[2018] UKFTT 590 (TC)

TC06754

Appeal number: TC/2018/3341

INFORMATION NOTICE – whether following* Jimenez *the Tribunal has power to order an inter partes determination of HMRC's application for approval of a third party information notice – no –* Derrin *is to be preferred – applications dismissed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

Mr E **Applicants**
and 3 corporate applicants

- and -

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

TRIBUNAL: JUDGE Barbara Mosedale

Decided on the papers on the basis of written submissions

Memery Crystal LLP for the applicants

Mr M Dyce, HMRC officer, for the Respondents

DECISION

1. A firm of solicitors, Memery Crystal LLP, representing their clients, whom I shall refer to as Mr E and three corporate applicants (being companies of which Mr E is the ultimate beneficial owner), applied by letter to the Tribunal on 30 July 2018 for:

(1) The hearing of HMRC's expected application for a third party information notice under Schedule 36 Finance Act 2008 ('Sch 36') in relation to an investigation related to Mr E and/or the three corporate applicants to be heard inter parties (in other words, for the applicants to have the right to attend the hearing and make representations);

(2) If the Tribunal was not prepared to agree to the above application, to call an inter parties hearing in which the applicants would have the opportunity to apply for an inter partes hearing as described above;

(3) And in any event for the Tribunal to inform the applicants if, when and where the hearing described in (1) was to take place;

(4) And that all of these hearings be in private; further that

(5) If unsuccessful in the above applications, and if Sch 36 notice approval was granted, for the applicants to be given a note of the hearing and the Judge's reasons for granting any Sch 36 notice together with a copy of any documents produced to the Tribunal by HMRC in the course of the application; and

(6) A stay of execution of any Sch 36 notices granted for 14 days from receipt of note of hearing in order to give the applicants the opportunity to consider and make an application for judicial review of the decision to approve the issue of the Sch 36 notices.

2. Memery Crystal were aware that an application to the Tribunal was likely to be made because the applicants had received notice of this under ¶3(3)(e) of Sch 36. And such an application has been made: the Tribunal decided not to determine it before determining the above applications because to do so would render the Mr E's applications otiose. So far, therefore, HMRC's application under Sch 36 has not been determined.

3. Directions were given on 4 September 2018 for HMRC to respond to the application and giving Memery Crystal a right to reply to the response. HMRC provided their representations on 11 September 2018 and on 18 September 2018 Memery Crystal filed their reply to HMRC's representations. I have considered those representations in coming to the conclusions recorded below.

4. I deal with each of the above applications, but taking them in what I think is the most logical order.

(2)Application for a hearing to determine whether the application should be heard ex parte

5. The application to hold the Sch 36 application hearing inter partes is itself necessarily determined inter partes, as was the similar application was in the case of *Ariel* [2017] UKFTT 87 (TC). The real question is whether I should make my determination following a hearing or whether I should do it on the papers, with the benefit of both parties' written submissions, which were made having seen the representations of the other party.

6. I have chosen not to accede to the applicants' request to hold a hearing.

7. Firstly, I am not required to hold a hearing. The Tribunal Rules only require the Tribunal to hold a hearing 'before making a decision which disposes of proceedings'. A decision on an application as to whether the proceedings should be ex parte or inter partes is not a decision which will dispose of the proceedings (if the proceedings are seen, as I think they should be, as the Sch 36 application by HMRC). The tribunal is not required to hold a hearing on a preliminary matter, such as this application.

8. It is a matter of discretion for the Tribunal. The Tribunal must decide it taking into account the interests of justice.

9. In this instance, I have the benefit of detailed written representations from the applicants' solicitors; I have been referred to a number of authorities which I can consult. I have HMRC's written reply to the applicants' representations, and the applicants' reply to that. I do not think that a hearing is necessary: the application depends on the interpretation of the law and the case of neither party would be assisted by calling evidence. The determination of these various matters is largely dictated by existing case law in any event.

10. Lastly, I am conscious that calling a hearing will delay the determination of HMRC's application for a Sch 36 notice by some months: dates to avoid from both parties would need to be sought and a hearing arranged. If the Tribunal were to do this routinely in any case where a taxpayer opposes the issue of a Sch 36 notice, it might encourage objections as a delaying tactic. So I think a hearing should only be called where there is any real doubt over the matter and I do not think that there is any doubt here (for reasons explained below).

11. I REFUSE the application for an oral hearing of the applicants' applications.

(1)Application for inter partes hearing of Sch 36 notice

12. The main application is for the hearing of HMRC's application under ¶2 and ¶3 of Sch 36 to be inter partes. The applicants here do not suggest that there is an absolute right to an inter partes hearing, so logically their application has two elements:

> (a) Can the Tribunal order an inter partes hearing of a Sch 36 application?

(b) And if so, should it do so in this particular case?

13. As well as addressing the first issue, the applicants made a number of lengthy submissions as to why I should call an inter partes hearing in their particular case: I only need to address these submissions if I conclude that as a matter of principle I have the power to call an inter partes hearing. And I consider that first.

Power to call an inter-partes hearing?

What is an inter partes determination?

14. In the letter from the Tribunal dated 4 September, an inter partes hearing was defined as a hearing at which both sides would be entitled to be informed in advance of when and where the hearing was taking place, and to make informed representations at that hearing and the right to hear, and respond to, representations made by the other party.

15. There could be an inter partes determination without a hearing: but that would require each party to have the opportunity to see the representations of the other party and to respond to them. An inter partes paper procedure is how I have chosen to determine the application for an inter partes hearing in the determination of HMRC's Sch 36 application.

16. An inter partes hearing is the opposite of an ex parte hearing: only one party would be entitled to be informed of the time and place of, and to be able to attend, an ex parte hearing. Only that party would be entitled to make oral representations.

17. Neither HMRC nor the applicants disagreed with that description of an inter partes hearing and where I refer to an inter partes hearing/determination, that is the type of hearing/determination to which I refer.

18. However, both parties are agreed that even in an ex parte process, the appellants can make representations <u>to HMRC</u> on whether or not a Sch 36 notice should be applied for; HMRC have provided those representations to this Tribunal in this case and it is their position that they always do so. That is consistent with the duty laid upon them in an ex parte procedure to put before the tribunal all material both for and against the application they are making.

19. Nevertheless, that does not make the procedure in some way equivalent to an inter partes determination on the papers: on the contrary, it is an ex parte procedure because the taxpayers must make their submissions at least partly in ignorance of HMRC's case and certainly without sight of any documents on which HMRC rely. While it is true that ¶3(3)(e) requires HMRC to give the taxpayer a summary of the reasons why HMRC seek the Sch 36 notice, even a complete summary of reasons is much less than a participant is entitled to in an adversarial process. In any event, that obligation may be disapplied under ¶3(4) so the taxpayer may be told a Sch 36 notice is being applied for but may not be told all the reasons why. An adversarial, inter partes process, on the contrary, wold entitle the taxpayer to full knowledge of the other side's case and sight of all documents relied upon as evidence.

20. So I consider whether the applicants are entitled to an inter partes *determination* of the Sch 36 application, and not just whether they are entitled to an inter partes *hearing*, before the Tribunal reaches its determination.

Sch 36

21. The starting point is Schedule 36 Finance Act 2008. The question of statutory interpretation is whether it gives the FTT the power to call an inter partes hearing of a third party information notice when HMRC have applied for the hearing to be 'ex parte' under ¶3(2A) of Sch 36.

22. 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.

23. There is nothing therefore in this paragraph (or the rest of sch 36) which explicitly deals with whether or not there could or should be an inter partes hearing of the application.

The decision in Jimenez

24. For the proposition that the Tribunal had the power to call an inter partes hearing the applicants relied on comments to that effect made by Charles J in *Jimenez* [2017] EWHC 2585 at [65-75]. Neither party suggested that what the Judge said there was binding on this Tribunal: they were clearly comments made which were not determinative of the issue before the Judge and therefore they are not binding on this Tribunal.

25. I have included the full text of what Charles J said in the appendix to this decision, but in summary the Judge was concerned that the Court of Appeal in *Derrin* had not addressed four Supreme Court cases dealing with the fundamental common law principles of the right to a fair trial (see [65]) and that the Court of Appeal decision in *Morgan Grenfell* (dealing with the predecessor regime to Sch 36) should be reconsidered in the light of what was said in *Browning v Information Commissioner* [68(iii)]. His conclusion at [69] was that the FTT had the power to call an inter partes hearing and the power, if it chose not to do so, to allow the taxpayer to attend the hearing and listen or to give the taxpayer a note of the hearing after the event.

26. All comments made by the High Court should be afforded respect even if they are not binding; that is particularly true in this case where the comments were made having the relevant authority (in this case the Court of Appeal decision in *Derrin*) in mind. Nevertheless, non-binding comments made in a High Court decision cannot overrule binding determinations of the Court of Appeal and cannot command quite the level of respect non-binding comments made by the Court of Appeal will receive.

27. *Jimenez* concerned a taxpayer notice under ¶1 of Sch 36 and for that reason it appears (see [65] of *Jimenez*) Charles J considered that the Court of Appeal's decision in *Derrin,* which concerned a third party notice under ¶2 of Sch 36, was properly distinguishable.

28. This case, however, concerns a third party notice under ¶2 which was precisely what was inn issue in *Derrin*. *Derrin* is therefore binding on this Tribunal, when considering HMRC's application under ¶2 & ¶3 of Sch 36 for a third party notice, to the extent that the Court of Appeal gave a binding ruling on the same point. So what was said in *Derrin* about inter partes determinations of applications under ¶2 and ¶3 of Sch 36 for third party information notices?

What was the ruling in Derrin?

29. Strictly, it seems to me that the Court of Appeal gave no ruling on this the question of an inter partes hearing. As the Court commented at [93], neither party

challenged the legality of the FTT's decision that the hearing of the Sch 36 application in that case would be ex parte. So, strictly, it was not in issue.

30. Nevertheless, my reading is that the Court of Appeal gave a very clear view on this matter. Sir Terence Etherton, giving the unanimous decision of the court, said:

> [67] … schedule 36, like its predecessor scheme in section 20 of the TMA, represents a balance between the interests of individuals and the interests of the wider community. So far as concerns the interests of the wider community, the statutory scheme is intended to assist HMRC in its investigation of tax avoidance and tax evasion. ….
>
> [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.
>
> …..
>
> [114] In any event, I cannot see any good reason why the judicial monitoring scheme in schedule 36 combined with judicial review should not be sufficient to satisfy the appellants' Article 6 rights combined with Article 8. For the reasons I have given in paragraphs 67, 68 and 80 above, Parliament has laid down a scheme in schedule 36 which serves a legitimate economic public purpose, and which balances in a proportionate way in accordance with Article 8(2) the interests of the wider community and private interests. Moreover, on the facts of the present case, the taxpayers, the third parties and the 21 non-taxpayer appellants all had the opportunity, even though not an express right (except in the case of third parties), to make representations indirectly or directly to the FTT….
>
> …..
>
> [118] Those submissions, however, are simply an attack on the whole model of a judicial monitoring scheme rather than one based on *inter partes* adversarial litigation. The judicial monitoring model was approved by the House of Lords in both *T.C. Coombs* and *Morgan Grenfell*, and there has been no decision of the ECtHR, including *Ravon*, which has held that such a scheme is inherently inconsistent with the Convention. ….

31. The applicants' reading of this appears to be that *Derrin* is only persuasive authority for the proposition that the Tribunal is not bound to call an inter partes

hearing and was right not to do so in that case; it is not (they say) authority for the proposition that the tribunal has no power to do so.

32. While I accept that *Derrin* is strictly not binding on the issue, the whole thrust of what the Court said was that the scheme of Sch 36 is one of judicial monitoring and is not an adversarial process: the court specifically stated that the statutory scheme does not afford the taxpayer even the opportunity of instituting adversarial proceedings (see [68]). My reading of Derrin is that its conclusion was that the Tribunal has no power to order any kind of adversarial process in the hearing of an application for a third party information notice under ¶2 & ¶3 of Sch 36.

33. Moreover, the Court referred to the earlier decision of the Court of Appeal in *Morgan Grenfell* [2000] EWHC Admin 415 and clearly considered their decision in *Derrin* to be consistent with it, albeit that case concerned the predecessor legislation contained in s 20 Taxes Management Act 1970. And it was clear from what the Court of Appeal said in *Morgan Grenfell* that there was no discretion on the Tribunal to hold an inter partes hearing (which is what was meant by 'oral' hearing):

> 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. ….. for the reasons we have given, we are satisfied that the Special Commissioner was right to conclude that he possessed no such power.

34. *Morgan Grenfell* is, however, no more binding on this Tribunal than *Derrin* on the point of whether the Tribunal has power to hold an inter partes procedure in the determination of a Sch 36 application under ¶2 and ¶3. This is because *Morgan Grenfell* was a case on the interpretation of s 20 TMA (the predecessor legislation) and not Sch 36 FA 2008. Nevertheless, the two Court of Appeal decisions, consistent with each other, are very persuasive on the issue.

35. Another point in favour of adopting what was said in those cases on this issue, which was a point I made in more detail in *Ariel* at [34-41] is that, although the new legislation on information powers contained in Sch 36 was about twice the length of the old legislation in s 20 TMA, in essentials it appeared to be virtually the same. There was every reason to suppose that Parliament, in enacting Sch 36, was aware of the interpretation given to the old legislation in *Morgan Grenfell* and intended the new legislation to be interpreted in like fashion.

36. But as it appears that neither *Derrin* nor *Morgan Grenfell* are strictly binding on this Tribunal, I will go on to consider whether I should depart from them in line with the concerns raised in *Jimenez.*

The concerns raised in Jimenez

37. The applicants think that the more recent decision in *Jimenez* is to be preferred over the older decisions in *Derrin* and *Morgan Grenfell.* The applicants point out that the basis of Charles J's criticisms of *Derrin* were that court's failure to refer to four important cases of the Supreme Court dealing with the right to a fair hearing.

38. However, I find that none of those cases concerned situations remotely similar to the question of a Sch 36 notice. All of them were concerned with 'final' hearings in the sense that a person's right to damages, access to family, or liberty was at stake. Here, there is an investigation into the applicants' tax affairs; fundamentally what is in dispute is the taxpayer's tax liability. As and when HMRC make any assessment, the taxpayer will have full rights of appeal in a full adversarial legal process: the taxpayer will have his fair hearing.

39. In the meantime, during the investigation stage, he has only a qualified right to privacy to protect. His right to privacy is qualified because HMRC have the right – both under the European Convention on Human Rights and under common law – to carry out reasonable checks into whether a taxpayer is paying the correct amount of tax. A taxpayer's right to privacy, in so far as HMRC is concerned, only relates to documents not reasonably required for the purpose of checking his tax position.

40. It is far from inconsistent with those Supreme Court authorities on the right to a fair trial, for the Court of Appeal to have reached the conclusion, as it did, that the public interest in an effective and speedy tax investigation outweighs any right to an inter partes hearing to determine whether there has been any breach of that limited right to privacy; any kind of adversarial procedure during a Sch 36 notice will inevitably significantly slow down the investigation and almost inevitably compromise the investigation by requiring HMRC to reveal to the taxpayer the state of their investigation. Referring to [47] of *Morgan Grenfell*, information notices must be one of those situations where 'exigencies of the legislative scheme make an inter partes procedure impossible.'

41. As I have said, with Sch 36, Parliament set up a scheme of judicial monitoring of a power conferred on HMRC; it did not set out to create an inter partes process. As the Supreme Court said in *Al Rawi* [2011] UKSC 34 (Lord Dyson at [69]) which was one of the cases to which Charles J referred, while the common law does not recognise a closed material procedure, it is always open to Parliament to legislate for one. And it seems to me that with respect to the taxpayer's limited right to privacy in respect of information HMRC seek via a third party information notice, Parliament has indeed created a closed material, ex parte, procedure.

42. In a similar vein to their references to *Al Rawi*, the applicants said that it was clear from case law that they had the right to know the allegations against them: they cited *R (X) v CC of Y Police* [2015] EWHC 484 (Admin) and *Ex parte Doody* [1993] 3 WLR 154 as authority for this saying that those exercising an administrative power conferred by Parliament must do so in fair manner and

> 'fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both (6) since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the fits of the cast which he has to answer'

But not only does this citation recognise the possibility of exceptions, again it misses the point: HMRC are merely investigating at present. If and when any assessment is made, the applicants will have the right to know the allegations against them and they will have the right to a fair hearing. But they do not have the right (and giving them such rights would be inconsistent with the rights of taxpayers generally to have an effective tax enforcement system) to know the state of HMRC's investigation before it is complete. HMRC have not reached the point of making any allegations and may never do so.

43. Another small point on why *Jimenez* is less persuasive than *Derrin* and *Morgan Grenfell* is that Charles J was influenced in what he said by the risk to the taxpayer (in that case the recipient of the notice) of penalties: there is no such risk to the taxpayer with third party information notices.

44. Lastly, I note that Charles J also suggested that the decision in *Morgan Grenfell* was possibly now inconsistent with the recent Upper Tribunal and Court of Appeal decisions in *Browning v Information Commissioner* [2013] UKUT 0236 and [2014] EWCA Civ 1050. But I do not understand that criticism because *Browning* was a case about when it was appropriate for the FTT to exercise its power conferred on it by its Rules to call an ex parte hearing; it did not concern whether legislation, such as Sch 36, should be interpreted as conferring on FTT the power to call an inter partes hearing.

Confidential informant material and Sch 36 applications

45. HMRC also point out that allowing <u>any</u> taxpayer to know the full state of their investigation will reveal to the taxpayer whether or not HMRC hold material from a confidential informant ('CI'). The applicants' reply was that, if HMRC held such material, they ought apply to be allowed to withhold disclosure on the grounds of public interest immunity and if such application was unsuccessful, the information ought to be revealed to a taxpayer in any inter partes determination of HMRC's Sch 36 application.

46. If I agreed with the applicants on this, it follows that they and all other taxpayers in respect of which HMRC make applications for third party information notices would be entitled to know whether or not HMRC had relied on CI material in the investigation, even if they were not entitled to see the material. That, it seems to me, would frustrate Parliament's intention to an even greater degree than merely revealing the state of the investigation at that point in time for the following reasons.

47. HMRC's position is that to prevent sources of CI material drying up, the Government, including HMRC, would not ordinarily disclose that they even held such material, let alone its contents. So far as Sch 36 notices are concerned, HMRC say that there is a risk that (a) the mere knowledge that CI material is held combined with (b) knowledge of the sort of information HMRC are seeking from a third party, will be enough to enable some taxpayers to work out the source of the CI material. So disclosing the mere fact that CI material is held in one case may be enough to lead a source being identified and therefore to CI material drying up in respect of all

taxpayers generally and therefore ultimately to less effective collection of tax in the UK in the future.

48. Therefore, says HMRC, they would never reveal to any taxpayer whether any CI material was held. So even in a case where no CI material is held, HMRC would not wish a taxpayer to know that no CI material was held; because that would indicate to other taxpayers who were not given that same assurance, that CI material *was* held. Doing so is to the detriment of the public interest as a whole as a government which discloses whether or not it holds CI material in any particular case is a government which won't receive much CI material in the future and its tax and other investigations will be less targeted and less effective.

49. Further, as I understand their position, it is HMRC's case that a taxpayer has no legitimate interest in knowing whether or not CI material is held. The nature of CI material is unconfirmed allegations and as such it can do no more than justify an investigation: it should not be the basis of any assessments and as such would not ordinarily need disclosing to the taxpayer at all. It should not be relied on to justify an assessment: it is just the trigger for an investigation to find out if there is any truth in the allegations.

50. I accept HMRC's position on this: I cannot see any significant legitimate interest in a taxpayer knowing whether or not HMRC hold CI material, certainly not such to outweigh the need for an investigating authority to protect its sources so that it can continue to obtain CI material in the future.

51. The applicants' suggestion that HMRC should apply for PII misses the point: that point being that HMRC should not, as a matter of general public interest, disclose to the taxpayer in any application for a Sch 36 information notice whether the application has been in whole or part triggered by CI material. An application for PII would instantly indicate that CI material is held.

52. The point about CI material was considered in *Jimenez* but Charles J seems to have thought that HMRC would always make a ¶3(4) application if they held CI material so that no notice of the Sch 36 application would be sent to a taxpayer and therefore there would be no question of the taxpayer making an application for an inter partes hearing; but that is not so. Even where CI material is held, HMRC may decide that it does not prejudice the enforcement/collection of tax to inform a taxpayer that approval for a Sch 36 notice is being sought, as long as HMRC do not disclose that they hold CI material, Therefore, when applying to the Tribunal in such a case, HMRC will apply under ¶3(4) for an order allowing them to provide less than a full summary of their reasons in the notice to the taxpayer, on the basis that a full summary would prejudice the enforcement/collection of tax as it would require them to refer to the CI material held. This is explained in Judge Berner's decision *Ex Parte a Taxpayer* [2014] UKFTT 931 (TC).

53. In conclusion, I agree with HMRC that the fact that some applications for Sch 36 notices are supported by reference to CI material is yet another reason why Parliament's intentions would be frustrated if *any* application for approval could be

determined inter partes. It is yet one more reason for presuming that Parliament never intended to give the Tribunal power to determine a §3(2A) application inter partes.

Conclusion

54. My conclusion is that, while neither *Derrin* nor *Morgan Grenfell* are technically binding on this Tribunal over the question of whether an ex parte application by HMRC under ¶2 & 3 of Sch 36 for third party information notices can only be determined ex parte, they are both very persuasive authorities that Sch 36 should be understood in that manner. It would make a nonsense of what was said in *Derrin* were I to conclude otherwise.

55. There is nothing in *Jimenez* that would cause me to think that *Derrin* was in any way wrong on the point. On the contrary, I think that it was right for the reasons given. I note that in *Jimenez* there was no argument on the point and that the taxpayer had in fact been refused (by other judges) leave to bring judicial review proceedings in so far as it was his claim he was entitled to an inter partes process, and the reason given by those judges for that refusal was the decision in *Derrin* (see §63 of *Jimenez).*

56. In conclusion, while the legislation provides for taxpayers to be put on notice that HMRC is applying for approval of a Sch 36 notice (save if HMRC make an application under ¶3(4) of Sch 36 to be excused giving any notice to the taxpayer), and while the Court recognised that, if the taxpayer chooses to make representations, HMRC must (if received in time) present them to the Tribunal, the applicants have no further rights other than to challenge any Sch 36 notice by way of judicial review.

57. Their application for an inter partes hearing of HMRC's Sch 36 application for a third party information notice is REFUSED as I find the Tribunal has no power to order such a hearing or to conduct an inter partes procedure.

(b) the exercise of discretion

58. Having concluded that I have no power to order an adversarial process in the resolution of HMRC's ex parte application for approval of a third party notice and in particular no power to call an inter partes hearing, it is pointless to consider whether, had I such a power, I would have exercised it in the applicants' favour in this case. I will therefore not consider their detailed arguments on why they think I ought to exercise the power in their favour to call an inter partes hearing. Nevertheless, I refer the parties to what I say at §§92-94 below.

(3) right to know date and location of hearing?

59. It follows from what I have said above in [56] that the Tribunal ought not inform the applicants of the date and location of the hearing of HMRC's application for third party notices. The hearing should be in private for the reasons given at [94] of *Ariel*; and for all the reasons given in *Derrin* as to why the application should be determined by an ex parte hearing, it follows that the taxpayers ought not be present

in the hearing room and therefore neither they nor any member of the public have the right to know the date and location of the hearing.

60. I REFUSE this application.

(5) A note of the hearing and a copy of the Judge's decision

61. The applicants also applied for a direction that, in the event I did not allow them to attend the hearing, that they should be provided with, after the event, a full record of what was said at the hearing and a copy of the Judge's reasons for giving (if I do) approval to HMRC's application together with a copy of all documents put before the FTT. The grounds of the application is that without those documents, it may be difficult to challenge the decision at a judicial review.

62. It seems obvious to me that providing a note of the hearing to the applicants frustrates at least one of the two objectives Parliament had in making the process ex parte: it would reveal to the applicants the state of HMRC's investigation.

63. The applicants case is that I must do so because, they say, it is what happened in *Derrin*; it was how the taxpayers in *Derrin* were able to make their application for judicial review.

64. However, what was actually said in *Derrin* was as follows:

> 120 In assessing, for Article 6 purposes, the adequacy of the monitoring model in schedule 36 combined with judicial review, it is to be borne in mind that in the present case, as is normally to be expected, the witness statements on behalf of HMRC on the judicial review set out in considerable detail the background to the third party notices and the various steps taken in relation to them, leading up to the hearing before the FTT, and exhibited copies of the application letter to the FTT (which set out the factual, procedural and legal basis for the application) and HMRC's note of the hearing on 23 November 2012. Further, as Simler J observed (at [78]), the appellants have seen the third party notices to Lubbock Fine and must know which documents are in the possession of Lubbock Fine (and others) and how and in what way they are admittedly connected with the taxpayers (many of them sharing the same addresses as the taxpayers under investigation). The reality is that the appellants are therefore well placed to know what factual basis there is, if any, for opposing the third party notices but none has ever been put forward by them.

65. There is no mention here of the *Tribunal* providing its notes of the hearing to the taxpayers. It appears merely that *HMRC* gave the taxpayers their notes of the hearing. I make no comment on whether HMRC were right to do so.

66. But so far as the Tribunal's notes are concerned, my conclusion is that, for the reasons given in *Derrin* as to why there is no discretion on the Tribunal to hold an

inter partes procedure in the determination of an ex parte application for a third party information notice, the Tribunal has no power to order the taxpayer to be given its record of the hearing or the reasons for its decision. To do so in any application for a Sch 36 notice would risk compromising that particular tax investigation and would compromise HMRC's ability to receive CI material in general.

67. That conclusion may seem to put the applicants and any other taxpayers who wish to challenge a third party information notice in a difficult position: how can they launch a judicial review of the decision to require third party notices if they do not know the reasons for the decision? But it seems to me that the position is as stated by the Court of Appeal in *Derrin*: taxpayers are the ones with, and the only persons with, complete knowledge of their own tax affairs and are therefore 'well placed to know what factual basis there is, if any, for opposing the third party notices'.

68. More particularly, taking into account that the taxpayers have no right to keep private from HMRC documents relevant to their tax affairs, their potential grounds to challenge a Sch 36 notice are limited. I can envisage three general grounds:

> (a) They may consider that the documents sought are not reasonably required for checking their tax position; and/or
>
> (b) They may consider that the reason for applying for the notice was improper, for example, to harass them, rather than to check their tax position; and/or
>
> (c) They may consider that the manner in which HMRC have gone about investigating them is unnecessarily heavy handed or oppressive.

69. Dealing with these possible allegations, I say as follows:

70. So far as (b) is concerned, there is a presumption of regularity so the taxpayers must have evidence to support their suspicion; HMRC does not need to disprove it. Therefore, in order to harbour the suspicion at all, the evidence for this allegation must already be known to the taxpayers. And if the Administrative Court considers that the taxpayers have an evidential basis for their suspicion, it has power to order production, if it sees fit, of the FTT hearing note if the court thinks it might contain something relevant to the allegation. But the FTT should not produce its hearing note without such an order simply so that a taxpayer can fish for evidence to support its allegation of irregularity.

71. So far as (c) is concerned, the answer is the same as for (b).

72. So far as (a) is concerned, again I think the answer is much the same. There is a presumption of regularity over the Tribunal's decision. If the taxpayers are able to satisfy the Administrative Court in their application for judicial review that there is good evidence that the documents ordered to be produced are not reasonably required for the purpose of checking their tax position, the Court has the power to order production of them if it thinks that the FTT hearing notes might contain something relevant to the allegation. But the FTT should not produce its hearing note simply so that a taxpayer can fish for evidence to support such an allegation.

After the tax investigation?

73. So far as I am aware, in inter partes proceedings where there has been an in camera interlocutory application, once the need for that part of the proceedings to be in camera disappears, the excluded party is given the notes of the in camera hearing.

74. But that is not the position here: the investigation is on-going. Even when the investigation is completed, HMRC will have an on-going need to prevent any taxpayer knowing whether or not HMRC held CI information, and it cannot do that if the Tribunal is required to produce the hearing notes of all ex parte Sch 36 hearings, or even only those that did not involve consideration of CI material. If it reveals which investigations were triggered by CI material, it risks its sources drying up.

75. In any event, the applicants' justification was their desire to consider judicial review proceedings: they do not apply for the notes only once the investigation is complete. They want them as soon as the Tribunal has made its decision, if that decision is to approve the application.

76. My conclusion is that the applicants have no right to the hearing note nor reasons for the decision, nor the papers produced to the Tribunal at any time, unless of course the Administrative Court were to order that they are disclosed. This application is REFUSED.

(4) In private?

77. Both HMRC and the appellant apply for the hearing of HMRC's Sch 36 application to be in private. Their reasons for doing so are not the same: HMRC do not wish to compromise their investigation; the applicants do not wish their tax affairs to be made public.

78. It is the invariable practice of this Tribunal to direct that Sch 36 applications are heard in private: see [95] of *Ariel* [2017] UKFTT 87 (TC). That is because it is inherent in an ex parte procedure that it should be in private or the confidentiality of the tax investigation, which is the purpose of the ex parte procedure, would be defeated. As I have concluded that applications for third party information notices under Sch 36 must be ex parte, it follows they should also be in private.

79. The applicants also wish their application for an inter partes hearing to be in private: it seems to me that it must follow that if I think (as I do) that the hearing of the Sch 36 notice application made by HMRC must be in private, it must follow that any hearing to decide whether that hearing should be ex parte or inter partes must be in private too, or the entire purpose of having the Sch 36 application hearing in private would be defeated.

80. In *Ariel,* the hearing of the application for the Sch 36 hearing to be inter partes was itself held in public. But in that case neither party applied for an in private hearing, presumably because nothing was being said about the tax investigation that was not already a matter of public knowledge following the earlier hearings in the

Bankruptcy Court. But for the reasons given in §78 above, I think that, had I decided to hold a hearing to determine the matter, it should be in private.

81. I decided (see §§5-11 above) that there is to be no such hearing in this case. Nevertheless, it follows from the fact that, had I held such a hearing, I would have held it in private, this decision notice ought to be anonymised. And that is the reason the four applicants are referred to as *Mr E and three corporate applicants.*

(6) 14 day stay?

82. The applicants' last application was for a 14 day gap between determination of the Tribunal of the approval, and the issue of any Sch 36 notice.

83. While the applicants recognise that they could apply for judicial review from the moment they received notification that HMRC intended to apply for Sch 36 notices to be approved, their point is that that is a potentially wasteful course of action: the Tribunal might refuse to give approval to HMRC thus making any prior application for judicial review pointless.

84. However, waiting until the Tribunal approves the notices (if it does) carries the risk that the third party will receive and comply with the notice before the applicants have even had time to consider whether to apply for judicial review.

85. There are two questions here: does the Tribunal have the power to order a 14 day stay and if it does, should it order one?

Discretion?

86. A 14 day stay is a short period; a much longer period has elapsed since the applicants were notified of HMRC's intention to apply for a notice and since the Tribunal received it. HMRC do not suggest that the 14 days period is critical; they do not suggest that the records they seek are in any imminent danger. I would be inclined, if I had the power to do so, to consider a very short stay for the reasons given by the applicants.

Power?

87. But the real question is whether I have power to do so. The appellant's submission is that the Rules give the tribunal power, particularly the Rule that requires the Tribunal to deal with cases 'fairly and justly'.

88. I reject the applicant's submission. Rule 2 and the overriding objective is a statement of how the Tribunal must approach the exercise of its powers. It must do so fairly and justly as described in that Rule. But what Rule 2 does not do is confer on the Tribunal powers that it does not otherwise have.

89. The Tribunal is given, by Sch 36, jurisdiction to determine certain applications for approval. It is not given any power to order HMRC to withhold the issue of a Sch 36 notice once it has been approved. I cannot therefore order any such stay.

90. It seems to me that it is up to HMRC whether to grant the applicants a short stay to see if they decide to initiate judicial review proceedings; but that is a matter for HMRC's discretion.

Conclusion

91. All the applications are REFUSED with the exception that I have decided for the reasons given that this decision notice should be anonymised.

Grounds of opposition

92. I note in passing that the applicants put various detailed grounds forward as to why they wish to challenge the Sch 36 notices and I have not referred to these in this decision notice. They were not relevant. But in so far as it is their case that (a) the information is not reasonably required for checking their tax position and (b) the application has not been properly made within Sch 36, these written submissions will all be considered when the Tribunal decides the application for the Sch 36 notices.

93. However, it seems to me that the applicants' criticism that HMRC will potentially damage their reputation and/or business interests if HMRC send the Sch 36 notice to the third party(s) on letter heading using the name of the unit undertaking the investigation (HMRC's Criminal Taxes Unit), that is beyond the scope of what the Tribunal can consider when considering whether to approve the notice. It is not a ground on which the Tribunal could refuse approval. But an allegation that HMRC is exercising its powers oppressively is, of course, within the scope of judicial review by the Administrative Court.

94. And while I am straying beyond my role, I do think HMRC should think carefully before doing anything that might damage the taxpayers' reputation and business interest other than the bare minimum inherent in asking a third party for information in order to check a person's tax position. In particular, when sending out precursor letters and Sch 36 notices to third parties, HMRC should think twice before using letter headings including words such as 'criminal' and/or 'fraud'.

Appeal rights

95. As the Court of Appeal identified in *Derrin*, there is real public interest in preventing challenges to Sch 36 notices being used as a delaying tactic. I do not suggest that that has happened here but it must not be encouraged in other cases: therefore, it does not seem right to me to defer consideration of HMRC's application for the 56 days that the applicants have in which to lodge an appeal against this procedural decision.

96. My decision is that I will consider HMRC's application in 14 days' time. If the appellants lodge an appeal before the expiry of 14 days, I will then decide whether to defer determination of HMRC's application until after any appeal process has been concluded.

97. 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: 09 October 2018

Appendix.

The relevant section of the decision of Charles J in *Jimenez:*

> 65.However, it seems to me that it is worth noting that in *Derrin* some reliance is placed on the difference between a third party notice and a taxpayer notice and that a number of cases relating to fundamental common law principles are not addressed in that case or in Ariel. These include Al Rawi v Security Service [2011] UKSC 34; [2012] AC 531 at paragraphs 10 to 17 and Re A (a child) (disclosure) [2012] UKSC 60; [2013] 1 FCR 69, R (Osborn) v Parole Board [2014] AC 1115 paragraphs 54 to 63 and perhaps in particular R v SSHD ex parte Doody [1994] AC 531 at 560 because it confirms that what satisfies the principles of fairness is case sensitive and a fundamental issue is whether a person knows the case he has to meet.
>
> 66.Schedule 36 provides that a taxpayer notice cannot be approved by the First -tier Tribunal if notice of what is sought by it and an opportunity to make submissions to the Revenue that are to be summarised to the First-tier Tribunal has not been given to the taxpayer unless paragraph 3(4) of Schedule 36 applies and so unless the First-tier Tribunal is satisfied that doing this might prejudice the assessment or collection of tax (and see paragraphs 3(3)(e) and 4 which apply to information to be given to the taxpayer about third party notices).

67.Applying the general approach to ex parte applications, the reasons for the application of paragraph 3(4) would have to be fully explained to the First-tier Tribunal and a full record of that explanation provided when the relevant risk has passed.

68.When paragraph 3(4) of Schedule 36 does not apply (and so at least arguably in cases when a precursor letter has been sent and so the condition for the offence provided for in paragraph 54 of Schedule 36 exists) it seems to me that it is at least arguable that:

(i) a private hearing is not justified on the grounds of confidentiality owed to the taxpayer, particularly if the taxpayer wants a hearing in public and so a full record of what is said and done at the hearing,

(ii) the underlying logic of the decision on the power to convene an inter partes hearing set out in paragraph 50 of the judgment of Blackburne J, and so of the Court of Appeal, in Morgan Grenfell does not apply to the monitoring jurisdiction conferred on the First-tier Tribunal under Schedule 36 because it envisages submissions being made by the taxpayer (and so that they can be of some use) and, in some cases, it may well not be the case that the Revenue will be at risk of letting "any cat out of any bag" and so taxpayer participation would not be excluded by the nature of the jurisdiction (e.g. on an issue relating to the territorial jurisdiction or on the reasonableness of the notice), and further

(iii) the reasoning in Morgan Grenfell based on the nature of the jurisdiction should be revisited having regard to the approach of the Upper Tribunal and the Court of Appeal in Browning v Information Commissioner and another [2013] UKUT 0236 and [2014] EWCA Civ 1050 and [2014] 1 WLR 3848.

69.To my mind, applying fundamental principles and the Rules of the First-tier Tribunal (including the overriding objective), it is at least arguable that in cases where a precursor letter has been sent the points that the First-tier Tribunal is carrying out a monitoring role and the taxpayer and third parties do not have a right to an inter partes hearing do not mean that the First-tier Tribunal, as the monitor charged with ensuring that arbitrary conduct by the executive is avoided and making a decision that removes rights of appeal and founds penal consequences, cannot or should not do any of the following:

(i) call for further explanation from the Revenue,

(ii) insist that the taxpayer be given a copy of the summary of his representations that the Revenue propose giving to the First-tier Tribunal,

(iii) call for further explanation or comment in writing from a taxpayer on his position or that summary,

(iv) hold the hearing in public or direct that the taxpayer can attend to observe and make public what is said and done,

(v) direct that a full record on what is said and done at any hearing and all documents put before the First-tier Tribunal are provided to the taxpayer, and

(vi) permit the taxpayer to take part in the hearing.

70.If there is a risk that disclosure of matters not covered in the precursor letter and related communications to a taxpayer (including the opportunity given to the taxpayer to make representations) would trigger grounds for their non-disclosure (e.g. the further disclosure would prejudice the assessment or collection of tax) the Revenue can set them out and the First-tier Tribunal can adapt its procedure accordingly.

71.The arguability of the points set out above, and the view of Mann J cited by the First-tier Tribunal in Ariel, underlie my suggestion that the Revenue and the First-tier Tribunal may wish to address their approach to applications made pursuant to the monitoring regime put in place by Schedule 36 to, as Mann J says, ensure that the First-tier Tribunal is properly informed in its performance of its monitoring role. I add that a transparent monitoring system may better promote the public interest and purpose of Schedule 36 and reduce challenges by way of judicial review.

72. In Derrin substantial information on what was provided and said to the First-tier Tribunal was provided to the judicial review court and the summaries to be given to the First-tier Tribunal by the Revenue were provided prior to the hearing before it (see paragraphs 37, 38 and 90). I do not know how this reflects what happened here, or general practice, but clearly what the taxpayer is told about a hearing before the First-tier Tribunal that he was not permitted to attend, and when he is given this information, and so how and when a full record of the hearing, the documents put before the First-tier Tribunal and its reasoning is provided to him, are at least potentially relevant to the fairness of the monitoring process and so its lawfulness applying public law principles.