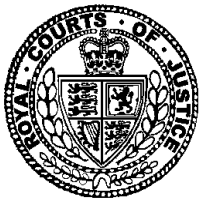

Neutral Citation Number: [2021] EWCA Civ 1082

Case No: A3/2020/1429

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/07/2021

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE SINGH
and
LADY JUSTICE SIMLER

- -

Between :

KANDORE LIMITED & 19 OTHERS	**Appellants**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondent**

- -
- -

Mr Michael Firth (instructed under the **Direct Access** scheme) for the **Appellant**
Ms Julie Anderson (instructed by the **Solicitor to HMRC**) for the **Respondents**

Hearing date: 10 June 2021

- -

Approved Judgment

Lord Justice Singh:

Introduction

1. This case raises two issues in relation to the way that the First-tier Tribunal (Tax Chamber) ("FTT") decides applications from Her Majesty's Revenue and Customs ("HMRC" or "the Respondents") for the approval of third party information notices under para. 3 of Sch. 36 to the Finance Act 2008 ("the 2008 Act"). First, does the FTT have the power to decide such an application on an *inter partes* basis, in particular by holding an *inter partes* oral hearing? Secondly, should any hearing it does hold to consider such an application (whether or not *inter partes*) be held in public?

2. The Upper Tribunal (Tax and Chancery Chamber) ("UT") held, first, that the FTT has no power to hold an *inter partes* hearing. Secondly, it held that, although the FTT does have the power to hold such a hearing in public, it would not normally be appropriate to do so in this context, given the nature of such an application. The UT itself granted permission to appeal to this Court.

3. We have had written and oral submissions from Mr Michael Firth for the Appellants and from Ms Julie Anderson for the Respondents. I express the Court's gratitude to them both.

Factual background

4. Since the issues which arise on this appeal are ones of law, the facts of the particular case which has given rise to them can be briefly stated.

5. In 2014, enquiries were opened by HMRC into the 2013 corporation tax returns of the Corporate Appellants.

6. On 2 October 2017, the Corporate Appellants applied for closure notices in relation to the enquiries into their corporation tax returns.

7. On 11 December 2017, HMRC applied to the FTT for approval of third party information notices to be sent to the Individual Appellants in relation to the enquiries into the Corporate Appellants. The Individual Appellants are therefore the third parties to whom the notices have been issued; and the Corporate Appellants are the taxpayers whose affairs are being investigated by HMRC.

8. Between 2 February 2018 and 9 March 2018, correspondence took place between HMRC and the Appellants. In that correspondence, HMRC agreed not to proceed with the application for approval made to the FTT until after a meeting on 22 March 2018.

9. On 8 March 2018, HMRC attended a hearing of their application for approval of the information notices before the FTT. The FTT raised the question of whether the taxpayers should be permitted to participate.

10. On 28 March 2018, HMRC made further submissions to the FTT in respect of the question of taxpayer participation.

11. On 30 April 2018, a letter was sent from HMRC to the Corporate Appellants stating that it was the intention of HMRC to proceed with the application for approval.

12. On 8 May 2018, the Appellants applied to the FTT for directions in relation to the conduct of, and their participation in, the determination of HMRC's application for approval of the third party notices. In that application they sought the following directions:

> "(a) HMRC's application for FTT approval of third party information notices to be served on the Third Party Applicants ('HMRC's Applications') should not be heard in private to the exclusion of the Applicants.
>
> (b) The Taxpayer Applicants and/or the Third Party Applicants should be given notice of where and when the hearing of HMRC's Applications will take place.
>
> (c) The Taxpayer Applicants and/or the Third Party Applicants 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.
>
> (d) The Taxpayer Applicants and/or the Third Party Applicants should be given the opportunity to make representations to the FTT in respect of HMRC's Applications and the questions of whether the FTT can or should approve the information notices."

13. The hearing of the closure notice application was scheduled to begin on 26 September 2018 but the FTT ordered a stay of that application pending the outcome of the application for approval of the third party notices.

14. On 3 December 2018 the FTT issued a decision refusing the Appellants' application of 8 May 2018. I will return to that decision in more detail below.

15. On 8 February 2019 the FTT granted permission to appeal against its decision to the UT.

16. On 3 December 2019 the UT heard the appeal. The appeal was dismissed in a decision issued on 30 January 2020. Again, I will return to that decision in more detail below.

17. Permission to appeal to this Court was granted by the UT on 4 March 2020.

The decision of the FTT

18. The decision of the FTT was reached by FTT Judge Kevin Poole on 30 November 2018, on the basis of written submissions, and released on 3 December 2018. He identified the main issue before him in the following way, at para. 1:

> "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."

19. As the Judge noted at para. 13, the main thrust of Mr Firth's argument for the current Appellants was that there was absolutely no justification for a private hearing in this case.

20. The Judge set out the reasons for his decision for refusing the applications of 8 May 2018 at paras. 27-34.

21. At para. 28, on the question of whether it was necessary or appropriate for there to have been an oral hearing of the application, he adopted the reasoning of the FTT in the case of *Mr E*, at paras. 5-11 (*sic*). I will return to that decision later.

22. At para. 29, on the question of whether the Appellants had the right to be given notice of, to attend and make representations at an oral hearing *inter partes* (that is directions (a), (b) and (d) of the directions sought), he again agreed with the reasoning of the FTT in the case of *Mr E*. He said that no such right exists. The Judge also observed 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 only for these companies and individuals but also for any other member of the public who wished to attend. The Judge said that, given the nature of the matters to be considered at the hearing, this could not be right.

23. At para. 33, on the question of whether the Appellants should be given an advance summary of the representations that HMRC proposed to make at the hearing, and copies of any documents supplied to the FTT (as proposed in direction (c)), he considered that this was largely parasitic on the earlier issues. 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 but, if they are not entitled to make such representations, then the need for this material falls away. Mr Firth had not argued that this material should be provided in any event but, if he had, any such argument would be doomed to fail. The Judge concluded that:

> "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."

The decision of the UT

24. The UT (comprising Judge Jonathan Richards and Judge Thomas Scott) held a hearing in public on 3 December 2019 and considered further written submissions from the parties. The decision was released on 30 January 2020.

25. There were two appeals before the UT. One concerned the closure notice application but this Court is not concerned with that matter. We are concerned with the other appeal which was before the UT, which arose from the application by HMRC for third party notices.

26. As the UT observed at para. 3, some aspects of the relevant factual background were contentious because the taxpayers alleged impropriety on the part of HMRC. Accordingly, the UT set out what was intended to be (commendably in my view) an uncontroversial and neutral account of the relevant background: see paras. 4-14.

27. What we are concerned with in the present appeal is what the UT described as the "Adversarial Hearing Application", at para. 8:

> "On 8 May 2018, the Taxpayers applied (the 'Adversarial Hearing Application') to the FTT for directions to be made in connection with the Schedule 36 Application. We will set out in detail the directions that were applied for later in this decision, but in broad summary, the directions sought would have given the Taxpayers the ability to attend a public hearing of the Schedule 36 application, to be provided with a summary of HMRC's arguments in support of the application and to make submissions to the FTT as to why the Schedule 36 Application should not be approved (including by responding to HMRC's arguments)."

28. At para. 21, the UT said that the Adversarial Hearing Application dealt with two distinct, though related, matters. They were, first, the Taxpayers' request that the Sch. 36 application should be determined at an *inter partes* oral hearing at which, as is normal for such hearings, they would have advance notice of HMRC's case and would have the opportunity to respond to it. Secondly, they were asking that the oral hearing should not be held in private to the exclusion of the Taxpayers.

29. At para. 24, the UT said:

> "… The parties were agreed that the FTT concluded that it lacked any power to make the directions sought. On balance, we think the parties' analysis of the FTT's decision is correct since (i) the FTT expressed agreement with the decision in *Mr E* which was quite clearly made on the basis that the FTT lacked power to make similar directions, (ii) the FTT did not conduct the kind of detailed examination of the circumstances of the case that might have been expected if it thought it had a discretionary power to make the directions sought and (iii) the 'keywords' section at the

> beginning of the decision (which the FTT would have drafted itself) indicated that the decision considers the 'power of the FTT to make such directions'."

30. The UT returned to this at para. 54, where it said:

> "Given our conclusions as to the nature of the FTT's decision (recorded at [24] above), the key issue before us is shortly stated. We must decide whether the FTT had power to make the directions the Taxpayer was requesting. Since the FTT is a creature of statute and, unlike the courts, has no inherent jurisdiction, the scope of its power can only be deduced from the relevant primary and secondary legislation. The question, therefore, is ultimately one of statutory construction. We must determine the scope of the FTT's power from relevant primary and secondary legislation. …" (Emphasis in original)

31. After detailed consideration of the relevant legislation, the authorities and the parties' submissions, the UT set out its conclusions, at paras. 82-88. At para. 83, it said:

> "… given the statutory provisions that Parliament has enacted and commentary from courts senior to this on those provisions, we have reached the clear conclusion that the FTT simply lacked any power to grant the Taxpayers' request that they be permitted to participate in an *inter partes* determination of the Schedule 36 Application. We accept that Parliament would have been aware of the FTT's case management powers when amending Schedule 36 to provide that applications for approval of third party notices should be made to the FTT. We also acknowledge that Schedule 36 does not expressly set out a procedure that the FTT is obliged to follow when considering an application for approval of an information notice. There is, therefore, room for an argument that Parliament intended to leave matters of procedure to the FTT so that it retained the power to direct an *inter partes* hearing. However, we have come to the clear conclusion that, by necessary implication, the scheme of the legislation in Schedule 36 excludes the possibility of information notices being approved following an *inter partes* hearing. Since the FTT's case management powers could only apply in the context of directions that the FTT was authorised to give we do not consider that the existence of those case management powers supports the construction of Schedule 36 that the Taxpayers advance."

32. At para. 84, in the light of that conclusion, the UT correctly said that it was not necessary to reach any conclusion as to whether the allegations of impropriety were

made out. It is unfortunate that some of those allegations resurfaced in the Appellants' skeleton argument before this Court when they are clearly not relevant to any issue of law which we have to decide. Mr Firth acknowledged this at the hearing before us.

33. At para. 85, the UT concluded on this issue that:

> "It follows that the FTT was correct to conclude that the Schedule 36 Application could only be determined on an *ex parte* basis and that aspect of the Taxpayers' appeals is dismissed."

34. At para. 86, the UT turned to the question whether any hearing could be in public. The UT disagreed with the FTT's view that it could never direct an *ex parte* hearing to be held in public. It said:

> "There is no absolute bar to the FTT directing that an *ex parte* hearing be heard in public. It follows that, in concluding that it did not even have the limited power to direct an *ex parte* hearing to be heard in public, the FTT made an error of law."

35. However, at para. 87, the UT continued:

> "In saying that the FTT has power to direct that an *ex parte* hearing should be in public, we are by no means saying that power should be exercised routinely or even at all. We are aware that the FTT's normal practice is to direct that such hearings be held in private and *we would regard that as justified unless a compelling reason is shown why the hearing should be in public*. In practice, taking into account the aspects of Schedule 36 and surrounding case-law we have identified, we anticipate that it would be rare for a direction that the *ex parte* hearing should be in private to fall outside the FTT's generous ambit of discretion in the exercise of its case management powers." (Emphasis added)

36. Finally, at para. 88, the UT concluded as follows:

> "In view of our conclusion that the FTT erred in finding that it lacked jurisdiction to make the requested direction that the hearing be in public, we set the FTT's decision aside on that point and remake it. In remaking it, we have noted that HMRC clearly do not consent to the Schedule 36 Application being heard in public. Ms Anderson's submissions at the hearing made it clear that HMRC's concern was a general one; if the hearing were held in public, the natural dialogue between them and the judge considering the application could well result in HMRC

> having to reveal details of their investigation that they would prefer the Taxpayers not to know. That concern was necessarily explained in general terms but that does not deprive it of force: indeed it was precisely the concern that the Court of Appeal accorded considerable weight in *Morgan Grenfell*. We understand Mr Firth's competing submission that a public hearing could serve to reassure the public that the FTT considers applications under Schedule 36 with rigour and that they are not just rubber stamping exercises. However, we consider that in this case HMRC's concerns should be given more weight. The allegations that are made about HMRC's behaviour do not, in our view, indicate a different approach: whatever the taxpayers' frustrations with HMRC, we see little risk that HMRC would mislead the FTT at a hearing of the Schedule 36 Application. Our conclusion is only reinforced by the fact that the Taxpayers will, ultimately, have a full right to a hearing in public against any decisions that HMRC make on completion of their enquiries. We therefore remake the FTT's decision so as to lead to the same overall result: the Schedule 36 Application is to be heard in private."

Sch. 36 to the 2008 Act

37. Sch. 36 to the 2008 Act is headed 'Information and Inspection Powers'. Part 1 concerns 'Powers to Obtain Information and Documents'. Para. 1 concerns the power to obtain information and documents from a taxpayer. Para. 2 concerns the power to obtain information and documents from third parties and provides:

> "(1) An officer of Revenue and Customs may by notice in writing require a person –
>
> (a) to provide information, or
>
> (b) to produce a document,
>
> if the information or document is reasonably required by the officer for the purpose of checking the tax position of another person whose identity is known to the officer ('the taxpayer').
>
> (2) A third party notice must name the taxpayer to whom it relates, unless the [tribunal] has approved the giving of the notice and disapplied this requirement under paragraph 3.
>
> (3) In this Schedule, 'third party notice' means a notice under this paragraph."

38. Para. 3 concerns the approval etc. of taxpayer notices and third party notices. It provides:

"(1) An officer of Revenue and Customs may not give a third party notice without –

(a) the agreement of the taxpayer, or

(b) the approval of the tribunal.

(2) An officer of Revenue and Customs may ask for the approval of the tribunal to the giving of any taxpayer notice or third party notice (and for the effect of obtaining such approval see paragraphs 29, 30 and 53 (appeals against notices and offence)).

(2A) An application for approval under this paragraph may be made without notice (except as required under sub-paragraph (3)).

(3) The tribunal may not approve the giving of a taxpayer notice or third party notice unless –

(a) an application for approval is made by, or with the agreement of, an authorised officer of Revenue and Customs,

(b) the tribunal is satisfied that, in the circumstances, the officer giving the notice is justified in doing so,

(c) the person to whom the notice is to be addressed has been told that the information or documents referred to in the notice are required and given a reasonable opportunity to make representations to an officer of Revenue and Customs,

(d) the tribunal has been given a summary of any representations made by that person, and

(e) in the case of a third party notice, the taxpayer has been given a summary of the reasons why an officer of Revenue and Customs requires the information and documents.

(4) Paragraphs (c) to (e) of sub-paragraph (3) do not apply to the extent that the tribunal is satisfied that taking the action specified in those paragraphs might prejudice the assessment or collection of tax.

(5) Where the tribunal approves the giving of a third party notice under this paragraph, it may also disapply the requirement to name the taxpayer in the notice if it is satisfied that the officer has reasonable grounds for believing that naming the taxpayer might seriously prejudice the assessment or the collection of tax."

39. Para. 4(1) requires an officer of Revenue and Customs who gives a third party notice to give a copy of it to the taxpayer to whom it relates, unless the tribunal has disapplied that requirement. Under sub-para. (2) the tribunal may not disapply that requirement unless (a) an application for approval is made by, or with the agreement of, an authorised officer of HMRC; and (b) the tribunal is satisfied that the officer has reasonable grounds for believing that giving a copy of the notice to the taxpayer might prejudice the assessment or collection of tax.

40. Para. 7 sets out provisions governing the duty of a person required by an information notice to provide information or produce a document within a reasonable period specified in the notice.

41. Para. 29 confers a right on the taxpayer to appeal against a taxpayer notice.

42. Para. 30 confers a right to appeal against a third party notice in the following terms:

> "(1) Where a person is given a third party notice, the person may appeal … against the notice or any requirement in the notice on the ground that it would be unduly onerous to comply with the notice or requirement.
>
> (2) Sub-paragraph (1) does not apply to a requirement to a third party notice to provide any information, or produce any document, that forms part of the taxpayer's statutory records.
>
> (3) Sub-paragraph (1) does not apply if the tribunal approved the giving of the notice in accordance with paragraph 3."

43. Accordingly, there is no right to appeal against a third party notice if it has been approved by the tribunal. It is common ground that, in such circumstances, the decision of the tribunal is amenable to judicial review on the application of either the third party or the taxpayer.

44. Part 7 of Sch. 36 sets out a scheme for the imposition of penalties for failure to comply with an information notice: see paras. 39-46. Liability does not arise if there is reasonable excuse for the failure: see para. 45. There is a right to appeal against a penalty: see para. 47.

45. Part 8 creates offences, where a person conceals documents following an information notice: see paras. 53-55.

46. Finally, reference should be made to para. 58, which is headed 'General Interpretation'. The word "checking" includes carrying out an investigation or enquiry of any kind. The "tribunal" means the First-tier Tribunal or, where determined by or under tribunal procedure rules, the Upper Tribunal.

Tribunal Procedure Rules

47. The relevant rules are the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (SI 2009 No. 273).

48. Rule 1 includes interpretation provisions. Para. (3) states that, in these rules, "appellant" means "(a) the person who starts proceedings (whether by bringing or notifying an appeal, by making an originating application, by a reference, or otherwise)". While one would normally think of the taxpayer as being an appellant before the FTT, it is clear from this definition that it is more extensive. It includes a person who starts proceedings by making an originating application. In principle, therefore, it can include HMRC, when it makes an originating application under rule 21, which is the way in which it makes an application for approval of a third party notice under Sch. 36 to the 2008 Act.

49. In rule 1, the definition of "party" is "a person who is (or was at the time that the Tribunal disposed of the proceedings) an appellant or respondent in proceedings before the Tribunal". I have already set out above the definition of "appellant". "Respondent" means "(a) … (i) HMRC, where HMRC is not an appellant; (ii) in proceedings brought by HMRC alone, a person against whom the proceedings are brought or to whom the proceedings relate". As will become apparent later, in the present context, HMRC bring the proceedings alone and an important issue will be whether there is a person "against whom the proceedings are brought" or "to whom the proceedings relate".

50. Rule 5(1) provides that, subject to the provisions of the Tribunals, Courts and Enforcement Act 2007 and any other enactment, the Tribunal may regulate its own procedure. Rule 5(3) provides that, in particular, and without restricting the general powers in paras. (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;
>
> …
>
> (g) decide the form of any hearing;
>
> (h) adjourn or postpone a hearing."

51. Rule 19 provides:

> "If a case or matter is to be determined without notice to or the involvement of a respondent–
>
> (a) any provision in these rules requiring a document to be provided by or to a respondent; and
>
> (b) any other provision in these rules permitting a respondent to participate in the proceedings
>
> does not apply to that case or matter."

52. Rule 21(1) provides:

> "Where an enactment provides for a person or persons to make an originating application or reference to the Tribunal, the appellant must start proceedings by providing an application notice or notice of reference to the Tribunal within any time limit imposed by that enactment."

53. Rule 23 provides for the allocation of cases to various categories: "default paper" cases, which are usually be disposed of without a hearing; "basic" cases, which were usually be disposed of after a hearing, with a minimal exchange of documents before the hearing; "standard" cases, which are usually subject to more detailed case management and disposed of after a hearing; and "complex" cases, for which specific provision is made.

54. Rule 29(1) provides:

> "Subject to rule 26(6) (determination of a Default Paper case without a hearing) and the following paragraphs in this rule, the Tribunal must hold a hearing before making a decision which disposes of proceedings, or a part of proceedings, unless–
>
> (a) each party has consented to the matter being decided without a hearing; and
>
> (b) the Tribunal considers that it is able to decide the matter without a hearing."

55. It will be seen from that provision that the two conditions must both be satisfied; they are not alternatives. However, in a case where there is only one party, the consent of that party will suffice.

56. Rule 30 provides:

> "Subject to rules 19 (proceedings without notice to a respondent) and 32(4) (exclusion from a hearing), each party to proceedings is entitled to attend a hearing."

57. Rule 31(1) provides:

> "The Tribunal must give each party entitled to attend a hearing reasonable notice of the time and place of any hearing (including any adjourned or postponed hearing) and any changes to the time and place of any hearing."

58. Rule 32 provides:

> "(1) Subject to the following paragraphs, all hearings must be held in public.
>
> (2) The Tribunal may give a direction that a hearing, or part of it, is to be held in private if the Tribunal considers that restricting access to the hearing is justified–
>
> (a) in the interests of public order or national security;
>
> (b) in order to protect a person's right to respect for their private and family life;
>
> (c) in order to maintain the confidentiality of sensitive information;
>
> (d) in order to avoid serious harm to the public interest; or
>
> (e) because not to do so would prejudice the interests of justice.
>
> …
>
> (3) Where a hearing, or part of it, is to be held in private, the Tribunal may determine who is permitted to attend the hearing or part of it.
>
> (4) The Tribunal may give a direction excluding from any hearing, or part of it–
>
> (a) any person whose conduct the Tribunal considers is disrupting or is likely to disrupt the hearing;
>
> (b) any person whose presence the Tribunal considers is likely to prevent another person from giving evidence or making submissions freely;
>
> (c) any person where the purpose of the hearing would be defeated by the attendance of that person; or
>
> (d) a person under the age of eighteen years.
>
> …"

Grounds of Appeal

59. On behalf of the Appellants Mr Firth advances two grounds of appeal:

(1) The UT erred in law in deciding that the FTT has no power to allow any level of participation by the taxpayer or a third party in determining an application by

HMRC for approval of a third party information notice under para. 3 of Sch. 36 to the 2008 Act.

(2) The UT erred in law in deciding that HMRC's application for approval of the third party notices should be heard in private.

Ground 1

60. There were four directions sought in the application made by the Appellants on 8 May 2018, which were compendiously described by the UT as the "Adversarial Hearing Application". This was clearly understood by the UT to raise the question of whether the FTT has power to direct that there shall be an oral *inter partes* hearing on an application by HMRC under para. 3 of Sch. 36 to the 2008 Act.

61. At the hearing before this Court Mr Firth made broader submissions: he criticised the UT for not appreciating that, even if an oral hearing were not required, some other form of *inter partes* participation might have been permitted to the third parties and taxpayers. When asked about this by the Court, however, Mr Firth made it clear that at least one of the issues for determination under Ground 1 is whether the FTT has power to direct that there shall be an oral *inter partes* hearing on this kind of application by HMRC. In order to succeed on Ground 1, therefore, Mr Firth must succeed on that issue.

62. The UT decided that the FTT has no such power. I agree with the UT essentially for the reasons which it gave. I have also found impressive the thorough reasoning of FTT Judge Mosedale in *Mr E* [2018] UKFTT 0590 (TC), at paras. 14-57, which was to the same effect and was followed by FTT Judge Poole in the present case.

63. The fundamental point is that a power to hold an oral *inter partes* hearing would be inconsistent with the nature of the scheme which Parliament has created in Sch. 36 to the 2008 Act. The nature of that scheme is for HMRC to seek the approval of the FTT for a third party notice which is made in the context of their investigation of a taxpayer. As the authorities make clear, this is a "judicial monitoring" of a step in an investigation by the executive; it is not like an adjudication in a dispute between parties to litigation. It is not intended to be an adversarial process.

64. Both parties referred us to the decision of this Court in *R (Morgan Grenfell Ltd) v Special Commissioners of Income Tax* [2001] EWCA Civ 329; [2003] 1 AC 563. The case went to the House of Lords but no reliance has been placed on that decision, since it concerned a different issue, to do with legal professional privilege. The judgment of this Court (which also included Schiemann and Sedley LJJ) was given by Blackburne J. At paras. 47-50 he considered the submission that a taxpayer or advisor at risk of compulsory disclosure of confidential documents ought to have an opportunity of "deflecting" the application (in that case under section 20 of the Taxes Management Act 1970). At first sight Blackburne J said that submission was "attractive" but, he accepted that there is a small group of cases "in which the exigencies of the legislative scheme make an *inter partes* procedure impossible."

65. At paras. 49-50 Blackburne J set out his reasoning as follows:

> "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 Inland Revenue Comrs, Ex p T C Coombs & Co* [1991] 2 AC 283, 288. We accept Mr Brennan's contention, therefore, that the possibility of an oral hearing is excluded by the nature of the process in question. … [F]or the reasons we have given, we are satisfied that the special commissioner was right to conclude that he possessed no such power."

66. Mr Firth submitted that *Morgan Grenfell* was wrong but that, in any event, it is not binding now, since it was concerned with earlier legislation. The first difficulty with that submission is that the legislation is not materially different, as FTT Judge Mosedale observed in *Mr E*, at paras. 33-34.

67. The second difficulty is that *Morgan Grenfell* has been followed by this Court in the context of the current legislation, albeit in comments that were *obiter*. The principal authority on Sch. 36 to the 2008 Act is *R (Derrin Bros Properties Ltd) v First-tier Tribunal (Tax Chamber)* [2016] EWCA Civ 15; [2016] 1 WLR 2423, in which the main

judgment was given by Sir Terence Etherton C, with whom Davis LJ and Vos LJ agreed. That was an appeal from the dismissal of a claim for judicial review by Simler J of the taxpayers' challenge to the approval of third party notices which had been issued under para. 2 of Sch. 36, requiring a number of banks and a firm of accountants to provide information and produce documents for the purpose of checking the tax position of some of their clients. It is common ground that the precise issue which arises in the present case was not before the Court on that occasion and therefore the decision is not binding on us. Nevertheless, for the Respondents Ms Anderson placed reliance on the description of the purpose of the statutory scheme as set out by the Court at paras. 68-81. In my view, she was right to do so.

68. In particular, I would note, first, what was said at paras. 68-69:

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

69. At paras. 71-72 it was said:

> "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 (Morgan Grenfell & Co Ltd) v Special Comr of Income Tax* [2003] 1 AC 563, 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."

70. At paras. 74-75 it was said:

> "74. Paragraph 3(3)(c) provides that the third party must be told that the information or documents referred to in the notice are required and be given a reasonable opportunity to make representations to the officer. Schedule 36 does not, however, require that the third party is given any explanation of the reasons why the officer requires the information and documents. It does not expressly confer on the third party a right to make representations directly to the FTT or a right to appear before the FTT.
>
> 75. It seems fairly clear that the reason the third party is to be told that the information or documents are required and be given a reasonable opportunity to make representations to HMRC is to enable it to state any practical difficulties with compliance. That is consistent with paragraph 30 of Schedule 36, which provides that a person given a third party notice may appeal on the ground that it would be unduly onerous to comply with the notice or any requirement in it. It is equally clear that the reason the third party does not have to be given any explanation as to why the officer requires the information and documents is because it is not for the third party to argue any case for the taxpayer as to the width or nature of the investigation. It does not need to know confidential information relating to the affairs of the taxpayer. The third party is not given any right to appear before the FTT because, consistently with the judicial monitoring scheme rather than an adversarial one and with the limited right of objection by the third party, it is sufficient that the third party is given a right to make representations to the officer, and the officer is obliged to provide the FTT with a summary of those representations."

71. The Court concluded on this point as follows, at para. 81:

> "In the light of what I have said about the scheme and purpose of Schedule 36, and particularly the clear distinction made by Parliament between the taxpayer, the third party and the non-taxpayer entity, there is no scope on ordinary principles of construction for a purposive interpretation of Schedule 36 which (1) requires, in the case of third party notices, that in every case all of those persons be told the reasons why the documents are required and that they be given a reasonable opportunity to make representations to HMRC or the FTT, and (2) precludes the FTT approving such notices unless that is done. Such an interpretation is quite simply inconsistent not merely with the literal wording of Schedule 36 but also with the manifest intention of Parliament."

72. Finally, it is important to note what the Court said at para. 118, where it rejected a complaint under the Human Rights Act 1998/European Convention on Human Rights, on the ground that that was "simply an attack on the whole model of a judicial monitoring scheme rather than one based on *inter partes* adversarial litigation." Sir Terence Etherton C went on to say that: "what the claimants 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."

73. The scheme for applications for third party notices and its relationship to judicial review proceedings was subsequently explained by Simler J in *R (Kotton) v First-tier Tribunal (Tax Chamber)* [2019] EWHC 1327 (Admin), at paras. 59-62 as follows:

> "59. First, it is important to recognise the purpose of the statutory scheme in Schedule 36. This represents a balance between the interests of individual taxpayers and the interests of the wider community by enabling HMRC to investigate tax avoidance and tax evasion in a proportionate but efficient manner. As was explained in *Derrin Brothers*, this is achieved through the means of a judicial monitoring scheme rather than a system of adversarial appeals from third party notices which could allow taxpayers and others to delay or frustrate an investigation and could take years to resolve. The Schedule 36 scheme differentiates between the recipient of a third party notice and the taxpayer whose tax position is being checked but common to the treatment of each of them is the limited scope for objecting to a third party notice. There is no appeal on the merits and it is not open to the taxpayer or third party recipient to challenge a notice on its merits.
>
> 60. Secondly, the question for the HMRC officer (and therefore the FTT judge) is an expressly limited one: the officer

> must be satisfied that the information or documents to be sought by a third party notice are 'reasonably required' for the purpose of 'checking' the tax position of the taxpayer. It is not for the officer to investigate the merits of the underlying tax investigation, or whether the investigation is itself reasonably required or justified as a precondition for the giving of a notice. That is unsurprising given that the scheme is directed at an early investigatory stage and in any investigation some lines of enquiry may prove more fruitful than others but nevertheless may need to be pursued. …
>
> Thus, provided there is a genuine and legitimate investigation or enquiry of any kind into the tax position of a taxpayer that is neither irrational nor in bad faith, that is sufficient. The challenge is not to the lawfulness of the investigation, but is limited to the rationality of the conclusion that the information/documents are reasonably required for checking the taxpayer's tax.
>
> 61. Nor is it necessary (as Mr Simpson submits) as a precondition for giving a third party notice to show that a positive liability to tax will arise or that liability will arise in a particular way. A valid investigation may result in no tax charge at all.
>
> 62. Thirdly and for the same reasons, the question for the FTT in relation to the information and documents sought by a third party notice is also expressly limited: the FTT must be satisfied that in all the circumstances, the officer giving the notice is justified in concluding that the information or documents are reasonably required for checking the tax position of the taxpayer. Again, that does not require any examination of the nature and extent of the underlying tax investigation, but rather a focus on whether there is a rational connection between the information and documents sought and the underlying investigation. The very purpose of the investigation is to establish the correct position by reference to all the evidence gathered and it is therefore unsurprising that the legislation does not make the approval of a notice conditional on the tax investigation itself being reasonably required."

I would respectfully endorse those observations.

74. Mr Firth placed reliance on the decision of the Supreme Court in *R (Haralambous) v Crown Court at St Albans* [2018] UKSC 1; [2018] AC 236, in particular the judgment of Lord Mance DPSC. That case concerned the grant of search warrants to the police by the Magistrates' Court or the Crown Court. Mr Firth submits that in *Haralambous* doubt was cast on the "presumption of regularity" which had been mentioned in earlier authority, in particular *IRC v Rossminster Ltd* [1980] AC 952: see paras. 48 and 51 in the judgment of Lord Mance.

75. I do not, however, consider that *Haralambous* assists Mr Firth's case. What the Supreme Court held in that case was that the procedure of judicial review in the Administrative Court "can and must accommodate a closed material procedure, where that is the procedure which Parliament has authorised in the lower court or tribunal whose decision is under review": see para. 59. In the same paragraph Lord Mance said:

> "… I consider that the scheme authorised by Parliament for use in the Magistrates' Court and Crown Court, combined with Parliament's evident understanding and intention as to the basis on which judicial review should operate, lead to a conclusion that the High Court can conduct a closed material procedure on judicial review of a Magistrate's order for a warrant under section 8 PACE or a Magistrate's order for disclosure, or a Crown Court Judge's order under section 59 of the CJPA [Criminal Justice and Police Act 2001]."

76. If anything, *Haralambous* is authority against the case advanced by Mr Firth, because it illustrates how the modern procedure for judicial review can be effective in challenging orders of a lower court or tribunal which has been made where one party does not have access to all of the information which was before that court or tribunal. In the present context, it is common ground that, if there are grounds for judicial review, that is the procedure by which the decision of the FTT on a third party notice application by HMRC can be challenged.

77. Mr Firth also placed some reliance on the decision of the House of Lords in *Wiseman v Borneman* [1971] AC 297, which arose from section 28 of the Finance Act 1960. The Revenue, having considered statutory declarations made by taxpayers under section 28(4) of that Act in relation to certain transactions concerning shares in a company, decided to submit the matter under subsection (5) to the tribunal constituted for the purposes of that section to determine whether there was a *prima facie* case for proceeding. The applicants requested that they be permitted representation by counsel and be given copies by the Commissioner's Certificate and counter-statement. This was refused by the registrar to the tribunal. The House of Lords held that in the circumstances there had been no unfairness. Nevertheless, Mr Firth places reliance on passages in the speeches of the House of Lords which indicate that they were prepared to contemplate the possibility that in principle the tribunal could have sought further comments from the taxpayer if they thought they could carry out their task more effectively in that way: see p.308F-G (Lord Reid); p.310A-B (Lord Morris of Borth-y-Gest); and p.320G (Lord Wilberforce).

78. I do not find reliance on *Wiseman v Borneman* to be apt in the present context. First, it concerned very different legislation, which included a procedure by which there was a statutory declaration made by the taxpayer against whom it was said there was a *prima facie* case. Secondly, as Lord Reid observed at p.308C, the process by which the courts imply rules of procedural fairness (natural justice as it was then called) into a statutory scheme should only be exercised where it is clear that the statutory procedure is insufficient to achieve justice and that to require additional steps "would not frustrate the apparent purpose of the legislation." In the present context, for the reasons I have

already given, it *would* frustrate the purpose of the legislation to introduce the power to hold an *inter partes* hearing for which Mr Firth contends.

79. Mr Firth then relied on the decision of the Supreme Court in *R (UNISON) v Lord Chancellor* [2017] UKSC 51; [2020] AC 869, in which Lord Reed JSC placed particular emphasis on the constitutional principle of access to justice. That case concerned a very different context: the imposition of fees to issue an application in the Employment Tribunal that were so high that they in effect prevented a large number of potential litigants from bringing their claims at all. I do not consider that the principle of access to justice requires an *inter partes* procedure to be adopted in the present context. It has to be recalled that the decision of the FTT approving a third party notice is amenable to judicial review. In that way a person who has grounds to challenge it (whether the third party or the taxpayer) will have access to justice. Furthermore, if the investigation by HMRC results in an assessment of tax, the taxpayer will have the right to appeal and, in that way, will have access to justice.

80. The final authority on which Mr Firth relied is the decision of the Divisional Court (Kennedy LJ and Forbes J) in *R v City of London Magistrates, ex p. Asif* [1996] STC 611. That case concerned para. 11 of Sch. 11 to the Value Added Tax Act 1994, which provided:

> "(1) Where, on an application by an authorised person, a Justice of the Peace is satisfied that there are reasonable grounds for believing –
>
> > (a) that an offence in connection with VAT is being, has been or is about to be committed, and
> >
> > (b) that any recorded information (including any document of any nature whatsoever) which may be required as evidence for the purpose of any proceedings in respect of such an offence is in the possession of any person,
>
> he may make an order under this paragraph."

81. By sub-paragraph (2) such an order required the person who appears to be in possession of the recorded information to give an authorised person access to it and permit that person to remove and take away any of it which he reasonably considers necessary.

82. Counsel for Customs and Excise in that case was unable to point to any provision in any statute which in the absence of express words has been interpreted as requiring applications to be made *ex parte* and never *inter partes*: see the judgment of Kennedy LJ at p.617e.

83. At p.618d-f Kennedy LJ said:

> "My conclusion therefore is that although para 11 of Sch 11 enables the commissioners to seek orders *ex parte* they must in each case consider, and any magistrate to whom they apply must

> also consider, whether it is appropriate to proceed in that way, bearing in mind that the balance is always in favour of proceeding *inter partes* unless there is real reason to believe that something of value to the investigation may be lost if that course is adopted. If it is decided to proceed *inter partes* then normally it will be appropriate to give notice of the application not only to those from whom access is sought (in this case the banks), but also to others who are obviously likely to be directly affected by the order (in this case the suspects). Even if they are not given notice by the commissioners they will, as this case shows, soon learn of the application from their bank, and the object of proceeding *inter partes* is best achieved if everyone who has a genuine interest in the proposed order is heard before it is made."

84. In my view, that case, which is not binding on this Court in any event since it is a decision of the High Court, is distinguishable, as it concerned very different legislation. In the present context, the relevant authorities are the ones that specifically concern this particular legislative scheme, in particular *Derrin Bros*.

85. Both in the Tribunals below and in this Court Mr Firth placed great reliance on the language of para. 3(2A) of Sch. 36 to the 2008 Act:

> "An application for approval under this paragraph *may* be made without notice …" (Emphasis added)

86. Mr Firth submits that, accordingly, it may also be made *with* notice. In my judgement, this point takes Mr Firth's case no further. First, this provision simply confers a power on *HMRC*. It says nothing about the powers of the FTT. Secondly, it refers simply to an "application". It says nothing about whether the process for *determining* that application can be *inter partes*. Thirdly, if an application by HMRC is in fact made without notice (as it lawfully can be under this provision), I cannot see how that then leads to the conclusion that the Tribunal has power to order that the process for determining it shall be *inter partes*.

87. Apart from authority, Mr Firth also relied upon the terms of the Tribunal procedure rules, which I have set out earlier. Before I turn to address his specific submissions, I would note that nothing in the Tribunal procedure rules could alter the nature of the scheme created by Parliament in primary legislation, although I do not think that there is any inconsistency between the rules and the 2008 Act.

88. Mr Firth points out that, subject to rules 19 and 32(4) each party to proceedings is entitled to attend a hearing: see rule 30. He submits that both the taxpayers and the recipients of the third party notices were parties to the proceedings initiated by HMRC and were therefore entitled to attend the hearing even if they were not entitled to participate. He also submits that they were entitled to be notified of the time and place of the hearing: see rule 31.

89. Mr Firth submits that the concept of "attendance" at a hearing is not the same as the concept of "participation" in it. For that submission he relies on the different use of wording: rule 19 refers to "participate" whereas other provisions, including rules 30, 31 and 32(3), refer to permitting a person to "attend" a hearing.

90. Next, Mr Firth relies on the meaning of "respondent" in rule 1, which I have set out above. In particular, he submits that, in proceedings brought by HMRC, the respondent is "a person against whom the proceedings are brought or to whom the proceedings relate".

91. In my view, the correct interpretation of the Tribunal procedure rules is as follows.

92. In proceedings which are brought by HMRC under Sch. 36, they are the "appellant". The proceedings are HMRC's application (made under rule 21) for approval of their third party notice. The proceedings are not brought "against" anyone. Nevertheless, that is not the end of the matter because the definition of "respondent" includes a person "to whom the proceedings relate".

93. A third party who is the subject of an application for approval of a third party notice under Sch. 36 is a person "to whom the proceedings relate" and is therefore a respondent within the meaning of rule 1 in proceedings brought by HMRC.

94. In contrast, the taxpayer is not a person to whom the *proceedings* relate even though the *information* sought in those proceedings may relate to them.

95. It follows that the provisions of rules 30 and 31 do apply in principle to the third party but do not apply to the taxpayer. A third party, but not the taxpayer, is therefore (on the face of it) a party entitled to attend the hearing.

96. However, rule 30, and therefore rule 31, are subject to rule 19. Although rule 19 talks about participation rather than attendance, in this context this must be interpreted also to prevent the attendance of a respondent. I would emphasise that rule 19 begins:

> "If a case or matter is to be determined without notice to or the involvement of a respondent …"

In other words it applies in the present context not only because no notice need be given to the third party but there need be no involvement by that person at all. That is consistent with the nature of the scheme created by Parliament in Sch. 36 to the 2008 Act.

97. I would therefore reject Ground 1 in this appeal.

Ground 2

98. Under Ground 2 Mr Firth submits that, although the UT was right to set aside the decision of the FTT that it had no power to hold any hearing in this context in public, it then fell into error because it considered that such a hearing would normally be held in private. He submits that the test the UT adopted in paras. 87-88 of its decision, which I have set out earlier, was wrong in law. In particular, he submits that the UT was

wrong to say that holding a hearing in private would be justified "unless a compelling reason is shown why the hearing should be held in public." He submits that is to put the principle the wrong way round: the principle of open justice demands that a hearing should be held in public unless there is a compelling reason to hold it in private.

99. In advancing his submissions about the principles of open justice, Mr Firth relied on a long line of authorities, including *R (C) v Secretary of State for Justice* [2016] UKSC 2; [2016] 1 WLR 444, at para. 16 (Lady Hale DPSC), citing *Scott v Scott* [1913] AC 417 at 477 (Lord Shaw of Dunfermline) and the quotations there from earlier writers, including Jeremy Bentham.

100. Mr Firth also placed reliance on the *Practice Guidance: Interim non-Disclosure Order* issued by the Master of the Rolls in 2012. That guidance sets out recommended practice regarding any application for interim injunctive relief in civil proceedings to restrain the publication of information, which it described as "an interim non-disclosure order". At para. 12, the guidance says:

> "There is no general exception to open justice where privacy or confidentiality is an 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 …"

101. At para. 13, it is said that the burden of establishing any derogation from the general principle lies on the person seeking it and that it must be established by "clear and cogent evidence". The guidance also draws attention to relevant provisions of the Human Rights Act 1998, including Article 10, which is one of the Convention rights set out in Sch. 1, and section 12.

102. No one doubts the importance of the principle of open justice but the above authorities and the Practice Guidance were concerned with the typical judicial hearing, in which a court or tribunal adjudicates on a dispute between parties. As I have set out earlier, the nature of the process under Sch. 36 to the 2008 Act is entirely different; it consists of the judicial monitoring of a step in an investigation into the affairs of a taxpayer by HMRC.

103. Of more direct relevance is rule 32, which provides that, subject to the following paragraphs, all hearings must be held in public. It is important to appreciate that this is not only about the taxpayer or the third party concerned. If Mr Firth is right, this provision would give all members of the public, including members of the media, the right to attend hearings of the present kind.

104. In my view, this is fundamentally inconsistent with the nature of the scheme which Parliament has created. If and insofar as it is necessary to do so, it is clear that one or more of the exceptions in rule 32(2) would apply in the vast majority of such cases: for example, a hearing will usually have to be in private in order to maintain the confidentiality of sensitive information (para. (c)); or to protect a person's right to

respect for their private life (para. (b)); or, more generally, because it would prejudice the interests of justice (para. (e)).

105. In this context it must be recalled that the private affairs of taxpayers will be discussed at this preliminary stage of an investigation. Very often it would not be in the public interest for those to be discussed in public.

106. Furthermore, it must be recalled that sometimes the investigation will end in no further action being taken, for example because the position of the taxpayer is vindicated. There would be a real risk of injustice if in the meantime questions had been raised in public over whether they had, for example, been illegally avoiding or evading tax when they had not in fact been doing so.

107. It may be, as Ms Anderson submitted before us, that, in the present case, the UT could have expressed themselves better in their reasons. In essence, however, I have come to the clear conclusion that, at paras. 87-88 of the decision, they were holding that, for one permitted reason or another, it would not be in the interests of justice for the hearing of HMRC's application to be heard in public in the present case. They did not rule out the possibility that such a hearing could take place in other cases. In that regard they differed from the FTT and there has been no cross-appeal by HMRC on that issue.

108. Finally, I would add this. The decision which the UT made was one which fell within its broad case management powers. I can see no basis on which this Court could interfere with that decision. It was one that was reasonably open to the UT.

109. I would therefore reject Ground 2 in this appeal too.

Conclusion

110. For the reasons I have given I would dismiss this appeal.

Lady Justice Simler:

111. I agree.

Lord Justice Underhill:

112. I also agree.