when and in what circumstances he made a "discovery" for the purposes of paragraph 28. The challenge letters and associated documents were therefore clearly relevant to that issue.

12. The respondents' position in relation to the application has changed over time. I will not set out the exchanges in detail, but an informal request for disclosure was met with a response which questioned the timing of the application and which asserted that the request was an "opportunistic fishing expedition". The respondents denied that privilege had been waived and raised issues of taxpayer confidentiality, albeit acknowledging the possibility of redaction. Disclosure was refused.

13. The respondents formally responded to the application for disclosure on 5 October 2017. In that response it was suggested that the respondents had originally placed no reliance on the challenge letters. However it was acknowledged that "*there is a possibility (albeit remote) that HMRC may wish to rely on parts of the document referred to in Mr Kane's witness statement, and part of the instruction document that gave rise to it, in order to make good the point that on 1 April 2010, HMRC came to the view that the Hummer schemes were susceptible to challenge*". That issue was said to be relevant *only* to the Third Appellants' appeal. The respondents' primary

case on 'discovery' was said to be that the advice from counsel (in the form of the three challenge letters) instigated an investigation which led to the discovery. It was asserted that the three challenge letters were "merely part of painting the picture" to explain how and why HMRC began their investigations.

14. The respondents' case was that it would disclose documents on which it may wish to rely. Those documents were:

(1) A redacted copy of the instructions to counsel in relation to a 'Hummer' fact pattern.

(2) A redacted copy of the draft challenge letter in relation to a 'Hummer' appellant.

15. In each case the redactions were said to protect confidentiality and privilege. Copies of the redacted documents were provided to the appellants. Any further disclosure was resisted on the basis that HMRC were not relying on any other documents, and those other documents were protected by legal professional privilege. Mere reference to a document in a witness statement did not waive privilege.

16. The appellants replied to the respondents' response on 12 October 2017. They maintained their application for disclosure of all three challenge letters and associated documents including instructions to counsel and advice from counsel.

17. Both counsel provided skeleton arguments for the purposes of this application. By the time of the hearing the respondents position had altered further and they relied on a second witness statement of Mr Kane dated 6 February 2018. In that witness statement Mr Kane stated that he had relied on two challenge letters drafted by counsel in concluding that the circumstances of the Hummer and Jeepster type schemes gave rise to a loss of tax. He produced redacted copies of those two challenge letters, apparently redacted only to the extent necessary to protect taxpayer confidentiality. For example the names of parties and details of properties and dates of transactions were obliterated. Mr Kane stated that the third challenge letter was not relevant to the schemes under consideration in the present appeals. Mr Kane's evidence was that receipt of the two relevant challenge letters was his prompt to undertake enquiries to identify undisclosed users of the Hummer and Jeepster schemes. He states:

> " I confirm that in arriving at my conclusion as to a tax loss I solely relied upon the challenge letters and knowledge that having drafted them counsel had concluded that there was a tax loss in the circumstances of the scheme described in the challenge letters."

18. As a result of this second witness statement it was necessary for Ms Belgrano to amend her skeleton argument. I am satisfied from what Ms Belgrano told me that the amendment was the result of a change in her instructions between the dates of the original and amended skeleton arguments.

19. The respondents' amended skeleton argument also stated that a conference with counsel had been held, but that Mr Kane had not relied on that conference. In fact Mr

Kane did not refer to any conference with counsel in his second witness statement. It appears to be the absence of any reference to the conference with counsel that invites an inference that Mr Kane did not rely on it, but that is a matter for the hearing of the preliminary issue.

20. I can now consider the issues arising in relation to disclosure in light of the skeleton arguments and the oral submissions of counsel. I start by describing the documents which have been made available for inspection and/or disclosed by the respondents since the application was made.

21. Two of the draft challenge letters have been have been made available for inspection. These are letters drafted by counsel and intended to be sent to specific taxpayers. Each letter summarises the transactions undertaken by the taxpayer concerned and the relevant statutory provisions. The letters then go on to set out HMRC's view as to why the planning did not technically work and hence why SDLT was payable. The first letter ends with a short note from counsel setting out an alternative argument based on a different assumption to that contained in the main body of the draft letter. The second draft letter has a one line note from counsel cross-referencing the note on the first letter.

22. Both letters are redacted to conceal the identities of the taxpayers concerned, the addresses of property being transferred and the dates of various transactions. For some reason, when the second letter was originally disclosed the one line note from counsel was redacted but in the version exhibited to Mr Kane's witness statement it is not redacted.

23. The instructions to leading counsel related to two specific taxpayers. There were similar redactions to conceal their identity and details of the property being purchased and the dates of various transactions. There was reference to previous advice from counsel in relation to other SDKL avoidance schemes. Counsel was instructed to advise in conference and, if he considered that a challenge to the scheme had a possibility of success, to draft a challenge letter. The facts were briefly set out followed by the legislation. There are then several pages under at least one separate heading which are obliterated, followed by a brief summary of the instructions including advice in conference as to the viability of a challenge and the drafting of a challenge letter.

24. Mr Bedenham submitted that the six categories of documents of which disclosure is being sought are plainly relevant to the appellants' case, and go the heart of the preliminary issue. He submitted that the appellants should be given disclosure for the following reasons:

(1) On the basis that the documents are relevant to the issues and so as to ensure that the appellants can properly challenge HMRC's case and Mr Kane's evidence as to the date of the discovery for each set of appellants.

(2) HMRC rely on the documents, and it cannot 'cherry pick' those parts of a document on which it relies when giving disclosure.

(3) HMRC cannot assert privilege. HMRC has clearly waived legal professional privilege in relation to the documents and other documents which place them into context.

(4) Taxpayer confidentiality should not prevent disclosure and in any event the appellants are content for taxpayer details to be redacted. In the event taxpayer confidentiality is not an issue. The respondents recognise that disclosure could be given in a redacted form if necessary.

25. It is important to identify at this stage the nature of the application. It was made pursuant to the tribunal's case management powers in Tribunal Rule 5(3)(d) which provides that the tribunal may require a party to provide documents to another party. The legal basis of the application was stated in the application itself at [5] – [10]. The appellant relied by analogy on the position in civil litigation governed by the Civil Procedure Rules, in particular r 31.14(1)(b) which provides as follows:

> " 31.14 (1) A party may inspect a document mentioned in –
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> (a) a statement of case;
>
> (b) a witness statement; …"

26. From that starting point, the appellants contend that the challenge letters should be disclosed, or strictly that they should be permitted to inspect the challenge letters; any privilege attaching to those documents has been waived by Mr Kane's reference to and reliance on the challenge letters in his witness statement; the appellants are therefore entitled to see the instructions to counsel and any associated documents in order to put the challenge letters into context.

27. I am satisfied that in a case such as the present, whilst the tribunal is not bound to apply the CPR it is appropriate that it should be guided by principles in the CPR.

28. It is also important to identify that this is not an application for specific disclosure as such. The application relies on the reference to documents by Mr Kane in his witness statement. Hence I was not referred to authorities as to when the tribunal should grant specific disclosure going beyond Tribunal Rule 27(2) (see for example: *HM Revenue & Customs v Hare Wines Ltd [2017] UKUT 465* and *HM Revenue & Customs v Citibank NA [2017] EWCA Civ 1416*).

29. I turn now to consider the issues raised by Mr Bedenham on behalf of the appellants. It is convenient to deal with the question of relevance and reliance together.

(a) Relevance and Reliance

30. Mr Bedenham commenced his oral submissions with the proposition that the documents sought were plainly relevant to the preliminary issue. He submitted that the documents might tend to suggest that Mr Kane could reasonably have expected to be aware on or sometime before 1 April 2010 that an amount of tax that ought to have

been assessed had not been assessed. He submitted that this is something that needs to be explored in cross examination of Mr Kane.

31. The appellant's application is based on CPR r 31.14(1)(b). I was not referred to any authority as to the application of this rule but it was recently considered by the Court of Appeal in *Blue Holdings (1) Pte Ltd v National Crime Agency [2016] EWCA Civ 760* where Gross LJ stated as follows:

> " 28. First, the mere fact that a document is "mentioned" in one of the documents specified in CPR r. 31.14(1) does not automatically and without more entitle the other party to inspect it. The Court retains a discretionary jurisdiction to refuse inspection.
>
> 29. Secondly, the general rule is clear. Ordinarily, if under CPR r. 31.14(1) a document is "mentioned", *inter alia*, in a witness statement, the other party has a right to inspect it. The reason was well-stated by Nourse LJ in *Rafidain Bank v Agom Sugar* [1987] 1 WLR 1606, at pp. 1610-1611:
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> > " The party who refers to the documents does so by choice, usually because they are either an essential part of his cause of action or defence or of significant probative value to him. ….the material provisions were evidently intended to give the other party the same advantage as if the documents referred to had been fully set out in the pleadings…. "
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> In CPR terminology, I would accept Mr Stanley's submission that CPR r. 31.14 reflects basic fairness and principle in an adversarial system; in accordance with the overriding objective, the parties are to be on an equal footing.
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> 30. Thirdly, the right to inspect under CPR r. 31.14 is not, however, unqualified; it is instead subject to CPR rules based limits, which may be invoked by the party resisting inspection - the burden resting on that party to justify displacing the general rule. Thus, "proportionality" is part of the overriding objective CPR r.1.1(2)(c) and, in an appropriate case, it would be open to a party to oppose inspection on the ground that it would be "disproportionate to the issues in the case": CPR r.31(3)(2). In determining any such issue of proportionality, a Court would very likely have regard to whether inspection of the documents was necessary for the fair disposal of the application or action. So too, the mere mention of a privileged document in (for example) a statement of case may not of itself lead to a loss of the privilege; CPR r.31.14 is to be read with and subject to CPR r.31.19(3) and (5): see, *Rubin v Expandable Ltd (supra)*, at [39]; *Civil Procedure, Vol. 1,* 2016, at 31.14.5 and 31.19.1.1.
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> 31. Fourthly and further, it was not argued before us and there is nothing to suggest that the RSC approach to *confidentiality* has changed under the CPR; see, for instance, *Civil Procedure*, at 31.3.6. Accordingly, while disclosure and inspection cannot be refused by reason of the confidentiality of the documents in question alone, confidentiality (where it is asserted) is a relevant factor to be taken into account by the Court in determining whether or not to order inspection. The Court's task is to strike a just balance between the competing interests involved – those of the party asserting an entitlement to inspect the documents and those of the party claiming confidentiality in the documents. In striking that balance in the exercise of its discretion, the Court may properly have regard to the question of whether inspection of the documents is necessary for disposing fairly of the proceedings in question: see, *Science Research Council v Nasse* [1980] AC 1028, esp. at pp. 1065-1066 (Lord Wilberforce), 1074 (Lord Edmund-Davies) and 1087 - 1088 (Lord Scarman).

> 32. Fifthly and differing from the Judge, I am not persuaded that there is some free-standing "necessity" test which needs to be satisfied before permitting inspection where CPR r.31.14 is otherwise satisfied. In this regard, the CPR differ from the previous regime contained in RSC O.24, though, as already demonstrated, the question of whether inspection is "necessary to dispose fairly" of the application or case is not rendered irrelevant – and may well arise in the context of proportionality or that of confidentiality. On this analysis "necessity" is or may be (depending on the facts) a relevant factor in striking the just balance; it is not a free-standing hurdle to be considered and surmounted in isolation before inspection may be permitted."

32. The documents referred to directly in Mr Kane's witness statements are the three challenge letters. The respondents have now disclosed two of the challenge letters and have stated that they do not rely on the third challenge letter because it did not relate to the Jeepster and Hummer schemes. As I understand it, there is no issue as to the redactions to the two challenge letters which have been disclosed.

33. Against that background and in relation to the challenge letters themselves the matter is quite straightforward. The question is whether I should direct disclosure of the third challenge letter. The burden is on the respondents to justify non-disclosure. Mr Kane has stated in his second witness statement that it was not relevant to the schemes under consideration in the present appeals and that he did not rely on it. I take into account that the respondents position has changed in relation to the documents they say were relied upon and which they consider should be disclosed. However, in my view it is not appropriate on an application such as this to go behind what Mr Kane has said in his second witness statement. At this stage it does not seem to me that disclosure of the third challenge letter is necessary to dispose fairly of the appeals. In circumstances where the respondents place no reliance on the third challenge letter and Mr Kane's evidence is that it was not relevant to the schemes under consideration in this appeal, I am satisfied that the respondents have justified non-disclosure of the third challenge letter.

(b) Legal Professional Privilege

34. I turn now to consider the instructions to counsel and associated documents. The documents that the appellants seek would ordinarily be covered by legal professional privilege, unless that privilege has been waived. The respondents have made a partial disclosure of documents, in the form of two challenge letters and the redacted instructions to counsel.

35. The position in relation to the instructions to counsel which have been partly disclosed is curious, in that the document is not referred to as such in Mr Kane's witness statements. Indeed, Mr Kane has not said that he saw those instructions at the time of making his assessments or that he relied on them. They are not mentioned as a document in his witness statement. HMRC's position is described in their written response to the application as follows:

"…there is a possibility (albeit remote) that HMRC may wish to rely on … part of the instruction document … in order to make good the point that on 1 April 2010, HMRC came to the view that the Hummer schemes were susceptible to challenge, such that this constituted a (potentially) relevant 'discovery' …"

36. The issues in relation to the instructions to counsel and the other associated documents relate to legal professional privilege. Mr Bedenham submitted that the respondents had waived privilege in relation to the two challenge letters and at least in part in relation to the instructions to counsel. In order to see those documents in their context he submitted that the appellants were entitled to full disclosure of the instructions to counsel and also disclosure of the associated documents. He relied on a statement of principle in *R (Factortame) v The Secretary of State for Transport (1997) 9 Admin LR 445* where the Divisional Court said as follows:

" 25. The classic judicial statement of principle is that of Mustill J in NEA Karteria, at 139:

> '... where a party is deploying in court material which would otherwise be privileged, the opposite party and the court must have an opportunity of satisfying themselves that what the party has chosen to release from privilege represents the whole of the material relevant to the issue in question. To allow an individual item to be plucked out of context would be to risk injustice through its real weight or meaning being misunderstood.'

26. The most obvious application of that principle is in relation to a single document, where a party waives privilege as to part of it but seeks to withhold the rest of it - "cherry picking" as Style & Hollander have called it (op. cit, 216 and 224) See, for example, the Court of Appeal's decision in the Great Atlantic in which Templeman LJ, with whom Dunn LJ agreed, held that, unless a document is severable as to its subject matter, either the whole or none of it should be disclosed. It also extends to attempted partial waiver of privilege in respect of certain of a number of documents relevant to the same issue or transaction. Of course, the scope for unfairness depends on the breadth of the matter in issue or their severability if more than one, and on the exact relationship and/or relevance to such issue(s) of the documents respectively disclosed and sought to be withheld. It may or may not be that partial disclosure of documents going to a matter or matters in issue, say in an exchange of correspondence with legal advisers, would be unfair.

27. Much depends on whether the party making partial disclosure seeks to represent by so doing that the disclosed documents go to part or the whole of an "issue in question", the expression used by Mustill J in the passage from his judgment in Nea Karteria that I have cited. The issue may be confined to what was said or done in a single transaction or it may be more complex than that and extend over a series of connected events or transactions. In each case the question for the court is whether the matters in issue and the document or documents in respect of which partial disclosure has been made are respectively severable so that the partially disclosed material clearly does not bear on matters in issue in respect of which material is withheld. The more confined the issue, for example as to the content of a single document or conversation, the more difficult it is likely to be to withhold, by severance, part of the document or other documents relevant to the document or conversation."

37. In Factortame, the issue in the proceedings was whether an infringement of European Community Law by the introduction into UK law of the Merchant Shipping Act 1988 was intentional or reckless. The Merchant Shipping Bill had been introduced to Parliament on 29 October 1987 and the Secretary of State waived legal professional privilege and disclosed legal advice in connection with his formulation of policy before that date. The applicant maintained that as a matter of fairness the Secretary of State should also waive privilege in relation to advice received up to 25 July 1991 when the European Court ruled that there had been an infringement. The applicants also sought full disclosure of various documents that had been redacted on the basis of irrelevance or legal professional privilege.

38. The application was dismissed in the following terms:

> " 29. As I have said, on this application Mr Richards has stated that the Secretary of State will not suggest at the trial that his conduct after 29th October 1987 in relation to the enactment and implementation of the 1988 Act was governed by the disclosed legal advice that he received before that date. It is not a case of partial disclosure in relation to his conduct throughout the period in issue, but one of clear severability of two periods within it and of the disclosed and undisclosed documents relating respectively to each period. If the Secretary of State keeps to Mr Richards' word I can see no unfairness to the applicants. The applicants and the Court know his stance, that of a party prepared to reveal the legal advice that he received as to his conduct over one period but not over another, with all the suspicion and adverse inference that that may engender. If the Secretary of State does seek to take an unfair advantage of his partial discovery at the trial, whether as a matter of evidence or argument, the applicants would be entitled to invite the trial judge to re-open the matter and determine whether there should be further disclosure.
>
> 30. The same considerations apply to the applicants' complaints about the redacted documents. As to irrelevance, the basis for some of the redactions, if part of a document is irrelevant that part can be redacted. See G.E. Capital Corporate Finance Group Ltd. v. Bankers Trust Co. [1995] 1 WLR 172, CA. So also can it be redacted if part of it is properly the subject of a claim for privilege. The Secretary of State's stand is that he has redacted documents either on the grounds of irrelevance or, in the case of documents after 29th October 1987 on the grounds of irrelevance or privilege. The applicants are sceptical of those claims and seek disclosure to their legal representatives or the Court to check them. This is in truth an application for discovery to see if discovery has been properly given. That is not the function of discovery and it is impermissible. See Berkeley Administration Inc. & Ors v. McClelland & Ors [1990] Fl. St. R. 381, CA."

39. I was also referred to a recent example of a direction for disclosure of material on which legal professional privilege had impliedly been waived in *'D' Cash & Carry Ltd v HM Revenue & Customs [2017] UKFTT 0732 (TC)*. In that case the appellant sought permission to notify a late appeal to the tribunal. The grounds in support of the application were that the appellant was not represented at the time and not aware of the time limit, later amended to say that the appellant's previous representative had

not advised it in relation to appealing and time limits. HMRC objected and required the appellant to substantiate the grounds for its application. HMRC then made an application to the tribunal for disclosure of advice received by the appellant from its previous representative. The issue for the tribunal was whether privilege had been impliedly waived in relation to the advice from the previous representative.

40. The tribunal was referred to and reviewed authorities as to what constitutes a waiver of privilege. It directed disclosure of the advice given by the previous representative. At the same time it made provision for redaction of material not pertinent to the question of advice in relation to the need to appeal and the time limits for doing so.

41. The issue between the parties in the present application is not whether there has been a waiver of privilege, which there clearly has been, but whether what has been released represents the whole of the material relevant to the issue in question, namely the issue in relation to which it has been disclosed. In particular whether there is a risk of injustice through the real weight or meaning of what has been disclosed being misunderstood.

42. In order to put the two challenge letters into context it is necessary to see why and in what circumstances they were produced. It seems to me that those parts of the instructions to counsel which have been disclosed do just that. It is clear from what has been disclosed that counsel was instructed to draft a challenge letter if he considered that a challenge to the scheme had a possibility of success.

43. The extent to which it is necessary to put documents into context depends on the nature of the issue to which they relate. The respondents rely on the documents they have disclosed in relation to the circumstances Mr Kane made a discovery that an amount of tax that ought to have been assessed on the present appellants had not been assessed. Mr Kane's evidence is that receipt of the challenge letters led him on a train of enquiry to identify previously unknown users of the schemes. That evidence can be tested at the hearing of the preliminary issues. I accept Ms Belgrano's submission that that is a discrete issue, which can be severed from other privileged aspects of the instructions to counsel. I do not accept that there is any unfairness to the appellants in privilege being retained in relation to other aspects of the instructions, such as the technical efficacy of the schemes.

44. I accept Mr Bedenham's submission that it has been the appellants' push for disclosure that has resulted in the respondents providing copies of the two challenge letters now relied upon by Mr Kane, and the redacted instructions to counsel. It is true that the respondents' position in relation to relevance and their reliance on those documents has changed since the application was made. However that does not satisfy me that any further disclosure is necessary to put those documents into context.

45. Mr Bedenham suggested that the redactions in the instructions to counsel were a section of the instructions which may have set out the respondents' views at that time, which would be relevant to whether the discovery was before 1 April 2010. In my view that is speculation on the part of Mr Bedenham. Ms Belgrano said that she was

content for me to look at the instructions to counsel to satisfy myself that the redacted elements were not relevant to that issue. I do not consider that is necessary. The instructions to counsel are clearly on the face of what has been disclosed relevant to technical aspects of the scheme, rather than the mechanism of assessment. There is simply nothing to suggest that they might contain material relevant to the assessment procedure.

46. For the same reasons, I am not satisfied that the respondents should be directed to disclose any other of the associated documents sought by the appellants. The respondents are entitled to retain privilege in those documents.

(2) Application by the Respondent for an Extension of Time

47. It is common ground that the respondents were approximately one month late in confirming to the appellants that their witnesses were required to attend the hearing for cross examination. That confirmation was provided in a letter dated 16 October 2017 by which the respondents "unreservedly apologised" for what was described as "their oversight" in not previously confirming their position. It was submitted that no prejudice would be caused as the preliminary issue had not yet been listed for hearing.

48. The appellants submit that the respondents' letter dated 16 October 2017 is properly characterised as an application for relief from sanctions. The sanction being that in the absence of compliance, the respondents are barred from requiring the appellants' witnesses to attend for cross examination. It is submitted that the principles outlined in *BPP Holdings Ltd v Commissioners for HM Revenue & Customs [2017] UKSC 55* concerning non-compliance with directions of the tribunal should therefore be applied. The Supreme Court in BPP Holdings stated at [26]:

> "26. …In a nutshell, the cases on time limits and sanctions in the CPR [Civil Procedure Rules] do not apply directly, but the Tribunals should generally follow a similar approach."

49. The principles to be applied in relation to relief from sanctions under the CPR were set out by the Court of Appeal in *Denton v TH White Ltd & others [2014] EWCA Civ 906*. At [24] the court set out what is now the familiar three stage approach as follows:

> (1) Identify and assess the seriousness and significance of the breach (discussed at [25]-[28] of the judgment).
>
> (2) Consider why the default occurred (discussed at [29]-[30] of the judgment).
>
> (3) Evaluate all the circumstances of the case so as to deal justly with the application for relief from sanctions (discussed at [31]-[38] of the judgment).

50. Mr Bedenham submitted that the breach of direction 6.1 could not be said to be insignificant; no good reason had been provided by the respondents; and there were no circumstances that would justify relief being granted.

51. The respondents' case is that barring them from cross examining the appellants' witnesses would be a disproportionate sanction where:

(1) The direction itself contained no sanction.

(2) The evidence of the appellants' witnesses goes to a crucial issue, namely whether disclosure notes were sent to the respondents.

(3) The tribunal hearing the preliminary issue would be faced with evidence that was not accepted but which was untested by cross examination.

(4) The respondents would be denied the opportunity to participate fully in the proceedings, which is inconsistent with the overriding objective in Tribunal Rule 2 of dealing with cases fairly and justly.

52. Ms Belgrano submitted that this was not a case of relief from sanctions. Paragraph 6.1 contained no sanction. If the sanction suggested by Mr Bedenham had been imposed then one would expect to see that made plain on the face of the direction. Instead, Ms Belgrano invited me to apply the balancing exercise endorsed by Morgan J in *Data Select Ltd v Commissioner for HM Revenue & Customs [2012] UKUT 187 (TCC)*. Namely to consider (1) the purpose of the time limit, (2) the period of delay, (3) whether there is a good explanation for the delay, (4) the consequences for the parties of extending time for compliance, and (5) the consequences for the parties of refusing to extend time.

53. In conducting that excise Ms Belgrano submitted that the purpose of the time limit and direction 6.1 was to assist the parties to determine the anticipated duration of the hearing when providing listing information; the delay was short; the explanation for the delay was oversight rather than deliberate inaction; the respondents would be significantly prejudiced if they were unable to cross examine the witnesses; the appellants have not been prejudiced and were not taken by surprise that the respondents wished to cross examine their witnesses - it was clear from the statement of case that they would want to do so.

54. Ms Belgrano also relied on the fact that the appellants had not asked the respondents to confirm their position in relation to the appellants' witnesses. She suggested they ought to have done so pursuant to their obligation under Tribunal Rule 2 to further the overriding objective.

55. I do not consider that paragraph 6.1 imposes any sanction for non-compliance. It requires the parties not just to identify which witnesses are required for cross examination but also which witnesses are not required to attend because their evidence is not contested. I agree with Ms Belgrano that if a significant sanction for non-compliance was intended then that would have been expressly stated in the direction. As a matter of general principle, evidence is given by way of oral testimony tested under cross examination, subject to any direction the tribunal might make in

appropriate circumstances. The default position is that all witnesses must attend for cross examination. In my view therefore, non-compliance with paragraph 6.1 does not give rise to any sanction as such.

56. Mr Bedenham submitted that such a result would be a nonsense because the direction would have no point. He submitted that there was an implicit sanction in the direction. I do not accept that submission. Not all directions involve a sanction for non-compliance, although non-compliance could for example lead to an "unless direction" expressly providing a sanction for non-compliance. In cases where there is no express sanction, Tribunal Rule 7 makes provision for non-compliance as follows:

> " **7 Failure to comply with rules etc**
>
> …
>
> (2) If a party has failed to comply with a requirement in these Rules, a practice direction or a direction, the Tribunal may take such action as it considers just, which may include--
>
> (a) waiving the requirement;
>
> (b) requiring the failure to be remedied;
>
> (c) exercising its power under rule 8 (striking out a party's case);
>
> (d) restricting a party's participation in proceedings; or
>
> (e) exercising its power under paragraph (3)."

57. Further, Tribunal Rule 8 makes provision for striking out or de-barring for breach of an unless direction where that is the express sanction.

58. It is clear from Tribunal Rule 7 that the tribunal should take whatever action it considers just when faced with non-compliance and it must plainly take into account all the circumstances. This is not a case of relief from sanction, and as a result I do not consider that the Denton approach is directly applicable, however it does emphasise and I take into account the nature and seriousness of the breach and why the breach occurred. I also take into account the consequences of the breach and the consequences of any sanction I might impose under Tribunal Rule 7. One possible sanction, which is the sanction effectively proposed by Mr Bedenham, is that HMRC should be barred from cross-examining the appellants' witnesses.

59. It is regrettable that the respondents failed to comply with direction 6.1. It is also regrettable that no details have been given to explain their oversight. The respondents' non-compliance has led to a delay in the proceedings. Subject to the

appellants' disclosure application the preliminary issue was otherwise ready for listing and the next step is for the parties to provide their listing information.

60. In Denton it was recognised that there are degrees of seriousness and significance to a breach. I am prepared to accept on the material before me that the breach was a matter of oversight. The delay caused was at least a month, but I consider that the matter would not have been listed for hearing until the appellants' disclosure application had been dealt with. The delay has therefore caused no prejudice, which is not to underestimate the importance of compliance with tribunal directions.

61. Mr Bedenham submitted that the respondents had not made good their case on prejudice because they had not identified what evidence they took issue with in relation to the appellants' witness statement and why they want to cross examine the witnesses.

62. I did not have copies of the appellants' witnesses statements before me, although at the hearing Ms Belgrano offered to provide copies. Whilst I have not seen the witness statements I am satisfied from the amended grounds of appeal and the respondents' statement of case that there are significant factual issues to be determined as part of the preliminary issues, in particular as to the sending of disclosure notes by the appellants and their receipt by the respondents.

63. Plainly the appellants were aware of the respondents' non-compliance and could have raised it with the respondents or drawn it to the attention of the tribunal after 15 September 2017. In the context of direction 6.1 I consider that would have been an appropriate course. However, I do not accept that the appellants are to be seriously criticised for failing to do so.

64. Taking all the circumstances into account, in my view it is not appropriate to bar the respondents from cross examining the appellants' witnesses. Mr Bedenham did not suggest any lesser sanction. Indeed, it is difficult to identify any other meaningful sanction save possibly a direction in relation to the costs of the respondents' application to extend time. I shall direct therefore that time for compliance with direction 6.1 shall be extended to 16 October 2017. Further, if the respondents object in principle to a direction that they should pay the appellants their costs of the application to extend time, then they shall do so in writing to be served on the tribunal and the appellants within 14 days of the date of release of this decision.

Conclusion

65. For the reasons given above I make no direction as to further disclosure and I extend time for compliance by the respondents with direction 6.1 to 16 October 2017. I have also made further case management directions which will be released separately.

66. 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.

TRIBUNAL JUDGE CANNAN
RELEASE DATE: 15 MARCH 2018