[2020] UKFTT 321 (TC)

TC07803

PROCEDURE—Disclosure—Application for specific disclosure

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2014/06023

BETWEEN

ROYAL BANK OF SCOTLAND GROUP PLC **Appellant**

-and-

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

TRIBUNAL: JUDGE CHRISTOPHER STAKER

The hearing took place on 26 and 29 June 2020. With the consent of the parties, the form of the hearing was V (video). The remote platform was the Tribunal Video Platform (TVP). A face to face hearing was not held because this was not in the public interest during the Covid-19 pandemic. The documents to which the Tribunal was referred are set out in the Appendix to the decision.

The Tribunal has previously directed that the hearing on 26 and 29 June 2020 was a public hearing, and that this decision will be a public decision.

J Wardell QC, instructed by Pinsent Masons, for the Appellant

R Atkins QC and J Puzey (with J Goldring), instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION on PRELIMINARY ISSUE

INTRODUCTION

1. This is a decision on an application made by the Respondents ("**HMRC**") for a direction requiring the Appellant to provide specific disclosure of documents and information.

2. The application, dated 5 May 2020, is made in reliance on rule 5(3)(d) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (SI 2009/273) (the "**Rules**").

3. The notice of appeal in this case was filed on 17 October 2014. On 20 January 2017, the Tribunal determined as a preliminary issue that the assessment was issued in time ([2017] UKFTT 223 (TC)). The case has now been listed for a 6 week substantive hearing from 2 November 2020 until 11 December 2020.

4. The Appendix to this decision sets out the material before the Tribunal and participants in the hearing of this application.

BACKGROUND

5. This case is an appeal by the Appellant against of a decision of HMRC, contained in a letter dated 20 September 2012, to refuse the Appellant the entitlement to the right to deduct input tax in respect of 536 trades in VAT periods 06/09 and 09/09 of carbon credits under the EU Emissions Trading System. The HMRC decision relied on the principle in *Kittel v État Belge* ECLI:EU:C:2006:446, [2006] ECR I-6161, [2008] STC 1537 ("***Kittel***"), HMRC having decided that they were satisfied that the transactions in question were connected with the fraudulent evasion of VAT (MTIC fraud) and that the Appellant either knew, or alternatively, should have known, that this was the case. The total input tax denied was some £86 million.

6. The transactions were entered into by two traders employed by RBS Sempra Energy Europe Limited (as it was then known) ("**SEEL**"), which was at material times an indirect subsidiary of the Appellant that was a member of the Appellant's VAT group. The Appellant subsequently sold its interest in SEEL to JP Morgan in 2010.

7. The transactions were with five different counterparties. The trades with two of these counterparties have also been subject matter of High Court proceedings in which a judgment was given on 10 March 2020: *Bilta (UK) Ltd & Ors v Natwest Markets Plc & Anor* [2020] EWHC 546 (Ch) ("***Bilta***"). It seems unclear whether there will be any appeal against that decision.

8. The *Bilta* proceedings are not concerned with the right to claim VAT input tax. The claimants in *Bilta* are a number of insolvent companies who claim that directors of those companies, in breach of their fiduciary duties, participated in MTIC fraud, that the two traders at SEEL dishonestly assisted this, and that the defendants in that case (SEEL and another subsidiary of the Appellant in the present appeal) were consequently liable to pay compensation for this. (References below to the "Appellant" are or include, where appropriate, references to these subsidiaries.)

9. In the present appeal, it is common ground between the parties that the Appellant has already voluntarily disclosed to HMRC a large amount of material, held by both the Appellant and JP Morgan. In particular, in September 2018 it provided to HMRC the disclosure that it gave in the *Bilta* litigation, which consisted of some 30,000 documents, and which as noted above concerned trades with two of the five counterparties to the transactions with which this appeal is concerned. The Appellant has explained that the disclosure exercise in *Bilta* involved identifying potentially relevant documents through electronic keyword searches of the data of 89 individual and group custodians. These electronic keyword searches returned some 1.25

million documents and some 460,546 audio recordings (over 3,500 hours), which were then individually reviewed to determine which of the items were to be disclosed.

10. Additionally, for the purposes of this appeal the Appellant carried out further electronic searches using additional keywords, which led to the subsequent disclosure in June 2020 of a further 6,454 documents concerning trades with the other three counterparties, and also concerning some potential counterparties with whom the Appellant decided not to trade. In February 2020 the Appellant further disclosed a part of the *Bilta* trial bundle. The disclosure has also included some 490 audio recordings, and certain other material.

11. HMRC point out that only some 2.5% of the 1.2 million documents reviewed in the *Bilta* disclosure exercise have ultimately been disclosed to HMRC in the present appeal, and that only some 0.1% of the audio has been disclosed. HMRC argue that this in itself raises concerns that relevant material may have escaped disclosure, in the absence of an adequate explanation of how the disclosure exercise was conducted by the Appellant, and in particular, of what criteria were used when reviewing the 1.2 million items identified by the keyword searches in the *Bilta* disclosure exercise. HMRC contend that they have not been given a sufficient explanation of this, such that HMRC now make the present application for specific disclosure.

12. HMRC set out the specific disclosure that they now ask the Tribunal to direct in four separate documents, referred to below as Schedule 1 to Schedule 4 respectively. These schedules have been revised by HMRC during the course of the proceedings in the light of developments in the case. The final versions of these schedules for purposes of the present application were provided by HMRC to the Tribunal after the hearing of this application.

APPLICABLE LAW

13. Rule 5 of the Rules relevantly provides:

> (1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.
>
> (2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.
>
> (3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may by direction—
>
> …
>
> (d) permit or require a party or another person to provide documents, information or submissions to the Tribunal or a party; …

14. Rule 27 of the Rules relevantly provides:

> (1) This rule applies to Standard and Complex cases.
>
> (2) Subject to any direction to the contrary, within 42 days after the date the respondent sent the statement of case (or, where there is more than one respondent, the date of the final statement of case) each party must send or deliver to the Tribunal and to each other party a list of documents—
>
> (a) of which the party providing the list has possession, the right to possession, or the right to take copies; and
>
> (b) which the party providing the list intends to rely upon or produce in the proceedings.

(3) A party which has provided a list of documents under paragraph (2) must allow each other party to inspect or take copies of the documents on the list (except any documents which are privileged).

15. The Civil Procedure Rules ("**CPR**") are not applicable in proceedings before the Tribunal. However, certain provisions of the CPR were referred to in argument by analogy.

16. Part 31 CPR deals with disclosure and inspection of documents. CPR 31.5(2)-(8) sets out a disclosure regime for multi-track claims, other than those which include a claim for personal injuries. CPR 31.5(1) provides that in cases to which these provisions do not apply:

(a) an order to give disclosure is an order to give standard disclosure unless the court directs otherwise;

(b) the court may dispense with or limit standard disclosure; and

(c) the parties may agree in writing to dispense with or to limit standard disclosure.

17. CPR 31.6 then provides that:

Standard disclosure requires a party to disclose only–

(a) the documents on which he relies; and

(b) the documents which –

(i) adversely affect his own case;

(ii) adversely affect another party's case; or

(iii) support another party's case; and

(c) the documents which he is required to disclose by a relevant practice direction.

18. CPR 31.7 adds that when giving standard disclosure, a party is required to make a reasonable search for documents falling within rule 31.6(b) or (c), and that the factors relevant in deciding the reasonableness of a search include the number of documents involved; the nature and complexity of the proceedings; the ease and expense of retrieval of any particular document; and the significance of any document which is likely to be located during the search. CPR 31.11 adds that any duty of disclosure continues until the proceedings are concluded, and that if documents to which that duty extends come to a party's notice at any time during the proceedings, that party must immediately notify every other party. CPR 31.12 states further that:

(1) The court may make an order for specific disclosure or specific inspection.

(2) An order for specific disclosure is an order that a party must do one or more of the following things –

(a) disclose documents or classes of documents specified in the order;

(b) carry out a search to the extent stated in the order;

(c) disclose any documents located as a result of that search.

(3) An order for specific inspection is an order that a party permit inspection of a document referred to in rule 31.3(2).

19. As has been noted, CPR 31.5(2)-(8) sets out a separate disclosure regime for multi-track claims, other than those which include a claim for personal injuries. The cases to which these provisions apply are thus the larger, more complex and higher stakes cases, and indeed, if the present appeal fell to be determined by the CPR rather than the Rules, these provisions would likely apply to the present appeal. Under this regime, the court gives more bespoke directions

concerning disclosure. The parties are required to file and serve a report verified by a statement of truth which, amongst other matters, estimates the broad range of costs that could be involved in giving standard disclosure in the case, including the costs of searching for and disclosing any electronically stored documents. The court will then decide, having regard to the overriding objective and the need to limit disclosure to that which is necessary to deal with the case justly, what order to make in respect of disclosure. In these cases, the court may order standard disclosure, but can also dispense with disclosure altogether, or make any other order that it considers appropriate.

20. CPR Part 31 is supplemented by Practice Direction 31A ("Disclosure and Inspection"). Its paragraph 5.1 provides that if a party believes that the disclosure of documents given by a disclosing party is inadequate, that party may make an application for an order for specific disclosure. Paragraph 5.4 provides that:

> In deciding whether or not to make an order for specific disclosure the court will take into account all the circumstances of the case and, in particular, the overriding objective described in Part 1. But if the court concludes that the party from whom specific disclosure is sought has failed adequately to comply with the obligations imposed by an order for disclosure (whether by failing to make a sufficient search for documents or otherwise) the court will usually make such order as is necessary to ensure that those obligations are properly complied with.

Paragraph 5.5 further provides that:

> An order for specific disclosure may in an appropriate case direct a party to –
>
> (1) carry out a search for any documents which it is reasonable to suppose may contain information which may–
>
> (a) enable the party applying for disclosure either to advance his own case or to damage that of the party giving disclosure; or
>
> (b) lead to a train of enquiry which has either of those consequences; and
>
> (2) disclose any documents found as a result of that search.

21. CPR Part 31 is also supplemented by Practice Direction 31B ("Disclosure of Electronic Documents") which provides in its paragraphs 5(5) and 10 that in some cases the parties may find it helpful to exchange the Electronic Documents Questionnaire ("**EDQ**") in the Schedule to that Practice Direction, in order to provide information to each other in relation to the scope, extent and most suitable format for disclosure of electronic documents in the proceedings. It goes on to provide in its paragraphs 25-27 as follows. It may be reasonable to search for electronic documents by means of keyword searches or other automated methods of searching if a full review of each and every document would be unreasonable. However, relying on keyword searches alone may result in failure to find important documents which ought to be disclosed, and/or may find excessive quantities of irrelevant documents, which if disclosed would place an excessive burden in time and cost on the party to whom disclosure is given. The parties should consider supplementing keyword searches and other automated searches with additional techniques such as individually reviewing certain documents or categories of documents (for example important documents generated by key personnel) and taking such other steps as may be required in order to justify the selection to the court.

22. It is noted that there is also a Practice Direction 51U to the CPR which establishes a Disclosure Pilot for the Business and Property Courts. That pilot scheme commenced on 1 January 2019.

RELEVANT PRINCIPLES

23. The plain fact is that the procedure under the First-tier Tribunal's Rules is different to that under the CPR. The mere fact that a case before this Tribunal is important or complex is not of itself a reason for exercising discretions under the Tribunal's Rules to direct a disclosure regime modelled on a disclosure regime provided for in the CPR for complex cases. The Tribunal's Rules were made for important as well as simple cases. (*E Buyer UK Ltd v Revenue and Customs Commissioners* [2017] EWCA Civ 1416 ("***E Buyer***") at [94].)

24. Even if CPR-style disclosure might be appropriate in all or certain cases before this Tribunal where fraud or dishonesty has been alleged (a matter that need not be decided in the instant case), in an MTIC case before this Tribunal where all that is alleged is knowledge of a fraud, rather than direct dishonest participation in a fraud, this Tribunal is entitled to make a case management decision to order normal disclosure under rule 27 of the Tribunal's Rules (*E Buyer* at [94]).

25. Disclosure of documents is not an end in itself but a means to an end, namely to ensure that the Tribunal has before it all the information which the parties reasonably require the Tribunal to consider in determining the appeal. The trend in the case law has been to ensure that disclosure is more closely related to the issues in dispute in the proceedings. Disclosure is to ensure that one party does not enjoy an unfair advantage or suffer an unfair disadvantage in the litigation as a result of lack of access to a document. If a party suffers no litigious disadvantage by not seeing a document, it is immaterial that the party is curious about the contents of a document or would like to know the contents of it. (*HMRC v Smart Price Midlands Ltd* [2019] EWCA Civ 841 at [40], [47], [71], [72].)

26. In exercising its discretion under rule 5(3)(d) of its Rules, the Tribunal must have regard to the overriding objective in rule 2. An exercise of discretion to direct disclosure should be proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties (rule 2(2)(a)). The question of proportionality should include an assessment of how focused the request for disclosure is, how difficult or expensive it will be to comply with it, and how relevant the information requested is. (*Tower Bridge GP Ltd v Revenue and Customs* [2016] UKFTT 54 (TC) ("***Tower Bridge***") at [23(5)].)

27. Depending on the particular circumstances of a case, it may be predictable at the earlier stages of proceedings that further disclosure may subsequently be necessary to cover new matters raised as the proceedings progress, such that it would be wrong to regard directions or agreements with respect to disclosure made at an earlier stage of the proceedings as the defining word on the approach to disclosure in the case. The circumstances of a particular case may show that the parties regarded the question of disclosure as something which should be kept under review and adjusted as the outline of the case developed. In particular, in a case where it is *known* that a party has further relevant documents which may be harmful to their case, it may be unfair and unjust for that party to be able to suppress or keep those documents from the view of the other party and the Tribunal as a consequence of the limitation on the extent of the other party's inspection of documents during the investigatory stage as a result of a sensible co-operative approach to the conduct of the investigation which was agreed as being in the interests of both sides (compare *Ingenious Games LLP v HMRC* [2014] UKUT 62 (TCC) ("***Ingenious Games***") at [61]-[62], [67]).

THE PARTIES' ARGUMENTS

The HMRC arguments

28. The Appellant's disclosure in this appeal has relied upon the disclosure exercise in *Bilta*, a keyword search and review exercise undertaken for a different case several years ago. HMRC were not a party to *Bilta* and had no say over the disclosure process adopted in that case.

29. HMRC have to be able to understand the disclosure exercise in *Bilta*. It would be unreasonable to require HMRC to prove that the Appellant's disclosure process was flawed but to allow the Appellant to refuse to explain how that process was undertaken. HMRC have sought clarifications of how the process was undertaken in correspondence with the Appellant, but there are still important questions to which HMRC have not been provided answers. HMRC cannot be satisfied that the Appellant's exercise was capable of identifying and disclosing all *relevant* material. HMRC have effectively been told that they must trust the effectiveness of a procedure in which they took no part, and which, because of the lack of disclosure as to the methodology, they have no means of checking.

30. The EDQ in *Bilta* makes it clear that the *Bilta* disclosure exercise deliberately excluded material considered relevant solely to the VAT dispute, and correspondence in the *Bilta* case repeatedly drew a distinction between the issues in the VAT dispute and those arising in the *Bilta* litigation. HMRC have not even been provided with the disclosure in the same format and order as it was provided in *Bilta*. As HMRC has pressed for further disclosure, more relevant documents have been disclosed which would not otherwise have been, and this has included particularly relevant material not previously disclosed. This shows that the *Bilta* exercise did not lead to the disclosure of all documents relevant to this appeal.

31. HMRC are not asking for the initial disclosure exercise to be redone, but is making highly specific, targeted requests for documentation and information arising from the service of the Appellant's evidence in this case and the disclosure from the *Bilta* litigation. The vast majority of those requests have either had no answer or have been met with the blanket response (referred to by HMRC as the Appellant's "mantra") that such documents would have been disclosable in *Bilta* so that HMRC would already have them if they exist. In the absence of a complete and coherent explanation for the disclosure exercise undertaken in *Bilta*, HMRC cannot simply accept that they have had the material they seek already or that "if it isn't there it doesn't exist". The Appellant has also ignored some requests for disclosure.

32. The targeted searches requested will not be too onerous, time consuming or costly. It is perfectly possible for searches to be refined and conducted on a targeted basis against the information held by specific named individuals for particular dates or events.

33. Disclosure in a case of this size is an ongoing and developing process and seldom will the party holding information disclose everything of relevance at the first opportunity.

34. Given the sums involved in this case, and the fact that a very serious allegation of knowledge or, alternatively, means of knowledge, of a connection to fraud has been levelled at employees of a major and publicly-owned financial institution with vast resources at its disposal, a rigorous and transparent process of disclosure is justified in the present case.

The Appellant's arguments

35. The disclosure in the *Bilta* proceedings was built on an investigation initially carried out for the purposes of the VAT appeal. Its search terms were deliberately tailored to the *Kittel* test. Since then, at the request and agreement of HMRC, the Appellant has carried out further

electronic searches using additional keywords. In addition, the Appellant has volunteered various further documents.

36. The Appellant has adopted a remarkably open and truly exceptional co-operative approach to disclosure with full transparency. The Appellant has given comprehensive standard disclosure in accordance with CPR 31.6.

37. HMRC fail to understand the methodology adopted by the Appellant in both the *Bilta* proceedings and in this appeal. HMRC is asking the Appellant to re-invent the wheel by asking questions which really assume that the extensive exercise carried out to date did not happen. If this were an application in the High Court, it would have no prospect of success because the High Court would immediately appreciate that the Appellant had bent over backwards to ensure that it complied with its disclosure obligations and had in fact so complied. That is why the Appellant has drawn a line in the sand in respect of what it is prepared to disclose voluntarily.

38. Under CPR 31.7(1) the obligation is only to undertake a reasonable search taking into account the factors at CPR 31.7(2), which include the "ease and expense of retrieval of any particular document". Applications for specific disclosure under CPR 31.12 should be made sparingly and only when there are good reasons for thinking that the document exists and is in the possession or under the control of the respondent. Such an order will be made only when the court is satisfied that it is necessary and that the cost of disclosure will not outweigh the benefits (Queen's Bench Guide, paragraph 10.7.6).

39. There is always the risk that human error could creep into a disclosure review. No party in litigation can categorically confirm that no document was missed in a disclosure review given the residual risk of human error, especially when dealing with a vast data set, but the disclosure rules do not require a party to provide such categorical confirmation; rather, a party must establish that it has undertaken a reasonable search. A litigant will not be required to carry out a further substantial and time-consuming exercise just because it is not able to state with certainty (as opposed to a high degree of probability) that a document does not exist. In this case, at its highest, there remains a speculative possibility, not supported by any evidence, that some documents may have been missed in the disclosure exercise.

40. The requests for further documents are not reasonable or proportionate. To make an order in the terms sought would be disproportionate and highly unlikely to produce any further documents.

41. The requests for further documents are seeking orders which would not be made in the High Court and would involve a radical departure from this Tribunal's usual approach to the issue of disclosure.

THE TRIBUNAL'S FINDINGS

Rule 27 of the Rules and disclosure

42. HMRC argue that rule 27 of the Rules is not intended to address the subject of disclosure as such, but rather is concerned with the evidence that a party relies upon. The Tribunal does not accept that argument. Rule 27 is the standard provision in the Rules for disclosure in standard and complex cases. That is the disclosure regime that applies in this case, unless and until, and except to the extent that, the Tribunal directs otherwise.

43. The Tribunal has the power pursuant to rule 5(3)(d) to direct otherwise, and to impose broader disclosure obligations on one or more parties. The Tribunal may also have powers pursuant to other provisions of the Rules (for instance, under the more general provisions in rule 5(1) and (2)) to expand or restrict the disclosure obligations of a party or parties in a particular appeal. However, in order for the Tribunal to exercise its power to direct disclosure

going beyond the requirements of rule 27, the Tribunal must be persuaded that it is appropriate in the circumstances of the particular case to depart from the default regime in rule 27.

44. The Rules intend that the disclosure regime in rule 27 will apply to cases across the whole spectrum of standard and complex cases before the Tribunal, including the largest, most complex and highest stakes cases. The Tribunal's Rules have been enacted for important as well as simple cases, and the regime in this Tribunal is intended to be different from that under the CPR. The fact that a case is large, complex, and involves high stakes is therefore not of itself a sufficient reason to depart from the usual disclosure regime under rule 27, even if size, complexity and the amount at stake may be relevant considerations to be taken into account with other relevant considerations.

45. On general principles, where a party makes an application for directions imposing disclosure obligations on another party, the burden is on the party making the application to persuade the Tribunal that there are sufficient reasons for granting it. It is not for the other party to persuade the Tribunal that the application should not be granted.

The approach to be taken in deciding the application

46. The HMRC submissions assume implicitly that the Appellant is under an obligation to disclose all *relevant* material, and that (if all other requirements are met) an order for specific disclosure should be granted if it can be shown that the material sought is *relevant*. For instance, the HMRC skeleton contends that "it is not apparent that the Appellant's exercise was capable of identifying and disclosing all *relevant* material" (emphasis in the original). The 13 July 2020 HMRC submission states at paragraph 7(a) that when dealing with a request for specific disclosure, the Tribunal must ask "Is the material sought relevant to the issues in the case?"

47. More particularly, HMRC suggest that *Tower Bridge* at [23] is authority for the propositions (1) that in complicated cases of the present kind concerning major financial institutions and serious allegations, there should be a presumption that both parties would disclose not only the documents on which they intend to rely but generally relevant documents as well; (2) that the primary criterion in considering an order for disclosure is relevance; and (3) that the test of relevance "should not set an unduly high bar" and that documents and information which might assist or undermine a party's case or lead to a "train of enquiry" that might do the same would be classed as relevant.

48. HMRC refer also to *Ingenious Games*, in which it was said at [68(iii)] that "According to the usual standards of justice in heavy civil litigation, such as these proceedings, it is just and fair for a party to see documents held by its opponent relevant to that opponent's pleaded case, in order to see whether they undermine that case or support the party's own case in opposition". This passage seems to suggest that a party should disclose all material relevant to its own pleaded case, whether or not that party considers the material to fall within the criteria for standard disclosure, so that the party to which that material is disclosed can make that assessment for itself.

49. To the extent that these two decisions can be so read, this Tribunal finds that they are wrong in law in this respect. Such propositions are inconsistent with what was subsequently said by the Court of Appeal in *E Buyer* at [94]-[95], [116] and [125] (indicating that even in an MTIC cases before this Tribunal in which millions of pounds are at stake, disclosure may be limited to that provided for under rule 27) and *Smart Price* (see paragraphs 23-25 above).

50. Furthermore, even the CPR do not provide that in "complicated cases" or "heavy civil litigation", each party is generally entitled to disclosure all *relevant* material held by the other

party, or all material falling within the criteria of standard disclosure. As set out above, under the CPR, in a multi-track claim not involving a claim for personal injuries (that is, the category of cases into which the present case likely would fall, if it were hypothetically to be heard as a case to which the CPR apply), the court may under CPR 31.5 direct a more limited disclosure regime than standard disclosure, or may even dispense with disclosure altogether.

51. This is explained in the White Book at paragraph 31.5.1 as follows:

> The rule [rule 31.5] was designed to reduce the costs of disclosure by restricting its scope, but allowing for specific disclosure by court order (r.31.12), and by providing that disclosure was not "automatic" but available only by court order. It marked a significant departure from the earlier law. … It remained the case that standard disclosure could impose considerable cost burdens on parties, in particular in the heavier cases. ... As a consequence, sub-rules (2) to (8) of r.31.5 were inserted by the Civil Procedure (Amendment) Rules 2013, as part of the major reforms as to costs brought about by provisions in that statutory instrument. Those provisions, which are, in terms, restricted to multi-track claims (other than those which include a claim for personal injury) came into force on 1 April 2013. …. Sub-rules (2) to (8) are intended to have the effect of restricting further (for the purpose of reducing costs) the scope of standard disclosure in the claims to which they apply (that is to say, further than the scope allowed by what is now r.31.5(1)).

52. Under the CPR, if, in a multi-track claim not involving a claim for personal injuries, the court directs a more limited disclosure regime than standard disclosure or dispenses with disclosure altogether, it will always be open to a party to apply for specific disclosure. However, paragraph 5.5 of Practice Direction 31A (see paragraph 20 above) provides that the court "may" grant such an application "in an appropriate case", indicating that specific disclosure will not be granted automatically, even where documents of the kind referred to in that paragraph may exist and may not have been disclosed.

53. The Tribunal finds that the approach to be taken under the Rules to an application for specific disclosure in a case such as the present is as follows.

54. An application for specific disclosure assumes that there has been a prior regime of initial disclosure. The Tribunal may previously have made case-specific directions for a regime of initial disclosure. Otherwise, the regime of initial disclosure will be that provided for in rule 27.

55. If a party has failed to comply adequately with the regime of initial disclosure, that may be a ground for directing specific disclosure to remedy the inadequacy (by analogy with the second sentence of paragraph 5.4 of Practice Direction 31A to the CPR: see paragraph 20 above).

56. In cases where there has been no inadequate compliance with the regime of initial disclosure, or to the extent that an application for specific disclosure seeks disclosure going beyond the requirements of the initial disclosure regime, an applicant for directions for specific disclosure will need to satisfy the Tribunal:

(1) that the material in respect of which specific disclosure is sought is necessary to deal with the case justly: this will be the case if the party applying for specific disclosure will suffer an unfair disadvantage (or the other party an unfair advantage) in the litigation as a result of lack of access to the material; that is, it is not enough that the material is merely *relevant* to the case or that the material would fall to be disclosed under a regime of standard disclosure;

(2) that the material is likely to exist, and is likely to be or have been in the other party's control;

(3) that the material has not previously been (or is unlikely previously to have been) disclosed to the applicant for specific disclosure;

(4) that the material is likely to be found and disclosed if the order for specific disclosure is made and is complied with (that is, if the order for specific disclosure requires a party to make a reasonable search for material, that the search will likely lead to identification and disclosure of the material sought); and

(5) that the proposed order for specific disclosure would be proportionate to the importance of the case, the complexity of the issues, the importance of the material sought to a just determination of the issues in the case, and the anticipated time and costs required to comply with the proposed order.

57. The Tribunal considers that an example of material that satisfies criterion (1) in the previous paragraph would be material which if put in evidence could potentially affect the outcome of the case in some material respect. That would include, for instance, material that would be evidence of a significant fact of which evidence is otherwise lacking, or of which the already available evidence conflicting. On the other hand, material that would be evidence relevant only to a non-controversial issue, or evidence that would merely confirm the significant amounts of already available evidence that is overwhelmingly one way, would be difficult to characterise as material that is necessary to deal with a case justly.

58. Of course, the applicant for specific disclosure cannot be expected to know in advance exactly what the material will show if it does exist and is disclosed. Thus, in the example given in the previous paragraph, to satisfy criterion (1) in paragraph 56 above, it would not be necessary to establish that the material *would* affect the outcome of the case in some material respect, but only that there are sufficient reasons for believing that there is a sufficiently great possibility that material could affect the outcome of the case in some material respect that disclosure of it is necessary to deal with the case justly.

59. In considering whether the criteria in paragraph 56 above are met, especially criteria (1) and (5), the Tribunal will bear in mind that the trend in the case law is to ensure that disclosure is more closely related to the issues in dispute in the proceedings (see paragraph 25 above), and that an over-readiness to make orders for specific disclosure could lead to disclosure obligations becoming disproportionately burdensome, especially in large and complex litigation.

60. It is unnecessary to determine here whether the approach in paragraphs 54 to 59 above is applicable in the generality of cases before the Tribunal. To the extent that the Tribunal has a discretion to determine the approach in an individual case, this Tribunal considers this to be the appropriate approach in the present case.

The circumstances of the present case

61. Various procedural directions have been made by the Tribunal by consent in this appeal. Some of these have contained provisions dealing with disclosure.

62. In particular, in directions dated 6 October 2015, the Tribunal relevantly directed, in relation to the substantive appeal, as follows:

> … there is no requirement to serve a list of documents but three months after the determination of this Tribunal of the preliminary issue the respondents shall serve on the appellant the witness statements upon which they intend to

> rely at the hearing of the appeal together with any supporting exhibits and shall confirm to the Tribunal that they have done so. Any document not served in this way shall not be relied upon in the hearing without the prior consent of the Tribunal;
>
> Similarly the appellant is not required to serve a list of documents but three months after service of the respondents' evidence in the appeal as set out above the appellant shall serve on the respondents the witness statements upon which it intends to rely at the hearing of the appeal together with any supporting exhibits and shall confirm to the Tribunal that it has done so. Any documents not served in this way shall not be relied upon in the hearing without the prior consent of the Tribunal;

63. Subsequent directions endorsed by the Tribunal on 16 May 2018 provided that the Appellant was to serve on HMRC documents on which it intends to rely that were not included as exhibits to its witness statements.

64. These directions thus modified the default initial disclosure regime under rule 27 to an extent, but did not expand the category of material to be disclosed.

65. These directions were subsequently amended by later directions, in particular to extend the time limits for compliance in the light of delays in the handing down of the judgment of the High Court in the *Bilta* case.

66. Subsequent consent directions endorsed by the Tribunal on 10 September 2018 and 6 December 2018 stayed proceedings for periods to enable HMRC to review the voluntary disclosure made by the Appellant.

67. The most recent of the consent directions was endorsed by the Tribunal on 26 February 2020. These provided that HMRC could make any application for specific disclosure by 6 March 2020, and that HMRC have leave to rely at the final hearing upon any of the documents given by way of voluntary disclosure by the Appellant in September 2018, together with any further documents received in response to an application for specific disclosure or in response to any earlier requests by HMRC.

68. The directions thus expressly reflect the fact that the Appellant was making voluntary disclosure. The directions did not intervene to determine how this voluntary disclosure exercise should be undertaken by the Appellant, or what its scope should be. The voluntary disclosure exercise has remained voluntary on the part of the Appellant throughout. There can in the circumstances be no question of the Appellant failing to comply adequately with its disclosure obligations under the voluntary disclosure exercise, because no directions of the Tribunal imposed any obligations in relation to that exercise.

69. It is not contended that there has otherwise been any material non-compliance by the Appellant with any of the procedural directions as amended that would be relevant to the present application.

70. The Tribunal has considered whether it makes any difference in this case that the Appellant has purported to give standard disclosure. In argument the Appellant contended that it "has given comprehensive standard disclosure in accordance with CPR 31.6". In a letter dated 2 June 2020, the Appellant's solicitors stated to HMRC:

> The fact that the reviews undertaken have been, and the reviews to be undertaken will be, to CPR standards should give the Commissioners comfort that documents identified by the search terms which are categorised as relevant are being disclosed irrespective of whether the document assists or is adverse to the Appellant's case. Our client would not countenance

> withholding contemporaneous documentation that it was aware would undermine its case.

However, the Tribunal does not consider that the making of such unilateral statements by the Appellant has resulted in the Appellant becoming subject to any additional disclosure obligations beyond those which it would otherwise have had pursuant to the Rules and directions of the Tribunal. HMRC have not in terms sought to contend otherwise.

71. The Tribunal therefore finds that it has not been established that compliance by the Appellant with the initial disclosure regime has been inadequate. The application for specific disclosure therefore falls to be determined in accordance with the criteria in paragraph 56 above.

72. It was entirely reasonable for the parties to proceed in a case of this complexity on the basis that the Appellant's initial disclosure would proceed by way of voluntary disclosure (with the possibility of associated negotiations between the parties), to be supplemented subsequently by any application by HMRC for specific disclosure.

73. By agreeing to this, HMRC were in no way accepting that the Appellant's disclosure in this case would be limited to whatever the Appellant decided to give by way of voluntary disclosure (compare paragraph 27 above). The directions have expressly acknowledged that HMRC, if dissatisfied with the voluntary disclosure, could make an application for specific disclosure.

74. On the other hand, the directions have not given HMRC a right to demand anything of their choosing by way of specific disclosure. The directions made in this case do not suggest that HMRC will be entitled to an order for specific disclosure of anything they ask for merely because it is "relevant" or because it meets the criteria of specific disclosure. The directions recognise the right of HMRC to apply for specific disclosure, but do not indicate that that any such application will be determined in accordance with anything other than the ordinarily applicable criteria.

Criterion (1): General

75. Because HMRC contend that the test for specific disclosure is whether the material sought to be obtained is *relevant* (see paragraphs 46-52 above), the HMRC arguments do not address directly the question of why the material sought is said to be *necessary to deal with the case justly*. The Tribunal has given consideration to whether it should invite further submissions from the parties on this particular issue, but has decided against that course. Both parties are legally represented by well-resourced teams, and have had a full opportunity to present their cases in relation to this application.

76. A very significant part of the HMRC arguments in support of this application for specific disclosure has been concerned with pointing out perceived shortcomings in the Appellant's voluntary disclosure exercise. HMRC contend that this exercise was based on the disclosure exercise undertaken in different case of a different kind (*Bilta*), to which HMRC was not a party and in which HMRC had no say over the process adopted. It is said that the keyword searches undertaken in the *Bilta* proceedings identified some 1.2 million documents, of which only some 2.5% were ultimately disclosed to HMRC. HMRC say that they do not *understand* how the Appellant went about undertaking its disclosure exercise for purposes of this appeal, and have been "attempting to unravel the methodology". HMRC also point to other perceived shortcomings.

77. In short, HMRC's position in effect is as follows. The information made available by the Appellant about its disclosure methodology is insufficient to establish that the voluntary

disclosure exercise is adequate to enable the case to be dealt with justly. As only the Appellant is in a position to explain its disclosure methodology, the Tribunal should therefore conclude that the disclosure to date is not adequate to enable the case to be dealt with justly. HMRC should therefore be entitled to specific disclosure.

78. The Tribunal does not accept that train of reasoning. Criterion (1) in paragraph 56 above does not involve a consideration of whether *disclosure to date* has been adequate to deal with the case justly, but rather, of whether the *particular items sought in the request* for specific disclosure are necessary to enable the case to be dealt with justly.

79. The Tribunal accepts that consideration of the application for specific disclosure needs to take into account the disclosure that has taken place so far. Matters such as those referred to in paragraph 76 above might potentially be relevant for instance to criteria (2), (3) and (4) in paragraph 56 above. However, such matters would not of themselves establish that criterion (1) in paragraph 56 above is satisfied, which is the initial, and necessarily prominent, consideration in an application for specific disclosure.

80. HMRC also argue that its requests for specific disclosure are specific and targeted, and that compliance with them by the Appellant will not be unduly onerous. Again, while such matters if established would be relevant in determining whether criterion (5) in paragraph 56 above is satisfied, they will not normally be relevant to criterion (1).

81. In relation to criterion (1) the significance of the prior disclosure is that HMRC have already had disclosure of a considerable volume of material, either as exhibits to the Appellant's witness statements, or pursuant to the voluntary disclosure exercise. Criterion (1) requires consideration of why the requests made in the application for specific disclosure are necessary to deal with the case justly (paragraph 56(1) above), having regard to the issues in dispute in the case (compare paragraph 25 above), the contents of the already available evidence (compare paragraph 57 above), and the anticipated contents of the items of which specific disclosure is sought (compare paragraph 58 above).

Criterion (1): The Schedule 1 requests

82. Schedule 1 contains requests which HMRC say arise from the witness statements and exhibits served by the Appellant. These requests seek material that HMRC say is either referred to in witness statements served by the Appellant, or which from what is said in such witness statements must exist.

83. Schedule 1, in its final form as submitted by HMRC after the hearing, sets out the relevant paragraph numbers of the relevant witness statement in which each of the requested documents is said to be referred to, or from which it is said that its existence can be inferred. However, the witness statements themselves have not been included in the bundles for the hearing of the HMRC application, nor even the relevant paragraphs of the witness statements in question. Beyond contending that the material requested in Schedule 1 would be "relevant" to the case, HMRC do not explain in relation to each of these items how they are necessary to deal with the case justly. HMRC do not explain how the requested items relate to the issues in dispute in the proceedings, or the perceived importance of the requested items to those issues, or exactly what unfair disadvantage HMRC would suffer as a result of lack of access to the requested items.

84. The version of Schedule 1 attached to the HMRC skeleton argument contains a column headed "Request for further disclosure following review of the witness statements served by RBS and the Bilta Disclosure ('BD')". This sets out why HMRC believe that the relevant

material exists and/or has not yet been disclosed, but does not explain in relation to each item why HMRC consider that the material is necessary to deal with the case justly.

85. The hearing bundle and supplementary bundle for this hearing total some 1162 pages, and the other bundles for the hearing total additional hundreds of pages. The Tribunal cannot be expected for itself to examine all of this material with a view to identifying potential reasons why the requested material is necessary to deal with the case justly. This is a key issue that falls to be addressed in argument.

86. Even if, from the Tribunal's limited understanding of the general issues in the substantive appeal, it seems likely that the requests would be of relevance to the case, that is not enough to satisfy criterion (1). An applicant for specific disclosure must explain to the Tribunal clearly why the requested material is needed. The Tribunal is not persuaded on the basis of such material and arguments as have been presented to it that the Schedule 1 requests are necessary to ensure that this appeal is dealt with justly.

Criterion (1): The Schedule 2 requests

87. Schedule 2 contains requests which HMRC say arise from the some 30,000 documents disclosed from the *Bilta* litigation. HMRC state that each of the requests in Schedule 2 cites an individual document or documents from the *Bilta* disclosure and makes specific enquiry thereof.

88. These requests are said to fall into three broad categories. One category consists of requests that HMRC say have simply not been answered by the Appellant. A second category consists of material that HMRC say the Appellant has refused to disclose. A third category consists of redacted material that HMRC say the Appellant has agreed to disclose an unredacted version of, but in relation to which the Appellant has not answered HMRC's questions.

89. Questions relating to whether the Appellant is entitled to refuse to disclose material, or to redact material, fall to be determined in connection with criteria other than criterion (1) in paragraph 56 above. These are matters that do not need to be considered at this stage.

90. Again, HMRC to not explain specifically in relation to each of these requests why the material or information sought is necessary to deal with the case justly, having regard to what is stated in paragraphs 56-59 above.

91. For similar reasons as in relation to Schedule 1, the Tribunal is therefore not persuaded on the basis of the material and arguments presented to it that the Schedule 2 requests are necessary to ensure that this appeal is dealt with justly.

Criterion (1): The Schedule 3 requests

92. Schedule 3 contains requests which HMRC say are requests for information as to the disclosure methodology adopted by the Appellant.

93. These requests include requests for details of the methodology of the disclosure exercise undertaken by the Appellant (for instance, a request for a "summary of the tests applied and instructions given to" those who carried out the reviews of material identified by keyword searches, and details of the methodology and criteria applied for the audio review). However, Schedule 3 also contains requests for specific searches or reviews to be undertaken, such as a request for disclosure of all emails and Instant Messenger messages to and from specified persons in specified periods relating to the trade in carbon credits with the counterparties relevant to this appeal.

94. In relation to requests for specific searches or reviews, the findings above in relation to Schedules 1 and 2 apply. Appropriate explanations have not been provided of the significance of each of the requests to the issues in dispute between the parties. The version of Schedule 3 accompanying the HMRC skeleton argument contains a column entitled "Explanatory notes to request". However, the notes here do not address directly the question of why the requests are necessary to enable the case to be dealt with justly. One item does state for instance that "The receipt of the letter and what happened thereafter is of significance. It relates to the extent of the Appellant's knowledge as to its market share and whether this raised concerns." However, to say that something is "significant", and that it "relates to" an issue that is presumably one of the issues in the case, falls short of explaining why that material is necessary for the case to be dealt with justly.

95. As to the disclosure methodology employed by the Appellant generally when undertaking the voluntary disclosure exercise, HMRC have not presented focused legal arguments or authorities concerning the level of detail with which a party making disclosure has to explain its methodology to the other party, or the circumstances in which failure to provide sufficiently detailed explanations of disclosure methodology will prevent a case from being dealt with justly.

96. The Tribunal finds that insufficient material and arguments have been presented to it to establish that the Schedule 3 requests are necessary to ensure that this appeal is dealt with justly.

Criterion (1): The Schedule 4 requests

97. Schedule 4 relates to transcripts of seven audio recordings that have been disclosed to HMRC by the Appellant as part of the *Bilta* disclosure. These are transcripts of conversations, in which the speech of only one party to the conversation have been captured. In Schedule 4, HMRC seek a direction, first, that the Appellant identify within the *Bilta* disclosure the exact files for the other side of the conversation. Schedule 4 also requests the Appellant to explain how it can state that such recordings/transcripts have been disclosed already, in light of certain evidence given in the *Bilta* trial.

98. The Appellant's contention is necessarily implicitly that they do not know whether there ever was a recording of an other side to any of the conversations, or if so, whether or not it has been disclosed. The Appellant says that the audio files that it received from JP Morgan were reviewed and relevant audios disclosed (at a cost to the Appellant of approximately £300,000 plus VAT), and that if HMRC do not have the "other side" then they do not exist within the audio provided to the Appellant.

99. For similar reasons as in relation to Schedule 1, the Tribunal is not persuaded on the basis of the material and arguments presented to it that the Schedule 4 requests are necessary to ensure that this appeal is dealt with justly.

Conclusion

100. HMRC have not satisfied the Tribunal that criterion (1) paragraph 56 above is satisfied in relation to any of the requests for specific disclosure. If follows that the HMRC application falls to be refused, without the need to consider whether the other criteria in paragraph 56 above are satisfied in relation to any of the requests.

DISPOSITION

101. The HMRC application for specific disclosure is refused.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

102. This document contains full findings of fact and reasons for the preliminary decision. Any party dissatisfied with this preliminary 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.

DR CHRISTOPHER STAKER

TRIBUNAL JUDGE

RELEASE DATE: 6 AUGUST 2020

APPENDIX

DOCUMENTS BEFORE THE TRIBUNAL

1. The Tribunal case file
2. Bundle for the hearing (pages 1-1072)
3. Supplementary Bundle for the hearing (pages 1073-1162)
4. Supplemental Bundle (Bilta Correspondence) (333 pages)
5. Skeleton Argument Bundle for the hearing (89 pages)
6. Authorities Bundle for the hearing (249 pages)
7. Non-agreed Authorities Bundle (containing the judgment in *Bilta* [2020] EWHC 546 (Ch))
8. Skeleton arguments of both parties
9. *King v Telegraph Group Ltd* [2004] EWCA Civ 613 (received from the Appellant on 25 June 2020)
10. Schedule 1 (revised 19 June 2020) – Specific Disclosure Request of 24 June 2019 (with Appellant's comments of 4 March 2020 and HMRC's response of 9 April 2020 and the Appellant's comments of 02.06.20 and 25.06.20) (received from the Appellant on 25 June 2020)
11. Revised Schedule 2 as at 19 June 2020 (Updated with the Appellant's Responses dated 25.06.20) (received from the Appellant on 25 June 2020)
12. Revised Schedule 3 as at 19 June 2020 (updated with Appellant Response on 25.06.20) (received from the Appellant on 25 June 2020)
13. Categories of Privileged Documents--Documents created on or after 30 March 2012 until 31 December 2012 (received from the Appellant on 25 June 2020)
14. Draft orders sought by HMRC (Schedules 1-4) (received by the Tribunal from HMRC on 29 June 2020) (subsequently superseded)
15. Table identifying issues that Rosenblatt (solicitors for *Bilta* claimants) had in understanding the methodology applied by the Appellant (received by the Tribunal from HMRC on 3 July 2020)
16. Final versions of the draft orders sought by HMRC (Schedules 1-4) (received by the Tribunal from HMRC on 3 July 2020)
17. Appellant's written representations pursuant to the oral direction of Judge Staker on 29 June 2020 and five annexes thereto (6 July 2020)
18. Transcript from day 4 (20 June 2018) of the trial in the *Bilta* proceedings (provided to the Tribunal by HMRC on 6 July 2020)
19. Respondent's reply to Appellant's written representations of 6 July 2020 (13 July 2020)
20. Respondent's reply to Annex 5 to the Appellant's Written Representations dated 6 July 2020 (13 July 2020)

PARTICIPANTS AT THE VIDEO-HEARING ON 26 AND 29 JUNE 2020 (FOR ALL OR PART OF THE HEARING

For the applicant (HMRC)

1. Richard Atkins QC, leading counsel
2. James Puzey, counsel
3. Jenny Goldring, counsel
4. Emma Moore, solicitor
5. Lawrence Collins, paralegal
6. Helen Hawthorne, trainee (observing)
7. Gareth Rhys, trainee (observing)

For the respondent to the application (the Appellant)

1. John Wardell QC, counsel and advocate
2. Ian Robotham, solicitor
3. Stuart Walsh, solicitor
4. Clara Boyd, solicitor