[2018] UKFTT 702 (TC)

TC06846

Application numbers: TC/2018/00245
TC/2018/00250
TC/2018/00269

Information notice – Third party notices under Schedule 36 Finance Act 2008 – application for direction that hearing of application for approval of notices take place inter partes and associated directions – power of Tribunal to make such directions – Derrin, Jimenez and Mr E and others v HMRC considered – application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS — **Applicants**

without notice to

X LIMITED, Y LIMITED AND Z LIMITED — **Taxpayer Third Parties**

and-

17 INDIVIDUALS — **Individual Third Parties**

TRIBUNAL: JUDGE KEVIN POOLE

Sitting in Chambers on 30 November 2018 and decided on the basis of written submissions from:

Sandy Robb, Officer of the Applicants

Michael Firth, instructed by The Independent Tax & Forensic Services LLP, for the Taxpayer Third Parties and the Individual Third Parties

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DECISION

Introduction

1. This decision is concerned with whether taxpayers whose affairs are under investigation by the applicants ("HMRC") and third parties to whom HMRC propose to send third party notices pursuant to Schedule 36 Finance Act 2008 ("Schedule 36") in connection with such investigation should be permitted to attend the hearing of HMRC's application to the Tribunal for approval of the issue of such notices. Certain other questions ancillary to that main issue are also under consideration.

2. In view of the subject matter of the decision, I consider it appropriate that it be anonymised.

The facts

3. HMRC have opened enquiries into the corporation tax returns of the three taxpayer third parties ("the Companies"), which operate retail businesses. In the course of doing so, they have reached the view that the primary business records are not robust and that there may have been significant extractions of cash. They consider that they need to examine the financial position of the directors and shareholders of the Companies and their spouses in order to establish whether they disclose evidence of cash extraction from the Companies. After the informal request they made to that effect was refused, they have therefore applied to the Tribunal for approval of third party notices addressed to a large number of individuals. If approved, those notices would require those individuals to provide information and documents for the period 1 April 2012 to 31 March 2013 in respect of personal bank accounts, credit card accounts, land/property and other investments owned during that period.

4. The representative acting for the Companies (and also, it would appear, the individual third parties ("the Individuals")) wrote to HMRC asking that they be notified of the time and date of any Tribunal hearing to consider approval of the proposed third party notices, in order to be able to attend that hearing and make representations as to why such approval should not be granted.

5. HMRC did not agree to provide that information, and instead issued formal "opportunity letters" to the individuals in question pursuant to paragraph 3(3)(c) of Schedule 36. They then applied to the Tribunal for approval of the relevant notices to be addressed to those individuals.

6. The hearing of the application was listed for 8 March 2018, at which time Judge Raghavan adjourned the substantive application and made directions for written submissions to be delivered by HMRC in respect of the matters raised by the representative, in particular:

> "(1) The persuasive value of the views of Charles J in *R (on the application of Jimenez) v FTT (1) HMRC (2)* [2017] EWHC 2585 (Admin) ([63] to [72]),

> (2) the relevance of those views to the circumstances of HMRC's application, and
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> (3) what, if any, directions, in the light of the above, should be made regarding the hearing of HMRC's application including whether the hearing should be in private and regarding the taxpayer companies'
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> (a) notification of the hearing
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> (b) ability to make representations
>
> (c) participation in the hearing".

7. It was stated that the Tribunal would then consider what further directions should be made to dispose of these "preliminary matters", which might include "directing that some or all of the submissions are sent to the taxpayer companies and then directing that the taxpayer companies make submissions in response".

8. On 28 March 2018, HMRC's written submissions were received by the Tribunal. Judge Raghavan considered them but decided they were not sufficiently clear and instructed the Tribunal to write to HMRC for more specific representations, which was done on 1 May 2018.

9. Shortly thereafter, on 8 May 2018, the representative contacted the Tribunal direct, attaching an "urgent application" settled by Mr Firth, applying for directions that:

> "(a) HMRC's applications for FTT approval of third party information notices to be served on *[the Individuals]* ("HMRC's Applications") should not be heard in private to the exclusion of *[Companies and the Individuals]*.
>
> (b) The *[Companies]* and/or the *[Individuals]* should be given notice of where and when the hearing of HMRC's Applications will take place.
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> (c) The *[Companies]* and/or the *[Individuals]* should be given a summary of the representations that HMRC propose to make to the FTT at the hearing of HMRC's Applications and copies of any documents supplied by HMRC to the Tribunal. This information and documents should be provided no less than 3 working days before the date of the hearing.
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> (d) The *[Companies]* and/or the *[Individuals]* should be given the opportunity to make representations to the FTT in respect of HMRC's Applications and the question of whether the FTT can or should approve the information notices."

10. The application also requested that these matters be dealt with at a hearing, additionally suggesting that "[i]t would appear to make sense to join the applications up with the *[Companies']* applications for closure notices because, plainly, if those are successful the question of information notices becomes redundant."

11. On 23 May 2018, HMRC submitted their further representations in response to the Tribunal's letter dated 1 May 2018, which also addressed the representative's application of 8 May 2018 and set out their grounds of opposition to it.

12. As referred to at [10] above, the Companies had applied for an order requiring HMRC to close the enquiries; that application was subsequently heard on 26 September 2018 and stayed by Judge Kempster pending the outcome of these proceedings. Following that hearing, it was decided that in view of the tension between the closure notice proceedings and these proceedings, it was appropriate for these proceedings to be dealt with by a different judge, and the matter was subsequently referred to me for determination.

The arguments

For the Companies and the Individuals

13. The main thrust of Mr Firth's argument was that there was "absolutely no justification for a private hearing in the present case." He cited a section from the "Practice Guidance (Interim Non-disclosure Orders)" issued by Lord Neuberger MR (as he then was), in his capacity as Head of Civil Justice, and set out at [2012] 1WLR 1003:

> "12 There is no general exception to open justice where privacy or confidentiality is in issue. Applications will only be heard in private if and to the extent that the court is satisfied that by nothing short of the exclusion of the public can justice be done. Exclusions must be no more than the minimum strictly necessary to ensure justice is done and parties are expected to consider before applying for such an exclusion whether something short of exclusion can meet their concerns, as will normally be the case: *Ambrosiadou v Coward* [2011] EMLR 419, paras 50–54. Anonymity will only be granted where it is strictly necessary, and then only to that extent.
>
> 13. The burden of establishing any derogation from the general principle lies on the person seeking it. It must be established by clear and cogent evidence…"

14. He also cited the following passage from *HMRC v Banerjee (No 2)* [2009] WEHC 1229 (Ch):

> "34 … In my opinion any taxpayer has a reasonable expectation of privacy in relation to his or her financial and fiscal affairs, and it is important that this basic principle should not be whittled away. However, the principle of public justice is a very potent one, for reasons which are too obvious to need recitation, and in my judgment it will only be in truly exceptional circumstances that a taxpayer's rights to privacy and confidentiality could properly prevail in the balancing exercise that the court has to perform.
>
> 35 t is relevant to bear in mind, I think, that taxation always has been, and probably always will be, a subject of particular sensitivity both for the

> citizen and for the executive arm of government. It is an area where public and private interests intersect, if not collide; and for that reason there is nearly always a wider public interest potentially involved in even the most mundane-seeming tax dispute. Nowhere is that more true, in my judgment, than in relation to the rules governing the deductibility of expenses for income tax. Those rules directly affect the vast majority of taxpayers, and any High Court judgment on the subject is likely to be of wide significance, quite possibly in ways which may not be immediately apparent when it is delivered. These considerations serve to reinforce the point that in tax cases the public interest generally requires the precise facts relevant to the decision to be a matter of public record, and not to be more or less heavily veiled by a process of redaction or anonymisation. The inevitable degree of intrusion into the taxpayer's privacy which this involves is, in all normal circumstances, the price which has to be paid for the resolution of tax disputes through a system of open justice rather than by administrative fiat."

15. He went on to submit that "the principle of open justice applies in its full rigour at the interlocutory stage and not just at trial", citing *Graiseley Properties Limited v Barclays Bank plc* [2013] EWHC 67 (Comm) at 35:

> "Furthermore, that the principle of open justice applies in its full rigour at the interlocutory stage and not just at trial, is clear from the statement of the law by Lord Neuberger MR in the Practice Guidance (Interim Non-disclosure Orders) [2012] 1 WLR 1003."

16. His most relevant citation was the comments of Charles J in *R (oao Jimenez) v FTT and others* [2017] EWHC 2585 (Admin) at [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".

17. In short, he submitted, the Companies and the Individuals were not aware of any reason why the "ordinary principle of open justice should not apply."

18. The second limb of his application (that details of the time and place of the hearing should be provided to the Companies and the Individuals) was necessarily parasitic upon the first limb; if a direction for an *inter partes* hearing were granted, then clearly that direction would be robbed of its effect unless information about the time and place of the hearing was provided.

19. As to the third limb (that a summary of the representations to be put to the Tribunal and copies of the documents to be seen by it should also be provided to the Companies and the Individuals shortly before the hearing), he submitted this was also

a "corollary" of an open hearing being ordered, citing the finding of the Upper Tribunal (Judge Sinfield) in *Aria Technology Limited v HMRC* [2018] UKUT 111 (TCC) at [20] and [22]:

> "Taking account of the comments of Toulson LJ in *Guardian News* and the provisions of the UT Rules, I have concluded that the UT has an inherent power to grant a third party access to any documents relating to proceedings that are held in the UT records and has a duty under common law to do so in response to a request by an applicant unless the UT considers, on its own motion or on application by one or more of the parties, that any documents or information in them should not be disclosed to other persons.
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> …
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> It is clear from [85] of *Guardian News*, quoted above, that I must conduct a balancing exercise in which I evaluate the competing interests at issue in the application in the context of the facts of this appeal. I must weigh the purpose of the principle of open justice and the potential value of the material in advancing it against the need to deal with the appeal fairly and justly which is the overriding objective of the UT Rules and includes consideration of any risk of harm which access to the documents may cause ATL and others."

20. In the present case, he argued, there was "no good reason why HMRC should not be required to provide the Applicants with the information and documents that they have put or intend to put before the FTT", and "as the purpose is, at least in part, to enable the recipient of the information or documents to understand the hearing, it logically follows that such information and documents should be made available before the hearing".

21. He also cited the dicta of Charles J set out at [69] of the judgement in *Jimenez*:

> "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:
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> (i) call for further explanation from the Revenue,
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> (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."

22. As to the fourth limb of the application (opportunity to make representations), he accepted that neither the Companies nor the Individuals had the right to make representations, but submitted there was nothing to prevent the FTT from receiving them. He submitted that this is what had happened in *HMRC (ex p. Certain Taxpayers)* [2012] UKFTT 765 (TC), as recorded at [2] and [3] in that decision:

> "2. The application originally came before me on 19 September 2012. The day before that, HMRC received certain representations from solicitors acting for a number of taxpayers whose affairs are the subject of the relevant enquiries. Those representations were settled by UK tax counsel. HMRC provided a copy of the representations to the Tribunal, and sought an adjournment of the application so that they could be fully considered by HMRC.
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> 3. Although there is no provision of Schedule 36 for the consideration of representations by the taxpayer as opposed to the third party to whom the notice is to be addressed, the representations raised a number of fundamental issues as to the Tribunal's jurisdiction. I therefore considered it right that consideration should be given to them, and I granted the adjournment."

23. He also referred to the Tribunal's normal practice of adding as party to proceedings persons who had a clear interest in their outcome (for example an employee whose entitlement to statutory sick pay was under consideration in proceedings before the Tribunal between HMRC and the employer). In the light of that, he submitted, it was appropriate to allow the Companies and the Individuals to make representations at the hearing, as it would allow for points which the Tribunal might otherwise overlook to be brought to its attention in performing its monitoring duty.

24. It was submitted that the failure of the opportunity letters to identify the company/companies whose tax affairs were under consideration, and the fact that HMRC's claim as to the inadequacy of the Companies' primary records was strongly contested were matters which went to the heart of the question as to whether the notices were reasonably required. It was also pointed out that the investigating officer had already purported to serve a third party notice on another company without either obtaining the Companies' consent or the Tribunal's approval, or sending a copy to the Companies – which cast grave doubt on the reliability of what the Tribunal would be told at the hearing. The alternative course of action to an *inter partes* hearing – relying on the general duty of "full and frank disclosure" in *ex parte* applications (as referred to in *Clavis Liberty Fund LP1 v HMRC* [2015] UKUT 72 (TCC) at [47]) was a poor substitute in the present circumstances.

For HMRC

25. Mr Robb's submissions relied mainly on the Court of Appeal's decision in *R (on the application of Derrin Brothers Properties Ltd & others) v A Judge of the First-tier Tribunal (Tax Chamber) and others* [2016] EWCA Civ 15, especially the summary given by the Chancellor at [68] to [72] and [118]:

> "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.
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> 69. Those considerations explain the principal features of schedule 36 relating to the service of third party notices. In the first place, Parliament has deliberately chosen a judicial monitoring scheme rather than a system of adversarial appeals from third party notices, which could take years to resolve. Secondly, paragraphs 2 and 3 of schedule 36 make a clear distinction between the rights and obligations of (1) the taxpayer whose tax position HMRC wish to check, (2) the third party, and (3) any entity ("the non-taxpayer entity") whose documents or copies of whose documents are required to be produced by the third party or about whom information is sought from the third party. Common to the statutory treatment of all of them, however, is the very limited scope for objection by them to the request for production of the documents and information specified in the third party notice.
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> 70. Paragraph 3(3)(e) of schedule 36 requires that the taxpayer has been given a summary of the reasons why HMRC's officer requires the information and documents. In contrast to the position of the third party, schedule 36 does not, however, require the taxpayer to be given any opportunity to make representations to HMRC opposing the request in the third party notice.
>
> 71. Consistently with the legislative objectives I have described, the giving of summary reasons to the taxpayer is not for the purpose of enabling the taxpayer to make representations directly or indirectly to the FTT. It was already established in *R v A Special Commissioner ex parte Morgan Grenfell & Co Ltd* [2002] TC 74 TC 511 in relation to the former scheme under section 20 of the TMA that, in the case of a notice to the taxpayer for production of documents, the fact the notice came at the investigatory stage as well as the need to avoid frustrating the intention of the legislation led to the conclusion that the taxpayer had no right to demand an *inter partes* oral hearing.

> 72. The reason for the giving of summary reasons to the taxpayer under schedule 36 is purely to guard against arbitrary conduct by the tax authority and to provide the context for any application to the FTT for approval of the third party notice, approval which cannot be given unless the FTT is satisfied pursuant to paragraph 3(3)(b) that the officer giving the notice is justified in so doing.
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> …
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> 116. Judicial review enables an independent and impartial tribunal to review compliance with the statutory pre-conditions for judicial approval of third party notices under schedule 36, both in relation to law and fact.
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> 117. That is disputed by the appellants on the ground that the only written judgment released by Judge Berner did not explain why he was satisfied that Mr Pandolfo reasonably required the appellants' documents for the purpose of checking the tax position of the taxpayers. They say that the combination of the absence of such an explanation, the *ex parte* nature of the hearing before Judge Berner and the presumption of regularity, which according to *T.C. Coombs* applies to the decision of Judge Berner, means that neither the appellants nor the court on judicial review have been able to investigate whether the central requirement in paragraphs 1(1) and 2(1) of schedule 36 has been satisfied. Indeed, at one point in her submissions Miss McCarthy appeared to be suggesting that the procedure is unfair if neither the taxpayer, nor the third party nor the non-taxpayer entities are able to challenge whether tax is due from the taxpayer.
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> 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. Miss McCarthy said that it was no part of the appellants' case that there was no opportunity for the appellants to participate in an oral hearing. She also said that the appellants do not challenge the decision to hear the application *ex parte*. Those concessions disguise, but do not detract from, the fact that what the appellants advance is something more akin to adversarial litigation than a judicial monitoring model in which applications are normally made *ex parte* and heard in private, with very limited rights of participation by those to whom information notices under schedule 36 are sent or who are affected by them."

26. In his submission, the above passages made it clear that the Court of Appeal had rejected any suggestion (as put forward in *Jimenez*) that the taxpayer should be regarded as a monitor of the lawfulness of the Schedule 36 process, or have any greater participation than that set out in Schedule 36. He also referred to the Court of Appeal's judgment in *R (on the application of Morgan Grenfell & Co Limited) v A Special Commissioner and another* at [47] to [50], where it was considering the predecessor regime to Schedule 36:

“47. The submission that a taxpayer or adviser at risk of compulsory disclosure of confidential documents ought to have an opportunity of deflecting the application is at first sight attractive. To see why, one need go no further than Lord Loreburn LC's celebrated remark in *Board of Education v Rice* [1911] AC 179 that acting in good faith and listening fairly to both sides "is a duty lying upon everyone who decides anything". But in the same passage Lord Loreburn made clear, as other judges of high authority have done many times since, that how this is done is in principle a matter for each decision-maker: natural justice does not generally demand orality. And there is a further, small, group of cases, of which Mr Brennan submits this is one, in which the exigencies of the legislative scheme make an inter partes procedure impossible.

48. What is said here by Mr Beloff is that although the disclosure procedure is in one sense a first step which in itself determines nobody's rights or liabilities, in another and more important sense it is conclusive of the Revenue's right to invade somebody's privacy and (given our conclusions so far) to disrupt a relationship of professional confidentiality. His position, he contends, is if anything stronger than that of the applicant in *Georgiou v United Kingdom* [2001] STC 80, in whose favour the European Court of Human Rights accepted that fine lines should not be drawn, for Article 6 purposes, between the civil and criminal aspects of an assessment to a tax penalty. Here, where it is respect for private life and correspondence under Article 8 which in issue, the impugned decision constitutes a completed invasion of the Convention right. If the court is to sanction it, as we have done, then Mr Beloff contends that it should only be by including at least a power (he no longer says a duty) in the Special Commissioner to hear oral submissions if he thinks they may help him to reach a sound conclusion. In this way the common law will be doing what it can and should to prevent procedural unfairness from being heaped on substantive injustice.

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

50. It has to be remembered that a right to be heard is axiomatically worth little without knowledge of the case that has to be met. Either, therefore, the inspector's hand has in some measure to be shown, or the taxpayer must be content to make submissions in the dark. The former, it is plain, is destructive of the whole purpose of the procedure; the latter, while some taxpayers may consider it better than nothing, will create a sustained pressure for disclosure. There are only two logical outcomes if these two imperatives clash in a face-to-face hearing: one is that the taxpayer will duly learn nothing, in which case it is not easy to see what will have been achieved on his behalf that could not have been achieved

> in writing; the other is that the Special Commissioner's opportunity (in Mr Beloff's happy phrase) to "enjoy the benefit of advocacy" will lead to accidental disclosure by him or (more probably) the inspector of material to which Mr Beloff does not contend that the taxpayer is entitled and the disclosure of which at this stage will run counter to Parliament's purpose. That purpose, we apprehend, is in lieu of any *inter partes* procedure to instal the General or Special Commissioner as monitor of the exercise of the Inland Revenue's intrusive powers and to require an inspector to put everything known to him, favourable and unfavourable, before the Commissioner when seeking his consent (*R v IRC, ex parte T.C.Coombs & Co [1991] 2 AC 283*). We accept Mr Brennan's contention, therefore, that the possibility of an oral hearing is excluded by the nature of the process in question. We do not accept his further ground that to establish a discretion to hold a hearing is to invite judicial review of every decision not to do so and of every failure to extract information from the inspector or to obtain reasons from the Commissioner. It is not legitimate, as Lord Bridge said in *Leech v Deputy Governor of Parkhurst Prison* [1988] AC 533, 566, to draw jurisdictional lines on a purely defensive basis. If the power exists, the possibility of judicial review comes with it. But, for the reasons we have given, we are satisfied that the Special Commissioner was right to conclude that he possessed no such power."

Discussion and decision

27. Since the hearing of the Companies' applications for closure notices, I note that issues very similar to those involved in this application have been considered by the Tribunal (Judge Mosedale) in *Mr E and three corporate applicants v HMRC* [2018] UKFTT 0590 (TC).

28. First, on the question of whether it was necessary or appropriate for there to have been an oral hearing of the Companies' and Individuals' application, I respectfully adopt the reasoning set out at [5] to [11] of the decision in *Mr E* and agree that no such hearing is necessary or appropriate in this case for essentially the same reasons.

29. Second, on the question of whether the Companies and/or the Individuals have the right to be given notice of, to attend and make representations at an oral hearing *inter partes* of HMRC's application under Schedule 36 (directions (a), (b) and (d) of the directions sought by Mr Firth's application, referred to at [9] above), I respectfully agree with the reasoning of Judge Mosedale in *Mr E*. For the reasons she gives, I agree with her that no such right exists. It is worth noting that in large part Mr Firth's case rested on the general "open justice" rule, which would (if it applied) require access to the hearing not just for the Companies and the Individuals, but also for any other member of the public who wished to attend. Given the nature of the matters to be considered at the hearing, this could not be right.

30. To the extent a taxpayer or a third party wishes to make representations for the consideration of the Tribunal, they are at liberty to do so to HMRC, and HMRC are in my view undoubtedly obliged, under their general duty of "full and frank disclosure" to convey those representations to the Tribunal at the hearing of the application. In this way, the Tribunal will consider representations from either a taxpayer or a third party

before making its decision whether or not to approve a notice. I would consider it a gross breach of HMRC's duties were they to withhold from the Tribunal any bona fide written representations received from either the taxpayer or a third party in response to the notifications sent to them under paragraphs 3(3)(c) and (e) of Schedule 36.

31. It is true that paragraph 3(3)(c) of Schedule 36 only requires that a "summary" of any representations from a third party need be given by HMRC to the Tribunal, and there is no express requirement in Schedule 36 for representations from the taxpayer to be conveyed at all; but if written representations have been received from either, I cannot currently envisage a situation in which it would be appropriate for HMRC to omit to mention that fact to the Tribunal and to provide a copy of the material received. Where representations have been made orally to HMRC, then it would be appropriate for them to provide a summary only, rather than a verbatim transcript.

32. Of course, if the Tribunal is satisfied that prior notification to either the taxpayer or the third party "might prejudice the assessment or collection of tax", then it can dispense with the requirement for such notification under paragraph 3(4) of Schedule 36, thereby effectively depriving the taxpayer and/or third party of any opportunity to make representations to the Tribunal. This is a procedure which is in my experience very rarely invoked, and in satisfying itself that it can properly dispense with such notification under paragraph 3(4), the Tribunal is likely to explore the detailed background in even greater depth than usual, being acutely aware of its role as "monitor" of the statutory procedure, both as to strict compliance with the statutory requirements and, more generally, as to the balance which has to be struck when deciding whether the giving of a notice is justified, on the basis that the particular information or documents being sought are "reasonably required".

33. Third, on the question of whether the Companies and/or the Individuals should be given an advance summary of the representations that HMRC propose to make at the hearing of their Schedule 36 application, and copies of any documents supplied to the Tribunal (as referred to in proposed direction (c) referred to at [9] above), I consider this application to be largely parasitic on the issues considered above. The purpose of requesting such a summary and documents is to put the taxpayer and/or third party in a position to be able to focus their representations at the hearing upon the case being put forward by HMRC; if they are not entitled to make such representations, then the need for this material falls away. Mr Firth has not argued that this material should be provided in any event (i.e. whether or not in advance of an oral hearing), but any such argument would in my view be doomed to fail. If the Tribunal were to make such an order, it would effectively turn the streamlined "judicial monitoring" exercise intended by Parliament into a potentially lengthy adversarial process.

34. The application dated 8 May 2018 is therefore REFUSED.

35. It follows that the hearing of HMRC's Schedule 36 application should now go ahead. The Tribunal will be instructed to fix a hearing date for as soon as practicable after 1 January 2019. If an application for permission to appeal the above decision is received by that time, then I will decide whether (in the light of that application) to postpone the hearing until after any such appeal has been determined.

36. For the avoidance of doubt, nothing in this Decision should be regarded as pre-judging in any way the Tribunal's decision on HMRC's Schedule 36 application, if and when it is heard by the Tribunal. Such application will be considered entirely independently on its own merits, by strict reference to the statutory requirements of Schedule 36. HMRC would be well advised to review carefully the papers which have been submitted to the Tribunal to ensure they can satisfy the Tribunal at the hearing that all the necessary statutory requirements have been satisfied.

37. 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 1 January 2019 (the time limit having been shortened pursuant to the Tribunal's general power contained in Rule 5(3)(a) of the said Rules. 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.

KEVIN POOLE
TRIBUNAL JUDGE

RELEASE DATE: 03 DECEMBER 2018